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The Aftermath of Provocation:
Homicide Law Reform in Victoria, New South Wales and England

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DECLARATION

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university or other institution and to the best of the candidate's knowledge, it contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Signed

Date

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LIST OF ABBREVIATIONS

ACT	Australian Capital Territory
DOJ	Department of Justice (Victoria)
LIV	Law Institute of Victoria
MOJ	Ministry of Justice (UK)
NSW	New South Wales
NSWCCA	New South Wales Court of Criminal Appeal
NSWLRC	New South Wales Law Reform Commission
NSWSC	New South Wales Supreme Court
NSWSCA	New South Wales Supreme Court of Appeal
NT	Northern Territory
NZ	New Zealand
NZLC	New Zealand Law Commission
ODPP	Office of the Director of Public Prosecutions (NSW)
OPP	Office of Public Prosecutions (Vic.)
QLRC	Queensland Law Reform Commission
SAC	Sentencing Advisory Council (Vic.)
UK	United Kingdom
VLRC	Victorian Law Reform Commission
VSC	Victorian Supreme Court
VSCA	Victorian Supreme Court of Appeal
WA	Western Australia

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ABSTRACT

Over the past decade, homicide law reform surrounding the partial defences to murder has animated debate among criminological scholars and legal stakeholders in Australia and the United Kingdom. In response to these debates, criminal jurisdictions have conducted reviews of the partial defences to murder and implemented reforms targeted at reducing gender bias in the law which has played out through the operation of the partial defence of provocation. This research examines the different approaches taken to addressing the problem posed by provocation in Victoria, New South Wales and England. In doing so, it explores questions around the need for reform to the law of homicide, the effects of these reforms in practice, and the influential role of sentencing in questions surrounding homicide law reform. Throughout the analysis key frameworks of criminological thought in relation to feminist engagements with the law, the conceptualisation of denial and the influence of law and order politics upon the development of criminal justice policy are applied. By drawing on 81 in-depth interviews conducted with legal stakeholders across the three jurisdictions under study, and an analysis of relevant case law, this research concludes that reforms implemented to counter gender bias in the operation of homicide law have produced mixed results in practice, particularly in connection to the law's response to three key categories of person in the courtroom: the jealous man, the female victim of homicide, and the battered woman.

CHAPTER 1 The Provocation Problem: *Ramage,* Gender Bias and the Role of Law Reform

Debate surrounding the partial defence of provocation came to the fore in 2004 with the manslaughter conviction and sentencing of James Ramage in the Victorian Supreme Court (VSC) (*R v Ramage* [2004] VSC 508, hereinafter *Ramage*). The *Ramage* case prompted action and interest among government, law reform commission bodies and the wider legal community by highlighting the gendered operation of the partial defence and the role that it played in defaming the character of the (often female) victim of homicide (Howell 2005; Kissane 2009; Ramsey 2010). The *Ramage* case was also central to my interest in the way that governments and law reform commission bodies seek to overcome the gendered problems that have appeared to be enshrined in the courtroom operation of this partial defence to murder. Particularly, it raised my interest in how, in the aftermath of *Ramage*, the law sought to respond more adequately to the lethal actions of men who kill their female intimate partner.

On 21 July 2003, Julie Ramage met with her estranged husband, James Ramage, at their previously shared family home to discuss renovation plans. In what has since been referred to as a form of 'honour killing' (Kissane 2004), Ramage claimed that he 'lost control and attacked' his estranged wife, following a discussion in which he claimed she told him that sex with Ramage 'repulsed her and screwed up her face and either said or implied how much better her new [boy]friend was' (*Ramage* per Osborn J: 22). Forensic evidence presented at trial showed that in this period of 'lost control' Ramage had:

> struck at least two heavy blows to her face, and that she then fell to the ground striking her head severely … having knocked her to the ground and in circumstances where she was already affected by the initial blows, you [Ramage] proceeded to deliberately strangle her with your bare hands until she appeared lifeless. (*Ramage* per Osborn J: 23)

Subsequent to his use of lethal violence, Ramage began a series of 'careful and calculated actions to try and cover up' the killing (Ramage per Osborn J: 34). He

buried the body along with other incriminating evidence in a shallow grave, ordered granite benchtops for the kitchen, took his son out for dinner and consulted with a lawyer before finally handing himself into the police. Ramage has since been described by researchers and the media in less than favourable terms as 'a bully, a bastard and an emotional pygmy' (Silvester 2011: 26) and an 'aggressive, self-absorbed man' (Kissane 2004; 4); however, there is one term that Ramage can never be called – 'a murderer.' His successful use of the partial defence of provocation in the VSC in 2004 ensured this[1].

The partial defence of provocation gave legitimacy to Ramage's defence that in the circumstances immediately prior to her death his wife's new relationship and failure to consider returning to their marriage had caused him to lose self-control[2]. As such, the case became the key example cited throughout research and the media as evidence of the dangers of the provocation defence (Cleary 2004; Coss 2005; Howe 2004; Kissane 2004; McSherry 2005a). Critics pointed to the role that the partial defence had played in effectively putting on trial Julie Ramage and in diminishing the seriousness of the perpetration of lethal violence against her. As described by Maher et al. (2005: 156), throughout the trial 'the act of killing was located as having happened to, rather than being commissioned by, James Ramage'. In agreement with this assessment, the case was positioned by one feminist scholar as a:

> spectacularly misogynist defence tale of a man provoked beyond endurance by a taunting, exiting, adulterous and menstruating woman … The appalling circumstances of Julie Ramage's killing and post-mortem slander in the courtroom demonstrate, once again, that the provocation tales told in femicide cases posthumously harm women… (Howe 2004: 74–5)

This research examines how governments and law reform commission bodies have sought to solve the problem posed by provocation in the five years following the

[1] There is the possibility that the jury in *Ramage* returned a verdict of manslaughter based on no intent; however, the case was sentenced as manslaughter by reason of provocation and has been dealt with since as an example of a provocation case. For the purpose of this research it is assumed that this was the basis of the juror's verdict.

[2] Specifically, the defence argued that Julie had provoked Ramage in two different ways: first, by leading him to believe that there was a possibly that she would resume the marriage; and second, through her verbal taunts in their final argument.

verdict in *Ramage*. It questions whether *Ramage* was representative of how provocation was operating in the majority of cases prior to the implementation of reform or whether the case represented a one-off injustice of the partial defence. In doing so, the research examines the contrasting approaches taken to dealing with the partial defence of provocation in the English, Victorian and New South Wales (NSW) criminal justice systems. These three research locations were chosen given the prominent discussions surrounding, and in two of the jurisdictions the significant reforms implemented to, the law of homicide in this area since the 2004 verdict and sentencing in *Ramage*.

1.1 The Law's Potential for Reform

> the interesting questions are about how reform *both* succeeds and fails, simultaneously and obviously. Indeed, the very transparency of these conflicts should merit our attention not only for feminism's sake, but also for the sake of understanding how law maintains apparent consistency, and at the same time, perpetuates injustice. (Nourse 2000: 952)

In examining the impacts of reforms to the partial defence of provocation and the changing nature of the law's response to lethal intimate violence, this research builds upon over three decades of criminological, feminist and socio-legal research that has considered the ability of the law to adequately respond to, and represent, women's experiences of lethal and non-lethal violence[3]. Central to this research has been questions relating to the transformative potential of the law and the ability of law reform to enable women's experiences of violence to be better addressed and understood within the discursive framework of the law (Armstrong 2004; Graycar & Morgan 2005; Hunter 2006; Nourse 2000; Wells 2004).

This research recognises the limited potential for law reform to achieve actual change in practice, as described by Henderson (1996: 479):

[3] See, for example, Burman 2010; Busch et al. 1995; Dawson 2003; Dawson 2004; Dobash & Dobash 1992, 1995; Douglas 2008; Dwyer 1995; Easteal 2001; Freeman 1980; Hunter 2006; Jordan 2008; Kaspiew 1995; Langer 2005; Lewis 2004; Randall 2004; Stalans & Lurigio 1995; Martin 1998; Siegel 1996; and Walklate 2008.

> as feminists may suspect from their experiences with rape law and law reform efforts, the criminal law continues to disadvantage the relatively powerless and perpetuate the dominant ideologies of the powerful.

In providing an overview of this body of research, Lewis et al. (2001) explain that research has often considered two opposing focuses: seeking justice either outside the criminal justice system or searching for justice within the criminal justice system. This research is concerned with the latter approach as it undertakes an examination of homicide law reform targeted at the provocation defence in the Victorian, NSW and English criminal justice systems. In doing so, it seeks to build upon research that has considered both the failure and the success of law reform initiatives in relation to rape law, legal responses to sexual assault and domestic violence, and reform surrounding the law of self-defence and provocation (Bachman and Paternoster 1993; Daly and Bouhours 2009; Goldberg-Ambrose 1992; Graycar and Morgan 2005; Hunter 2006; Kaspiew 1995; Mackinnon 1991; Nourse 2000; Tang 1998; Tyson 2011). The importance of examining the effects of law reform is captured by Nourse (2000: 977):

> The interesting and challenging part is to understand how and when success lives with failure. This is worth investigating in its own right so that we may better understand the odd discontinuities of reform rather than simply assuming the impossibility of change or the ease of effectuating it.

In recognising the value of Nourse's argument, this research is explicitly concerned with the observation of change in practice, and questions surrounding the ability of the law to overcome the problems historically associated with the operation of the partial defence of provocation. In examining the transformative potential of the law in this area, this research investigates the law's response to three categories of people: the jealous man who kills, the female victim of homicide, and the woman who kills in response to prolonged family violence. This research focuses upon the law's response to these three categories of people, in light of the significant attention researchers and other commentators have paid to the use of provocation in two specific contexts; by men who kill in response to relationship separation or alleged infidelity and women who kill in response to prolonged family violence.

Drawing on qualitative data obtained from in-depth interviews conducted with 81 members of the Victorian, NSW and English criminal justice systems and a case analysis of trial and sentencing transcripts from each jurisdiction, this research examines the law of homicide, both prior and subsequent to the implementation of reforms to the partial defence of provocation in each of the three jurisdictions. By drawing upon the interview data, this research gives voice to a population of senior legal practitioners who have traditionally been hesitant to publicly engage with law reform debates, and as such offers a unique inside perspective into how the partial defence of provocation has been perceived – prior to, without and following the implementation of reform – by the Victorian, NSW and English legal communities.

1.2 Thesis Overview

The resulting analysis has been organised to reflect the main themes that were identified from the interview and case analysis data. These three key themes focus upon respondent considerations of the law prior to the implementation of homicide law reform (Chapter 5), examinations of the effects of homicide law reform (Chapter 6), and third, consideration of the relationship between homicide law reform and sentencing policy (Chapter 7).

Chapter 2: *Questioning the Law of Homicide* provides a review of past debates within the research surrounding the operation of the partial defence of provocation within Australia and internationally. This chapter has two focuses: first, to examine the historical origins of the partial defence of provocation and recent arguments surrounding its viability as a partial defence to murder; and second, to review the operation of provocation in Australian and international criminal jurisdictions, with a specific focus on its role as a partial defence to murder in Victoria, NSW and England.

Chapter 3: *Theoretical Frameworks for Homicide Law Reform* provides an overview of the three theoretical frameworks that are applied throughout this thesis to an examination of homicide law reform in Victoria, NSW and England. In doing so, it examines Hudson's (2006) principles of justice alongside a broader examination of feminist scholarship concerning the ability of the criminal justice system to adequately account for the female 'other'. Second, it provides an overview of Cohen's

(2001) and Sykes and Matza's (1957) conceptualisation of denial; and third, Chapter 3 examines the work of Hogg and Brown (1998) and Garland (1996; 2001) on the influence of law and order politics on the implementation of criminal justice policies and McCarthy's (2008) argument for the need to consider gender-based violence in sentencing.

Chapter 4: *Research Design: An International Comparison of Homicide Law Reform* examines the qualitative research design employed for this research. The research design combines in-depth interviews with a case study analysis to examine the operation of the law of homicide in Victoria, NSW and England. In providing an overview of the research design implemented, this chapter examines the value of an international comparative study, the strengths and weaknesses of interviewing as a social science research technique, the thematic findings that emerged from the resulting interview data, the role of the case analysis within the research methodology, and ethical considerations that emerged from the use of this methodology.

Chapter 5: *Examining the Law: The Provocation Problem and Approaches to Homicide Law Reform* is the first of three analysis chapters. The chapter engages with past debates on the partial defence of provocation (as covered in Chapter 2) by examining legal respondents' evaluations of the operation of provocation prior to the implementation of the recent homicide law reforms in Victoria and England. In doing so, it draws upon Hudson's principles of justice to consider the daily operation of the provocation defence prior to its abolition in Victoria in November 2005 and its replacement in England in October 2010. This chapter also examines respondents' evaluations of the specific approaches taken to addressing the problem of provocation in the Victorian and English criminal justice systems[4].

Chapter 6: *For Better or Worse? The Effects of Homicide Law Reform* considers the operation of the law of homicide in Victoria, NSW and England in the period following the implementation of reforms targeted at the partial defence of provocation. The chapter examines both the productive and counter-productive

[4] Given that NSW has not implemented any significant reforms to the partial defence of provocation in the past decade, the research interviews within this jurisdiction did not focus on respondents' perceptions of the approach taken to reforming the law of provocation, and as such the findings from this jurisdiction are not discussed in this chapter.

impacts of these reforms as evident from the interview data and the case analysis. These effects are considered using Cohen's (2001) and Sykes and Matza's (1957) conceptualisation of denial and its effect upon representations of the victim and the offender in intimate homicide trials. Specifically, the chapter examines four main effects evident across the three jurisdictions: the continued existence of the problems previously associated with the partial defence of provocation, the ongoing legitimisation of male violence, the inadequacy of the law of homicide to cater for situations within which women kill in response to prolonged family violence, and the over-complication of homicide law post-reform.

The seventh, and final, analysis chapter – Chapter 7: *Homicide Law Reform and the Challenge of Sentencing for Murder* – examines the relationship between homicide law reform and key issues relating to sentencing policy and reform in Victoria, NSW and England. Central to this discussion is an examination of respondents' evaluations of the viability of reform packages that propose moving provocation to the sentencing stage of the court process. Additionally, this chapter examines the NSW and English respondents' perceptions of the impact of restrictive sentencing schemes on sentencing for murder and the viability of future reforms to the partial defence of provocation. Drawing on the work of Garland (2001) and Hogg and Brown (1998), this discussion is considered in light of research acknowledging the difficulty of implementing reform within a law and order climate.

Finally, Chapter 8: *Beyond Provocation: The Transformative Potential of Law Reform* brings together broad conclusions surrounding the lessons that can be learnt from the approaches taken in Victoria, NSW and England to reforming the partial defence of provocation and minimising the problematic influence of gender bias in this area of the law of homicide. In providing lessons to be applied to comparable jurisdictions that seek to address the problem of provocation, this chapter draws upon the three key focal points of each of the analysis chapters and identifies methods of best practice that could be incorporated into any future law reform initiatives.

Conclusion

The period following the *Ramage* case has witnessed significant change in the way that the law seeks to respond to allegedly provoked lethal violence, particularly that which occurs within an intimate context. As such, an examination of the operation of the law of homicide and the effectiveness of law reform targeted at the partial defence of provocation is timely. In the period subsequent to the implementation of reforms in Victoria and England it is important to question what effects these reforms have had in practice and to what extent they have been successful in overcoming the problems historically associated with this partial defence to murder. Additionally, it is also valuable to consider whether the operation of the law of provocation in NSW is as problematic as previously thought in other jurisdictions and, if so, to examine the ways in which these problems could be overcome by drawing upon lessons learnt in comparable jurisdictions.

CHAPTER 2 Questioning the Law of Homicide

Central to addressing questions surrounding the operation of the law of homicide has been over three decades of scholarly debate and governmental reforms surrounding the partial defence of provocation. As noted by the New Zealand (NZ) Law Commission (2007: 18) in its review of the partial defence of provocation:

> Provocation is widely recognised as a troublesome and difficult area of the criminal law. Dissatisfaction with it has been extensively and repeatedly expressed, in all manner of forums … There is a vast and complicated literature, addressing and critiquing every possible aspect of the defence, and a similarly vast and complicated body of case law.

This chapter provides an overview of 'this vast and complicated literature,' by examining the historical origins of the provocation defence as well as its most recent application in Australian states and comparable criminal jurisdictions. In doing so, it presents a review of the research that has examined the viability of a partial defence of provocation within two key contexts: when used by men who have killed a female intimate partner, and when raised by women who have killed in response to prolonged family violence. In reviewing the debates, this chapter has two key focuses: first, to examine the historical origins of the partial defence of provocation and recent arguments surrounding its viability as a partial defence to murder; and second, to review the operation of provocation in Australian criminal jurisdictions and internationally, in particular its role in the Victorian, NSW and English jurisdictions.

2.1 The Partial Defence of Provocation

Historically, the partial defence of provocation emerged in English law in the 17th century as a concession to human frailty at a time when inflexible homicide laws meant that capital punishment was mandatory for all offenders convicted of murder (Ashworth 1976; Bronitt and McSherry 2010; Brookbanks 2006; Clough 2010; Dressler 2002; Stewart & Freiberg 2009). Designed as a partial justification for men defending their honour against other males (Forell 2006; Horder 1992; Tolmie 2005), provocation provided an alternative verdict of manslaughter, in place of murder, which allowed judicial flexibility to impose a sentence other than death (Lane 2004).

During this period, four accepted categories of provocation emerged: provocation resulting from grossly insulting assault; responding to a 'friend, relative or kinsman being attacked'; 'seeing an Englishman unlawfully deprived of his liberty'; and 'seeing a man in the act of adultery with one's wife' (Horder 1992: 24; Rozelle 2005). The acceptance of partial responsibility in the final category is evident in case law at the time, where, for example, in *Mawgridge* it was noted that 'when a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of the man, and adultery is the highest invasion of property' (*R v Mawgridge* [1707] Kel. 119: 137). Additionally, the modern concept of loss of control is seemingly absent from early formulations of the partial defence of provocation, which was based more upon the concept of anger (Horder 1992).

More recently, the content of the partial defence has been significantly changed from that implemented in the 17th century (Ramsey 2010). While it still operates to reduce murder to manslaughter, the partial defence has developed into an excuse-based defence grounded on a person's loss of self-control, rather than on anger (Stewart & Freiberg 2008; Wells 2000; Horder 1992). Where successfully used, the partial defence serves to recognise 'human imperfection' and the role that anger and other emotions can play in diminishing a person's self-control (Dressler 2002: 978):

> In provocative circumstances, ordinary people become angry, self control in such circumstances is more difficult, and in some cases twelve jurors, probably both men and women, will determine that the provoked person who kills is less culpable than one who kills while in control.

It also operates to provide a distinction between lethal violence that is committed without premeditation as a loss of self-control and lethal violence that is meticulously planned (Kissane 2004). In doing so, the defence suggests that the former is a less culpable category of homicide warranting a manslaughter not a murder conviction (Yule 2007).

While there are variations in the formulation of the provocation defence dependent on the specific jurisdiction, it essentially operates to reduce culpability where a defendant

had responded to a provocative situation or behaviour with lethal violence that was beyond their self-control (VLRC 2004). For there to be provocation deemed sufficient to reduce murder to manslaughter, the provocative conduct of the victim must have been done to or in the presence of the killer and have caused the killer to temporarily lose self-control (Yule 2007). Under its new formulation the defence still requires that the defendant's use of lethal violence be proportionate to the provocation offered, as described by Horder (1992: 114):

> Where provocation is grave, they will be taken genuinely to have induced a loss of self-control, the killings thus being attributed to 'human frailty'. Where the provocations are trivial, on the other hand, they will be taken merely to have been the setting within which defendants displayed their bad character or malice in killing the victims.

Additionally, in several jurisdictions the scope of the defence has been extended to include provocation arising from the verbal taunts of the victim[5]. The use of the partial defence of provocation to provide a partial excuse for killing in response to verbal taunts has been a point of significant debate over the past two decades, particularly in relation to the successful use of the partial defence in male-perpetrated intimate femicides.

Critical to the assessment of whether, and to what extent, the offender's loss of control was due to a provoked behaviour is the question of whether the 'ordinary person' would have responded to the same scenario with the same level of loss of self-control as did the accused (Stewart & Freiberg 2009; Morgan 1997). This concept of the 'ordinary person' is largely founded on the 'objective capacity' theory (Horder 2004), and operates as a 'relevant yardstick of self-control against which the accused is measured in determining whether the defence of provocation succeeds' (Eburn 2001: 206). While there are variances specific to different jurisdictions, in essence the operation of the ordinary person test is such that the gravity of the provocation is assessed with reference to the relevant characteristics of the offender (which may include age, ethnicity, past history and other factors, dependent on the jurisdiction).

[5] Specifically in England, words alone could constitute provocative behaviour following the passing of the *Homicide Act 1957.*

The jury must consider whether, given the gravity of the provocation, an ordinary person would have lost their self-control and responded with the same actions as those carried out by the defendant (Stewart & Freiberg 2008).

The ordinary person test has given rise to significant debate among researchers, as critics have argued that both the subjective and objective elements of the ordinary person test render it too complicated for the average juror member to be able to adequately understand and apply (Tolmie 2005; Yule 2007). Additionally, legal and scholarly commentators have pointed to the difficulty of applying an ordinary person test in multicultural jurisdictions such as those in Australia and England (Eburn 2001; Riley 2008), with one scholar describing the test as 'vexing' (Findlay 2006: 287). This concern is also recognised in case law; for example, in *Masciantonio* (*R v Masciantonio* [1995] 183 CLR 58, hereinafter *Masciantonio*) it was commented that 'In a multi-cultural society such as Australia the notion of an ordinary person is a pure fiction'.

Furthermore, research has questioned the viability of a test that is based on the premise that an ordinary person kills (Coss 2006b; Morgan 1997; NZLC 2007; Rozelle 2005). As Coss has argued (2006b: 142), 'ordinary people when affronted, do not resort to lethal violence … it is clear that the ordinary person does not kill. Only the *most* extraordinary person does'. In agreement, the New Zealand Law Commission (NZLC) (Law Commission 2007: 45) commented in its review of provocation that the ordinary person test was the defence's 'most telling flaw', and that problematically provocation 'assumes that the ordinary person, faced with a severely grave provocation, will in consequence resort to homicidal violence, when in fact it is arguable that only the most extraordinary person does this' (Law Commission 2007: 11).

2.1.1 The Provocation Problem: Arguments for Reform and Abolition

Over the past two decades, ongoing debates around the partial defence of provocation have recognised the flawed nature of the defence and have called for, at a minimum, reform to this aspect of homicide law (Brookbanks 2006). Such debates have largely focused on the gendered operation of the partial defence of provocation and its use in contrasting contexts: specifically, by men who kill a female intimate

partner in situations of infidelity and relationship separation, and by women who kill a male partner following prolonged periods of family violence (Eltringham & Olle 2005; Howe 1999; Howe 2002; Rozelle 2005). Research has suggested that the use of provocation in these contexts highlights the gendered operation of the law. In this regard, as observed by an Australian scholar, the type of narrative often mobilised in provocation trials:

> recounts the familiar story of jealousy, betrayal and infidelity – the story of the jealous husband. It does not enable the accurate retelling of a different story, a story of fear, violence and oppression – the story of the battered wife. (Bradfield 2000: 5)

This body of literature has examined the effects of the successful use of provocation by both male and female defendants, as well as the subsequent representation of female victims during the trials of men who raise provocation in intimate femicide trials.

Provocation and the Jealous Man

> One must now ask whether the doctrine of provocation, under the cover of an alleged compassion for human infirmity, simply reinforces the conditions in which men are perceived and perceive themselves as natural aggressors, and in particular *women's* natural aggressors. Unfortunately, the answer to that question is yes. (Horder 1992: 192)

Over the past two decades, the partial defence of provocation has come to be known as the 'heat of passion' and the 'jealous man's' defence (Burton 2003; Coker 1992; Dressler 2002; Fontaine 2009; Forell 2005; Gorman 1999; Lee 2003; Nourse 1997), referring to its use, or arguably abuse, by men who kill a female intimate partner in the context of separation, estrangement or infidelity (Bradfield 2000; Forell 2006; VLRC 2004). As captured by Bradfield (2003: 324), 'the doctrine of provocation has allowed stories to be told of men who kill to assert control: men who have been rejected, rebuffed, or told to "hit the road", men whose violence ultimately culminates in death'.

These trials often involve claims such as ‘I lost it’, ‘I snapped’, ‘I blew a fuse’, ‘my mind went blank’ or ‘black’, and ‘I saw red’ (Tyson 2006: 3). Howe (1999:129) has described how such provocation cases have typically involved ‘pathetic excuses ranging from alleged infidelities, sexual slights, jealousies and abandonment’. The consequence of the successful use of provocation in such cases, as explained by Gorman (1999:479) in relation to the Canadian context, is that ‘in its present state its primary purpose appears to be to reward men who are so possessive of their spouses that they are willing to kill in order to ensure their spouse does not leave them for another man’.

In critiquing the applicability of the concept of loss of control to such cases, Yule (2007) posits that:

> Many cases involve the factual paradigm where a woman leaves a man for another man and the former partner kills the woman and claims he was provoked by her actions. If you consider the divorce rate throughout the jurisdictions, can it be said that an ordinary person could lose control and kill because their former partner has commenced another relationship? If this were so, then there would surely be far more murders than there actually are.

Furthermore, Coss (2006b: 52) has argued that the ‘real “loss of control” is that the men have lost control of their women’.

The use of the provocation defence within this context has been the focal point of calls for the reform, and specifically abolition, of the partial defence both within Australia and internationally. Critics have argued that the abuse of the partial defence by men who kill a female intimate partner suggests that the law is outdated and no longer reflective of community values. As questioned by one Victorian legal commentator, ‘how in a civilised society, can the desire to leave a relationship constitute behaviour which would provoke anyone to kill?’ (Howe 1999: 130). In agreement, Bradfield (2000: 35) has argued that in practice provocation:

> endorses outmoded attitudes that women are the property of their husbands, attitudes that continue to permit men who kill their partners following sexual provocation such as rejection, a partner's unfaithfulness or jealousy to be accommodated within the defence of provocation. The defence of provocation operates as a 'licence' for men to kill their female partners who dare to assert their own autonomy by leaving or choosing a new partner.

This argument has also been acknowledged and advanced by law reform commissions and government bodies. In abolishing the partial defence of provocation in Victoria in November 2005, the then Attorney-General Robert Hulls (2005) commented that:

> the law of provocation has failed to evolve sufficiently to keep pace with a changing society. By reducing murder to manslaughter, the partial defence condones aggression towards women and is often relied upon by men who kill partners or ex-partners out of jealousy or anger. It has no place in a modern, civilised society.

However, Dressler (2002) contends that when put into perspective the gender bias argument does not provide adequate support for the abolition of the defence. While he concedes that the partial defence has worked predominantly in favour of male defendants, Dressler argues that this must be understood in light of statistics that show that lethal violence is primarily committed by men. Furthermore, Tolmie (2005) has argued that while the use of the provocation defence in this context does engender certain problems, these can be resolved. She proposes that rather than abolishing the partial defence, which may serve to disadvantage female defendants, a model of reform be implemented that serves to restrict the circumstances within which the provocation defence is available. Specifically, she argues:

> The defence should be unavailable in circumstances where the act of the victim is provocative because it challenges the power and control that the offender believes he is justified in exercising over another person. This includes behaviours that women, as independent and autonomous actors, are entitled to do, such as leaving their relationship with the offender… (Tolmie 2005: 48)

However, critics of such a model of reform have argued that despite such restrictions the defence could continue to be abused by men who kill a female intimate partner in the context of relationship separation and infidelity.

Female Victims and the Partial Defence of Provocation

> As with every provocation case, it was the woman not the killer who the family believed was on trial. And what was this woman's crime? That she said she was seriously considering leaving a controlling and violent husband. (Cleary 2006a: 21)

Of further concern in relation to the operation of the provocation defence has been the perceived mobilisation of gendered stereotypes that serve to defame the character of the deceased, often female, victim (Howe 2002; Morgan 1997; Naylor 2002; Tyson 1999; Wells 2000). As described by Naylor (2002), such trials often become a 'slander fest' in relation to the character and past behaviour of the victim. Expanding on this, Wells (2000: 101) poses that women killed by their male partners are often stereotyped according to their alleged 'infidelity, nagging, or other undesirable characteristics'. In reflecting on such stereotyping, commentators have questioned why 'the defence of provocation allows women to be dragged through the dirt so that men can get away with murder' (Kissane 2004: 4).

United Kingdom (UK) Minister, and long-term advocate for the abolition of the partial defence of provocation, Harriet Harman (2003) has argued that the use of the defence by men who kill a female partner means that in practice 'the law allows him, encourages him to say that it was not his fault – it was hers'. Research has suggested that this trend of victim blaming by the defendant may not be unique to provocation and that in the operation of partial defences generally there is often a 'strong temptation for the defendant to exaggerate as far as possible any element of blame that can be attached to the deceased victim for what happened, to show up the defendant's own actions in a better light' (Horder & Hughes 2007: 13).

In terms of the mobilisation of such stereotypes, it is particularly concerning that in the majority of cases in which the partial defence is raised the only witness to the

provoking behaviour is the surviving offender on trial for murder (Morgan 1997; Yule 2007). As commented by Yule (2007), 'it is usually only the word of the accused as to what was said and done leading up to the killing … the defence of provocation encourages blaming [of] the victim for the criminal acts of the accused'. Howe (2002: 61, emphasis in original) has also described that:

> The provocation narrative thus reveals the fundamental dependency of the killer's story of intolerable provocation on the other, the silenced victim. In a provocation case, only the killer's story is narrated, allowing him, the *sexed* who, to become a "narratable self" while the victim – whether female or feminised – is reduced to an annihilated "what". As such the provocation narrative is a narrative, utterly ethnically bankrupt.

In discussing this problematic trend, long-term advocate of the abolition of the provocation defence Phil Cleary (2004:20) has argued that 'the fact that dead women can't speak is a godsend for these killers'. In this regard, commentators have argued that abolishing the defence of provocation would allow the legal system to send the message that women can no longer be blamed for the lethal violence committed against them by men (Cleary 2004).

Debates surrounding the role played by the provocation defence in defaming the character of female victims have built upon an already established body of research that has examined the gender biases inherent within the criminal justice system, specifically, the subordination of women within the court system. As captured by one scholar, 'The core stereotype for women in the courts is that of the victim, and blaming the victim is the classic courtroom response to crime in the private arena' (Kennedy 2005: 117). This subordination of female victims is most clearly evidenced in the historical treatment, and legal silencing, of female victims of domestic violence. In relation to the Canadian court system Mahoney (1992: 21) describes how the law has 'ignored, trivialised or blamed' the victims of domestic violence. Tarrant (1990a: 579) has similarly argued that 'women who are the victims of marital violence are silenced not only by the physical suppression they suffer but are also silenced by the construction of [the] meaning of domestic violence'.

> The partial defences are designed to deal with a grey area of criminal culpability: cases where the choice between outright acquittal and a murder conviction is too stark. The question is whether this grey area currently offers something useful and necessary in relation to battered defendants. (Tolmie 2005: 38)

Provocation, as a partial defence to murder for women who kill within the context of family violence, has been a focal point of both debate around law reform and scholarly questions surrounding the applicability of provocation to such cases (Burton 2001; Horder 1992; Tarrant 1990b; Tolmie 1990; Yeo 1993). Historically, research has questioned whether such killings should fall within the realm of provocation given that most women do not experience a sudden loss of control when killing within this context, as argued by Horder (1992: 188):

> many battered women do not lose their self-control immediately prior to the killing of the batterer. Following long-term abuse, some battered women appear to have taken a calculated decision to kill that was not triggered by any very recent provocation; still others appear to have acted in the face of recent provocation, but with more or less deliberation at or close to the moment of the fact.

Some researchers have argued that the failure of the provocation defence to account for women's perpetration of lethal violence stems from the fact that the law is structured to reflect male experiences of violence (Tarrant 1990b; Yeo 1993). Tarrant (1990b: 15) has argued that for this reason the stories of women who kill in response to prolonged family violence are 'absent' from the formulation of the partial defences, specifically provocation. In highlighting the effects of this male construction of provocation upon female defendants who kill within this context, Yeo (1993: 104–5) has noted that:

> there is a major problem confronting women who seek to rely on these criminal defences. It is that the defences have been developed through a long history of judicial precedents on the basis of male experiences and definitions

> of situations. Consequently, female defendants whose experiences and definitions fall outside these male-inspired defences are confronted with the prospect of either failing to plead them successfully or having to distort their experiences in an effort to fit them into the defence.

In attempts to better account for such situations of lethal violence, over the past three decades national and international jurisdictions have expanded the applicability of the partial defence of provocation. Such reforms have included the removal of the 'sudden' requirement and the recognition of cumulative provocation (Bradfield 2000; Horder 1992; Yeo 1993). The adoption of this type of reform is most clearly illustrated in the NSW context, where in response to the recommendations of the NSW Parliamentary Task Force on Domestic Violence (1981), the partial defence of provocation was substantially reformed to more accurately reflect the context within which battered women kill. The reforms implemented in 1982 through the *Crimes (Homicide) Amendment Act 1982* served to remove the requirement that the use of lethal violence by the defendant must have occurred immediately after the provocative incident, provided that the defendant still used lethal violence as a result of their own loss of self-control. The revised legislation also sought to account for past incidents of provocation in understanding the use of lethal violence in response to the final provocative act, as explained by Tolmie (1990: 63) 'these developments shift the emphasis from provocative actions occurring immediately prior to the homicide to actions which occur over a broad time span'. As further explained by Yeo (1993: 113), this meant that the law came to acknowledge that:

> what might appear as a relatively minor act of provocation when seen in isolation, for example a slap on the face, could justifiably be constructed otherwise by a woman who had endured a long period of violence and abuse from the provoker.

Some critics, however, have suggested that such reforms still fail to account for the fact that most female defendants who kill within this context do so 'calmly and with deliberation' (Horder 1992: 190).

Accommodating the needs and realities of battered women within the provocation defence has given rise to a body of criticism that argues that provocation is not the appropriate categorisation for these types of homicide (Law Commission 2007; Morgan 2002; Tolmie 1990; Tolmie 2005). As explained by Bradfield (2000: 26):

> The circumstances in which women kill their abusive partners suggests that the killing was predominately motivated by a genuine fear for safety (self-defence) rather than a loss of self-control (provocation). The tendency automatically to classify women who kill after prolonged domestic abuse as provoked killers has meant that the fact that these women were predominately acting in self-preservation has been obscured.

In agreement, Morgan (2002) has highlighted that, within the Victorian context, although provocation has been successfully raised by female defendants who have killed an abusive domestic partner, it is important to consider whether such cases should in fact have led to a complete acquittal for self-defence rather than a conviction of provocation manslaughter. Tolmie concurs (2005: 38) in her analysis of successful provocation cases in New Zealand, questioning whether a conviction for provocation manslaughter in cases of battered defendants[6] is more representative of 'an instance where the defence of provocation did some of the work that should have been accomplished by the complete defence of self-defence'. Morgan (2002) asserts that self-defence is the appropriate categorisation of such killings and that more attention should be given to ensuring that battered women are adequately protected within that category.

However, despite such arguments, in the wake of proposed reforms – the abolition of the partial defence of provocation, in particular – scholars have argued that the defence plays an important role in providing a legal avenue through which to understand how and why battered women kill their domestic abusers (Bradfield 2003; Brown 1999; Forell 2006; Horder 2005; Tolmie 2005). Specifically, in advancing this argument in 2005, the Victorian Criminal Bar Association claimed that the abolition of the provocation defence would serve to disadvantage females who kill in response

[6] In her article, Tolmie (2005) refers specifically to the use of the provocation defence in *R v Wang* [1990] 2 NZLR 529 (CA).

to prolonged domestic abuse (Tomazin 2005). Similarly, Brown (1999) has previously argued that without provocation as a partial defence such female defendants could be at risk of being convicted of murder rather than the less severe conviction of manslaughter.

The Question of Provocation: Judge or Jury?

Debates concerning the abolition or retainment of the partial defence of provocation have also often centred on the question of whether a person's loss of self-control in the face of a provoking incident should be decided upon by a jury of the defendant's peers or by a presiding judge. Although it recommended the abolition of the provocation defence, the NZ Law Commission (2007: 52) did acknowledge arguments affirming the key role of the jury in deciding upon provocation defences:

> Dealing with provocation as a partial defence, at trial, allows 12 community members to make the value judgment about reduced culpability … It is said that, if there is a community endorsement of the fact that there were extenuating circumstances, this will in turn provide a foundation for the judge's decision to impose a significantly lower sentence, which otherwise the community might neither accept nor understand.

A similar argument was raised by the NSW Law Reform Commission (NSWLRC) in its 1997 review of the partial defences to murder, in which it commented that 'The question of whether a person's culpability for an unlawful killing is so significantly reduced because of a loss of self-control is an issue which should be decided by a jury, as representatives of the community' (NSWLRC 1997: 31). As cautioned by Dressler (2002), any law reform exercise that limits the role of the jury in provocation cases is of questionable value and should be rigorously critiqued.

However, opposing this view, Riley (2008: 64) has acknowledged the counterargument which supports the role of judges, who may apply the law of provocation more 'consistently and without prejudice' by considering and taking into account all of the factors relevant to a case at sentencing. In reviewing the need for provocation to be a jury-based decision in NSW, Findlay (2003: s. 10.12) has questioned:

> Why is provocation so different from other kinds of mitigating circumstances, such as remorse or prospects of rehabilitation, that it should be decided by a jury rather than a judge? Would removing the defence from the jury place too much power in the hands of judges, or be otherwise undesirable?

Furthermore, Riley (2008) argues that through sentencing judges are required to provide justifications for their decision-making, and therefore the public will become better informed as to why provocation is considered a mitigating factor in such cases.

2.1.2 The Partial Defence of Provocation in Australia

> The partial defence of provocation to murder is in its death throes.
> (Stewart & Freiberg 2008: 283)

Within Australia, the past decade has witnessed numerous reviews into the partial defences to murder, which have recommended the retainment of provocation as a partial defence to murder in some jurisdictions, and its abolition in others. Consequently, these reviews have led to the abolition of the partial defence of provocation in three Australian jurisdictions, where consideration of provocation has been moved to the sentencing stage of the court process. The decision to abolish provocation in these jurisdictions has been praised by one American scholar as one of 'the boldest strides toward a feminist transformation of homicide law', and for achieving 'substantive gender equality in homicide law' (Ramsey 2010: 3).

Table 2.1: Homicide Law Reform and the Partial Defence of Provocation in Australia

	Provocation available as a partial defence to murder	Provocation abolished (month, year of implementation)	Provocation only considered at sentencing	Mandatory life sentence for murder
Australian Capital Territory	✓	X	X	X
New South Wales	✓	X	X	X
Northern Territory	✓	X	X	✓
Queensland	✓	X	X	✓
South Australia	✓	X	X	✓
Tasmania	X	✓ May 2003	✓	X
Victoria	X	✓ November 2005	✓	X
Western Australia	X	✓ August 2008	✓	X

As shown in Table 2.1, the past decade has seen the abolition of the partial defence of provocation in three Australia jurisdictions: Tasmania[7], Victoria[8] and Western Australia (WA)[9]. In abolishing the defence, former Tasmanian Minister of Justice Judy Jackson (2003: 60) acknowledged the gender bias inherent in the formulation of the partial defence:

> The defence of provocation is gender biased and unjust. The suddenness element of the defence is more reflective of male patterns of aggressive behaviour. The defence was not designed for women and it is argued that it is not an appropriate defence for those who fall into the 'battered women syndrome'. While Australian courts and law have not been sensitive to this issue, it is better to abolish the defence than to try to make a fictitious attempt to distort its operation to accommodate the gender behavioural differences.

The willingness to abolish the partial defence of provocation in these jurisdictions has often been linked to the abolition of the mandatory life sentence in the same jurisdictions and the subsequent implementation of a discretionary model of

[7] Tasmania abolished the partial defence of provocation in 2003 through the enactment of the *Criminal Code Amendment: Abolition of Defence of Provocation) Act 2003*.
[8] Victoria abolished the partial defence of provocation in 2005 through the enactment of the *Crimes (Homicide) Act* 2005.
[9] WA abolished the partial defence of provocation in 2008 through the enactment of the *Criminal Law Amendment (Homicide) Act 2008.*

sentencing for murder (Douglas 2010; Forell 2006; Hemming 2010; Yule 2007). As commented by Leader-Elliot (2007: 183):

> So far as the structure of defences is concerned, it is unlikely that the current trend to recommend abolition of the qualified defence of provocation would have had the same momentum and the same success, if the penalty for murder was mandatory.

Specifically, this can be seen in WA where, alongside the abolition of the provocation defence, the government abolished the mandatory life sentence for murder and replaced it with a presumptive life sentence, representing an approach that has been praised by some researchers as 'the correct path' to reform (Hemming 2010: 1).

In contrast to the abolition of the provocation defence in several Australian jurisdictions, the partial defence of provocation is still accessible as a partial defence to murder in NSW, Queensland (QLD), the Northern Territory (NT), South Australia (SA) and the Australian Capital Territory (ACT). Of these five jurisdictions, as shown in Table 2.1, three retain a mandatory life sentence for murder. Within these jurisdictions the elements that comprise the partial defence of provocation are set out in the High Court case of *Stingel* (*Stingel v The Queen* [1990] 171 CLR 312, hereinafter *Stingel*). In *Stingel*, the 19-year-old male defendant killed a male victim after finding him having sex with his former girlfriend. The defendant alleged that prior to his killing the victim had verbally provoked him by saying, 'piss off you cunt' (as cited in Morgan 1997: 257). The defendant had been obsessed with his former girlfriend and at the time of the offence she had a restraining order against him. The High Court did not allow determination of provocation to be left to the jury in this case, and subsequently the test for provocation was established to include both subjective and objective factors.

The subjective and objective elements of the partial defence of provocation have subsequently been followed in SA and are also reflected in the statutory provisions of the ACT, NSW and the NT (Bronitt & McSherry 2010; McSherry 2005a). Specifically, the test for provocation in these jurisdictions is based on three key requirements, as outlined by McSherry (2005a: 909):

- There must be provocative conduct
- The accused must have lost self-control as a result of the provocation …
- The provocation must be such that it was capable of causing an ordinary person to lose self-control and to act in the way the accused did…

As such, the test for provocation comprises both subjective (second requirement above) and objective (third requirement above) elements. In further developing the objective element in *Stingel*, the High Court ruled that the ordinary person should be of no specific gender, ethnicity or cultural background and that as such the only characteristic relevant to this test was the age of the accused, as explained by Eburn (2001: 208) this meant that 'the jury is required to determine what level of self-control should be exercised by an ordinary person of the same age as the accused but otherwise representing the minimum standard of self-control to be expected by the community'[10].

Australian states that have retained provocation as a partial defence to murder have implemented reforms over the past decade in response to concerns surrounding its operation. Both the ACT (through the *Crimes Act 1900* s 13(3)) and NT (through the *Criminal Code* s 158(5)) have implemented provisions that exclude the use of the defence in response to non-violent sexual advances (Riley 2008). Furthermore, in QLD, the government commissioned a review of the partial defence of provocation in 2008, which ultimately led to the November 2010 retention and reform of the defence (through the Criminal Code and Other Legislation Amendment Bill 2010).

While the QLD Law Reform Commission (QLRC) recommended that provocation continue to be available as a partial defence to murder, it also recommended that the burden of proof should be shifted to the defence (Douglas 2010; Hemming 2010; Yule 2009). This recommendation has been praised by Hemming (2010: 42), who noted that, 'as the victim is the silent witness in court with the defendant putting unanswered words into the mouth of the deceased, placing the onus of proof on the defence is entirely appropriate'. Alongside this recommendation, the QLRC argued

[10] This judgement of the relevant characteristics of the ordinary person in *Stingel* was also reinforced in *Masciantonio* and *Green (Green v The Queen* [1997] 191 CLR 334, hereinafter *Green).*

that certain situations that have typically given rise to successful defences of provocation should no longer apply to the defence, central among them being the exclusion of killings triggered by a victim's decision to end a relationship and a victim's use of words alone constituting provocative behaviour[11]. In response to the recommendations of the QLRC, the QLD Government implemented a package of reforms aimed at ensuring that, except in exceptional circumstances, provocation would not be applicable to situations where an offender was verbally provoked or was motivated by jealousy or sexual possessiveness (Ironside 2010; Sweetman 2010; Yule 2009). However, it should be noted that, given its inability to review the continued imposition of a mandatory life sentence to murder in Queensland, it has been argued that the QLRC was 'limited' in its reference to provocation (Douglas 2010; Yule 2009).

2.1.3 The Road to Change: The Partial Defence of Provocation in Victoria

In Victoria, between July 1998 and June 2007, 175 offenders were convicted of manslaughter, of which 20 cases were classified and sentenced as provocation manslaughter (Stewart & Freiberg 2009). Of the 20 offenders sentenced for a provocation manslaughter, 85 per cent (17 out of 20) were male and received head terms of imprisonment ranging from four to 15 years imprisonment, with non-parole periods ranging between two and 13 years imprisonment (Stewart & Freiberg 2009). Within this sentencing range, the most common maximum penalty imposed was eight years and six months imprisonment (Stewart & Freiberg 2009). In comparison to murder terms of imprisonment imposed during the same period, in which the most common maximum term of imprisonment imposed was 18 years, these sentences were extremely favourable to the defendants (Stewart & Freiberg 2009). In analysing sentencing trends for provocation manslaughter during this period, Stewart and Freiberg (2009) observed that in cases where the provocation resulted from sexual jealousy and/or infidelity, the imposed sentence was above the average for manslaughter for this time period.

[11] As clarified by Douglas (2010), the QLRC recommended the exclusion of these two situations except in exceptional circumstances.

The Influence of Ramage*: A Catalyst for Reform*

> The government later changed the law so cockroaches like Ramage could no longer slip through that legal crack. (Silvester 2011: 26)

As highlighted in the introduction to this research, the 2004 trial and sentencing of James Ramage has been central within debates surrounding the partial defence of provocation in Victoria, and more broadly throughout Australia and internationally. The case is frequently cited by scholars and legal commentators alike as a key example of the problems often associated with the operation of this partial defence to murder. Specifically, critics have pointed to the role that the provocation defence played in allowing Julie Ramage to be put on trial and in excusing the perpetration of lethal violence against her (Howe 1999; Maher et al. 2005; McSherry 2005a). The case has thus been cited by researchers as an illustration of the role of this partial defence in allowing the victim, usually a female, to be put on trial and their words to be used to legitimise the use of lethal violence committed against them. As described by one commentator, 'Julie Ramage was dead and her husband had confessed to killing her, but at his murder trial … James Ramage put his victim firmly in the dock' (Howell 2005: 276). In calling for the abolition of the partial defence of provocation following *Ramage*, Cleary (2004: 20) argued that 'It's time we changed the law, affirmed a woman's right to leave a relationship and made sure the days of blaming women for the violence of men are over'.

While such critiques, and the significant volume of coverage given to the case in the media, did not impact on the recommendations of the Victorian Law Reform Commission (VLRC), which were made prior to the decision in *Ramage*, the case has been linked to the Victorian Government's subsequent quick response in abolishing the partial defence in November 2005 (Hemming 2010; Howell 2005; Kissane 2009; McSherry 2005a; Ramsey 2010). As described by one commentator at the time, Victoria became 'swept up in a tide of outrage over the James Ramage verdict' (Neal 2004). Kissane (2009: 39) has also highlighted that the 'proposed changes had been in the pipeline for some time, but the furore over the case might have helped energise the political will to push them through'. Comments made by the sentencing judge in *Ramage* also reflect opinion within the judiciary as to the perceived need to address

the issue of provocation in the Victorian justice system: 'I of course must apply the current law whatever view I may hold as to the desirability of change to it' (*Ramage* per Osborn J: 28).

Cultural Defences of Provocation: The Killing of Zerrin Dincer and the Trial of Mazin Yasso

In addition to the *Ramage* trial, the successful use of the provocation defence in *Dincer* (*R v Dincer* [1983] VR 460, hereinafter *Dincer*) and the unsuccessful use of the provocation defence in *Yasso* (*R. v. Yasso* [2002] VSC 468, hereinafter *Yasso*) illustrated the cultural nuances inherent to the provocation defence. The Victorian trial of Kemalettin Dincer for the February 1981 killing of his stepdaughter, Zerrin Dincer, casts further spotlight on the potential dangers of the provocation defence. Dincer stabbed his victim to death, and despite admitting to police that he had 'thrust it [the knife] very hard to kill her. She disgraced my honour', he was convicted of manslaughter on the grounds of provocation (Cleary 2008). In *Dincer*, the trial judge instructed the jury to consider 'whether an ordinary Muslim man, as Dincer was considered to be, might lose control and kill his daughter upon learning that she was sexually active' (as cited by Cleary 2008).

Nearly two decades later, the failed use of the provocation defence in *Yasso* arguably indicated the level of cultural change that had occurred in relation to the acceptance of provocation as a defence in the Victorian criminal justice system. Described by Coss (2006a: 63) as the 'epitome of a homicidal propriety male', Yasso was convicted of the murder of his estranged wife, Eman Hermiz. Yasso argued that by spitting in his face in a public supermarket the victim had provoked his use of lethal violence; however, he was convicted in 2002 of the murder, and again in 2005, after a successful appeal on the basis that in 2002 the judge should have left the determination of provocation to the jury. The *Yasso* trial raised questions about whether a concession should be made for men from non-Australian cultural backgrounds where men have a perceived 'higher propensity towards violence' (Riley 2008: 68).

Scholars have argued that the unsuccessful use of the provocation defence by Yasso provides evidence that while the provocation defence acts to protect 'white middle-

class masculinity', represented by the likes of James Ramage, it does little to protect '"less civilised" cultures, which are seen as inherently violent and oppressive' (Maher et al. 2005: 147). Furthermore, Maher et al. (2005) argue that a comparison between the use of the provocation defence in *Ramage* and in *Yasso* reveals the continued influence of traditional ideals surrounding gender and masculinity in the Victorian court system, and specific to their analysis, the influence of cultural assumptions in both the legal system and society more broadly.

The VLRC

Following the heightened debate and controversy surrounding the partial defence of provocation and particularly influenced by the work of Morgan (2002), the VLRC conducted an extensive review of the provocation defence in 2004. This review culminated in the 2004 release of the final report *Defences to Homicide*, which has since been described as 'the most comprehensive and cogent critique of the doctrine' of provocation in Australia (Freiberg & Stewart 2011: 104). The VLRC report recommended the abolition of the partial defence of provocation alongside 56 other recommendations targeting homicide law. In launching the report, Commissioner Justice Neave (2004: 1) explained that while the VLRC had initially explored different avenues through which reform of the partial defence might be achieved, it 'unanimously decided [that] provocation was unsalvageable'. This decision was based upon the Commission's belief that rage in response to situations of infidelity and estrangement should 'no longer be an excuse for intentionally killing another person' (Neave 2004: 1).

Alongside its recommendation to abolish the partial defence of provocation, the VLRC (2004) recommended that a partial defence of excessive self-defence be implemented to provide a 'safety net' for women who kill in response to prolonged family violence. This recommendation emerged to address concerns that abolishing provocation might act to disadvantage women who kill in response to prolonged family violence (DOJ 2010). Where successfully used, the proposed partial defence would operate to reduce murder to manslaughter, and would be available to persons who killed in self-defence, while still recognising that their use of lethal violence was disproportionate to the threat posed (Neave 2004). This recommendation was praised by Tolmie (2005: 41), who commented that 'it might encourage battered defendants

to go to trial, rather than to plea-bargain, because self-defence will no longer be an all-or-nothing proposition'.

Following the publication of the VLRC's final report, these recommendations were praised by Coss as successfully 'confront[ing] the reality of male violence and condemn[ing] it' (2006b: 138). Other commentators noted that the recommendations of the VLRC 'mark an important step in redressing gender bias in existing homicide law, and in sending a strong message to the community that violence against women will not be tolerated or excused' (Eltringham & Olle 2005: 3).

Abolishing the Partial Defence of Provocation

> These reforms will help make our system of criminal justice as fair, as efficient, and as accessible as possible. (Office of the Attorney-General 2005)

As a response to the VLRC's recommendations, the partial defence of provocation was abolished on 23 November 2005 in what was described as 'the most significant reforms to homicide laws since the death penalty was abolished 30 years ago' (Office of the Attorney-General 2005). In abolishing provocation the Victorian government recognised that the defence reflected centuries-old values that no longer reflected community standards (Capper & Crooks 2010) and that the new legislation would 'better reflect modern community standards' (Office of the Attorney-General 2005). Former Attorney-General Rob Hulls (2010: 21) described provocation as an 'outrageous, outdated' defence, and announced that 'Gone are the days when prehistoric assumptions about honour and violence – about male and female behaviour – should be allowed to hold traction in our legal system' (Shiel 2005: 3). This argument was supported by researchers, with one scholar commenting that prior to the reforms 'the law of homicide in Victoria fit poorly not only with the social context of intimate-partner killings, but also with community values' (Ramsey 2010: 13).

Opposition to the abolition of the provocation defence in Victoria largely centred on the use of the partial defence by women who kill in the context of prolonged family

violence and the perceived need for a concession to human frailty in these cases. Prior to its abolition, the Law Institute of Victoria (LIV) argued that:

> The LIV strongly believes that this concession reflects prevailing social norms that the culpability of a person who kills after planning the act is higher than for a person who loses his or her faculty and kills in an act of rage. The LIV believes it is a regressive step to eliminate a partial defence which is a concession to human frailty. (2005: 15)

This argument links to the aforementioned debates surrounding whether provocation should be retained for killings that occur within this context, or whether it is an inappropriate categorisation of such offences.

Provocation in Sentencing

> Of the hundreds of sentencing factors, provocation has been amongst the most controversial, problematic and variable in its treatment by the law. (Freiberg & Stewart 2011: 102)

Alongside its recommendation to abolish the partial defence of provocation, the VLRC (2004: 58, Recommendation 1) recommended that issues pertaining to provocation should be taken into account during sentencing. The VLRC (2004) explained that through a consideration of the full range of options available when sentencing an offender for murder, members of the judiciary would be able to impose appropriate sentences to reflect the culpability of the offender. This contention has since been put forward by the NZ Law Commission, which, in recommending similar reforms, commented that 'sentencing judges may be better equipped to deal with the issues in a way that is consistent, and therefore just, than juries are' (Law Commission 2007). Similar reforms were implemented in Tasmania following the abolition of provocation as a partial defence in May 2003, and have since been implemented in WA and NZ (Freiberg & Stewart 2011). The Law Reform Commission of WA believed that the sentencing process, rather than the trial phase, was 'uniquely suited to identifying those cases of provocation that call for leniency and those that do not' (Law Reform Commission of WA 2007: 220).

Recommendations that serve to move consideration of provocation from the trial to the sentencing phase of the court process have raised concerns among both legal and academic commentators (Bradfield 2003; Fitz-Gibbon 2009; McSherry 2005b; Morgan 1997; Stewart and Freiberg 2008; Tolmie 2005). Scholars have argued that shifting provocation-based elements to sentencing could lead to inconsistencies in sentencing across murder cases involving elements of loss of self-control (McSherry 2005b; Tolmie 2005). In support of this argument, Bradfield (2003) has asserted that post-abolition caution is needed to ensure that no undue sympathy is afforded to intimate homicide offenders during the sentencing stage of the court process and that a clear rejection of their claim of provocation is given by members of the judiciary. As noted by Stewart and Freiberg (2008: 284):

> If the underlying purposes of the proponents of abolition are to be achieved, it is imperative that the problems and flaws of the pre-existing law not be transferred from the substantive criminal law into the law of sentencing … in the transformation of the law of provocation the partial defence should not re-emerge in a new guise as a particular variety of murder. Many of the old assumptions will need to be discarded and a new normative framework must be developed.

If this does not occur, Bradfield (2003: 324) warns, 'the sentencing process will merely reiterate the legitimacy of men's violence in response to sexual jealousy and possessiveness'.

Given that the VLRC did not recommend a specific approach or framework for the consideration of provocation within sentencing, the work of Stewart and Freiberg (2009, 2008) has since been instrumental in providing a model framework for the consideration of provocation at this stage of the court process. The work of these authors has been praised by former Victorian Attorney-General Rob Hulls as providing 'an important resource' for sentencing in the wake of the reforms (Wilkinson 2008: 23). Stewart and Freiberg (2009: s. 1.1.10) suggest that provocation should only be considered at sentencing where 'serious provocation should be found to have given the offender a justifiable sense of having been wronged' and where the

degree of provocation is proportionate to the severity of the offender's response. Specifically, they assert that:

> Where the offender reacted particularly violently or intentionally caused serious harm or death, only the most serious examples of provocation are likely to reduce the offender's culpability. Where the harm caused by the offender is less serious, a lower degree of provocation may warrant a reduction in the offender's culpability. (Stewart & Freiberg 2008: 294)

Stewart and Freiberg (2008, 2009) proposed that this consideration be directly relevant to the culpability of the offender and subsequently the seriousness of the offence that has been committed. Currently, the assessment of an offender's culpability and degree of responsibility for the offence at the sentencing stage is legislated through the Victorian *Sentencing Act 1991* (s 5(2)(d)). However, in relation to provocation, Stewart and Freiberg (2008) recommend that a sentencing judge should consider the gravity of the provocation (including both the duration and the nature of the provoking conduct), the emotional response of the offender and whether it was proportionate to the provocation experienced, and third, the justifiability of that response.

In line with the concerns indentified by the VLRC (2004), Stewart and Freiberg (2008, 2009) argue that this judgement be made with consideration of society's common understandings and expectations of human behaviour and personal autonomy. Specifically, they propose that provocation related to a victim exercising their equality rights should not serve to reduce an offender's level of culpability at sentencing. This would be relevant to violence arising from a victim leaving an intimate relationship, a victim's formation of an intimate relationship or friendship with someone other than the offender, as well as conduct arising from the victim's decision to work or obtain an education, or any other assertions of the victim's independence.

In terms of sentence length, Stewart and Freiberg (2008: 286) discuss two potential impacts of the reforms on the length of murder sentences imposed: that abolishing provocation may 'result in a significant (upward) departure from previous sentencing

practices for provoked killers'; or conversely that the prior average sentencing range for the offence of murder 'may experience a downward departure to reflect the incorporation of "provoked murderers"'. The Law Reform Commission of WA (2007: 221) also predicted that moving the consideration of provocation to sentencing would have disparate effects on the lengths of murder sentences:

> in some cases an offender will receive a higher sentence than would have been imposed if the offender was convicted of manslaughter, but in some cases the offender will be sentenced leniently for murder … Not all cases of provocation deserve leniency. A person who kills his wife after discovering she is having an affair is entitled to less mitigation than a person who kills his friend after discovering him sexually abusing his child.

Furthermore, Stewart and Freiberg (2009) observed that, in the first four years following the implementation of the Victorian homicide law reforms, provocation did not emerge as a significant factor in Victorian murder sentencing, having only been referred to briefly in a small number of judgements[12].

Instating Defensive Homicide

In place of implementing a partial defence of excessive self-defence as per the recommendation of the VLRC, the Victorian Government implemented a new offence of defensive homicide. Enacted through the *Crimes Act 1958* (s. 9AD), the offence operates where a person who kills another does so in the belief that their acts were necessary to defend either themselves or another person, but has no reasonable grounds for that belief, and so may be convicted of defensive homicide, rather than the more serious offence of murder. The government felt that through this new offence juror members and judges would be provided 'with more options than the current "all or nothing" provisions' for self-defence cases (Office of the Attorney-General 2005). Additionally, it was argued that by creating a separate offence, rather than an additional partial defence to murder, there would be greater consistency between juror verdicts and sentencing, as judges would not have to decide upon the basis on which a jury manslaughter verdict had been reached (DOJ 2010).

[12] Freiberg and Stewart (2011) have listed that since it was relocated to sentencing in 2005 provocation has only been directly considered at sentencing in four Victorian cases - see *R v Maddox* [2009] VSC 447; *R v Johnstone* [2008] VSC 584; *DPP v Tran* [2006] VSC 394; *DPP v Lam* [2007] VSC 307.

The creation of alternative homicide offences to cater for battered women has been considered in other Australian and international jurisdictions. The QLRC (2008: Recommendation 21-4) recently recommended that:

> Consideration should be given, as a matter of priority, to the development of a separate defence for battered persons which reflects the best current knowledge about the effects of a seriously abusive relationship on a battered person, ensuring that the defence is available to an adult or a child and is not gender specific.

In their review of the QLRC's recommendations (2008), Mackenzie and Colvin (2009: 9) observed that consultants preferred the introduction of a separate defence for persons who kill in response to seriously abusive relationships given that 'widening the net of the general law of self-defence might protect unmeritorious defendants as well as those who deserve a defence'. It was based upon such opinion that Mackenzie and Colvin (2009: 11) recommended to the Queensland Attorney-General that a separate partial defence to murder be created for 'victims who believe that killing their abusers is necessary for self-defence'. As seen in QLD, the Victorian experience similarly led to the creation of an alternative defence based upon the perceived inability of the law to respond to the needs of battered women who kill.

One of the key case catalysts for the implementation of defensive homicide was the 1996 murder conviction of Heather Osland in the VSC (Shiel 2005). Heather Osland was convicted of the murder of her husband, Frank Osland, in October 1996. During the trial, Osland's defence team argued that she had suffered from battered women's syndrome and had killed her husband in self-defence after a 13-year period of prolonged abuse[13]. The jury rejected her claims of self-defence and delivered a guilty verdict to murder, and she was subsequently sentenced to a non-parole period of nine and a half years imprisonment, with a maximum sentence of 14 and a half years. The *Osland* case raised awareness in Victoria about the inability of the law to adequately respond to the situations within which battered women kill.

[13] See *Osland v R [1999]* 197 CLR 316.

In relation to some of the key concerns that emerged from the *Osland* trial and subsequent murder conviction, former Attorney-General Hulls highlighted that through the new offence:

> where a killing occurs in the context of family violence, the legislation will affirm that she can argue self-defence even if the threat from which she was defending herself is not immediate, and even where her response involved greater force than the form with which she was threatened. (Shiel 2005: 3)

In implementing the new offence, Attorney-General Hulls (2010) clarified that the offence was not designed to provide a replacement for provocation, but rather it was being implemented with the broader aim of bringing Victorian homicide law up to date with the current expectations of the Victorian community.

However, since its implementation in November 2005 the initial operation of the offence of defensive homicide has been a point of concern for criminologists, legal scholars and media commentators (Capper and Crooks 2010; Cleary 2006b; Douglas 2010; Howe 2010; Lowe 2010; Tyson 2011). In response to raised concerns and in line with the recommendations of the VLRC (2004) - that the operation of defensive homicide be reviewed five years following its implementation – in August 2010, the Victorian Labour Government announced that the Department of Justice (DOJ) would conduct a review of this new category of homicide with the aim of considering how the law's response to homicides perpetrated in response to family violence is currently operating and could be improved (Office of the Attorney-General 2010). In further describing the initial goals of the review, former Attorney-General Rob Hulls explained that the:

> offence was never intended to replace the defence of provocation and this review will examine whether the application of the offence reflects the Government's intentions and that of the VLRC…If the original intention of the law has not kept pace with the reality of its application, the Department of Justice can recommend further reforms to protect victims of family violence. (Office of the Attorney-General 2010)

The review sought to gain insight into the initial operation of defensive homicide from members of the legal profession, community and family violence experts (Office of the Attorney-General 2010). Initially, the review involved the release of a *Discussion Paper* and a call for submissions on key issues surrounding the operation of the offence and its future viability, central to which was an examination of whether 'the application of the offence reflects the government's intentions and VLRC's original recommendations' (DOJ 2010: 11). Praising the formation of this review, Mary Crooks – executive director of the Victorian Women's Trust – explained that the emerging 'concern is the law was largely ushered in to try to provide better protection for women in the context of family violence, and we think that's not working' (as cited in Munro 2010: 9). However, given the change of state leadership in Victoria in November 2010 as yet this review of the offence of defensive homicide has not progressed beyond this initial stage[14].

2.1.4 Retaining Provocation: The Partial Defence of Provocation in NSW

In contrast to the abolition of the provocation defence in Victoria, the partial defence of provocation is still accessible as a partial defence to murder in NSW. Set out in section 23 of the *Crimes Act* 1990, the partial defence of provocation in NSW has undergone reforms that differentiate it from the defence formerly available in other Australian jurisdictions, such as Victoria (Findlay 2006). A review of the use of the provocation defence in NSW from 1990 to 2004 conducted by the Judicial Commission revealed the use of the defence in three key contexts: by male defendants who kill within the context of infidelity or relationship separation (11 cases), by defendants who kill in response to an alleged homosexual advance (10 cases), and by female defendants who kill following prolonged domestic abuse (Indyk et al. 2006).

The Operation of Provocation in NSW

The successful use of the partial defence by defendants who kill in response to a non-violent homosexual advance has raised serious concerns about the operation of provocation in NSW. As explained by Roth (2007: 3), 'many people were alarmed' at the successful use of the provocation defence in this context 'despite the presence of several factors prima facie inconsistent with the requirements of self-defence or

[14] Several of the questions raised in the DOJ's (2010) *Discussion Paper* are examined in more detail in the analysis undertaken in Chapter 5 and Chapter 6.

provocation'. In response to such concerns, the NSW Government established a Working Party in 1995 to examine the use of the defence within this context. The Working Party (1998) found that the verdicts in these cases were 'profoundly troubling', and that legislative reform should be implemented to exclude the availability of provocation as a partial defence to murder where persons have killed in response to a non-violent homosexual advance. To date, these reforms have not been implemented.

Central to the debates surrounding the characterisation of provocation in NSW as a 'homosexual advance defence' was the 1997 trial of *Green*. The 22-year-old defendant was convicted of the murder of a male friend who got into bed with him and touched him, and was sentenced to a maximum term of 15 years, with a 10-year minimum term (Roth 2007). However, upon appeal to the High Court, a 2:1 majority overturned the conviction, and during his second trial he was convicted of manslaughter, on the grounds of provocation. The decision of the High Court was criticised by the Working Party (1998) as failing to 'explicitly distinguish between a sexual attack and a non-violent sexual advance'. Furthermore, in relation to the High Court's judgement Justice Michael Kirby commented that the decision:

> would sit ill with contemporary legal, educative, and policing efforts designed to remove such violent responses from society, grounded as they are in irrational hatred and fear. 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... (*Green v R* [1997] HCA 50, per Kirby J at 193–4)

Similar concerns over the successful use of the provocation defence within this context were noted by the NZLC prior to the abolition of the partial defence in NZ (Law Commission 2007).

The use of the provocation defence in NSW by battered women who kill has also garnered significant attention. In response to suggestions that the law of homicide was not appropriately structured to take into consideration the experiences of battered women who killed, in 1982 NSW implemented reforms to restructure the provocation

defence. The subsequent implementation of the *Crimes (Homicide) Amendment Act 1982* served to remove the 'sudden' requirement within the partial defence to better serve such scenarios by allowing the inclusion of cumulative provocation within the partial defence (Indyk et al. 2006; Roth 2007). The concept of self-control, and the loss of self-control, however, still remained critical to assessing provocation in NSW (Findlay 2006).

Following the above reforms, the 1994 *Chhay* case (*R v Chhay* [1994] 72 A Crim R 1, hereinafter *Chhay*) reinvigorated discussions about the applicability of provocation to cases of battered women who kill. In *Chhay*, the defendant was convicted of the murder of her husband of 13 years, who had inflicted 'severe and frequent abuse' upon her throughout their marriage (Tarrant 1996: 191). Prior to the killing, the defendant and her husband had an argument over business concerns, during which the victim threatened to leave the defendant and withdraw financial support from her and her children. In court the defendant alleged that immediately prior to the killing her husband had approached her with a knife and that she had responded with lethal violence; however, the Crown contended that she had stabbed the victim while he slept (Tarrant 1996). Following her conviction for murder, the defence appealed on the grounds that provocation had not been adequately put to the jury. Significantly, the NSW Supreme Court of Appeal ruled that the history of violence experienced by the defendant was sufficient grounds for provocation to be put to the jury, regardless of the alleged knife attack.

Reforming and Retaining the Provocation Defence

In 1997, the NSWLRC produced a report presenting the recommendations resulting from its review of the partial defences to murder in NSW. The report recommended that the partial defence of provocation be retained but revised (NSWLRC 1997: 22). As justification for the retention of provocation, the NSWLRC commented that, 'Where a person's mental state is significantly impaired by reason of a loss of self-control, it is appropriate that the person not be treated as a murderer' (NSWLRC 1997: 30). In response to a number of submissions received by the NSWLRC which recommended that a specific exclusion for male-perpetrated intimate homicides should be added to the defence, the NSWLRC argued that specific

situations should not be excluded in legislation and that doing so would fail to allow for 'the merits of individual cases' to be adequately considered (1997: 70).

The 1997 review also drew attention to the perceived continued inability of the NSW justice system to adequately respond to the needs of battered women who kill, as noted in its report:

> There is concern that the [provocation] defence is not readily accessible to women who kill their assailant partners because it is not defined in terms which are appropriate to those women's experiences of domestic violence. (NSWLRC 1997: 86)

Subsequent to the release of the NSWLRC's report, and the published report and recommendations of the Attorney-General's directed Working Party (NSW Attorney General's Department 1998), the NSW Government has not responded to calls for reform to this specific area of homicide law.

2.1.5 The Partial Defence of Provocation Internationally

In line with reforms throughout Australia, comparable international jurisdictions have also sought to address problematic aspects of homicide law through reviews and reforms targeted at the partial defence of provocation.

Table 2.2: Homicide Law Reform and the Partial Defence of Provocation Internationally

	Provocation available as a partial defence to murder	Provocation abolished (month, year of implementation)	Provocation only considered in sentencing	Mandatory life sentence for murder
Canada	✓	X	X	✓
England and Wales	X	✓ (October 2010)	X	✓
France	X	✓	✓	X
Germany	✓	X	X	✓
New Zealand	X	✓ August 2009	✓	X
Scotland	✓	X	X	✓

As shown in Table 2.2, other comparable jurisdictions have abolished provocation as a partial defence to murder, in favour of reforms that move consideration of provocation to the sentencing stage. In NZ, provocation was abolished through the *Crimes (Provocation Repeal) Amendment Act 2009*, in recognition of concerns that the partial defence was 'bias in favour of the interests of heterosexual men' and had been used problematically in the defence of men who killed women and homosexual men (Law Commission 2007: 11). When recommending the abolition of the provocation defence, the NZLC (2007: 49) posited that in both cases male defendants are arguably responding with lethal violence to 'situations where they deem their masculinity to be fundamentally threatened' (when their partner leaves them for another, or when they are propositioned by another man)'.

Some European jurisdictions, like France, have also followed suit by favouring reforms that seek to abolish provocation as a partial defence to murder and move discretionary consideration of provocation to sentencing (Spencer 2007). This reform was made in France following recognition 'that there was no need for it [provocation] after minimum penalties were abolished' (Spencer 2007: 47). However, other European jurisdictions, such as Germany, have reviewed and retained the provocation defence. In Germany, provocation continues to be available as a partial defence to murder; however, it operates in a much stricter form than that previously available in other jurisdictions (du Bois-Pedain 2007). Under German law the defendant must demonstrate that they were the 'wronged party' in the time leading up to the killing as the partial defence has been restricted to only apply in situations where 'the killer is blameless' (Horder & Hughes 2007: 14; du Bois-Pedain 2007).

In Scotland the partial defence of provocation continues to be available to mitigate murder to manslaughter, yet is more restricted in scope than that previously available in England and Wales (Tadros 2007). The defence operates such that only physical violence can constitute provocative conduct (Tadros 2007), with one exception: relationship infidelity can also constitute provocation sufficient to reduce murder to manslaughter (Tadros 2007). The inclusion of infidelity as the one exception to the physical violence rule has been criticised within the research, with one scholar commenting:

> Whilst it is no doubt the case that discovery of infidelity still commonly results in very strong feelings, it is difficult to see anything that might justify the exception in modern times. Rather, this form of the defence is probably best thought a remnant of the days in which killing one's spouse or (normally) her lover was seen as having some kind of honour attached to it. (Tadros 2007: 202)

It has also been argued more generally that in Scotland the defence 'is in need of substantial reform' (Tadros 2007: 200), and that in restricting the defence the law 'fails to accommodate cases in which the provocation, while not violent, is extreme, or even where other forms of provocation are accompanied by non-extreme violence' (Tadros 2007: 202).

Under Canadian law, provocation is still available as a partial defence to murder, alongside the continued implementation of a mandatory life sentence for murder. In line with critiques of provocation in other jurisdictions, it has been argued that in Canada the defence of provocation 'does need to be more strictly applied, particularly in the area of spousal or similar homicides where it has been successfully invoked in a number of very questionable circumstances' (Holland 2007: 132). In the United States, several state jurisdictions, such as Texas, have implemented reforms to abolish the availability of a partial defence of provocation, while others, such as California and New York, have favoured the retention of provocation-like defences to murder (Finkelstein 2007).

Most relevant to this research, however, are debates within the English criminal justice system, where after over a decade of review and scholarly debate the government abolished the partial defence of provocation in October 2010.

2.1.6 Replacing Provocation: The Partial Defence of Provocation in England

The operation of the partial defence of provocation in England has been a focal point of scholarly and media scrutiny over the past two decades (Yule 2007). In line with debates in other jurisdictions, discussions about the provocation defence in England have centred on the use of the partial defence in male-perpetrated intimate homicides and the applicability of provocation to the situations within which women

kill in response to prolonged family violence. Central to these debates, and to the extent to which the problems associated with provocation can be addressed, is the continued implementation of a mandatory life sentence for murder in England (Yule 2007).

Influential upon the formulation of the provocation defence in England were a spate of perceived injustices that occurred in the 1990s in cases in which battered women who killed their male abusers attempted to access the provocation defence. These cases, and the resulting changes to the law, were pivotal in making provocation more accessible as a defence to homicides that occur within this context. As described by Jerrard (1995: 24), these cases led to a 'slight softening' of the immediacy requirement of the provocation defence. Specifically, the cases of *Thornton* (*R v Thornton* [1992] 1 AER 306), *Ahluwalia (R v Ahluwalia* [1992] 4 AER 889, hereinafter *Ahluwalia)* and *Humphreys (R v Humphreys* [1995] 4 AER 1008, hereinafter *Humphreys)*[15] garnered academic and media attention. Specifically, the decision in *Ahluwalia* to allow both cumulative provocation and battered woman's syndrome to be considered, has been praised 'as an attempt to bring battered women within sight of the law's justice' (Edwards 2004).

The Recommendations of the Law Commission

The review of the law of homicide conducted by the UK Law Commission, as instructed by the government, commenced in 2004 and continued through to the implementation of the reforms in October 2010. In justifying the need for such an extensive review of homicide law in England and Wales, the Ministry of Justice (MOJ) explained that it had been over 50 years since the last comprehensive review of homicide law and that it needed to determine whether 'the law as it now stands meets the needs of the 21st century' (2008:1). The British Government announced that the review would seek to clarify various elements of homicide law, including the partial defences to murder, particularly in response to its use in domestic homicide cases (MOJ 2009; Law Commission 2006). In doing so, the review was intended to establish recommendations, taking into account the mandatory life sentence for murder, which would create clearer offences of murder and manslaughter, and to

[15] In *Humphreys*, the 17-year-old female defendant was convicted and sentenced for the murder of her violent boyfriend.

ensure that there were appropriate punishments for convicted homicide offenders (Law Commission 2006).

Following its review, the UK Law Commission (2005: 187) recommended that the partial defence of provocation be retained because it:

> should remain for those who, without acting out of a considered desire for revenge: (1) killed only in response to gross provocation; and/or (2) killed only in response to a fear of serious violence in circumstances where someone of the defendant's age and of an ordinary temperament might have reacted in the same way.

This recommendation was made alongside a host of other recommended reforms to the English law of homicide[16], including a recommendation to reformulate a retained version of the provocation defence. Specifically, the UK Law Commission (2006) recommended that the requirement for loss of self-control be removed from the provocation defence, that the ordinary person test be further clarified, and that the applicability of the defence be extended to situations in which a person kills in response to fear of serious violence. The last of these recommendations most closely resembles what is categorised as excessive self-defence in comparable jurisdictions.

Reforms to the English Law of Homicide

In response to the subsequent 2006 review by the UK Law Commission, the government introduced *The Coroners and Justice Act 2009*, which served to abolish the defence of provocation and introduce a two-limbed partial defence of loss of control (ss. 54–6). The new partial defence would serve to cover two contexts: killings that occur in response to a fear of serious violence, and killings that occur in 'response to words or conduct which caused the defendant to have a justifiable sense of being seriously wronged' (MOJ 2009: 5). Furthermore, the new partial defence included a specific provision to exclude situations of sexual infidelity from giving rise to a partial defence to murder (ss. 55(6)(c)). In justifying the need to include a

[16] Other recommendations of the UK Law Commission, specifically its recommendation for the offences of murder and manslaughter to be reformulated to a three-tier structure, will be explored in the later analysis chapters.

provision that excludes situations of sexual infidelity, the MOJ (2009: 14) commented that:

> The Government does not accept that sexual infidelity should ever provide the basis for a partial defence to murder. We therefore remain committed to making it clear – on the face of statute – that sexual infidelity should not provide an excuse for killing.

Prior to the implementation of these reforms, the MOJ conducted a consultation process based on the government's proposals for reform. The consultations revealed strong support for the government's view that the law of homicide, including the partial defences to murder, was in need of reform (MOJ 2009). Specifically, the consultation process identified strong support among academics, non-government organisations, professional organisations and other government departments and bodies for a partial defence based upon the notion of a fear of serious violence. These participants in the consultation also argued that the new partial defence would represent 'a welcome shift from the traditional model of provocation based around anger and noted that it helpfully recognises the realities of domestic abuse sustained over a long period of time' (MOJ 2009: 10). Additionally, the change of label from provocation to loss of control was praised by the participants, who commented that 'the term "provocation" should be avoided, as it implies judgement of the victim' (MOJ 2009: 19).

The inclusion of fear in the new partial defence has been praised in initial research into the reforms as taking 'a step in the right direction, particularly for battered women who kill their abusers' (Clough 2010: 123), and as a 'radical' proposal for reform which 'recognises that the psychology of killing can be complex, with several emotions working together' (Mackenzie & Colvin 2009: 7). Opinions, however, surrounding the British Government's decision to include a provision to exclude situations of sexual infidelity from the new partial defence have been mixed; consultations with several organisations[17] found significant levels of support for the

[17] The Ministry of Justice (2009: 13) listed the following organisations as an example of those that supported this view: Justice for Women, Welsh Women's Aid, Broken Rainbow, Women's Aid (England), Victim Support, Women's Aid Federation Northern Ireland, Committee for the

proposal, while legal academics and lawyers have expressed the belief, 'as a matter of principle', that if all other requirements of the defence are met then the defence should successfully apply (MOJ 2009: 13).

Whilst the new partial defence of loss of control sought 'to solve a number of problems that plague the plea of provocation' in the 12 months following the implementation of this reform package, critiques have begun to emerge through scholarly commentary (Yeo 2010: 8; Clough 2010). As commented by Clough (2010: 125), 'The government's attempt to resolve the infamous provocation problem is a welcome change but some areas are still without solution'. Furthermore, Clough (2010) poses the question of whether future cases will show that the law has indeed swung in favour of women by including fear of violence in the new partial defence, while legislating against concessions being made for homicides that occur in response to sexual infidelity (a perceived disadvantage for male defendants). Additionally, in critiquing the government's attempt to overcome the gender-biased operation of the law of homicide, one legal commentator argued that 'the trouble is that the changes give the impression that the law would regard one kind of domestic violence (by women) leniently while viewing another kind (by men) as beyond the pale' (McDonagh 2008: 24).

Conclusion: Building upon the Debates

The operation of the partial defence of provocation in Australia, and internationally, has given rise to a significant body of research that has reviewed, critiqued and ultimately recommended avenues for reforming this specific aspect of the law of homicide. An understanding of the historic underpinnings of the defence provides a platform from which to examine the current approaches to solving the problems raised by provocation. This research acknowledges the significant attention that has previously been paid by researchers to the operation of provocation within two contexts: in the case of men who kill a female intimate partner, and cases of women who kill in response to prolonged family violence. As such, it adopts these two contexts of homicide as key points from which to consider the successes and failures of law reform within this area.

Administration of Justice, Victim Support Northern Ireland, and the Probation Board for Northern Ireland.

A review of the shared drivers for reform in Australia and internationally reveals the commonality of problems associated with the partial defence of provocation, as well as the significant role that has historically been played by key cases – such as *Ramage* – in motivating reform. This research evaluates legal perceptions of these law reform motivators (Chapter 5), and considers whether, in the period, following the implementation of law reform in the Victorian, NSW and English criminal justice systems, members of these justice systems have come to see that reform has adequately allowed the law to overcome the gendered problems that research has consistently identified in the courtroom operation of this partial defence to murder (Chapter 6).

CHAPTER 3 Applying Theory to Homicide Law Reform

Over the past two decades, research into the operation of the law of homicide, and more specifically the partial defence of provocation, has drawn upon a variety of theoretical frameworks. In doing so, this bank of research has examined the contribution of feminist, socio-legal, political and retributive discourses to the study of the law's response to lethal violence against women and the potential for reform in this area. In recognition of the range of theories that have been applied to relevant analysis in this area, this research adopts multiple theoretical frameworks in examining the law of homicide in Victoria, NSW and England. Specifically, this research draws upon key criminological thought in connection to feminist engagements with the law, the conceptualisation of denial, and the influence of law and order climates upon the development of crime and justice policies affecting the operation of the partial defence of provocation.

The application of these three theoretical frameworks to different aspects of this research is shown below in Table 3.1. In particular, the theoretical focuses are organised according to the structure of the analysis chapters, and as such each chapter adopts a different theoretical lens through which to consider the relevant interview data and case analysis.

Table 3.1: Theoretical frameworks applied in this research

Analysis chapter	Broad theoretical framework applied	Specific theory drawn upon
Chapter 5: Examining the Law: The Provocation Problem and Approaches to Homicide Law Reform	Feminist framework	▪ Hudson's (2006) principles of justice
Chapter 6: For Better or Worse: The Effects of Homicide Law Reform	Framework of denial	▪ Cohen's (2001) states of denial ▪ Sykes and Matza's (1957) techniques of neutralisation
Chapter 7: Homicide Law Reform and the Question of Sentencing for Murder	Law and order framework	▪ McCarthy (2008) and gender-based violence in sentencing ▪ Hogg and Brown's (1998) themes of law and order commonsense ▪ Garland's (2001) indices of change

This chapter provides an overview of the three broad theoretical frameworks that are used in this research. In doing so, it considers research related to the development of these frameworks, as well as their applicability to the analysis of homicide law, provocation and the potential for law reform within this context.

3.1 Accounting for the Female 'Other' in the Law of Homicide

In examining whether there was a need for reform to the partial defence of provocation in Victoria and England, this research first investigates how the law of homicide was operating prior to the implementation of these reforms. In doing so, it draws upon a body of feminist research within the area of criminal law, which has questioned the capacity of the law to adequately account for the female 'other' within the bounds of the criminal courtroom. The law's ability to account for the experiences of women – as both victims and offenders – is highly relevant to this research, given that a key focus of past research in this area has been legal responses to women who kill in response to prolonged family violence and the treatment of female victims of homicide where the partial defence of provocation is raised. It is with these two contexts in mind that this research considers prior criminological research that has examined the struggles of the female other within the legal realm.

The ability of the law to adequately respond to violence against women, and the sexist assumptions and operation of the law, have been the focus of considerable feminist criminological study (for example, Gelsthorpe & Morris 1988; Laster & O'Malley 1996; Morris & Gelsthorpe 2000; Naffine 1990; Smart 1989; Walklate 2008). This past research has often been concerned with the problems of, and the potential for, law reform that attempts to take account of the cultured and gendered other. Researchers have argued that women have historically been assigned the role of the other within the criminal justice system (Currie 1995; Graycar 1996; Kaspiew 1995; Walklate 2008). Currie (1995: 14) has described how 'the realities of women's lives have been invisible in the law because women have not been able to tell their stories, because they have not been listened to and because they have not been believed'. In further recognising this, Graycar (1996: 297) has noted that 'women's stories about the violence in their lives remain rarely (and barely) acknowledged in legal discourse'.

Seeking to explain the 'otherness' of women within the legal context, research in Western jurisdictions has often made reference to the 'dominant white, affluent, adult, male' construction of the law (Hudson 2006: 30; Currie 1995; MacKinnon 1991; Naffine 1990; Wells 2004). In broadly outlining this argument, Currie (1995: 16) has described how 'the law consists of male stories and it is a male version of impartiality and objectivity we are being presented with'. Similarly, Hudson (2006: 30) contends that 'the case that criminal justice is "white man's justice" is sufficiently well established in criminology and legal scholarship that it does not need to be re-argued'.

Daly (1990: 10) conducts a broad analysis of feminist legal thought, in which she highlights the two key problems that arise from the masculine construction of the law:

1. If the law is fashioned from men's experiences and viewpoints, then where are the entry points for women? Can women's experiences and viewpoints be heard?
2. If the law reinforces gender hierarchies and women's oppression, how, then, can women's demands for equality and justice be addressed in any significant way?

By illustrating the effects of these problems, and of the construction of 'white man's' justice more broadly, past scholarship has often drawn on examples of the law's inadequate responses to, and in some cases inability to recognise, female victimisation through rape and intimate violence, as well as the male construction of key aspects of these laws, such as provocation's 'reasonable man' and the law of self-defence (Graycar & Morgan 2005; Hudson 2006; MacKinnon 1991; O'Donovan 1993; Smart 1989; Wells 2004; Yeo 1993). As such, the two problems identified by Daly (1990) are particularly relevant to this research in relation to an examination of the law's capacity to incorporate the stories and experiences of women who are the victims of intimate partner homicide and women who have perpetrated intimate homicide in response to prolonged family violence.

Where law reform has attempted to accommodate the female other, questions are raised as to the appropriateness of law as a vehicle for change, noting that the

criminalisation of violence can often lead to short-term gains but long-term losses (Chesney-Lind 2006; Graycar 1996; Walklate 2008). Importantly, significant concerns emerge when the inclusion of the other is the explicit aim of legal reform. As Carlen (2008) has explained through her conceptualisation of 'imaginary penalties', the incorporation of the other engenders a range of contradictions between the demands of justice and the demands of social conditions. Walklate (2008) has expanded on this idea of the 'imaginary' by considering how reforms aimed at improving justice responses to violence against women depend upon the suppression of available knowledge that challenges the efficacy of such reforms. In attempting to overcome the problems connected to attempts to incorporate the female other and her account of violence into the law, Graycar (1996: 298) argues that it is essential to also:

> dismantle and rearrange the framework within which these stories are told. In other words, while it is essential to hear alternative stories, in particular the stories of the powerless, this approach is itself constrained by the legal categories within which we understand legal problems and hear the telling of legal stories. This discussion, then, is concerned with the ways in which legal categories help to shape legal problems, and in the case of violence against women, help to obscure the reality of many women's lives.

In relation to this research, Graycar's argument is particularly useful for a consideration of the ability of the law of homicide in Victoria, NSW and England to accommodate the experiences of the female other. Specifically, these concerns over the law's futile attempts to include this other, and the apparent obstacle of legal categories, are particularly relevant to an examination of the formulation of new categories of homicide that seek to better accommodate the experiences of women: namely, the offence of defensive homicide in Victoria, the reformed partial defence of provocation in NSW, and the partial defence of loss of control in England.

3.1.1 Hudson's Principles of Justice: Discursiveness, Relationalism and Reflectiveness

In examining the law's ability to account for the other, Hudson (2006) has conceptualised three key principles of justice: discursiveness, relationalism and

reflectiveness. For the purposes of this research, Hudson's principles of discursiveness and reflectiveness form the focus as key elements of each emerged from the empirical data. Hudson (2006) argues that all justice processes should embrace these principles in order to effectively minimise the influence of sexism and racism in the operation of the law. As such, it is posed that through the adoption of these three principles justice can be better achieved for traditionally 'othered' populations, such as women (Hudson 2006).

Hudson (2006: 34; Hudson 2008) explains how the first principle – that justice must be discursive – is concerned with bringing inside the discursive circle of justice those who have been traditionally excluded from it, and challenging the ways that legal claims have often only been acknowledged if they were 'voiced in terms of the dominant group'[18]. In doing so, the principle of discursiveness does not simply seek to create spaces in legal proceedings for participants to speak, but also seeks to challenge the assumed identity of the law. Hudson (2006: 34) asserts that through the inclusion of traditionally silenced discourses, the law is better able to establish 'a story of "what happened" and of the responsibility and culpabilities involved'. However, it must be emphasised that this principle can only be upheld if the law provides more than merely a forum for 'various participants to speak' – there must also be an acceptance of all topics of discourse, particularly behaviours that have traditionally been excluded from the law, such as domestic violence (Hudson 2006: 35).

In highlighting the need for, and benefits of, discursiveness, Hudson (2006, 2008) refers to its illustration in restorative justice approaches where the opportunity for all parties involved to tell their stories is paramount. Other criminal justice system initiatives Hudson (2006) cites as upholding the principles of discursive justice include victim impact statements (VISs) and the increasing use of expert witnesses to admit battered women syndrome evidence in the trials of women who commit intimate homicide in response to prolonged family violence. In linking the benefits of this principle to the law's response to intimate violence, Douglas (2008) argues that if justice were discursive the stories of the victims of intimate violence (and their

[18] As covered previously by Hudson, as well as within research more broadly, this dominant group has commonly been characterised as compromising the 'white male'.

families) would be better heard and recognised by the legal system. However, Hudson (2006) and Douglas (2008) also highlight the potential dangers of justice that is discursive, emphasising that it is essential that this discourse not become dominated by any one person involved or become a mere replication of the power relations in any one case.

Second, Hudson's (2006: 39) 'principle of reflectiveness' means that justice should be individualised such that individual cases should not be:

> Subsumed into a restricted range of legal categories; rather they should be considered in the totality of their features and weighed against broader horizons of justice. Concretely, reflective justice means that each case should be considered in terms of all its subjectiveness, harms, wrongs and contexts and then measured against concepts such as oppression, freedom, dignity and equality.

Specifically, what Hudson (2006, 2008) poses through this principle is that the law must allow for the individual social context of any offence, victimisation or offending to be reflected alongside any strict consideration of legal categories, or factors of mitigation and aggravation. As such, the aim in adopting this principle is to challenge how the courts, rather than those who come before them, determine what is relevant or irrelevant in each case, and how the rules and legal categories developed by the powerful are often 'impregnable against the claims of the powerlessness' (Hudson 2006: 38).

In illustrating the importance of the principle of reflectiveness, Hudson (2006) provides a critique of the traditionally inflexible construction of the law and highlights the consequent difficulty of achieving justice within an individual case. Hudson (2006: 38) claims that:

> actual individual acts have to be fitted into gender categories. This generality, this abstraction, means that justice can never be done for the individual case, because some of its aspects are bound to be lost in rejecting all those unique circumstances which are not present in the paradigm case.

In using Hudson's (2006) principles as a framework for analysis, this research recognises the dangers of generality within the application of the law and the use of a 'restricted range of legal categories'. As such, it questions whether through the operation of the legal category of provocation the experiences of men and women involved in intimate partner homicide were adequately dealt with and represented by the law in the period prior to the implementation of homicide law reforms in the Victorian and English criminal justice systems.

3.2 Discourses of Denial in the Criminal Justice System

In Chapter 6, the influential work of sociologist Stanley Cohen (2001), in conceptualising the sociology of denial, provides a framework from which to examine the recent operation of the law of homicide in the Victorian, NSW and English criminal justice systems. In conjunction with Sykes and Matza's (1957) techniques of neutralisation, the two frameworks are applied to an examination of the effects of the 2005 Victorian and 2010 English homicide law reforms as well as the ongoing operation of provocation as a partial defence to murder in NSW. Specifically, the concept of denial is examined in relation to the continued influence of gender bias in the recent operation of the law of homicide, and in the consequent mobilisation of problematic trial and sentencing narratives in these three jurisdictions.

The application of Cohen's states of denial, and Sykes and Matza's techniques of neutralisation, in analysing the operation of the criminal justice system can be seen throughout criminological research in which scholars have applied the conceptualisation of denial to their examination of a variety of different types of offending (Adshead 2011; Agnew 1994; Agnew & Peters 1986; Cowburn 2010; Erez & Laster 1999; Jackson 1978; Minor 1980; Mitchell & Dodder 1983; Priest & McGrath 1970; Shields & Whitehall 1994; Turton 2010; Tombs & Jagger 2006). Most relevant to this analysis is the scholarship that has used Cohen's framework of denial to explain the denial of responsibility among members of the judiciary at sentencing (Tombs & Jagger 2006), professional responses to perpetrators of sexual abuse (Turton 2010) and media and public policy responses to male sexual violence (Cowburn 2010).

One of the most extensively researched areas in which denial manifests within the criminal justice system is in the historical denial of domestic violence, and its trivialisation as an inherently private crime (Cohen 2001; Freeman 1980; Hudson 2006; Hunter 2006). As described by Hunter (2006: 752–3):

> Social and legal stories about domestic violence tend rather to deny, minimise and trivialise violence than to regard it as a serious issue … legal descriptions still tend to deny or minimise domestic abuse … tend to provide distanced, detached, dispassionate descriptions of the violence, to employ passive constructions and otherwise to obscure male agency in perpetrating violence.

This trivialisation of the perpetration, and denial of the harm, of domestic violence is evident throughout research into the law's response to the spectrum of violence committed by men upon a female intimate partner. Cohen (2001: 52) argues that this historical failure to acknowledge the perpetration of violence within the home can be explained through traditional understandings of 'women as property, the exercise of domination as a male right, [and] the protection of the family as a private space'.

While the women's movement of the 1960s and 1970s saw a growing push for domestic violence to be considered a serious form of violent crime (Bancroft 2002; Freeman 1980; Gelsthorpe & Morris 1998; Hunter 2006), it is still questionable whether this has been achieved at all points within the criminal justice system. As such, a key question of this research is to examine whether such violence in its most severe form – lethal domestic violence – is adequately recognised and represented in the operation of the law of homicide in Victoria, NSW and England, or whether the ongoing availability of alternative categories of homicide are allowing for the continuation of the denial of intimate violence.

In addition to his conceptualisation of the states of denial, which provide a theoretical focus for the analysis presented in Chapter 6, Cohen (2001: 6) has conceptualised the 'passive bystander effect' as a way of understanding the historical denial of domestic violence by persons other than the victim and the perpetrator. Cohen poses that the passive bystander effect provides an understanding of why observers are often reluctant to acknowledge or assist in cases of domestic violence. Cohen (2001) argues

that in such cases people often fear the possible repercussions of any involvement and are motivated by a perceived lack of personal benefit should they intervene. However, of particular relevance to this research, and to an analysis of the law's response to lethal domestic violence, is Cohen's conceptualisation of normalisation. In explaining the additional modes by which domestic violence is denied, Cohen (2001: 51) utilises the concept of normalisation, whereby a problem, event or situation is 'unrecognised, ignored or made to seem normal'. In relation to domestic violence specifically, this occurs when different parties involved normalise and justify the use of violence:

> 'It didn't happen' (victim, friends, neighbours); 'He's perfectly okay without drink' (victim); 'You can't call that real violence' (offender); 'She really enjoys it' (offender, some observers and therapists). (Cohen 2001: 51)

This research examines the production of these modes of normalisation among members of the legal profession at the trial and sentencing stages of the criminal justice process. In doing so, it questions the extent to which different approaches to reform in each of the jurisdictions under study have been able to achieve a decrease in the legal normalisation of lethal domestic violence that has been problematically associated with the court operation of the partial defence of provocation. In addition to normalisation, this research also considers how Cohen's conceptualisation of the sociology of denial can contribute towards understanding the effect of the narratives mobilised in trials concerning domestic violence in its most serious form – intimate partner homicide.

3.2.1 Cohen's Sociology of Denial

Cohen (2001) conceptualised the sociology of denial as a framework for explaining the ways in which denial is mobilised by nation-states following the perpetration of war crimes. Through this framework Cohen (2001) has illustrated how, in the period following the perpetration of past atrocities and mass suffering, governments have often mobilised three states of denial to evade responsibility for their actions: literal denial, interpretive denial and implicatory denial[19].

[19] Cohen (2001) notes that these three states of denial are not mutually exclusive categories and that in many cases there may be overlap between the different categories of denial.

Literal denial is mobilised where there is complete denial that a reported event has occurred. As conceptualised by Cohen (2001: 7), this form of denial most closely aligns with 'the dictionary definition' of denial whereby there is an 'assertion that something did not happen or is not true'. As described by White (2010: 8):

> It can include the simplest of statements which declare that 'nothing has happened', or can further involve the labelling of an allegation as 'propaganda'. The intended consequences of literal denial are the silencing of alternative narratives, and the attempted shifting of a particular 'truth' into a position of primary definition and dominance.

In observing the influence of literal denial in cases of domestic violence, research conducted with convicted male domestic violence abusers by Henning and Holdford (2006) identified that such offenders regularly engage in literal denial strategies to minimise and deny the severity of their violence. Specifically, their research found that one in five of the respondents interviewed denied the occurrence of a physical argument with his partner despite their subsequent arrest and conviction for that abuse (Henning & Holdford 2006).

Cohen's (2001) second form of denial, interpretive denial, occurs where an event is acknowledged but the interpretation of that event absolves a key party of blame. As described by Cohen (2001: 7), while the main facts of the event are not denied, they 'are given a different meaning from what seems apparent to others'. Most relevant to this research, Cohen (2001) highlights how interpretive denial can be mobilised to avoid legal accountability for an event and to shift blame and responsibility from one party to another.

The third state of denial – implicatory denial – occurs where governments justify harmful actions, or deny responsibility for their actions, by displacing the responsibility onto others (Cohen 2001). While there is no denial of the event having occurred, Cohen (2001: 8) explains that the denial takes the form of the minimisation or denial of the 'psychological, political or moral implications' of that event. This form of denial is often achieved through four techniques: evasion, avoidance, deflection and rationalisation (Cohen 2001). According to Cohen (2001), the

displacement of responsibility is often onto non-state actors, or more importantly for this research, onto the victims themselves.

Cohen (2001) considers that these three states of denial can be mobilised at an individual, cultural and collective-official level. Where denial is mobilised at an individual level, explanations of personal denial are largely grounded in psychological research and understandings of the individual mind and behavioural motivations (Cohen 2001). However, Cohen (2001) argues that denial at the other end of the scale, at the official level, is highly organised, public and structured, and often aimed at denying the existence of political failures or atrocities, such as massacres and famine. Third, at the cultural level the mobilisation of denial is neither individual nor constructed by an official entity, but rather occurs where 'societies arrive at unwritten agreements about what can be publicly remembered or acknowledged' (Cohen 2001: 11). Denial at a cultural level can be mobilised to deny events of the past or to ignore current events occurring in society. Cohen (2001) contends that the former can be seen in the historical denials of the suffering experienced by Indigenous Australians or denials of the Holocaust, while the latter is evidenced in current denials of forms of cruelty and discrimination enacted through the 'war on terror'. In some cases, through cultural denial individuals within the collective begin to believe information that they know to be untrue (Cohen 2001).

3.2.2 Denial through Techniques of Neutralisation

Research on Cohen's (2001) states of denial has also drawn upon Sykes and Matza's (1957) techniques of neutralisation to understand the operation of different forms of denial in the criminal justice system. Derived as an extension of Sutherland's (1924) theory of differential association, the theory of the techniques of neutralisation assumes that while people who commit violent offences disapprove of violence, they engage in varying techniques of neutralisation to justify their own offending. Sykes and Matza (1957) proposed that such techniques are developed by the offender prior to their offending and are critical to their perception that it is acceptable to violate the legal normal. As explained by Mitchell and Dodder (1983: 308), 'In each case, an ulterior motive is offered by the youth as an explanation for behaviour in advance of the act'. As such, through the utilisation of techniques of neutralisation behaviour that

would normally be considered unacceptable becomes justifiable to the offender given the specific circumstances (Hamlin 1988; Jackson 1978).

In conceptualising these techniques of neutralisation, Sykes and Matza (1957) characterised five techniques of denial that are mobilised to neutralise the use of violence: denial of responsibility, denial of the victim, denial of injury, condemnation of the condemners, and the appeal to higher loyalties. Of greatest relevance to this research is their conceptualisation of denial of the victim, a technique that 'allows the redefinition of the victim as someone who is not a real victim' (Sykes & Matza 1957: 668). As explained by Sykes and Matza (1957: 668):

> Even if the delinquent accepts the responsibility for his deviant actions … the moral indignation of self and others may be neutralized by an insistence that the injury is not wrong in light of the circumstances. The injury, it may be claimed, is not really an injury; rather, it is a form of rightful retaliation or punishment.

This form of denial often leads to the utilisation of justifications such as 'they had it coming to them' to position the victim as deserving of the violence for some reason (Agnew 1994: 556)[20]. Research carried out by Agnew (1994: 564) lists four of the reasons often provided by offenders to justify their acts of violence, and which explain the mobilisation of the denial of the victim:

> (1) if the other person started the fight, (2) called you names, (3) did something to make you really mad, or (4) 'walked all over you'.

In further explaining this technique of neutralisation, Sykes and Matza (1957: 668) argue that victims who are denied the normal status of 'victim' are typically outcast members of the community, such as 'homosexuals or suspected homosexuals … [and] members of minority groups'. This notion of neutralisation aligns closely with the work of Nils Christie (1986), who has examined the treatment of 'ideal' and 'non-ideal' victims within the criminal justice system. Christie (1986: 18) describes the

[20] In addition, a second kind of denial of the victim conceptualised by Sykes and Matza (1957) refers to victims who are not personally known and offences that do not directly impact upon a victim – for example, where a store is the victim.

‘ideal victim’ as a ‘person or category of individuals who – when hit by crime – most readily are given the complete and legitimate status of being a victim’. In contrast to the victims who through techniques of neutralisation fail to achieve legitimate victim status, Christie (1986) poses that the ideal victim is often represented as a vulnerable, innocent and defenceless person whose victimisation is immediately legitimised by the legal system through sympathy and compassion.

In building upon the original formulation of the technique of victim denial, this research considers the mobilisation of this technique in the law’s treatment of victims of homicide, specifically female victims of homicide, where the partial defence of provocation is raised. In doing so, it seeks to examine whether through the operation of the law of homicide in Victoria, NSW and England forms of victim denial gain legitimacy at the trial and sentencing stages of intimate homicide trials. This research draws from previous findings by Jackson (1978), who sought to explain the mobilisation of the denial of the victim among rape offenders. Jackson (1978: 33) observed that while rape offenders understand that ‘rape is wrong’, there is often a belief that ‘some women *deserve* to be raped’. As explained by Jackson (1978: 33), in such cases:

> The victim is seen as a ‘cock teaser’, the cruel woman who leads men on only to reject them. She has acted provocatively and can hardly expect any other response, she ‘had it coming’. The provocation must be slight or non-existent from the point of view of the victim. It is enough…

These justifications mirror those often associated with provocation trials both within Australia and internationally, where the denigration of the female victim of homicide has often been used to justify the use of lethal violence against her. Moreover, Sykes and Matza (1957: 666) have recognised that, when mobilised and legitimised by the law, techniques of neutralisation can have a similar effect to defences in criminal law:

> The individual can avoid moral culpability for his criminal action – and thus avoid the negative sanctions of society – if he can prove that criminal intent was lacking. It is our argument that much delinquency is based on what is essentially an unrecognised extension of defences to crimes, in the form of

> justifications for deviance that are seen as valid by the delinquent but not by the legal system or society at large.

In addition to denial of the victim, Sykes and Matza (1957) also conceptualised the technique of denial of responsibility, whereby offenders commonly believe that their perpetration of criminal behaviour is out of their control and due to external factors. Such factors cited in the research include drug use, unloving parents, alcohol use and poverty (Agnew & Peters 1986; Minor 1980). Scholarship has identified that offenders typically engage in denial of responsibility in situations where they believe that 'they were not responsible for their criminal behaviour, perhaps because they were overcome with rage' (Agnew 1994: 565). This aspect of this form of denial is particularly relevant to this research as it links back to the common justifications of anger, provocation and loss of control mobilised in the defences of men convicted of the provocation manslaughter of their female intimate partners. In addition, research has also linked the denial of responsibility to explanations of self-defence, such that offenders will deny responsibility for an action if they believe that they were 'trying to protect' themselves (Mitchell & Dodder 1983).

While Sykes and Matza (1957) have focused predominantly on the development of techniques of neutralisation and justification among juvenile delinquents, subsequent research has sought to apply these theories of neutralisation to explain both specific types of deviant behaviour (Adshead 2011; Jackson 1978; Minor 1980; Priest & McGrath 1970; Topalli 2005), and general patterns of deviant behaviour (Agnew 1994; Agnew & Peters 1986; Mitchell & Dodder 1983; Shields & Whitehall 1994). Of particular relevance to this study is the small sample of research studies that have considered the influence of the techniques of neutralisation in the criminal court system (Brennan 1995; Erez & Laster 1999).

The mobilisation of techniques of neutralisation and denial in the operation of the criminal justice system is explored in the work of Erez and Laster (1999), who observed the influence of techniques of neutralisation in the responses of legal professionals to the implementation of victim-focused reforms. Through their research on VISs, Erez and Laster (1999: 550) argue that employing techniques of denial allows 'legal professionals who are charged with the implementation of VISs to

thwart a potentially important and far-reaching reform'. This research seeks to add an additional layer to previous studies by examining the utilisation of the techniques of neutralisation in the trials of men and women convicted of the killing of an intimate partner, particularly where partial defences are raised.

Previous scholarship examining the validity of the mobilisation of techniques of neutralisation among offenders has often produced conflicting results (Agnew 1994; Hamlin 1988; Maruna & Copes 2005; Minor 1981). A key criticism of this theory has been that it focuses on the offender's use of techniques of neutralisation prior to their offending (Maruna & Copes 2005; Minor 1981). Critics have often asked: 'how can one neutralise something before they have done it?' (Maruna & Copes 2005: 2005). Rather than focusing on criminal aetiology, such critiques have proposed that the theory should be utilised to explain an offender's perceptions of their criminal offending subsequent, rather than prior, to the perpetration of the act (Hamlin 1988; Maruna & Copes 2005). It is from this vantage point that this research adopts the concept of techniques of neutralisation to examine how key actors in the criminal justice system utilise modes of denial, as proposed by both Cohen (2001) and Sykes and Matza (1957), to deny the harm of lethal violence committed within the context of an intimate relationship. While Sykes and Matza (1957) explained how the techniques of neutralisation used are perceived as valid by the individual but not by the legal system and society, this research considers the effect of these techniques of denial when mobilised, and arguably legitimised, by members of the criminal justice system through the operation of the law of homicide in Victoria, NSW and England.

3.3 Political Discourses: The Law and Order Influence

> Law and order is an issue that arouses powerful community passions. Increasingly it has also become an issue of considerable electoral significance … each successive campaign sees new levels of stridency in the rhetoric of the major parties as they seek to outbid each other with promises to crack down on crime, introduce more police, tougher laws, mandatory penalties, curfews, boot camps for youthful offenders and so on. (Hogg & Brown 1998: 116)

This research acknowledges the difficulty of understanding the impact of reforms within the area of homicide law and sentencing without examining the influences of the broader political climate within which these policies have been introduced and continue to operate. As such, the third and final theoretical framework adopted in this research draws on the work of David Garland (2001) and Russell Hogg and David Brown (1998) to examine the influence of law and order politics on the relationship between homicide law reform and sentencing practices for murder in each of the jurisdictions under study.

The influence of law and order agendas in political debates surrounding crime and justice, although not new, has gained significant momentum over the past two decades, both nationally and internationally (Brown 2005; Hogg and Brown 1998; Mackenzie 2005; Pratt & Clark 2005). In characterising the increasing influence of these discussions, research has identified certain key themes emerging from the law and order climate, namely: the acceptance of high crime rates, the normalisation of the fear of crime, the emergence of 'popular punitiveness', the increasing important of public opinion in the formulation of crime and justice policy, the symbolic importance of the victim of crime and the prioritisation of punishment over rehabilitation (Brown 2005; Garland 1996; Reiner 2000; Walklate 2005; Walklate 2009).

It is within this climate that perceptions of criminal activity and increases in crime rates have led to the normalisation of the fear of crime (Reiner 2000). As described by Carlen (1996: 53, as cited in Walklate 2002: 47), 'the 1970s rediscovery of the victim certainly fed into 1990s punitiveness with a vengeance! The results? A greatly increasing fear of crime, daily demands for stiff sentences, and a steep increase in levels of criminological nonsense'. Garland (1996: 448) explains the effect of this climate:

> the perceived normality of high crime rates, together with the widely acknowledged limitations of criminal justice agencies, have begun to erode one of the foundational myths of modern societies: namely, the myth that the sovereign state is capable of providing security, law and order, and crime control within its territorial boundaries.

In response to questions over the ability of governments to adequately deliver on crime and justice promises, routine 'tough on crime' political campaigns have emerged over the past two decades, which have been becoming increasingly punitive in nature (Garland 1996; Reiner 2000). Drawing on the British context, these campaigns are described by Garland (1996: 460):

> In the face of evidence that crime does not readily respond to severe sentences, or new police powers, or a greater use of imprisonment, the British government (like others elsewhere) has frequently adopted a punitive 'law and order' stance that seeks to deny conditions, which are elsewhere acknowledged, and to reassert the state's power to govern by force of command.

These political agendas are commonly associated with the 1992 Labour government campaign of British politician Tony Blair, who adopted the catchcry 'tough on crime, tough on the causes of crime'. This campaign was successful in overturning the previous 'soft on crime' image associated with the Labour Party, while also demonstrating the capacity of a punitive agenda to garner support from a public increasingly anxious about crime and justice issues (Reiner 2000). The pressure of penal populism within the English context is also evident in the 2006 'name and shame' campaign, headed by the *News of the World*, which sought to publicly identify members of the English judiciary who were deemed to be imposing 'excessively lenient' sentences (Roberts 2008: 23).

Perhaps unsurprisingly, the policies implemented within this climate have adopted an increasingly punitive, rather than rehabilitative, stance (Garland 1996; Reiner 2000). As described by Garland (1996: 447), they have been focused primarily on 'dealing with the effects of crime – costs and victims and fearful citizens – rather than its causes'. As such, these punitive policies stand in contrast to preventative strategies for crime and justice, which Garland (1996: 462) argues are premised upon 'consolidated research results and clear administrative rationalities'.

The penal policies implemented as a result of these law and order agendas have been heavily critiqued throughout criminological and sociological research. This is particularly evident in the work of Garland (1996: 466), who argues that:

> The new penal policies have no broader agenda, no strategy for progressive social change and no concern for the overcoming of social divisions. They are, instead, policies for managing the danger and policing the divisions created by a certain kind of social organization, and for shifting the burden of social control onto individuals and organizations that are often poorly equipped to carry out this task.

Of these policies, the most relevant to this research are politically motivated and publicly favoured policies that have been implemented within a law and order climate to influence the realm of sentencing, particularly for serious violent offences such as murder and manslaughter.

3.3.1 Penal Populism and the Influential Role of Public Opinion

> If it is accepted that sentencing does not, and should not, lie only in the domain of criminal justice professionals, this does not mean that it should become a popular sport … what is needed is a system which permits *properly informed* public opinion to be taken into account in the whole of the criminal justice process. (Freiberg 2003: 227, emphasis in original)

Within a political climate in which growing recognition of the public fear of crime fed the implementation of punitive strategies for combating crime and justice, the influence of public opinion in the formulation of criminal justice policy has become increasingly apparent over the past two decades (Allen & Hough 2008; Brown 2005; Freiberg 2003; Gelb 2008a; Johnstone 2000; Loader 2009; Pratt 2008; Reiner 2000; Roberts 2008). As described by Freiberg (2003: 223), 'the "mob" has always provided a backdrop for the theatre of punishment. What distinguishes recent events is that "the public" is not only the stage but may have become a lead player'. This increasing role of public opinion in the formulation of law and order strategies is also recognised in the extensive work of Pratt (2008: 31), who notes that:

> Over the past 15 years or so, increasing attention has been given to what is thought to constitute 'public opinion' in relation to the development of sentencing and penal policy. The views and aspirations of the general public are regularly invoked by politicians, usually as a justification for more severe sentencing, or when drawing attention to perceived inadequacies in existing criminal justice and penal systems. (Pratt 2008: 31)

Explaining how the public became the 'fourth party to the criminal justice system process', Gelb (2006: 3) notes that as 'law and order' political rhetoric developed around issues of sentencing in the 1990s, the opinion of the public became central to government decision-making on crime and justice policy.

In recognition of the growing influence of the public on crime and justice policy, Bottoms (1995: 40) coined the term 'populist punitiveness', which he defines as 'the notion of politicians tapping into and using for their own purposes, what they believe to be the public's generally punitive stance'. Also termed 'penal populism', Pratt and Clark (2005: 304) describe that penal populism occurs where 'politicians encourage punitive laws and sentences and thereby improve their chances of re-election by making such responses to indicators of the public moor or sentiments'. Bottoms (1995) argues that by seeking to understand the nature of populist punitiveness, the reasons for the increase in rates of imprisonment and the apparent growing fear of crime become clearer.

In examining the role of public opinion on the development of law and order politics over the past two decades, research has often identified a gap between the reality of the criminal justice system and the beliefs of the community about crime and punishment (Casey & Mohr 2005; Freiberg 2003; Pratt & Clark 2005; Roberts & Indermaur 2007; Roberts et al. 2003). Problematically, this gap between the fear of crime held by the community and the reality of decreasing crime rates is often used by politicians to continue to garner public support for law and order campaigns. The influence of the media in this respect cannot be underestimated (Freiberg 2003; Gelb 2006; Gelb 2008b; Gelb 2011b; Pratt 2007; Pratt & Clark 2005). As acknowledged by Pratt (2007: 4), 'the media can have the effect of both shaping, solidifying and directing public sentiment and opinion on crime and punishment'. Freiberg (2003:

228) concurs, noting that 'the nature of the modern media is such that they tend to simplify and amplify issues, partly with a view to inform, but more with a view to entertain'. As Pratt and Clark (2005: 312) note in relation to the influence of law and order politics in NZ in the 1980s:

> Even when reported crime levels stabilised in the next few years, the public continued to think crime was increasing … as it was as if high crime and high risk of victimization was endemic – a viewpoint then regularly confirmed and played back in newspaper reports and headlines. As a result, concerns about crime in the early to mid-1990s ultimately became a common and in some respects a unifying theme in public discourse.

Despite these identified limitations, the increasing influence of public opinion on crime and justice policy is also evident in the formulation of several sentencing councils and advisory bodies which incorporate members of the community, both within Australia and internationally (Freiberg 2003; Gelb 2006; Gelb 2008a). Gelb (2006: 3) has described the development of these bodies as 'the most obvious mechanism for public representation'. This has occurred alongside a growing use of public opinion polls by governments when consulting on criminal justice issues (Gelb 2008a). Gelb (2008a) specifically links this increasing acceptance of the importance of public opinion to penal populism.

Beyond the inclusion of members of the public on sentencing councils and other bodies, research also suggests that the influence of public opinion is most apparent within the realm of sentencing, as explained by Roberts (2008: 27):

> It is clear, however, that promoting public confidence in criminal justice is a major preoccupation of Western governments. As sentencing is the stage of the criminal process that attracts the most attention and criticism, it is unsurprising that efforts to promote public confidence have focused on the sentencing system. (Roberts 2008: 27)

Problematically, the general public's influence on the formulation of policies related to sentencing has largely led to the favourability of a law and order approach to

sentencing, in place of the previous emphasis on rehabilitative approaches (Garland 2001).

3.3.2 Law and Order Sentencing

Of most relevance to this research is the influence of law and order politics, and penal populism, on the development of sentencing policy over the past two decades. The law and order approach to sentencing is largely based upon political calls for tougher sentences and is motivated by the public's distrust of the criminal justice system and the abilities of those who operate within it (Casey & Mohr 2005; Garland 1996; Pratt & Clark 2005). As described by Palmer (2005: 24–5):

> Law and order sentencing can be described as any sentencing policy that dictates sentences in excess of what would be suggested if the only factors taken into account were the damages caused by the offender and his or her culpability … the primary justification for this kind of sentencing appears to be political … Whereas pure retributive sentencing assumes that the sentence should be proportional to the offence committed, and its just desserts variation allows consideration of the culpability of the offender, law and order sentencing does not necessarily take either into account.

As such, law and order sentencing has come to be associated with the implementation of mandatory sentencing schemes, presumptive minimum sentencing schemes, three-strikes laws, indeterminate sentences, zero tolerance schemes, increased maximum penalties and the decline of rehabilitation, largely in relation to serious violent and sexual predatory offenders (Brown 2002; Gelb 2008a; Loader 2009; Palmer 2005; Pratt & Clark 2005). Garland (1996: 146) describes how these policies gain validation through the political discourse:

> Offenders are treated as a different species of threatening, violent individuals for whom we can have no sympathy and for whom there is no effective help. The only practical and rational response to such types is to have them 'taken out of circulation' for the protection of the public.

It is this political justification that is often associated with government 'tough on crime' campaigns. The purpose of such an approach is to 'demonize the criminal, to

excite popular fears and hostilities, and to promote support for state punishment' (Garland 1996: 461).

Critiques of the influence of law and order sentencing policies, particularly upon imprisonment rates, are widespread throughout the research (Freiberg 2003; Garland 1996; Palmer 2005; Roberts et al. 2003), and are succinctly captured by Garland (1996: 460–1), who notes that:

> A willingness to deliver harsher punishments to convicted offenders magically compensates a failure to deliver security to the population at large … Such action gives the appearance that 'something is being done' here, now, swiftly and decisively … a punitive political and legal culture soon gives rise to mass incarceration, with all of its social and financial consequences.

In drawing on similar arguments, Freiberg (2003: 225) comments that:

> Rather than ignoring, suppressing or mollifying the public with token gestures, governments now respond to public sentiment with more and harsher sentences, in spite, or even in defiance of, scientific evidence to the contrary regarding the penological efficacy of such measures.

Despite such critiques, the influence of these types of sentencing policies are widespread, and arguably most evident in the reported increases in the prison populations of Western jurisdictions over the past two decades (Garland 2001; Pratt & Clark 2005; Roberts 2003). This use of imprisonment to illustrate the 'tough on crime' stance of politicians, and the influence of the public, is recognised by Freiberg (2003: 224), who describes how:

> the voices of those indirectly affected by crime, the observers, the readers of newspapers and consumers of electronic media, were increasing in volume as the increasing crime rates of the 1960s, 1970s and 1980s were unsettling their lives and appeared to be unresponsive to rehabilitatively-oriented government interventions. Answers were wanted, and quickly, and imprisonments appeared to be the most obvious solution. In parliamentary democracies,

> where power may hinge on changing a few votes, 'law and order' became a salient issue and therefore the views of the public on this issue became increasingly important.

The increase in prison populations, both in Australia and internationally, is well established within the scholarship and is often attributed to the rise of penal populism and the subsequent creation of law and order policies favouring punishment (Gelb 2006; Gelb 2011a; Pratt & Clark 2005). While it is too simplistic to suggest that the increase in imprisonment rates is solely a result of the increasing dominance of law and order in crime and justice policy, the law and order agenda is undoubtedly a key influencing factor.

3.3.3 Law and Order Commonsense

In examining the influence of law and order politics on the development of recent sentencing reforms, this research draws from the extensive work of Hogg and Brown (1998), specifically their conceptualisation of the key themes of law and order commonsense. Hogg and Brown (1998: 21) have identified seven key themes evident in the development of law and order commonsense politics:

1. 'Soaring crime rates'.
2. 'It's worse than ever': law and order nostalgia.
3. New York and LA: the shape of things to come.
4. Soft on crime: the criminal justice system does not protect its citizens.
5. 'We need more police with greater powers'.
6. 'We need tougher penalties'.
7. Victims should be able to get revenge through the courts.

The influence of several of these themes of law and order commonsense is evident in the recent development of sentencing policy in the NSW criminal justice system. As such, these themes are considered in Chapter 7 through an examination of how recent sentencing reform in NSW has influenced broader questions around homicide law reform. Specifically, three of the themes within Hogg and Brown's (1998: 21) law and order commonsense are particularly relevant to this analysis: 'soaring crime

rates'; 'soft on crime: the criminal justice system does not protect its citizens'; and 'we need tougher penalties'.

Hogg and Brown's (1998) first theme of 'soaring crime rates' refers to the emergence of a public 'assumption that we are currently afflicted by crime problems of unprecedented size and seriousness'. While Hogg and Brown (1998) clarify that in some instances, and at some points in time, crime rates may in fact be rising, they argue that the growing influence of the media has created an inaccurate representation of an ever-increasing rate of criminal offending in Western societies. In support of this argument, Reiner (2000: 87) has also recognised that the increasing fear of crime among the public is largely driven by the occurrence of 'relatively rare, spectacular, exceptionally fear-provoking crimes' as opposed to 'more mundane offences'. Problematically, this unfounded fear of crime is then used to inform and guide the implementation of law and order policies (Hogg & Brown 1998).

The fourth theme of the law and order commonsense – 'soft on crime: the criminal justice system does not protect its citizens' – is also particularly relevant to this research as it arguably underpins the political motivations for the recent implementation of restrictive sentencing policies in the NSW criminal justice system. This theme captures the growing criticisms aimed at the perceived inability of the criminal justice system to offer adequate protection for victims of crime and members of the public. Hogg and Brown (1998: 30) contend that the influence of this theme is 'obvious' in calls for 'more resources, power, tougher penalties, and so on'. Beyond the work of Hogg and Brown (1998), other criminological research has also identified the political influence of anti–'soft on crime' policies (Garland 2001; Palmer 2005).

This theme of law and order commonsense also recognises that arguments critiquing the criminal justice system's inability to 'protects its citizens' and victims of crime often also focus upon critiquing the importance that the system often places upon ensuring the liberties and rights of accused persons (Hogg & Brown 1998). As such, the common arguments put forward include that 'acquittal rates are too high, the jury system is irrational, and convicted offenders are given sentences which are too lenient and put in jails which are too luxurious' (Hogg & Brown 1998: 30). However, Hogg and Brown (1998) highlight that while these criticisms are frequently made they are

rarely accompanied by any evaluation that clarifies what is meant by a failing system or how that system's achievements could be better measured.

The third theme of law and order commonsense that is applied to this research is the notion that 'We need tougher penalties'. While calls for tougher penalties have traditionally been associated with debates surrounding the retention or reintroduction of capital punishment, Hogg and Brown (1998) contend that more prevalent recently have been calls for longer and harsher sentences, and greater rates of imprisonment. Hogg and Brown (1998: 38) describe the call for tougher penalties as a 'perennial theme' within law and order debates, and as such is highly relevant to an analysis of its influence on the development of sentencing policy within the current law and order climate. The effects of this theme were explored earlier in this chapter under the overview of the growth of law and order sentencing initiatives and the related critiques.

3.3.4 Garland's Indices of Change

In addition to Hogg and Brown's (1998) themes of law and order commonsense, this research also applies the extensive work of Garland (1996, 2001, 2004) to an examination of the intersection between political climate and the implementation and retention of restrictive sentencing reforms within the English context. Garland (1996) argues that the growing criticism of criminal justice agencies, alongside an acceptance of high crime rates, has created a unique problem for governments in recent decades. In response to this unique climate, Garland (2001) has conceptualised the indices of change, comprising 12 key conditions that have affected the development of crime and justice policy over the past three decades.

The 12 indices of change indentified by Garland (2001: 8–20) are:

1. The decline of the rehabilitative ideal.
2. The re-emergence of punitive sanctions and expressive justice.
3. Changes in the emotional tone of crime policy.
4. The return of the victim.
5. Above all, the public must be protected.
6. Politicisation and the new populism.

7. The reinvention of the prison.
8. The transformation of criminological thought.
9. The expanding infrastructure of crime prevention and community safety.
10. Civil society and the commercialisation of crime control.
11. New management styles and working practices.
12. A perpetual sense of crisis.

Garland (2001) highlights that these indices are not to be considered mutually exclusive but rather are related to each other and explain recent changes in crime and justice policies, dominant discourses and the use of various institutions of the criminal justice system. Of particular relevance to this research, and specifically to the analysis conducted in Chapter 7 of the current structure of sentencing for murder in England, are the first, second, sixth and seventh of Garland's (2001) indices of change. These 'currents of social change', as Freiberg and Gelb (2008: 2) have referred to them, are specifically relevant to an analysis of English respondent evaluations of the continued use of mandatory life sentencing for murder and the recent introduction of minimum starting points for murder.

Garland's (2001) first index of change, 'the decline of the rehabilitative ideal'[21], acknowledges what he denotes as one of the 'major changes in penal policy in the last thirty years'. In describing the decreasing role of rehabilitation, Garland (2001: 8) argues that:

> Sentencing law is no longer shaped by correctional concerns such as indeterminacy and early release. And the rehabilitative possibilities of criminal justice measures are routinely subordinated to other penal goals, particularly retribution, incapacitation, and the management of risk.

This decline of penal policy that is based upon rehabilitative ideals is also acknowledged more broadly in the research, in which it has become a hallmark of the growing emergence of law and order campaigns that prioritise punishment over rehabilitation in an attempt to curry public favour (Brown 2002; Casey & Mohr 2005; Garland 1996; Gelb 2006; Gelb 2008a; Loader 2009; Palmer 2005; Pratt & Clark

[21] Garland (2001: 8) notes that this phrase was also the title of a book published in 1981 by Francis Allen.

2005; Reiner 2000). Additionally, the decline in rehabilitation-based punishments has occurred despite the emergence of research which suggests that the public, when properly informed, are accepting of alternatives to imprisonment (Gelb 2011a; Roberts & Doob 1989).

Garland's (2001: 8) second index of change – 'the re-emergence of punitive sanctions and expressive justice' – also acknowledges the decline of rehabilitation in crime and justice policy in favour of approaches that are increasingly punitive in nature. Garland (2001: 9) describes this index as follows:

> Punishment – in the sense of expressive punishment, conveying public sentiment – is once again a respectable, openly embraced, penal purpose and has come to affect not just high-end sentences for the most heinous offences but even juvenile justice and community penalties.

This description illustrates the influence of this index of change at all levels of the criminal justice system. Alongside the increasing use of punitive sanctions, this index recognises the growth of a retributive discourse 'of condemnation and punishment', which Garland (2001: 9) argues 'has made it easier for politicians and legislatures to openly express punitive sentiments and to enact more draconian laws'. Examples of these draconian laws are evident throughout the research, and were previously cited in this chapter as including mandatory sentencing schemes, presumptive minimum sentencing schemes, three-strikes laws indeterminate sentences, and zero tolerance schemes.

The third of Garland's (2001) indices of change, which is highly relevant to the English analysis in this research, is the sixth index, which recognises the increasing politicisation of crime policy alongside the growth of a populist political discourse. Through this index Garland (2001: 13) describes how crime policy has become a significant feature of 'electoral competition', whereby policy is now 'constructed in ways that appears to value political advantage and public opinion over the views of experts and the evidence of research'. Garland (2001) argues that this politicisation has been accompanied by a growing influence of the 'commonsense' public in the formulation and implementation of crime and justice policies. The problematic

influence of public opinion in the formulation of sentencing policy has already been discussed in this chapter; however, Garland (2001: 13) also notes that the growing privileging of the public has led to a minimisation of the role of the academic and of research in the formulation of these policies.

Garland's (2001: 14) seventh index – 'the reinvention of the prison' – is the last of his indices applied in this analysis. In conceptualising this index, Garland (2001) recognises that while crime policy in the 20th century was focused upon the creation of alternatives to imprisonment – such as community supervision and the use of monetary fines – the past two decades have seen a return to the implementation of crime policy that favours punishment through incarceration. As described by Garland (2001: 14), 'the prison has once again transformed itself. In the course of a few decades it has gone from being a discredited and declining correctional institution into a massive and seemingly indispensible pillar of contemporary social order'. This growing reliance upon the prison system as a mode of punishment can be seen as a result of the previously explored indices which mark the decline of rehabilitation and the growth of punitive crime policies. This increase in the use of the prison system is evident in the significant growth in prisoner populations in the US, UK and New Zealand (Garland 2001; Pratt & Clark 2005).

Conclusion: Creating a Framework for Analysis

This chapter has outlined the three theoretical frames applied in this research in order to enhance understanding of the effects, implications and significance of the reforms to the partial defence of provocation in Victoria, NSW and England. By drawing upon a spectrum of key criminological theories, this research seeks to undertake a nuanced analysis of the approaches taken to solving the problem of the partial defence of provocation. It gives consideration to the role of Hudson's principles of justice, discourses of denial and law and order influences in seeking to address questions surrounding the viability of reforms and adequacy of the current operation of the law of homicide.

More specifically, in Chapter 5 Hudson's (2006) principles of justice are used as a framework for analysing respondent perceptions of the operation of the law of homicide in Victoria and England prior to the implementation of significant reforms

to this body of law. In considering whether there was a need for these reforms, the analysis questions the extent to which the law of homicide in these two jurisdictions was upholding Hudson's (2006) principles of discursiveness and reflectiveness in the period immediately prior to these reforms. Additionally, these two principles of justice are applied to an examination of respondents' initial evaluations of the packages of reforms implemented in these two jurisdictions and questions surrounding whether the approach taken to reform provides a better model for achieving a form of justice that is both discursive and reflective.

Chapter 6 examines the current operation of the law of homicide in each of the three jurisdictions, and in doing so adopts a theoretical framework of denial to examine the effects of the approaches taken to reforming the law of provocation within each criminal justice system. By examining the extent to which narratives of Cohen's (2001) implicatory and interpretive denial, alongside Sykes and Matza's (1957) techniques of neutralisation, are evident in the trials of men and women who kill an intimate partner, the analysis seeks to identify whether the reforms have successfully overcome the problems historically associated with the courtroom operation of the partial defence of provocation.

Finally, the third analysis chapter – Chapter 7 – adopts a framework of law and order to examine the influence of sentencing factors upon considerations of homicide law reform, and specifically, the role of provocation in sentencing. As examined throughout the second half of this chapter, the influence of law and order agendas upon the formulation and retention of punitive sentencing policies in the past two decades cannot be understated, and as such, its application to the current research is aimed at determining how provocation can best be accommodated within sentencing in a law and order climate. These questions are explored with specific reference to McCarthy's analysis of sentencing in cases of gender-based violence, Hogg and Brown's (1998) conceptualisation of the themes of law and order commonsense, and Garland's (2001) model of the indices of change.

CHAPTER 4 Research Design: An International Comparison of Homicide Law Reform

This research employs a qualitative research methodology that combines in-depth interviews with observational research and a case study analysis to examine the operation of the law of homicide in Victoria, NSW and England. Specifically, this research is explicitly concerned with an examination of the need for, and the effects of, homicide law reform in three comparable, yet contrasting, criminal jurisdictions. Through the application of a qualitative research methodology, it questions the extent to which reforms related to the partial defence of provocation have produced actual change in practice at the trial and sentencing stages of the court process.

While historically research within the field of criminology has been predominantly quantitative in nature, the past two decades have evidenced a growth in scholarship based upon qualitative research methods (Berg 2007). In contrast to quantitative research which relies almost exclusively on numerical methods of analysis, qualitative research is based on methods that utilise descriptions, observations, concepts and characteristics (Berg 2007). In doing so, qualitative research often seeks to 'address case examples or topics in depth with particular emphasis upon answering the questions of "why" and how"' (D'Cruze et al. 2006: 7). Researchers have suggested that a qualitative level of analysis allows for greater knowledge and understanding of the dynamics of the phenomenon under study (Attridge-Stirling 2001; Bachmann & Schutt 2003; Berg 2007). As described by Flynn (2011: 55), 'Qualitative methods can provide a unique insight into how and why people and processes operate in the manner in which they do'.

4.1 An International Comparison of Homicide Law Reform

This research critically analyses how the different climates of homicide law reform in Victoria, NSW and England have differentially impacted the trial and sentencing phases of the criminal justice systems in these jurisdictions. These three research locations were chosen because of the prominent discussions surrounding, and in two of the jurisdictions the significant reforms implemented to, the law of provocation over the past decade. As discussed in Chapter 2, in Victoria the VLRC

(2004) recommended the abolition of the provocation defence alongside a host of other reforms targeting the law of homicide. The subsequent reform package was implemented by the Victorian Government in November 2005. Most relevant to this research, these reforms transferred the consideration of provocation from the trial to the sentencing stage of the court process and introduced a new offence of defensive homicide. As shown in Table 4.1, this research examines the operation of the Victorian law of homicide in the period since the implementation of these reforms.

Second, this research examines the period surrounding the October 2010 implementation of the *Coroners and Justice Act 2009* in the English criminal justice system. As covered in Chapter 2, following more than two decades of debate about the role of the partial defences to murder, the Coroners and Justice Act abolished the partial defence of provocation while implementing a new partial defence of loss of control. As such, this study examines respondents' perceptions of the operation of the law of homicide during the period of transition, reflecting on both the need for reform in the period immediately prior to the government's implementation of the 2010 law reform package and upon initial perceptions of the reforms implemented.

Third, in NSW provocation remains available as a partial defence to murder. As such, this research examines the continued operation of the law of homicide in this state, specifically the partial defence of provocation, within a jurisdiction that has yet to respond to concerns over the gendered operation of the law within the context of this partial defence.

Table 4.1: Three climates of homicide law reform

Research location	**Relevant reform**	**Date of implementation**	**Stage of law reform examined**
Victoria	Abolition of the partial defence of provocation and implementation of an offence of defensive homicide.	November 2005	Post-provocation abolition.
New South Wales	Retainment of provocation as a partial defence to homicide.	Not applicable	Continued availability of the partial defence of provocation.
England	Abolition of the partial defence of provocation and implementation of a partial defence of loss of control.	October 2010	Period immediately prior to the abolition of provocation.

In light of these reforms a comparison between sections of the Australian and English criminal justice systems is timely. As England and Victoria have continued to reshape their approaches to homicide trials since the abolition of the provocation defence, it is essential to consider what effect these reforms have already had in practice, and to what extent the previously acknowledged problems in the operation of the provocation defence continue to influence the trial and sentencing phases of the court process in these jurisdictions. Furthermore, a comparative analysis of these two jurisdictions against the continued operation of provocation as a partial defence to murder in NSW allows this research to examine whether the problems historically identified and associated with the courtroom operation of this defence are evident in practice, and as such whether there is a need for reform within the NSW criminal justice system.

Prior scholarship has acknowledged the value of comparative analysis across jurisdictions insofar as it provides an opportunity for each to learn from the experiences of the other (Nelken 2010; Reichel 2008). Specifically, Reichel (2008: 4) has proposed that 'to understand better one's own circumstance, it is often beneficial to have a point of contrast and comparison'. In agreement, Horder and Hughes (2007: 1–2) have commented on the value of comparative research specifically within the context of examining approaches to law reform:

> Trying to understand how other jurisdictions tackle similar problems, almost always from a different vantage-point in terms of the norms of criminal procedure, is what can shed such critical light … From the law reformer's perspective, an idea or solution crudely lifted from another jurisdiction, even if it was taken out of context or misunderstood, may eventually be made to bear fruit in fresh soil; and if it does, that will have justified the comparative exercise.

Furthermore, the value of comparative research in this area is demonstrated through the extensive sentencing-based research conducted by Ashworth (1992: 181–2):

> The concerns that have led to this widespread reappraisal of sentencing vary from country to country, as do the reforms proposed or implemented. Much

> depends on the social and political context. Yet there are some common elements that run through the reforms, which make it worthwhile considering them together. Moreover, although one must guard against the assumption that sentencing reforms are simply transferable from one criminal justice system to another, the techniques used in one jurisdiction might be more suitable, albeit in a modified form, for adoption in another.

Building upon Ashworth's (1992) argument, this research seeks to use three jurisdictions to examine the lessons to be learnt for comparable jurisdictions that seek to review and reform the law of homicide within this area. By incorporating differential climates of law reform into the analysis, this research adds to current understandings of the effects of contrasting approaches to reforming the law of homicide, both nationally and internationally.

4.2 Interviews with Legal Stakeholders

This research sought to move beyond statements of law and policy by conducting a detailed examination of the operation of the criminal justice system from an insider's perspective. As such, a key component of the qualitative methodology employed was the use of in-depth interviews conducted with members of the criminal justice system, and relevant policy stakeholders, who are involved in the daily operation of the law within each of the jurisdictions studied[22].

The value of using in-depth interviews with legal practitioners to inform criminological research is recognised throughout the field. For example, Nelken (2010) has argued that it is through discussions with key actors within the criminal justice system that research can understand and make sense of legal trends and observations. Concurring, specifically in relation to sentencing research, Ashworth (1995: 263) has also noted that:

> Research into why judges and magistrates do what they do has long been advocated as a prerequisite of the successful development of sentencing policy, but sentencers in many countries seem to resist research. Apart from the irony that judges sometimes berate academics for not understanding

[22] Ethics clearance was received for this research from the Monash University Human Research Ethics Committee, reference number CF10/0451 – 2010000212.

> practice when it is the judges who bar the way to research by means of observation and interview, the social importance of sentencing is a powerful argument in favour of careful research. More ought to be known about the motivation of judges and magistrates. Such knowledge would assist in the formation of sentencing policy.

The benefits of conducting interviews with legal stakeholders has also been recognised by government bodies such as the Victorian Sentencing Advisory Council (SAC), the VLRC and the Law Commission, which regularly draw on the results of consultative processes with key stakeholders to inform their reports and submissions[23]. The value of such consultations is captured by Davis (2005: 156) who notes that:

> Face-to-face consultations remain a key consultative strategy…Direct meetings allow the agency and those it consults to talk much more freely about the topics of interest; to explain and amplify their views or the reasons behind them; or to apply nuance where this is inevitably harder to do in writing… Little is as valuable as an understanding of how the law and its institutions operate in practice.

However, in contrast to public consultative processes, this research ensured full confidentiality for respondents, and consequently was able to access a broader and more senior sample of legal stakeholders who have traditionally not publicly contributed to law reform discussions in these three jurisdictions. Additionally, because this research ensured respondent confidentiality, it was able to go beyond the level of consultation often achieved by government and law commission bodies to elicit more open and detailed observations from respondents concerning their perceptions of how the law of homicide operates in practice, and their assessments of the approaches taken to address the issues related to the defence of provocation.

More specifically, 81 interviews were conducted to identify legal practitioners' experiences with the law of homicide, and their views on reform to the partial defence of provocation. The method of conducting in-depth interviews was chosen because it

[23] See Law Commission 2003, 2005; MOJ 2008; SAC 2007, 2009; Sentencing Council 2010a, 2010b; VLRC 2004.

allows for the initial identification of key themes, which then guided the formulation of questions prior to the interviews, yet also permits the use of open-ended questions that allow the 'meanings and contexts of particular actions and experiences of the research participants to be explored' (Harne 2005: 180).

Prior to the interviews, key themes were identified – largely based on the case analysis – which were used throughout the interviews to inform the direction and focus of discussions with respondents. These broad interview themes were in some cases structured according to the professional role and/or jurisdiction of the respondent, allowing the research to draw specifically upon their experiences with homicide law reform. For example, questions were tailored depending on whether the respondent was a judge, lawyer or policy respondent. Due to the overarching thematic focus, despite these variances in the questions a comparison of respondent views was still possible as uniform themes were covered across all of the interviews, regardless of each respondent's professional role or jurisdiction.

The thematic schedule for the interviews was designed to encourage respondents to reflect upon their experiences in homicide trials, specifically intimate homicide trials or trials in which the partial defence of provocation was raised. In doing so, the questions were designed to invite respondents to consider how the law was operating prior to the implementation of reforms (specific to the Victorian and English interviews), how the law of homicide was currently operating in these two contexts, and whether respondents believed that the approach taken to addressing the problem of provocation in their jurisdiction – whether it be to abolish, replace or reform – was the best practice approach. At the end of each of the interviews in each jurisdiction, respondents were asked an open-ended question about whether there were any other concerns that they had at present in relation to the law of homicide within their jurisdiction. This open-ended question allowed for the identification of any further relevant issues that had not previously been considered during the interview[24].

The interviews conducted with key policy stakeholders in Victoria and England focused primarily upon their experiences in being involved in the Law Commission's

[24] See Appendix A: Indicative Interview Schedule

(England) and the VLRC's (Victoria) reviews of the defences to murder. Within the English context, the interviews questioned respondents about the perceived need for reform to the English law of homicide, the prior workability of the partial defence of provocation and their initial perceptions of the partial defence of loss of control. The interviews with Victorian policy respondents focused on questions surrounding their views on the need to abolish the partial defence of provocation in Victoria, the operation of the law prior to the reforms, the role of provocation in sentencing, and initial perceptions of the workability of the offence of defensive homicide.

4.2.1 Interview Respondents

The in-depth interviews were conducted across each of the three criminal jurisdictions with members of the judiciary, prosecutorial services, and practising defence and legal counsel. All of the legal respondents interviewed had at least 24 months' experience as a legal practitioner within their jurisdiction. The respondents were selected, and invited to participate in the research, based on their involvement over the past 10 years within their jurisdiction in either judging, prosecuting or defending a case of male-perpetrated intimate homicide or manslaughter in which the partial defence of provocation was raised. This prior experience of all of the respondents allowed the research to draw specifically upon their direct experiences of the law of homicide and their evaluations of the law's operation in relation to the partial defence of provocation in cases of intimate homicide.

In addition to legal respondents, a smaller number of interviews were also conducted with key policy stakeholders in the Victorian and English criminal justice systems. These participants were invited to participate based on their significant involvement in the recent Law Reform Commission reviews of the partial defences to murder in Victoria and England. Given that there has not been an officially established review of the partial defences to murder in NSW, and subsequently no significant reform packages implemented in this area in the past five years, no policy stakeholders were interviewed in this research location.

As detailed in Table 4.2 below, across the three jurisdictions 81 in-depth interviews were conducted for this research. The interviews were all audio-taped, with the exception of four interviews (see a further discussion of these interviews under

Ethical Considerations and Constraints below). The interviews lasted between 30 and 90 minutes in duration and were all conducted within the respondents' private chambers, offices or court chambers. Across the three jurisdictions, of the respondents interviewed, 13 were female (16 per cent) and 68 were male (84 per cent).

Table 4.2: Interview participants by professional role and jurisdiction

Professional role	**Victoria**	**NSW**	**England**	**Total by professional role**
Prosecutors	8	5	20	51
Defence counsel	10	8		
Judicial members	8	8	6	22
Policy representatives	5	0	3	8
Total by jurisdiction	**31**	**21**	**29**	**81**

Within Australia, interviews were conducted in Victoria and NSW. The Victorian interviews were conducted over a seven-month period between May and November 2010 with 31 members of the Victorian judiciary (n = 8), members of the Office of Public Prosecutions (OPP) (n = 8), current practising defence counsel (n = 10) and stakeholders involved in the 2004 VLRC review of the defences to murder (n = 5). The NSW interviews were conducted between October and December 2010. Within this jurisdiction, 21 interviews were conducted with members of the NSW Supreme Court (NSWSC) judiciary (n = 8), current practising defence counsel (n = 8) and members of the NSW Office of the Director of Public Prosecutions (ODPP) (n = 5).

The English interviews were conducted over a five-week period between June and July 2010. These interviews primarily involved legal respondents from London; however, a smaller sample of interviews were also carried out in Liverpool, Manchester, Coventry, Leeds, Kingston upon Hull, Leicester and Birmingham. In total, interviews were conducted with 29 individuals, including members of the English judiciary (n = 6), current practising legal counsel (n = 20) and stakeholders involved in the Law Commission's 2004 review of the defences to murder (n = 3).

All interview participants were initially contacted via email to request their participation in the study. These emails were sent using publicly available contact information, and it was only when requested by the participants that this email was followed up with a phone call prior to conducting the interview. Researchers have

often recognised the difficulty of obtaining access to members of the criminal justice system to conduct interviews, specifically members of the judiciary (Ashworth 1995; Baldwin 2008). Consequently, to date 'This distaste for research has not altogether prevented criminologists from involving sentencers in their inquiries, although it has invariably been lay magistrates rather than professional judges who have participated' (Baldwin 2008: 386). Such observations emphasise the significance of the data obtained for this research, which draws upon in-depth interviews conducted with 22 senior members of the judiciary across the three criminal jurisdictions under study. In doing so, it is able to offer a detailed and unique insight into the operation of the court system in homicide trials, and into the role and process of sentencing, as well as an examination of the effects of, and the need for, reforms to the provocation defence.

To ensure participant confidentiality, all respondents were assigned a pseudonym following the interviews. These pseudonyms reflect the jurisdictions and professional role of the respondents, followed by a randomly assigned letter of the alphabet (for example, VicJudgeA, NSWDefenceB, UKPolicyC). During the transcribing process, the data analysis and throughout this research respondents have been referred to only by their assigned pseudonyms. Any identifying characteristics and identifying case discussions have also been removed. While Victorian and NSW legal counsel have been differentiated according to their predominant role as either a prosecutor or defence counsel (for example, VicProsecutorA or NSWDefenceB), English legal counsel have been categorised without a specialisation (for example, UKCounselC). This reflects the trend away from specialisation in the English legal system where all English legal counsel practitioners interviewed for this research had recent experience prosecuting and defending in homicide trials.

4.2.2 Emerging Respondent Concerns and Research Themes

Following the interview and transcribing process, the interview data was uploaded into and analysed using the qualitative data software NVivo. The transcripts were thereby thematically coded across the three jurisdictions and professional roles. To code the interview data, each of the transcripts was first analysed individually to identify the key points made by each respondent. From this individual analysis a set of codes were developed to reflect the main themes to emerge from the key respondent points, which subsequently became the main themes of the research. Each

of these main themes was then subdivided according to several sub-themes which were generated according to the viewpoints and experiences expressed by the legal respondents. Each of the interview transcripts was then coded according to these key themes and sub-themes[25]. This allowed the interview responses to be analysed and considered individually, collectively and comparatively. Throughout this process the codes were amended to reflect any change in focus as the research progressed, and in some cases codes were merged where similar themes became evident across the jurisdictions and professional roles. The resulting data included respondent descriptions of behaviours, criminal justice institutions, court processes and trends, actions, interactions, legal narratives and accounts of how the law operates in practice.

Based on this analysis, three key themes emerged from the interview data: respondent evaluations of the law prior to reform, the effects of reform, and the influence of sentencing practices on the need for future reform. Discussions surrounding these themes emerged across all professional roles and jurisdictions, with the exception of the NSW interview data, which did not reflect on the effects of reform but rather focused upon the continued operation of the law of provocation in the absence of any such reform. While it was not the intention for the interviews to draw out respondent evaluations of current sentencing practices and legislation, this emerged as a central theme throughout – particularly among the respondents from the NSW and English samples, who consistently commented upon the implementation of restrictive sentencing legislation within their jurisdiction as influential on their evaluations of the viability of reforms to the partial defence of provocation.

The three main themes identified have been used to structure the analysis of the interview data throughout this thesis, and thus the analysis is organised into three chapters. While there were other secondary themes that emerged during the interviews, particularly relating to respondents' views on the operation of other available partial defences to murder in their jurisdiction and of the operation of homicide law more broadly, the present research focuses on the three central themes that emerged, and which are relevant to an examination of the need for, and the effect of, homicide law reform targeted at the partial defence of provocation.

[25] See Appendix B: Thematic Interview Data Codes

4.3 Court Observations

Court observations were also conducted in each of the three research locations throughout 2009 and 2010. This involved the observation of murder and manslaughter trials in the VSC, Victorian County Court, English Central Criminal Court, the Manchester Crown Court and the NSWSC. The value of combining interviews with court observations in examining the operation of the law and those who participate in it has been captured by Friedman (1994: 119), who argues that:

> We can measure it [legal culture] directly, by asking people questions; or indirectly, by watching what people do and inferring their attitudes from what we see. Probably if we did both things at once, we would get a more accurate picture.

In agreement, Baldwin (2008: 382) has posed that observational studies of the criminal courts allow for a greater 'understanding of the influence of "court culture" on decision-making and the importance of examining the relationships that exist between various court actors'. For this research, court observations were used to enhance the researcher's understanding of how homicide law is applied and currently operates in practice in each of the three jurisdictions, and of the specific context from which the case study documents were derived.

4.4 Analysing the Law in Operation: Trial and Sentencing Discourses

> Qualitative analyses of case studies can lead to an understanding of the complexity and meaning of violence. (Giles-Sims 1998: 49)

To supplement the interview data, this research analysed key cases relevant to the operation of the law of homicide, in particular the law's response to the perpetration of intimate femicides, in the three jurisdictions. Specifically, the case analysis was used to support and add illustrative validity to the observations of, and comments made by, interview respondents about the operation of the law of homicide, including the partial defence of provocation, in Victoria, NSW and England. Case studies have been used to examine how the law of homicide operates in practice

within past criminological scholarship (Burman 2010; Polk 1994). The value of analysing trial transcripts, and specifically sentencing judgements, has been previously recognised by the MOJ (2008: 6) who noted that such an analysis can 'improve our understanding of how the law is working at the moment.' In the Victorian context, the value of and need for a detailed case analysis following the implementation of the 2005 homicide law reform package has been noted by Tyson, Capper and Kirkwood (2010: 19):

> There is also a need for in-depth analysis of trial, plea and sentencing transcripts post the 2005 reforms to explore the ways in which the changes to Victoria's homicide laws are operating in practice, and the impact they are having on the way men's and women's actions, particularly in the context of family violence, are understood and interpreted by the courts.

This study has sought to undertake the research needed to fill this gap highlighted in the comment above, and has also added an element of comparative examination by seeking to identify the lessons the Victorian experience might offer, or what Victoria might borrow from the approaches favoured in the English and NSW criminal justice systems.

4.4.1 Case Study Selection: Legal Examinations of Intimate Femicide, Defensive Homicide and Provocation

For the case analysis all cases of intimate partner femicide[26] heard within the VSC, the NSWSC and an English criminal court over the same five-year period (1 January 2006 to 31 December 2010) were included within the analysis. This was inclusive of all intimate femicide cases that resulted in a conviction of murder or manslaughter. These cases were examined utilising publicly available sentencing judgements[27] and relevant court transcripts that were obtained by application to the Victorian OPP and the relevant English court transcribing services.

[26] This research defined intimate partner femicide as the male perpetration of lethal violence against a female intimate partner, whether current or estranged, inclusive of girlfriend/boyfriend relationships, de facto relationships and marriage.

[27] Sentencing judgements in England are not publicly available through a database like Austlii (from which the Victorian and NSW sentencing judgements were accessed). The sentencing judgements for all relevant English cases were obtained from the relevant transcription company for the county court in which the case was heard.

The case analysis focused on intimate femicides given the significant attention that the law's response to this context of homicide has attracted within law reform debates concerning the partial defence of provocation. Cases of intimate femicide were analysed in relation to the use of provocation, and more broadly the gendered operation of the law within this context. As highlighted by Graycar and Morgan (2005: 419), 'Any assessment of whether the defence of provocation is gender-biased cannot rely solely on mathematical calculation but must address the contexts in which killings by men and women occur'.

The number of cases of intimate femicide analysed within each of the three jurisdictions varied according to the number of male offenders of intimate femicide who were sentenced within the five-year period examined. Where the public availability of the sentencing judgement had been suppressed or indefinitely delayed due to future legal issues (such as an ongoing appeal), the case was excluded from the analysis. This resulted in an analysis of 25 Victorian cases, 30 NSW cases and 25 English cases of intimate femicide[28]. While the subsequent analysis chapters do not refer in detail to each and every one of the cases analysed, they were all used to inform broader understandings of the operation of the law of homicide in practice.

Additionally, further cases were analysed insofar as they were found to be relevant to an examination of the effects of reforms to the law of homicide during this period, and to contribute to a broader understanding of the recent operation of the partial defence of provocation in the NSW criminal justice system. Within Victoria, this involved an additional analysis of all cases of defensive homicide sentenced in the VSC over the first six years of its operation (November 2005 to November 2011)[29]. In NSW, in addition to all cases of intimate homicide over the five-year period, all cases resulting in a manslaughter conviction by reason of provocation between January 2005 and December 2010 were also included in the case analysis. This resulted in the analysis of a further 15 cases of provocation manslaughter finalised in the NSWSC[30].

[28] See Appendix C: Intimate Femicide Case Study List.
[29] See Appendix D: Victorian Defensive Homicide Case Study List.
[30] See Appendix E: NSW Provocation Manslaughter Case Study List.

4.4.2 Analysing Legal Texts

A textual analysis was employed to examine the ways in which different ideas and viewpoints are generated within the legal texts. Discourse analysis has been used within criminological studies over the past two decades, specifically in relation to examining gendered and judicial discourses within the legal system (Burman 2010; Crocker 2005; MacMartin & Wood 2005; Sarat 1993). While various forms of discourse analysis have been adopted by social and cultural researchers (Poynton & Lee 2000), this research utilised a research design that aligns with the approach suggested by Fairclough (2003).

According to Fairclough (2003), textual analysis is a key component of discourse analysis whereby different ideas, genres and concepts are mobilised within a text to create various viewpoints. As such, the process of textual analysis involves judging a text to determine what the writer meant and what intentions were at play in producing the text's narratives (Fairclough 2003). In conducting such an analysis, Fairclough (2003) proposes that, first, the key themes represented in the text must be identified, and, second, that the point of view or perspective from which the text is written must be acknowledged and considered.

Specific to this research, in the first phase of the textual analysis key themes were identified within the trial transcripts and sentencing judgements for each case using a close reading of the text. The structure of the text was then analysed, by questioning how language was used to create different discourses and perspectives about a particular person, event and/or relationship. As highlighted by Fairclough (2003), texts can be used to promote changes in public beliefs, knowledge and predominant attitudes. This research was explicitly concerned with the role played by legal practitioners within the criminal justice system in informing public understandings of acceptable and unacceptable forms of lethal domestic violence, and the intersection of these beliefs with broader concerns surrounding the gendered operation of the law of homicide across the three jurisdictions. As such, the case analysis was focused on discerning how the operation of different legal categories of homicide in each of the jurisdictions frames the stories of those who come before the courts, whether as an offender or a victim.

While this research project was fundamentally driven by the interview data, decisions regarding the initial design of the thematic focuses for the interviews were informed by the textual analysis of the cases outlined above. This also enabled the analysis of interview data to be informed by the key themes and analytical insights developed through the textual analysis.

4.5 Ethical Considerations

This research[31] adhered to the ethical protocols and terms of approval of the Monash University Human Research Ethics Committee. In conducting the fieldwork interviews, there were two key ethical considerations: ensuring the confidentiality of all respondents; and ensuring the wellbeing of those participants, both during and following the interview process. Prior to the commencement of each interview, written informed consent was received from each of the participants involved, following their reading of the Research Explanatory Statement[32]. The consent form provided to each of the participants outlined the basis of the research project, stated that the interviews were to be audio-taped and assured participant confidentiality in the final research dissertation[33]. Participants were also provided with the option of obtaining a copy of the resulting interview transcript as well as a final copy of the thesis.

At the consent form stage of the interview process one Victorian participant, one NSW participant and two English participants expressed their preference for the interview not to be audibly recorded. For these four interviews, written notes were taken throughout the interview and the respondent has only been referred to throughout this research according to those notes.

The professional focus maintained during all of the interviews ensured that the respondents did not experience any distress, anguish or emotional side effects from participating in the research. All respondents were questioned only about their professional perspectives and experiences, and were not required at any stage of the interview process to respond to personal questions or divulge information that would

[31] Project number CF10/0451 – 2010000212, ethics approval granted on 19 April 2010.
[32] See Appendix F: Research Explanatory Statement.
[33] See Appendix G: Participant Consent Form.

be considered to be of a sensitive nature. Within the written consent form that all respondents received prior to the interview commencement, respondents were made aware that at any time during the interview they were free to suspend the questions without explanation. However, no interview participant withdrew from the research during the interview process.

Conclusion: An Insider's Perspective of Provocation in Action

Utilising a qualitative methodology which combined interviews with court observations and a case analysis, this research has sought to examine how the law of homicide relating to the partial defence of provocation has operated, and in NSW continues to operate, in practice in three comparable criminal jurisdictions. By combining these three modes of qualitative research methodology, this research examines the law of homicide in Victoria, England and NSW from the vantage point of the practitioners charged with its daily implementation, from the perspective inside the courtroom, and from a close reading of the legal texts and the discourses that are generated within it.

CHAPTER 5 Examining the Law: The Provocation Problem and Approaches to Homicide Law Reform

Debates surrounding the partial defence of provocation have become increasingly widespread nationally and internationally over the past two decades. As explored in Chapter 2, the arguments within these debates have largely focused on either retaining or abolishing provocation as a partial defence to murder. Within these debates, references to the use of provocation have usually been in the context of one of two contrasting scenarios: men who kill their female intimate partners and women who kill in response to prolonged family violence. This chapter engages with and extends on the consideration of these issues by examining legal respondents' evaluations of the operation of the partial defence of provocation prior to the implementation of the recent homicide law reforms in Victoria and England. In so doing, it considers the daily operation of the provocation defence prior to its abolition in Victoria in November 2005 and its replacement in England in October 2010. Additionally, in the second half of the chapter, the analysis of interview data considers the specific approaches taken to reform in the Victorian and English criminal justice systems. Specifically, the respondents' views on the decision to abolish provocation as a partial defence to murder in Victoria and the British Government's decision to replace provocation with a partial defence of loss of control are discussed[34].

This chapter is the first of three analysis chapters that present the findings of the interview data and case analysis. In particular, it considers the context within which the reforms in each jurisdiction were implemented and the response to such reforms among those charged with their implementation. By establishing the context within which this research is set, this chapter sets the platform for a more nuanced analysis of the impact of homicide law reform in the following analysis chapter.

[34] Given that NSW has not implemented any significant reforms to the partial defence of provocation in the past decade, the research interviews within this jurisdiction did not cover respondents' perceptions of the approach taken to reforming the law of provocation or the operation of the law prior to reform within this jurisdiction. As such, no findings from this jurisdiction are discussed in this chapter.

This chapter utilises Hudson's (2006) principles of discursiveness and reflectiveness[35] as a framework for analysing respondent viewpoints on the gendered operation of the law of provocation prior to its abolition as a partial defence to murder in Victoria and England. Hudson (2006) argues that all justice processes should embrace these principles in order to effectively minimise the influence of sexism and racism in the operation of the law. While Hudson (2006) was most interested in applying these principles to an examination of restorative justice, this research considers how they can provide insight into other areas of the criminal justice system, such as homicide law reform and the partial defence of provocation.

As discussed in Chapter 3, the principle of discursiveness is concerned with bringing inside the discursive circle of justice those who are excluded from it, and challenging the fact that legal claims can often only be acknowledged if they are 'voiced in the terms of the dominant group' (Hudson 2006: 34). This principle does not seek to simply create spaces in proceedings for participants to speak, but also to challenge the very identity of the law. Moreover, it suggests that any range of issues may be raised within the legal realm, including details and areas previously outside the remit of the law, such as violence against women in the private sphere. This chapter considers Hudson's (2006) principle of discursiveness in examining respondent discussions of the suitability of provocation as a partial defence to murder for women who kill in response to prolonged family violence. In doing so, this chapter questions whether prior to the reforms, the operation of provocation allowed women's stories to be brought into the courtroom and the violence, including the threat of violence, perpetrated against them to be adequately recognised.

Hudson's (2006) principle of reflectiveness is also applied to the analysis in this chapter. As covered in Chapter 3, the principle of reflectiveness is based on the view that individual cases should not be:

> subsumed into a restricted range of legal categories; rather they should be considered in the totality of their features and weighed against broader

[35] Hudson (2006) has also conceptualised the principle of relationism; however, in analysing the interview data key elements of the principles of discursiveness and reflectiveness were found to be most relevant to this research, so formed the focus of this analysis.

> horizons of justice. Concretely, reflective justice means that each case should be considered in terms of all its subjectivities, harms, wrongs and contexts and then measured against concepts such as oppression, freedom, dignity and equality. (Hudson 2006: 39)

Essentially, this principle is concerned with how the courts determine what is relevant or irrelevant to each case, and how the rules and categories developed by the powerful are often 'impregnable against the claims of the powerless', especially in terms of the whiteness and maleness of the law (Hudson 2006: 38). The principle of reflectiveness is applied here to examine the gendered use of the partial defence of provocation by men who commit intimate partner femicide and the subsequent treatment of the female victim of homicide, prior to the implementation of reforms in the Victorian and English justice systems.

5.1 Examining the Partial Defence of Provocation

A key focus of the interviews was the respondents' evaluations of the operation of the partial defence of provocation prior to its reform in Victoria and England. In drawing upon their professional experience within the criminal justice system, this research examines their experiences with, and perceptions of, the operation of provocation in their jurisdiction. In analysing the resulting data, conflicting views emerged both within and across the jurisdictions, and a series of common themes of concern were discernible. This chapter explores these contrasting experiences and perceptions, and in doing so, considers four key issues of debate: perceptions of gender bias in the courtroom operation of provocation, disparities between the successful use of the provocation defence and contemporary expectations of justice, arguments surrounding the importance of the jury in deciding upon provocation-based questions, and perceptions of whether provocation was a difficult defence to successfully run.

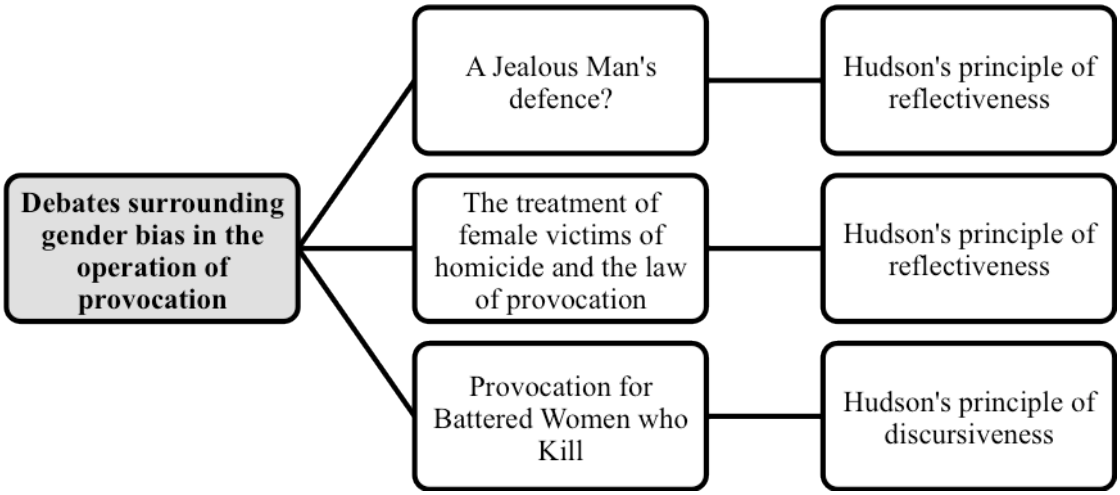
5.1.1 Gender Bias in the Operation of the Partial Defence of Provocation

> there were major problems with gender and the dynamics of the defence. (VicPolicyB)

As examined in Chapter 2, discussions around the value and impact of the partial defence of provocation have often centred on questions over the gendered operation of the law, and the use of the partial defence in two different contexts: by male defendants charged with the homicide of a female intimate partner and by female defendants charged with the homicide of an abusive male partner. Across the Victorian and English interviews, the discussions with respondents often led to an appraisal of their own experiences with provocation, and their perceptions of the success or perceived abuse of the defence within these two contexts[36].

As represented in Table 5.1 below, Hudson's (2006) principles will be used to frame an examination of Victorian and English respondent evaluations of the gendered operation of the partial defence of provocation across the two jurisdictions in three key areas.

Table 5.1: Debates surrounding the gendered operation of the partial defence of provocation and Hudson's principles of justice



In addition to these three specific focal areas, general evaluations of the gendered operation of the law of provocation also emerged from the interviews. In particular, a large proportion of Victorian respondents – predominantly from the prosecution and policy samples – were in agreement with the VLRC (2004) that the defence of

[36] Debates around the gendered nature of the continued operation of provocation in NSW will be examined in the following analysis chapter.

provocation was unsalvageable, largely due to perceived gender biases in the law's operation in this area. As described by one policy respondent, 'because of the way it had been formulated it ended up operating in a really gender skewed way' (VicPolicyD). In support of this, a Victorian prosecutorial respondent commented that, 'In many, many cases where provocation was relied on it was just an excuse for someone behaving in a murderous and outrageous fashion' (VicProsecutorA). However, this view was contrasted with the experiences of respondents from the Victorian defence bar, who in the main expressed the view that the provocation defence, prior to its abolition, did not operate in a gender-biased way. As will be explored throughout this chapter, these respondents often considered that the abuse of provocation in key cases, like *Ramage*, had created an inaccurate perception of a gender bias within the law.

Concurring with respondents from the Victorian defence sample, a significant number of English respondents considered that the law was not as gender biased in its operation as was publicly perceived. As one policy respondent commented, 'I certainly didn't think there was any real gender bias' (UKPolicyB). This policy respondent attributed public outcry surrounding gender bias in the law of homicide to 'one or two high-profile cases', but felt that these cases did not provide sufficient evidence for the need for 'a radical change of common law doctrine which has existed for many years' (UKPolicyB). Furthermore, this policy respondent explained that:

> There was this perception that the system discriminates against women in particular, battered wives and that the provocation defence wasn't working very well; that it was working in a way that favoured men because it was built on a male perspective of provocation and anger and so forth. So there was a lot of perception and anecdotal evidence that things weren't working out but we didn't have any hard and fast evidence of that … I think you'll find that the empirical evidence just doesn't support it. (UKPolicyB)

In agreement, another English policy respondent commented that in researching the operation of the provocation defence:

> What I didn't find, which I think the Law Commission might have been slightly disappointed about, I didn't find any gender bias … I think there was an expectation that the research would reveal some gender bias but I didn't actually find that. (UKPolicyC)

Similarly, an English judicial respondent commented that 'I failed to see what the hoo haa was about … I couldn't see the problem with the old law to be honest' (UKJudgeF). However, in contrast, a smaller number of respondents from the English counsel sample considered that the provocation defence had actively promoted gender bias in the criminal justice system. One English defence counsel respondent linked the production of gender bias to the formulation of the provocation defence to accommodate the situation in which men kill, while ignoring that of women:

> If it's the man accused of killing the woman because he walks in and finds his wife in bed with another man – that [provocation] used to work quite well. There was an imbalance because women who were slow burn, as a result of years of domestic abuse, they used to fail on provocation because they couldn't show a sudden and immediate loss of self-control. (UKCounselD)

Another English counsel respondent pointed to the masculinised formulation of provocation as a reason for its use mostly by men, commenting that, 'As almost all defences are, they were all developed with men in mind. So a complete sudden snap and loss of self-control is a male reaction almost unanimously' (UKCounselH). These respondent viewpoints support a large bank of prior feminist critique which has highlighted the difficulties that arise from the construction of the law by and as 'white man's' justice (Currie 1995; Hudson 2006; MacKinnon 1991; Naffine 1990; Wells 2004).

The following three sections explore the three key themes that emerged from the interviews regarding the gendered operation of the partial defence of provocation in these two jurisdictions. Specifically, respondent perceptions of the use of the defence by men who kill a female intimate partner, the subsequent treatment of female victims in trials in which the provocation defence is raised, and the use of the partial defence

by female defendants who kill within the context of prolonged family violence are examined in turn.

A Jealous Man's Defence

> Most people who kill are men. I understand that some women kill also but usually within a domestic situation it's a man killing a woman. In my mind and experience often that is the result of the loss of the relationship, often triggered by infidelity. (UKCounselP)

Across both the English and Victorian jurisdiction, but particularly evident in the discussions with the Victorian respondents, concerns over the operation of the former partial defence of provocation were often focused on the perceived abuse of the defence by men who kill a female intimate partner. As described by one Victorian prosecutor, 'there were many cases of ridiculous defences of provocation that succeeded in reducing shocking crimes of murder to manslaughter and often in the domestic murder situation' (VicProsecutorA). This perception was evident across all Victorian samples interviewed, but was most apparent in discussions with Victorian prosecutorial, judicial and policy representatives, with one judicial respondent observing that 'the whole question of whether homicide law was in a sense directed towards assisting or at least protecting men, and men's behaviours and exposing women' was problematic (VicJudgeG). In commenting on the use of provocation in specific cases of intimate homicide, one Victorian policy respondent reflected that:

> I have appeared in a number of homicide cases representing people who were able to avail themselves of provocation in circumstances where a jealous or angry husband or boyfriend had killed the partner … and whilst it was obviously an advantage for them to have a conviction for manslaughter instead of murder and a much lesser sentence, as a person I thought it was wrong that jealous rage could mitigate to manslaughter. (VicPolicyD)

These Victorian respondent perceptions of the abuse of the provocation defence by men who have killed a female intimate partner are supported by a case analysis of

successful provocation defences in Victoria in the period immediately prior to the abolition of the partial defence. As shown in Table 5.2, in the five years prior to its abolition in Victoria, the partial defence of provocation was primarily used by men who killed within the context of an intimate relationship (eight of the 14 cases). In contrast to the two cases in which a female defendant killed a male intimate partner[37], the cases of intimate homicide perpetrated by a male that resulted in a manslaughter by provocation conviction occurred mainly within the context of either relationship separation or alleged infidelity. As overviewed in Chapter 2, the dangers associated with the use of provocation as a defence within this context are well established throughout the research (Bradfield 2000; Forell 2006; Howe 1999; MOJ 2008; Rozelle 2005; VLRC 2004).

[37] The intimate homicide cases of *Denney* (*R v Denney* [2000] VSC 323, hereinafter, *Denny*) and *Tran (R v Thao Thi Tran* [2005] VSC 220, hereinafter *Tran*) involved a female defendant and a male victim who were married.

Table 5.2: Cases of provocation manslaughter, January 2000 – November 2005

Defendant (trial year)	Plea/ trial	Defendant sex– victim sex	Relationship between victim and offender	Nature of provocation	Sentence max/min
Feti Turan (2000)	Verdict	Male–Male	Offender killed son	Verbal exchange	4yrs/2yrs
Cornelis Teeken (2000)	Verdict	Male–Male	Victim in relationship with offender's ex-wife	Verbal exchange	5yrs/3yrs
Barbara Denney (2000)	Verdict	Female– Male	Married	Violence	3yrs – wholly suspended
Teklemariam Abebe (2000)	Plea	Male–Male	Victim in relationship with offender's ex-wife	Verbal exchange	8yrs/6yrs
David Changan (2001)	Verdict	Male–Male	Offender killed father	Verbal exchange	6yrs/3yrs
Francesco Farfalla (2001)	Verdict	Male–Female	Intimate relationship	Verbal exchange	9yrs/7yrs
Jesus Butay (2001)	Verdict	Male–Female	Married	Verbal exchange	8yrs/6yrs
Albert Goodwin (2001)	Plea	Male–Female	Married	Verbal exchange	6yrs/2yrs, 8months
Dennis Hunter (2002)	Verdict	Male–Female	Married	Verbal exchange and violence	7yrs/4yrs, 6months
PP (youth offender) (2002)	Verdict	Male–Male	None	Violence	6yrs/4yrs
Nanh Nguyen (2003)	Verdict	Male–Male	Acquaintances	Verbal exchange including threat of violence	8yrs/5yrs
Vangel Stavreski (2004)	Plea	Male–Female	Offender killed daughter	Violence	3yrs – wholly suspended
James Ramage (2004)	Verdict	Male– Female	Estranged marriage	Verbal exchange	11yrs/8yrs
Thao Tran (2005)	Verdict	Female– Male	Married	Violence	3yrs – wholly suspended

Additionally, in nine of the 14 cases in which provocation was successfully raised in the five years prior to its abolition in Victoria, the nature of the provocation was cited

as a verbal exchange, and in one of these cases only, also a threat of violence. As overviewed in Chapter 2, research has long recognised the difficulties that arise when provocation is raised on the basis of words alone, particularly given that the victim is unable to verify the verbal exchange (Morgan 1997; Yule 2007). The use of alternative categories to murder within the context of relationship separation and in defence of provoking incidents resulting from verbal exchanges is further examined in the following chapter in relation to the continued operation of provocation in NSW and the initial operation of defensive homicide in Victoria.

Although not raised as frequently as in the Victorian interviews, English respondents also recognised – but often stopped short of critiquing – the use of the partial defence of provocation by male perpetrators in defence of lethal violence provoked by relationship separation or infidelity. Commenting on the use of provocation within this context, one English counsel respondent stated that 'murder shouldn't be an alternative to divorce' (UKCounselG). Another counsel respondent described that:

> Provocation occurs quite a lot in domestic killings in the sense that the wife goes off with another man and says to her husband, 'I've never liked you, you've never been good in bed', so the husband batters her skull in with a hammer or something. Should he be found guilty of murder then? Probably. (UKCounselA)

In answering this question with a contrasting view, another English respondent commented that:

> Partial defences of provocation have had their roots in the crime of passion, this notion particularly between men and women, that women drive men, either through sex or through nagging, to perform all sorts of crazed acts … there has to be some way of mitigating the consequence of this passion. (UKCounselG)

In reflecting on the successful use of provocation within this context, one English respondent considered that in many cases in which provocation was used, 'if it's the

man accused of killing the woman because he walks in and finds his wife in bed with another man – that used to work quite well' UKCounselD). These reflections support the findings of previous research on the use of provocation within the English context, such as that of Burton (2003: 280), who has noted that:

> the jealous male defence retains a firm hold in England and Wales. There are a number of cases where prosecutors have accepted guilty pleas to manslaughter resulting from provocation or juries have allowed the provocation defence to succeed where men have killed allegedly unfaithful women.

Critiques of the use of provocation within this context are well established within past research, as was previously examined in Chapter 2. Most notably, researchers have argued that a concerning effect of the use of provocation by such defendants is that subsequently the deceased female victim is put on trial (Cleary 2006a; Harman 2003; Howe 1999; Morgan 1997; Naylor 2002; Tyson 1999; Wells 2000; Yule 2007) – an assertion that is considered in more detail in the following section. Additionally, when considered in the light of Hudson's (2006) principles of justice, the use of the provocation defence within this context becomes more problematic given that it impedes the law's ability to achieve the principle of discursiveness. By privileging the stories of men who kill within the context of relationship separation and alleged infidelity, the law of homicide – and the criminal justice system more broadly – is arguably failing to bring into the discursive space the silenced voices of the female victim of homicide. As such, an accurate account 'of "what happened" and of the responsibility and culpabilities involved' cannot be established (Hudson 2006: 34).

Female Victims and the Provocation Defence

A second key theme to emerge from the interviews related to the perceived role that the partial defence of provocation played prior to its reform in producing courtroom narratives of victim blame. In both Victoria and England, respondent evaluations of the treatment of the (deceased) female victim during trials in which provocation was raised as a defence were strongly tied to discussions surrounding the use of provocation by male perpetrators of intimate partner homicide. Specifically, this issue was most frequently raised by respondents from the policy, prosecution and

judicial samples, and in the Victorian-based interviews. In examining these respondent evaluations, this research applies Hudson's (2006) principle of reflectiveness to consider the implications of the emergence of these narratives in the courtroom, in the period prior to the abolition of provocation as a partial defence to murder in the Victorian and English criminal justice systems. Specifically, it considers whether the representation of the female victim in trials in which provocation is used accurately reflects the individual case factors and social context within which the offence is committed.

Victorian policy respondents expressed the view that in practice the partial defence of provocation had produced trial narratives that appeared to put the deceased victim, often female, on trial, while legitimising the use of lethal violence perpetrated against her. As described by one Victorian respondent:

> I couldn't help but conclude that it [provocation] was conceptually flawed. It seemed that the assumption we started with was that women bring about violence, that the violence that's perpetrated against them is brought about by the woman; the murdered woman. It appeared to me that it was the murdered woman who was on trial and in particular it had its expression in the belittling of the woman and the character assassination, and all the while the man was assuming the position of victim. (VicPolicyA)

Another Victorian policy respondent claimed that in operation the provocation defence would often 'adduce a whole lot of evidence that blackened the character of the victim and made the accused out to be a saint' (VicPolicyD). Such an approach, another policy respondent argued, was often 'based around blaming the women for the violence inflicted by men' (VicPolicyA). This view was shared by a smaller number of the Victorian defence respondents, one of whom reflected that in provocation trials 'when we used to speak about women being unfaithful and slutty, it was verging into the Texas defence – and the Texas defence is "deserved killin'"' (VicDefenceC). In questioning the effect that these narratives had upon the jury, one Victorian policy respondent commented that 'There are times when juries are quite enlightened on this topic and don't fall for the misogyny and the woman blaming

narrative but unfortunately the cases in which they do are problematic too' (VicPolicyA).

These responses reflect the concerns of a significant volume of feminist scholarship and victimological studies that have detailed the ways a woman's character has been used to position her as an unfavourable victim throughout both homicide and rape trials (Currie 1995; Horder & Hughes 2007; Howe 2002; Kaspiew 1995; Kennedy 2005; Lees 1997; Mackinnon 1991; McBarnet 1983; Temkin & Krahe 2008). In listing the types of victim representations common in sexual assault cases, Mackinnon (1991: 1306) refers to judicial narratives that are 'condescending, demeaning, hostile, humiliating and indifferent'. Extending this to a consideration of the factors that influence juror decision-making, Temkin and Krahe (2008: 45) have commented that 'It has long been recognised that information about the victim's sexual history can have a powerful impact on juror's decisions, undermining her credibility and leading to the acquittal of the defendant'.

Given that in homicide trials cross-examination of the victim obviously cannot occur, respondent viewpoints instead reflect that the examination of the victim's character in these cases becomes woven throughout the trial and sentencing process without a clear point at which the prosecution can put forward a counter-representation. The problems that arise from the missing voice of the victim in such trials were recognised by respondents during both the Victorian and English interviews. As one Victorian prosecutorial respondent commented, 'it was easy when the person's dead to create a picture of something that wasn't really an accurate picture … and there was never a victim there to say, "well hang on, it didn't happen like that"' (VicProsecutorC). In building on this concern, one Victorian defence respondent explained how this could be used to the defence's advantage: 'This isn't meant to be in any way callous but the old saying "dead men tell no tales" has a lot going for it because in a sense you don't have a witness for the prosecution who can say "this is what happened to me"' (VicDefenceB).

While Hudson (2006: 38) has argued that justice fails to be reflective when key experiences surrounding 'race, gender, being in an abusive relationship and economic

coercion' are not included within the criminal justice process, respondent viewpoints surrounding the partial defence of provocation also suggest that the principle of reflectiveness is equally not achieved when there is an excessive focus upon the details of the female victim's life which are not relevant to questions of an offender's culpability and blameworthiness in the context of an intimate homicide trial. When this occurs, the principle of discursiveness is arguably also not met and confusion ensues as to which party – the offender or the victim – is on trial.

Recognition of the production of problematic narratives in provocation trials also emerged from the English interviews. One respondent commented that often in intimate homicide provocation cases 'the intimate, personal, intrusive character assassination classically happens in the domestic cases' (UKCounselD). Further highlighting this, and recognising the difficulty of overcoming the influence of these narratives, another counsel respondent commented that 'the defendant is able to say, "she is a bitch, she had a boyfriend, she is manipulative" and it is very hard to counter that' (UKCounselC). One English policy respondent expanded on this critique:

> There is an incentive to completely go to town and blacken the name of the absent victim and say it was all their fault because they can't come back and say anything … they can't tell their side of the story … there is a very, very great incentive for the accused to do that and to cast the victim in an extremely poor light. (UKPolicyA)

Similarly, an English counsel respondent reflected on his involvement in a recent trial in which he had witnessed the mobilisation of such narratives:

> the family had to sit there while he did his best to assassinate her character in every conceivable way. There are limits to what the prosecution can do to rebut that because her character strictly speaking isn't in issue … It was very intrusive … Not only was he trying to make out that his wife knew about his affairs and didn't care, he went further than that and he said she was having lots of affairs, she was an alcoholic, he made out that it was her fault that he owed money, it was a deliberate attempt in every conceivable way to turn everything that pointed towards his bad behaviour to her. (UKCounselD)

Additionally, in linking these problematic narratives to intimate partner homicide trials, this respondent commented that victim blaming 'is difficult and it does happen in many cases where one partner kills another. There is an attempt to blacken the character of the dead partner' (UKCounselD). As canvassed earlier in Chapter 2, these critiques mirror those evident throughout research over the past 10 years that has argued that the operation of the partial defence of provocation allows for the denigration of the character of the female victim of homicide (Cleary 2006a; Harman 2003; Howe 1999; Morgan 1997; Naylor 2002; Tyson 1999; Wells 2000; Yule 2007).

This clear acknowledgement among English and Victorian respondents of the dangers of the provocation defence lends weight to suggestions that as a partial defence to murder provocation was complicit in sustaining problematic gendered discourses. In illustrating the law's failure, prior to its reform, to uphold the principle of reflectiveness, this also supports arguments that the defence of provocation needed to be reformed if the legal system was going to make a serious attempt at limiting recourse to socially unacceptable applications of gender relations in the context of intimate partner homicide. Moreover, in recognising the need for the law to also be discursive in order to overcome the influence of these problematic narratives, one English counsel respondent commented, 'I do think that one of the ways to minimise the problems of provocation in domestic killings would be to get a much more honest defence by allowing both sides to put in a lot more of the background evidence' (UKCounselC). This respondent argued that by also including a discursive space for the stories of both the male perpetrator, and importantly the female victim, to be heard, the law may better overcome the problematic narratives attributed to intimate femicide and provocation trials.

Provocation for Battered Women who Kill

A third key theme that emerged from the interviews in relation to the gendered operation of the partial defence prior to its reform was related to respondent views on the use of provocation by women who kill within the context of family violence. The English and Victorian interviews revealed tensions around whether the legal category of provocation was indeed sufficient to respond to women's experiences of violence, or whether it was insufficient to support women's claims, and therefore demonstrating

the need for a new legal category to better respond to homicides occurring within this context. Specifically, an analysis of respondents' views on the use of the partial defence of provocation in this context questioned whether Hudson's (2006) principle of discursiveness, and the promise of including within the legal discursive space women who had previously been left outside it, was being achieved by the use of provocation by female defendants who kill in response to prolonged family violence.

Some of the respondents – mainly from the Victorian defence and English legal counsel samples – commented that in their experience over the past 10 years the partial defence of provocation had been effectively used by female defendants. A Victorian defence respondent described how 'provocation worked a treat for women', and that 'towards the end it didn't work so well for blokes, it worked well for women … it was a really handy thing' (VicDefenceC). This argument was also raised by a respondent from the Victorian prosecution sample, who reflected that 'I certainly saw it being used with some frequency in relation to women who killed men. I'm not sure it was as sexist and as gender driven as it was put up to be' (VicProsecutorG). Thus, these respondents believed that ultimately the abolition of provocation would be to the disadvantage of battered women who kill – an impact of the homicide law reforms that is examined in more detail in the following chapter.

In contrast to the Victorian defence respondent viewpoints, throughout the English interviews respondents largely argued that in operation provocation had failed to cater to the unique context within which women kill in response to prolonged family violence. As described by one English respondent, 'the difficulty there was always, of course, that she being the weaker partner has to pick her moment and the minute that happens the element of premeditation appears to come into it, which therefore robs her of the opportunity to access the provocation defence' (UKCounselS). This problem was further described by another English respondent in reflecting that 'there was an imbalance because women who were slow burn – as a result of years and years of domestic abuse – they used to fail on provocation because they couldn't show a sudden and immediate loss of self-control' (UKCounselD). This argument was also advanced by an English judicial respondent who stated that battered women:

> would not ordinarily have provocation available as a defence because provocation required this loss of self-control. So provocation did not cover what might be termed as excessive self-defence cases, cases where the person was acting out of genuine fear but not an immediate fear. (UKJudgeA)

Adding to these observations, an English policy respondent described how in the period prior to the 2010 reforms, there was a growing perception that 'such cases were falling between a gap' and were being inadequately dealt with under the current law of homicide (UKPolicyA). This failure of the partial defence of provocation to accommodate women's stories of violence into the legal realm suggests a dominant opinion among the English respondents that through the operation of provocation the principle of discursiveness was not being followed prior to the implementation of reform.

However, in contrast to this view, there was a smaller sample of English respondents who believed that the law of provocation did adequately cater for homicides occurring within this context. These respondents reflected that 'it was working. I'm sure there were some hard cases in there but they modified it very effectively in relation to battered wives' (UKJudgeF), and that there was 'more scope to run it possibly with a woman' than with a male defendant (UKCounselQ).

In response to suggestions that the partial defence could be expanded to better fit the situations within which such female defendants kill, an English policy respondent argued that such as expansion could arguably:

> benefit in some ways the women who it is thought have been falling between the cracks … however, there is a risk that you will also benefit – because the law is gender neutral in its application – that you will also benefit men who may have responded to their wife's or partner's provocation. You will benefit them by broadening the defence when they were only responding if you like to a concession of adultery or something of that nature. There is a bit of a dilemma here about not wanting to expand the defence in ways that have

> undesirable side effects, even if they have beneficial effects that you intend. (UKPolicyA)

In agreement, Howe (2002: 43) has noted that 'those advocating the retention of provocation in order to assist women defendants pay far too high a price: the defence is retained for men who seem to get provoked in a much wider and far less compelling array of circumstances.' This comment also illustrates one of the key problems often associated with any significant reform package, whereby a reform may have unintended consequences in practice that undermine the original intentions of its implementation. This theme is explored in more detail in Chapter 6, which examines both the intended and the unintended consequences of homicide law reforms targeted at better catering to the situations within which women kill in response to recurring domestic abuse.

5.1.2 Community Values and Expectations of Justice

> It [provocation] was being used as a cloak, as a cover for deliberate murders that were then dressed up as something less than that and really some of the provocation defences that got up, if you can use that term, were ludicrous. And the community wouldn't cop that any more. (VicProsecutorA)

In addition to discussions of the gendered operation of the partial defence of provocation, another key theme to emerge from the interviews related to the perceived disconnect between the values promoted through the operation of the provocation defence and current community values and expectations of justice. Claims of such a disconnect were raised specifically by respondents in Victoria and England who advocated for the abolition of provocation as a partial defence to murder. These respondents argued that the need to bring the law of homicide up to date with current community values – a key goal of both the VLRC (2004) and the English Law Commission (2004) – provided ample reason for the abolition of the partial defence of provocation. As one Victorian prosecutorial respondent questioned, 'what decade do we live in here? This is no longer the age where you're entitled to lose your temper to such an extent just because they [the victim] might be fooling around'

(VicProsecutorD).

In drawing on the previously cited arguments concerning the gendered operation of the provocation defence, several Victorian respondents considered that the specific use of the provocation defence in intimate femicide cases was out of line with current community values. As one prosecutorial respondent commented, 'in reality why would anyone in the community think that just because she may not have been the nicest person in the world and may have treated him badly at times that he had any justification for doing what he did?' (VicProsecutorA). In agreement, a Victorian policy respondent reflected that 'when women were exercising their rights to, their equality rights, they were being murdered; and the notion that our society condoned that via the defence of provocation seemed not good' (VicPolicyC). A Victorian judicial respondent also posed that the problems surrounding the provocation defence did not 'sit well with 21st century law' (VicJudgeB).

Similar criticisms of the outdated values promoted by the operation of the partial defence of provocation were raised in interviews with English counsel respondents, one of whom argued that the very existence of provocation was not congruent with current values held by men within the community:

> to extend an excuse for an intention to kill as arising from an understandable motive because she just went on and on and on, again says really quite a lot about men. Murder shouldn't be an alternative to divorce and we lose sight as we look at ways of mitigating the penalty of murder, we lose sight of what by implication we are saying about the society that produces that particular type of excuse. (UKCounselG)

These arguments build upon prior research which has questioned whether a concession to human frailty in the form of provocation is still reflective of community values and expectations of justice (Brookbanks 2006: Clough 2010; Hulls 2005).

Additionally, a smaller number of respondents in both England and Victoria expressed the view that the provocation defence was outdated given that the abolition

of the death penalty had reduced the need for a concession to human frailty in situations of killing resulting from provocation. As explained by one Victorian policy respondent:

> Once we got rid of the death penalty for murder, and then the mandatory life sentence for murder, you could properly reflect a range of different culpabilities for homicide in sentencing. There was no longer a justification for allowing it. (VicPolicyD)

Despite England retaining a mandatory life sentence for murder, respondents from the legal counsel and judicial samples still argued that the abolition of the death penalty was a key reason for the subsequent abolition of provocation as a partial defence. As one English respondent proposed, 'It was used to mitigate the effects of the death penalty but once you've moved away from that you really don't need, I don't think, these very convoluted defences' (UKCounselE). The influence of restrictive sentencing practices on debates surrounding the need to either retain or abolish the partial defence of provocation are explored in more detail in Chapter 7.

5.1.3 The Importance of the Jury

Also central to debates around the partial defence of provocation has been the question of whether a person's loss of self-control in the face of a provoking incident should be decided upon by a jury or by a presiding judge (Dressler 2002; NSWLRC 1997). This issue also emerged throughout the interviews, during which contrasting views were evident across the research locations as to whether questions relating to the degree of provocation and the subsequent culpability of the offender should be considered by a judge or by a jury. In relation to Hudson's (2006) principles of justice, these debates question whether the individual circumstances of a case, which are relevant to upholding Hudson's principle of reflectiveness, and the stories of the individuals involved, which must be upheld for justice to be discursive, are better evaluated by a representative of the criminal justice system (the judge) or the community (the jury).

Within the Victorian sample, arguments in favour of the jury deciding upon questions related to provocation were evident from the discussions with defence and judicial respondents. As commented by one defence respondent, provocation was:

> the one area I always thought where the community has a real input into who it wants to call a murderer … It was very important because it was founded on the notion that ordinary people will understand that sometimes you lose control … and juries aren't stupid. They're the ones who decide whether it's murder or manslaughter not the judge, none of the others, they're the community and we should have always backed them up. But there you go. (VicDefenceJ)

A Victorian judicial respondent concurred with this view, claiming that 'juries are a good barometer for what the community thinks about these things' (VicJudgeH). This respondent also concluded that the public would be less likely to accept a sentence on the basis of provocation without a jury verdict that supported the mitigation. As explained by the respondent, 'the uninformed public is much more likely to accept that sort of thing from juries than from judges because they can't criticise juries because juries are them, but judges are sitting ducks' (VicJudgeH). Such an argument suggests that while the respondents believed that gender bias expressed by juror members would be acceptable to the public, such views emanating from the judiciary would be perceived as out of touch. Additionally, and as will be examined further in Chapter 7, NSW respondents countered arguments supporting the role of the jury in this regard by highlighting the role already played by members of the judiciary in ruling upon the degree of provocation at sentencing.

5.1.4 Provocation as a Hard Defence to Run

> You don't turn up the law because someone got it wrong once. I have never been in a case where I thought provocation was easy. It has always been very difficult to run, it's a hard defence and juries see through it if it's crap. (UKCounselK)

In expanding upon discussions about the importance of the jury in trials in which the provocation defence is raised, English and Victorian legal counsel often reflected that prior to its abolition in each of their jurisdictions there had been a declining acceptance of the defence, which ultimately mitigated the need for reform. As described by one Victorian defence counsel respondent, 'I think provocation was on the way out as a defence anyway, except in the most extreme cases and they were there for the jury to decide' (VicDefenceA). In agreement, another reflected that, 'towards the end it didn't work so well' (VicDefenceC), and a defence respondent observed that:

> I think two abhorrent results have led to enormous angst and the perception is wrong that juries are falling over themselves to acquit men of killing their wives, spouses, girlfriends and so on of murder on the basis of provocation. When in actual fact juries aren't that stupid. I've got to say that it was a lot easier to get provocation up for a male 30 years ago than it was the last 10 years prior to its abolition. (VicDefenceI)

In mirroring the above comment, various Victorian respondents linked the decline of the successful use of the provocation defence to the fact that, over time, juries had become less accepting of the traditional 'she asked for it' defence often attributed to male-perpetrated provocation defences. The reduced amenability of jury members to the use of legal categories dependent upon problematic gender discourses and stereotypes of gender relations was thus identified by respondents as a significant factor. As one Victorian defence respondent reflected:

> The days have long since gone when the husband can say, 'you know, I came home and found her in bed with my workmate, my best mate, so I shot them both, sort of thing, or I shot her, you know let him go and shot her'. But juries don't, they haven't bought that for a long time. (VicDefenceA)

A prosecutorial respondent expressed a similar sentiment when considering the successful use of the defence in *Ramage*, commenting, 'I know it worked in the *Ramage* case, which was really why it changed … but it was a pretty risky defence …

it didn't work very often in my experience so I wouldn't have changed it' (VicProsecutorB).

This opinion was also supported by some Victorian judicial respondents, one of whom reflected that, 'as we've become more enlightened about not tolerating relationships where men oppress women, juries were less likely to allow provocation defences unless it was very clear' (VicJudgeH). Another Victorian judicial respondent observed, 'I think that in most of the domestic murder situations, in the latter years, most of the time wife-killers didn't get this up. It just didn't work that way' (VicJudgeC). In explaining why the final report of the VLRC (2004) did not find that the defence had become more difficult to prove in the years immediately prior to reform, a judicial respondent noted that:

> things had toughened since the period they sampled. I know it was only a couple of years difference but I think the reality is that juries did assess these things within the framework of current understandings of behaviour and relationships, and it's not true that it was succeeding all that often. (VicJudgeC)

Mirroring the Victorian interview findings, English respondents also advanced the argument that given the declining acceptance of the partial defence in the period leading up to its abolition in England in October 2010, there was a minimal need for its abolition. As described by one judicial respondent, 'provocation defences are not nearly as successful in practice as sometimes is made to thought' (UKJudgeA). In agreement with this point, another judicial respondent commented that:

> I couldn't see the problem with the old law to be honest … I don't honestly remember one genuine case of provocation but it was probably a useful safeguard to have in case you need to use it on occasion … I don't ever remember a case of provocation being successful … In nine years experience as a silk I never saw it run successfully. (UKJudgeF)

Another English judicial respondent similarly reflected that:

> Provocation defences are not nearly as successful in practice as sometimes is made to think. My own personal experience of trying murder cases is that that sort of defence would not succeed … I can think, for example, of two particular cases which I tried, both of which involved a provocation defence, where I can well have imagined that a jury might have said, 'yes, we'll accept that' and they didn't. In both cases they convicted of murder and I think they were absolutely right. (UKJudgeA)

Similar explanations for the decline in the use of the provocation defence were offered by English counsel respondents, with one commenting that 'juries were actually quite slow to acquit of murder and convict of manslaughter on the grounds of provocation … I think they look at it very, very cautiously before they decide to excuse murder and find manslaughter instead' (UKCounselE). In agreement, other counsel respondents claimed that provocation was a 'hard defence to run' (UKCounselL), that 'it was becoming more difficult to run' (UKCounselC), and that it was 'a difficult one to run' (UKCounselQ). Thus, these respondents argued that given the perceived difficulty of raising a successful provocation defence in practice, the move towards its abolition in Victoria and England had become increasingly unnecessary in the period immediately prior to the implementation of these reforms.

5.2 The Provocation Problem: Victorian and English Approaches to Reform

> There's much agreement that the old law of provocation was deficient, there's less agreement as to its reform. (VicPolicyB)

Arguments concerning the gendered operation of the provocation defence were also apparent in the Victorian and English respondent evaluations of the approach taken to reforming the partial defence of provocation in their jurisdiction[38]. Specifically, during the interviews respondents expressed their opinions about the Victorian and English abolition of provocation as a partial defence to murder in

[38] Given that no significant reform to this area of homicide law has been implemented in the past 10 years in NSW, this jurisdiction is not discussed in the remainder of this chapter. However, later analysis chapters do examine arguments posed by respondents favouring the future need to address this aspect of the law, and in some cases, the need for the abolition of provocation as a partial defence to murder in NSW (see Chapter 7).

November 2005 and October 2010, respectively. This research sought to understand whether those within the legal system perceived that the approaches taken to reforming provocation in these two jurisdictions had been of benefit or detriment to the law of homicide, and more specifically, whether they would serve to promote the principles of reflectiveness and discursiveness in the law of homicide.

In discussing the reforms implemented in the Victorian and English criminal justice systems, the respondents' general evaluations of the process by which homicide law reform is achieved also emerged. Respondents were often critical of the actual process of law reform, in particular the apparent lack of consultation prior to the implementation of reforms. Given their perceived inability to contribute to and influence law reforms at the time of their implementation, the perceptions of the legal respondents involved in this research is essential to inform understanding of how the reforms have been received by legal practitioners in each jurisdiction.

5.2.1 The Victorian Abolition of Provocation

In response to the recommendations of the VLRC (2004), the partial defence of provocation was abolished in Victoria on 23 November 2005, in what was described as one of 'the most significant reforms to homicide law since the death penalty was abolished' (Office of the Attorney-General 2005). As discussed in Chapter 2, the abolition of the provocation defence in Victoria, alongside a host of other reforms to the law of homicide, sought to overcome the gender-biased operation of the law, particularly in relation to the operation of the partial defences to murder in the trials of men who kill female intimate partners. The recommendations of the VLRC (2004) can be understood as seeking to uphold Hudson's (2006) principle of discursiveness insofar as they attempted to bring into the legal sphere women's accounts of violence within intimate relationships, while also recognising the importance of naming the crime of intimate femicide as murder rather than manslaughter, and ensuring that the legal process did not mimic the power relations underpinning violence against women.

Five years following the implementation of these reforms, this research has examined whether Victorian respondents believed that the government had imposed the best

model of reform for addressing the problems posed by provocation. The resulting responses drew upon ongoing debates surrounding the operation of provocation in Victoria, as well as a specific examination of key aspects of the 2005 homicide law reforms, most notably, the implementation of a new offence of defensive homicide.

In support of the recommendations of the VLRC, and the subsequent action by the Victorian Government, two-thirds of the Victorian respondents considered that the partial defence of provocation was beyond salvation and needed to be abolished. In drawing on the debates explored in the first part of this chapter, these respondents predominantly discussed their experiences with gender bias in the operation of the provocation defence, the production of courtroom narratives of blame, and the perceived outdated nature of this partial defence in Victoria. The arguments favouring abolition are captured in the respondents' descriptions of provocation as 'beyond redemption' (VicPolicyC) and 'discredited' (VicProsecutorA).

Specifically, Victorian prosecutorial respondents in favour of abolition claimed that in practice the partial defence had extended beyond what could acceptably be considered manslaughter. As one prosecutor commented, 'the insult or something justifying a man turning around and killing his partner, I mean really I just think the test for provocation had become far too loose' (VicProsecutorG). In agreement, another Victorian prosecutor reflected that the defence had 'come in for a very particular purpose and then got extended to another purpose', and that the extension of the partial defence to apply to domestic homicides 'was never intended to be', and as such Victorian homicide law is 'better off without it' (VicProsecutorH).

In contrast, Victorian respondents who opposed the abolition of the defence represented 10 of the 31 respondents interviewed, and were mainly from the defence counsel sample (seven of the 10 respondents). Mirroring the debates cited above about provocation as a partial defence to murder, these respondents reflected on the important role of the community, and thus the jury, in deciding upon the degree of provocation, as well as the perceived declining acceptance of the partial defence within the Victorian criminal justice system. Opposition to the Victorian Government's decision to abolish the defence of provocation is captured in the

following comments made by one Victorian defence respondent that 'I think it was a sorry day the day provocation was abolished', and that:

> I think the worst thing that's happened is the abolition of provocation. I think that was a completely stupid thing to do … it was absurd … the rationale was that it was a defence used by men. You don't abolish it because it's used by men. If it's used improperly juries can usually see through it. (VicDefenceJ)

Victorian respondents who opposed the abolition of the defence also highlighted the ways in which it could have been retained and reformed. Instead of abolition, some of these respondents proposed that it could have been restricted to 'ensure that something like Ramage didn't happen again' (VicDefenceF). In explaining how this could have been achieved, a prosecutorial respondent commented that:

> I would have preferred to see them strengthen the test for provocation myself. In the sense of setting out some outlines as to what does not constitute sufficient provocation or maybe having a guideline that a judge would properly look at, because we have a kind of threshold where the judge would say, 'Okay, provocation is not open here', but it was really low level and any hint of it was enough … I would have preferred to see something like that and to specifically put in there that romantic stuff is not good enough. (VicProsecutorD)

These suggestions of alternatives to abolition build upon those proposed throughout the consultation period prior to the abolition of provocation in Victoria, as part of which several advocates for reform argued that the availability of the defence could be limited to eradicate cases where males have killed in situations of relationship estrangement and separation (McSherry 2005b; Gorman 1999). However, in critiquing these suggestions, one Victorian policy respondent commented that if a reform package aimed at restricting the operation of the defence had been implemented there would have been the inevitable possibility that it would be 'misused' and 'manipulated by defence counsel' (VicPolicyC). This draws upon

arguments concerning the often unintended effects of law reform, which are explored in more detail in the following analysis chapter.

Examining the Influence of Ramage

> The case, the *Ramage* case, I spoke to the defence barrister the night he got that verdict and I said, 'I think you've just done a great disservice to the criminal law' because I could see that it would be used as a catalyst to do exactly what happened and that they would abolish provocation because Rob Hulls makes noises from time to time and he makes it quite clear that he wants to appease women at the drop of a hat. (VicDefenceI)

From the discussions surrounding the abolition of the provocation defence within the Victorian interviews inevitably emerged recognition among the respondents of the key role played by the controversial 2004 trial and sentencing of James Ramage. Respondents across all Victorian samples frequently expressed the view that the case was a key driver for the government in implementing the recommendations of the VLRC (2004). Specifically, respondents commented that while *Ramage* was not 'important to the Law Reform Commission, it was important to parliament' (VicPolicyC). In agreement, Victorian prosecutorial respondents believed that the case was the 'impetus for it [provocation] being abolished' (VicProsecutorA), and that *Ramage* represented 'the high watermark of the provocation defence, which as you know was a catalyst for getting rid of it' (VicProsecutorH).

In acknowledging the significant influence of the *Ramage* case on the government's 2005 reforms, Victorian respondents also questioned whether the case represented a one-off perverse verdict or a state-wide wake-up call as to the gender-biased nature of the partial defence of provocation. In considering this question in the interviews, contrasting viewpoints were evident across the four Victorian sample groups. While a strong recognition prevailed among prosecution and policy respondents that the *Ramage* case provided a much needed wake-up call to the Victorian justice system and the public about the problematic operation of the provocation defence, a smaller sample of defence respondents argued that *Ramage* was a unique example of the

injustice of the provocation defence and was not representative of how it had operated in the majority of cases.

The respondents who held the opinion that the *Ramage* case was representative of the Victorian operation of provocation more broadly expressed their dismay and opposition to the verdict obtained in *Ramage*. Such a response is captured in the following comment made by one Victorian policy respondent: 'This man knocks her to the ground, he dumps her in a bush grave, he hasn't murdered her?' (VicPolicyA). This view also highlights the perceived importance among these respondents of the need to correctly label a homicide as murder – a labelling which several respondents argued provides the necessary legal recognition of the harm perpetrated upon the victim. Using the *Ramage* case as a key illustration, these Victorian respondents often drew upon the earlier explored critiques of the role that the partial defence played in this case, in allowing the victim, Julie Ramage, to be put on trial and in using her words to legitimise the use of lethal violence against her.

In contrast, however, a smaller sample of Victorian respondents – all from the defence sample – while acknowledging that the government was motivated by the outcry over *Ramage*, were critical of the influential role played by the 2004 case. One respondent commented, 'I think it got changed for the wrong reasons, because you get a couple of so-called perverse or strange decisions and things that create publicity. The vast majority of times it was working okay' (VicDefenceB). In agreement, while recognising that the verdict in *Ramage* was indeed 'perverse', another Victorian defence respondent claimed that the subsequent abolition of the provocation defence following *Ramage* was 'media driven' and 'a knee-jerk political reaction' to the case (VicDefenceH). Although conflicting, these opinions reflect the important role that is often played by key cases, and the media, in generating public and political support for law reform, of which *Ramage* appears an important example within the Victorian context.

Introducing Defensive Homicide

Also central to the respondent evaluations of the 2005 reforms to the Victorian law of homicide was the introduction of the new offence of defensive homicide. As

outlined in Chapter 2, defensive homicide was introduced into Victoria in November 2005, alongside the abolition of the provocation defence. The offence operates such that a person who kills another in the belief that their acts were necessary to defend either themselves or another person, but has no reasonable grounds for that belief, may be convicted of defensive homicide, rather than the more serious offence of murder. For female offenders, the introduction of the offence of defensive homicide was intended to bring into the discursive legal realm women who had experienced long-term abuse at the hands of the intimate partners they eventually killed. While a detailed analysis of the operation of defensive homicide over the first five years of its operation will be conducted in the following chapter, this chapter considers the respondents' views of the implementation of and need for this alternative category of homicide within the Victorian law of homicide.

Support for the implementation of defensive homicide was primarily linked by half of the Victorian respondents interviewed to the need for the Victorian law of homicide to better cater for the unique circumstances in which persons (often women) kill in response to prolonged family violence. In considering the implementation of the offence as a safety net for women who kill in the context of prolonged family violence (DOJ 2010), these respondents described the offence as a 'sensible' inclusion, while noting that 'if you didn't have defensive homicide there would be a real risk that many people who have that sort of hypersensitivity to the first sign of the abuse cycle, that juries will see the response as being excessive' (VicPolicyD).

In contrast, half of the Victorian respondents were critical of the introduction of defensive homicide, with one respondent describing the offence as 'unnecessary' (VicPolicyC). Specifically, respondents from the Victorian policy sample argued that it 'would be too easy to get women off on defensive homicide when they should be off on self-defence' (VicPolicyC). These respondents also believed that women who kill in this context are 'really much more deserving of understanding and pity' and should be entitled to 'a complete self-defence defence' (VicPolicyD). These opinions mirror the findings of previous research conducted by Morgan (2002), in which she argued that battered women who kill their abusers would not need to access

alternative legal categories if the law of self-defence adequately catered for them. These opinions, alongside the operation of defensive homicide since 2005, are considered in more detail in the following chapter. Thus, while the above analysis has examined respondent evaluations of the reforms implemented in the Victorian criminal justice system in 2005, the following analysis chapter expands upon these opinions by undertaking a more nuanced analysis of the effects of these reforms, in relation to both the abolition of the provocation defence and the initial operation of defensive homicide.

5.2.2 Replacing Provocation in England: The Partial Defence of Loss of Control

> The new reform is more or less exactly the same as the last new reform and the one before that. Everybody knows what to do. Two children could put together something better than what we have at the moment. It's not lack of ideas; it is a lack of will. (UKCounselG)

Within the English context, this research sought to analyse respondent views of the approach taken to reforming the English law of homicide in October 2010. From the interviews emerged the respondents' evaluations of the recommendations of the Law Commission as well as the subsequent reforms implemented by the government, specifically, the creation of a new partial defence of loss of control. Mirroring the Victorian interview findings, respondents from the English criminal justice system were largely in favour of the abolition of provocation as a partial defence to murder, with over half of the 29 respondents favouring this model of reform. However, a smaller sample of English respondents, predominantly from the counsel and judicial samples, did oppose the abolition of provocation as a partial defence to murder. These respondents overwhelmingly considered that the continued implementation of a mandatory life sentence for murder in English sentencing legislation meant that alternatives to murder, such as provocation manslaughter, were essential[39].

[39] Within this research, the mandatory life sentence for murder was unique to this jurisdiction, and respondents' opinions surrounding its operation are further explored in Chapter 7.

> there have been numerous cases where interfering in detail, tinkering with what the Law Commission have done, skews the whole approach that the Law Commission have taken. This is one of them. (UKCounselD)

Central to the respondent views of the 2010 homicide law reforms in England was a critique of the significant difference between the recommendations proposed by the Law Commission (2004) and the subsequent legislation enacted by the government in the *Coroner's and Justice Act 2009*. As covered in Chapter 2, the Law Commission (2006) recommended that the defence of provocation should be retained but reformed to include only cases where persons kill in response to gross provocation or in response to a fear of serious violence. The Commission also recommended that the requirement of loss of self-control be removed from the defence.

Throughout the interviews, English respondents from all samples praised the Law Commission's recommendations as a preferable model of reform than that subsequently implemented by the government. This preference is captured in the following comments of one English counsel respondent:

> My personal view is that we should listen to the Law Commission. If the Law Commission proposes statutory change based on evidence and research then although we live in a parliamentary democracy where people can interfere with that I think there should be a presumption that you legislate in accordance with what the Law Commission have recommended. (UKCounselD)

In agreement, other English counsel respondents commented that they 'would much prefer to see the Law Commission's proposal' implemented (UKCounselE), that 'dividing it up into brackets might prove to be a good thing' (UKCounselR), and that the Commission's recommendations were much 'neater' and 'better' than the reforms implemented by the government (UKCounselH).

Further expressing their preference for the reforms proposed by the Law Commission, respondents across all English samples criticised the government's unwillingness to adopt its recommendations. This perception is evident in the comments made by English policy respondents who criticised the government's adoption of a reform package that 'chopped and changed' from what the Commission had recommended (UKPolicyA). English judicial and counsel respondents also observed that the alternative reforms implemented were not 'a clean package' (UKCounselD), and that the reforms showed that the recommendations of the Commission had been adopted in a 'rather piecemeal fashion', and that as such the law of homicide in England 'remained in an unsatisfactory state' (UKJudgeA).

Overwhelmingly, the English respondents attributed the government's unwillingness to implement the reforms proposed by the Law Commission to its desire to impose a package of reforms that would curry public favour and further promote a 'tough on crime' political image[40]. Respondents across all English samples interviewed claimed that the government's primary motivation to appease public concerns had prevented the implementation of legally favoured reforms to English homicide law. As commented by one respondent:

> the Law Commission do a brilliant job and then the politicians interfere and decide the papers will hammer them for it, like they're going soft on murder, so they tinker and don't carry it through. This is the one area of the law where substantial reform, I think, would have been a good idea but this type of tinkering I don't see clarifying the position. (UKCounselE)

Furthermore, mirroring the views of the Victorian respondents, one English judicial respondent considered that the government had implemented 'reforms to curry public favour' (UKJudgeD). These respondent views underpin the following specific evaluations, and main critiques, of the reforms that were implemented in October 2010 in England to address the problems associated with the partial defence of

[40] The influence of politics, and law and order campaigns, is explored in more detail in Chapter 7 in relation to sentencing practices for murder and manslaughter and the implementation of recent sentencing reforms.

provocation. Specifically, the following section analyses the respondents' initial evaluations of the government's formulation of a new partial defence of loss of control.

Implementing Loss of Control

> Reforms are always necessary. Will they work? The test is time. (UKCounselM)

One of the central components of the 2010 English homicide law reforms was the implementation of a new partial defence of loss of control through the *Coroners and Justice Act 2009*. As previously outlined in Chapter 2, the two-limbed partial defence operates such that the loss of self-control must be attributed to a qualifying trigger, which can be either fear of serious violence (s. 55(3)) or circumstances of an extremely grave character which cause a justifiable sense of being wronged (s. 55(4)(a) and (b)). Throughout the interviews, respondents across all professional roles – but particularly from the English judicial and policy samples – criticised the implementation of this partial defence to murder as a replacement for the provocation defence. These critiques are captured in one policy respondent's description of the loss of control partial defence as 'bonkers' and 'completely misplaced' (UKPolicyB). More specifically, respondent critiques of the partial defence of loss of control were focused upon the inclusion of fear as a qualifying trigger and the exclusion of homicides arising from situations of sexual infidelity. In doing so, these critiques link to earlier debates surrounding the gendered operation of the provocation defence.

Drawing on similar issues to those raised by the Victorian respondents in relation to the *Ramage* case, English respondents believed that the inclusion of fear as a qualifying trigger within the new partial defence was linked to the perceived inability of English homicide law prior to these reforms to adequately respond to the contexts within which battered women kill. As described by one policy respondent:

> I think the problem began, that got the interest of government, was when a series of cases occurred when women who had been abused by their violent

> partners over a number of years were responding to that by killing their partner … there was a perception that these cases were falling into a gap between self-defence, on the one hand, which it didn't really look like … but, on the other hand, there was a problem with charging provocation … because that only works amongst other things, if you've lost your self-control at the time of killing and very often in these cases there was no evidence … often her actions appeared to be quite deliberate and calm at the time … they would be charged with murder and the perception was that there wasn't really any legal basis on which the charge could be reduced from murder to manslaughter even in light of all that they'd suffered over the years. (UKPolicyA)

The respondents argued that the resulting injustices in these trials could be seen as drivers of the government's subsequent implementation of a category of homicide specifically designed to address homicides occurring within the domestic context. As one judicial respondent stated, the implementation of the partial defence of loss of control was a 'political knee-jerk reaction' and a 'people pleaser' (UKJudgeB). This can arguably be seen as an attempt by the British Government to achieve Hudson's (2006) principle of discursiveness by providing a partial defence to murder which would better accommodate women's experiences than that previously available. However, the question then emerges as to whether a partial defence of loss of control is an adequate vehicle for this type of change.

In considering the inclusion of fear as a qualifying trigger within this partial defence, respondents questioned whether this would actually be applicable to battered women, given that it is:

> unlikely that they will have lost self-control at that moment … but there may still be a case for reducing murder to manslaughter, or to a lesser crime because they were only doing what they did because of a fear of serious violence. (UKPolicyA)

This respondent was of the opinion that the requirement for loss of control in cases

involving battered female defendants would ‘prove to some extent quite problematic’ (UKPolicyA). Another English policy respondent concurred, claiming that ‘what is going to happen is that some people will feel a fear of serious violence but there wouldn’t be a loss of self control when they kill’ (UKPolicyC). As such, it was the perception of these respondents that despite the reforms these cases would continue to fall within a problematic gap between murder and manslaughter, and that therefore the law would arguably fail to uphold the principle of discursiveness within this context.

English respondent evaluations of the new partial defence were also focused upon the inclusion of a provision that a loss of control partial defence could not be used in the case of homicides arising from situations of sexual infidelity. Across all of the English sample groups respondent criticisms of this provision were two-fold: first, the respondents argued that it was an unnecessary restriction given the role of the jury; and second, they argued that it would serve to overcomplicate the law – an assessment that is further explored in the following chapter. However, regardless of their specific criticisms, most English respondents were of the view that the exclusion would have a significant, but as yet unclear, impact in practice. As described by one counsel respondent:

> I’m not sure the law will make it easier for the wives but I think that insofar as you’re going to tell a jury that discovering your wife was being unfaithful is not grounds for killing her, that’s going to make a big difference. (UKCounselD)

In broadly critiquing the driver of this change, English legal counsel respondents described the exclusion as ‘incredibly convoluted’ (UKCounselE) and ‘barmy’ (UKCounselQ), while a judicial respondent posed that it was ‘ill advised and ‘bad law’ (UKJudgeB). Furthermore, English policy respondents described the provision as ‘very problematic’ (UKPolicyA), ‘dire’ (UKPolicyB), and ‘really unnecessary’ (UKPolicyC).

These criticisms were often based upon the belief that the exclusion of a particular situation was not conducive to good law-making and that it would lead to significant questions surrounding the situations in which the partial defence would and would not apply. In explaining these perceived problems, a senior member of the English judiciary commented that:

> to try to produce specific subcategories of conduct that couldn't amount to a defence was not good law-making, it was better to lay down the general principles and provide the judicial check mechanism rather than try and carve out an additional specific exception. (UKJudgeA)

This judicial respondent further stated that the exclusion was 'unwise' for two key reasons: that it was 'unnecessary' given that traditional sexual infidelity defences had lost favour with juror members in recent years, and that one should 'never say never' because 'there may be cases of which sexual infidelity forms a part, where a properly directed jury might say on the particular facts of this case we do think there is' an argument for a partial defence to succeed (UKJudgeA). In agreement, other English respondents considered that there was no need to overtly exclude sexual infidelity, because, where it is unreasonably used, juries could discount it themselves. As one counsel respondent noted, 'it should be left completely to a jury with the usual directions' (UKCounselQ). In supporting the ability of the jury to adequately assess the individual circumstances of such cases, an English policy respondent argued that 'you have to trust the jury to use its commonsense and I think what has happened here is that there has been an over-engineering of the law to try and make sure that juries can't consider certain things' (UKPolicyA).

Given the lack of legal understanding among the English respondents of what situations would actually be excluded from this new defence, policy respondents also believed that in the initial operation of the partial defence:

> We will have cases going to the Supreme Court, I have no doubt, where the question is going to be was this or was this not an act involving infidelity. Is being seen kissing another person infidelity? Or do you have to go the whole

> way, so to speak? Is that infidelity? What would count? ... There will be a series of interesting questions I think for the courts to consider. (UKPolicyA)

This concern was also evident among English counsel respondents, one of whom commented that the new provision 'begs the question in itself of what is meant by that and in what context. I think that's why the concept about this is so potentially dangerous' (UKCounselE). Similarly, another English counsel respondent questioned, 'it depends, doesn't it, on the circumstances? I think it's absolutely ridiculous (UKCounselQ).

Despite these criticisms, and as discussed earlier in this chapter, English respondents did recognise that situations of sexual infidelity had in the past given rise to unsatisfactory successful defences of provocation. However, in relation to this it was argued that:

> If you are going to excuse it where someone, to put it in very colloquial terms – loses it – sexual infidelity is going to be one of those features. The law is putting that into a special category and saying that all sorts of other things might count, which may be equally unpleasant or reprehensible but we'll allow those, but we won't allow this. (UKCounselE)

Another respondent also questioned whether in all contexts it was appropriate to exclude sexual infidelity, arguing that 'if somebody has been a loving partner and they have constantly been subjected to infidelities and they're too weak to get out of the relationship and one day they flip, how do you distinguish that from another form of mental cruelty?' (UKCounselQ). These English respondent viewpoints conflict with earlier arguments raised where respondents recognised the unsatisfactory acceptance of provocation in situations of sexual infidelity and relationship separation. However, in light of the recent reforms, several of these counsel respondents stopped short of recommending that these cases should be expressly excluded from raising a partial defence.

Finally, and perhaps most problematically, while the exclusion of sexual infidelity is intended to progress the vindication of the rights of women, and to safeguard them from the lethal violence of their male counterparts, one English policy respondent believed that 'by using a backwards concept like infidelity, which on any event is only a duty which arises in marriage', the partial defence fails to be a 'progressive piece of legislation' (UKPolicyA). This contention draws upon a key focus of the following analysis chapter – an examination of the unintended gendered effects of homicide law reform within the English criminal justice system.

Conclusion: Legal Evaluations of Provocation

In exploring the respondents' evaluations of the law of homicide in Victoria and England prior to reform, this chapter has established the context within which reforms to the partial defence of provocation were implemented and have since been evaluated. In doing so, the chapter has examined the respondents' experiences and perceptions of the operation of the partial defence of provocation prior to the implementation of the relevant reform packages. Key themes in the operation of the defence have been identified both within and across the two jurisdictions examined. The interviews primarily revealed that questions surrounding the abolition or retention of the defence of provocation inherently gave rise to a gendered discussion of the operation of homicide law, whereby perceptions of the use of the defence by both male and female defendants within an intimate context proved critical.

Respondent evaluations of the operation of the law of provocation prior to reform and of the approaches taken to reforming this partial defence suggest that while the law prior to reform was not upholding Hudson's (2006) principles of justice, this may also be the case following the implementation of the Victorian and English reform packages. This was particularly evident in relation to government efforts to provide an avenue of understanding for the stories and experiences of women who kill in response to prolonged family violence through the formulation of alternative categories to murder. While these reforms can be seen as an attempt by each government to bring traditionally silenced stories into the discursive realm of the law, the respondents' initial evaluations of these categories suggest that: in the case of defensive homicide, the space provided for these stories may be inadequate, and that

they would be better heard under the banner of self-defence; and in the case of loss of control, the defence may still be formulated in a way that restricts the ability of the court system to adequately understand and respond to women's stories.

In examining how the Victorian and English reforms might be able to uphold these two principles of justice, this chapter has also considered legal respondent evaluations of the specific reform approaches taken to solving the provocation problem within the Victorian and English criminal justice systems. This analysis has revealed contrasting views of the reforms implemented, particularly in relation to the creation of alternative categories of homicide designed to counter the problems previously associated with the partial defence of provocation and to cater for persons who kill in response to prolonged family violence. Both the intended and unintended effects of these reforms – alongside the continued operation of provocation in NSW – are explored in the following chapter, by drawing upon respondent observations and a case analysis of relevant homicide trials.

CHAPTER 6 For Better or Worse? The Effects of Homicide Law Reform

> There is always a difficult temptation that once you have implemented difficult legislation to put your feet up and say, 'oh well, that's that and let's move to the next project' … I would expect in a reform of this seriousness that there would be some sort of post-legislative scrutiny and examination of how the cases work right from the beginning. I mean it would be silly not to. (UKPolicyA)

In considering the transformative potential of the law, this chapter examines the consequences of reforms to the partial defence of provocation in Victoria[41], NSW[42] and England. In doing so, the chapter explores both the productive and counter-productive impacts of recent law reforms in this area as experienced by those charged with the daily implementation of homicide law. Despite the different approaches taken to addressing the problem of provocation in each of these jurisdictions, some uniform impacts emerged throughout the research interviews and case analysis. Specifically, this chapter identifies four main effects of homicide law reform across the three jurisdictions: the continued existence of problems previously associated with the partial defence of provocation; the ongoing legitimisation of lethal male violence; the inadequacy of homicide law to cater for situations within which women kill in response to prolonged family violence; and the over-complication of the law of homicide post-reform.

This research recognises that while reforms to the law of homicide, in particular the partial defence of provocation, are implemented, with specific goals for minimising gender bias in the law's operation, there are often unintended consequences of the reform which need to be acknowledged and addressed. As stated by one English policy stakeholder, 'You have to say, alright you might make a difference by doing this, but there will be wider ripples that will also have an impact … the important thing is how the provisions actually work in practice' (UKPolicyA). This chapter seeks to examine both the contradictory and the uniform effects of differential approaches taken to reforming the partial defence of provocation in Victoria, NSW

[41] Sections of the Victorian analysis discussed in this chapter have been published in Fitz-Gibbon and Pickering (2012).
[42] Sections of the NSW analysis discussed in this chapter have been published in Fitz-Gibbon (2012, forthcoming).

and England[43]. In doing so, the chapter analyses the concerns raised by legal respondents that the law reforms implemented in each jurisdiction, particularly the significant reforms to the Victorian and English legislation, have had unintended, and in some cases detrimental, effects in practice. As captured in the comments of one Victorian judicial member, 'It's been reformed, [but] our experience is that it's not working' (VicJudgeD).

The analysis of the effects of reforming the law of homicide is based on two theoretical frameworks: Cohen's (2001) states of denial and Sykes and Matza's (1957) techniques of neutralisation. Specifically, Cohen's (2001) notion of the modes of implicatory and interpretive denial, alongside Sykes and Matza's (1957) conceptualisation of the techniques of neutralisation – specifically denial of the victim – are applied throughout this chapter to examine the effects of reform upon the achievement of justice, the representation of the victim and the law's treatment of intimate homicides perpetrated by male and female offenders. In exploring the role of denial in these cases, this research seeks to build upon a body of research that has examined the 'stories' that are told by the law and through the law's operation, and how those stories have historically acted to 'silence' those traditionally subordinated by the legal system while validating the accounts of the powerful – namely, the white male (Currie 1995; Hudson 2006; Kaspiew 1995; MacKinnon 1991; Naffine 1990; Wells 2004).

The first half of this chapter utilises Cohen's concept of implicatory denial, and Sykes and Matza's ideas around denial of the victim, to explore the impact of the continuation of the problems previously associated with, and critiqued, the courtroom operation of the partial defence of provocation. Drawing from a case analysis of recent intimate homicide trials in each jurisdiction, these modes of denial are used as a lens through which to understand the uniform effects of problematic trial narratives of victim denigration and harm minimisation in each of the jurisdictions under study.

[43] Given the recent implementation of the law reforms in England and Wales (implemented in October 2010 through the *Coroners and Justice Act* 2009), the effects of this law reform package are not yet evident in case law. As such, an examination of the impact of these reforms in England are based predominantly on the respondents' projections of the likely issues that will arise in practice in future.

The second half of this chapter examines the implications of the gendered effects of homicide law reform, by applying Cohen's (2001) notion of interpretive denial and Sykes and Matza's (1957) conceptualisation of the technique of denial of the victim. Specifically, this chapter analyses the mobilisation of techniques of victim denial in defensive homicide trials post-2005 and how this functions to legitimise the use of lethal male violence. Additionally, the current adequacy of the law of homicide in Victoria, NSW and England in responding to the contexts within which battered women kill is considered with reference to Cohen's conceptualisation of interpretive denial.

By combining the work of these theorists the effects of reforms to the partial defence of provocation become particularly evident. In exploring these effects, this chapter lends further weight to arguments previously made by scholars that the law of homicide within this area has operated in a gender-biased way that serves to privilege men convicted of intimate femicide, while simultaneously defaming the female victims of lethal domestic violence. This chapter also analyses the applicability of historical concerns surrounding the inability of the law of homicide to adequately understand and respond to the context within which women kill in response to prolonged family violence.

6.1 New Laws, Same Problems: The Continuation of Provocation Post-Reform

> Old norms do not die; they are resurrected in empty spaces, deliberate ambiguities, and new rhetorics. Indeed, old norms not only do not die, but also live alongside, and are perpetuated by, the denial that they still live. (Nourse 2000: 952)

In the period following the implementation of reforms targeted at the partial defence of provocation, interviews with legal stakeholders and an analysis of relevant case law suggests that, despite these new laws, similar, if not identical, trial narratives have continued to dominate the courtroom. Respondents noted the continued mobilisation of problematic narratives of gender bias in the use of the available partial defences and alternative offences to murder in each of the three jurisdictions. This is particularly apparent in the Victorian operation of the new offence of defensive

homicide and the continued operation of the provocation defence in NSW, and was predicted by respondents to occur through the operation of the partial defence of loss of control in England.

In examining the mobilisation of problematic gendered narratives throughout the trial and sentencing phases these sections draw upon Cohen's conceptualisation of implicatory denial and Sykes and Matza's notion of the technique of denial of the victim. Implicatory denial is at play where stakeholders seek to justify harmful actions, or to deny responsibility for such actions, by displacing the responsibility onto others, including the victims themselves (Cohen 2001). Within this research, the idea of implicatory denial is applied to examine the effects of the continuation of traditional provocation narratives in recent case law, specifically in relation to the continuation of the gendered discourses that run throughout the trials of men convicted of the provocation manslaughter of their female intimate partner in the NSWSC and of defensive homicide in Victoria. In identifying this form of denial within traditional discourses of provocation, the implicatory denial of lethal violence is discernible in courtroom narratives that promote a culture of victim blaming which displaces responsibility for the harm back onto the victims themselves.

6.1.1 Victoria: Defensive Homicide as Provocation

> if we fast-forward right up to defensive homicide law we're now talking about the same narratives dominating the courtroom, so we say we've changed the law, we've abolished provocation, but we've allowed the same narratives to coexist with the abolition of the law. (VicPolicyA)

Victorian respondents considered whether the problems previously associated with the partial defence of provocation have continued to exist within the operational framework of homicide law post-2005. The interviews revealed that the initial operation of defensive homicide since its implementation was critical to respondent evaluations of the effects of the law reform package in practice. Interviews with Victorian legal personnel revealed a concern that the offence has provided an avenue through which the problems previously linked to the partial defence of provocation have continued to manifest within the Victorian criminal court system. As commented

by a prosecutorial respondent, 'I'm not quite sure that the way that defensive homicide has worked since the changes has been particularly effective in solving the evils that the abolition of provocation was meant to' (VicProsecutorD). Other respondents from the Victorian OPP sample raised similar concerns, with one respondent commenting that 'defensive homicide has just replaced provocation, point fact, I can't see the huge difference … I think it has just changed the terminology' (VicProsecutorG).

This view was also evident in discussions with a smaller number of Victorian defence counsel respondents, with one defence respondent stating that, 'provocation is still around' (VicDefenceG). This critique of the new offence was also advanced by respondents from the Victorian policy sample. One policy respondent reflected that 'merely abolishing the partial defence [of provocation] has not necessarily eliminated all the problems that numerous law reform bodies have identified. These have now emerged in different guises' (VicPolicyB).

One of the key concerns to emerge from the discussions surrounding the operation of defensive homicide was that the offence has fostered the continuation of trial narratives of victim blame. Prior to its abolition, this was a key problem associated with the courtroom operation of the provocation defence both in Victoria and in other Australian and international jurisdictions (Cleary 2006a; Coss 2006b; Harman 2003; Howe 1999; Morgan 1997; Naylor 2002; Tyson 1999; Wells 2000; Yule 2007). Traditionally, these concerns have focused on the complicit role historically played by the courts in putting the female victim of lethal domestic violence on trial while simultaneously trivialising the use of lethal domestic violence against her. One Victorian judicial respondent described this as 'a most regrettable aspect' of the now abolished provocation defence (VicJudgeG). The effect of these narratives of victim blame become particularly apparent when analysed using Sykes and Matza's (1957) framework of denial of the victim and Cohen's (2001) conceptualisation of implicatory denial.

In relation to the perpetuation of narratives of victim blame in the Victorian operation of defensive homicide, the interviews also highlighted the importance of the naming of an offence and the subsequent labelling of the offender. As one respondent

highlighted, the very name of the offence of defensive homicide implies that the victim is being held somewhat responsible for the lethal violence committed against them:

> I mean defensive homicide actually indicates that the person was defending themselves, the wording of it indicates that the other person has done something wrong, how is that any different to provocation? And in fact to me it implies more fault on the part of the victim than less. Provocation at least involved some sort of loss of control on the part of the accused, whereas defensive homicide makes it sound like they're defending themselves. (VicProsecutorD)

In examining cases of defensive homicide since November 2005, Victorian prosecutorial and policy respondents expressed concern that the courtroom narratives advanced in the trials of Anthony Sherna (*DPP v Sherna* [2009] VSC 526, hereinafter *Sherna*) and Luke Middendorp (*R v Middendorp* [2010] VSC 202, hereinafter *Middendorp)* provide evidence of the continuation of traditional provocation narratives in the operation of Victorian homicide law. These trials are particularly important as they represent the first cases in which defensive homicide was raised by a male perpetrator who killed a female intimate partner[44]. In commenting on *Sherna*, one policy respondent expressed the view that the defence was 'clearly run as a provocation defence. Have any thoughtful or learned person read the transcript of that trial and tell me that the narrative wasn't a provocation narrative' (VicPolicyA). Expanding on this analysis, the respondent described the defence in *Sherna* as a 'classic provocation defence' where the 'word provocation was never used' (VicPolicyA). In agreement, and in linking back to the problematic mobilisation of victim blaming narratives in defensive homicide cases, a Victorian prosecutorial respondent described the *Sherna* trial as 'an assassination of her [the victim's] character' (VicProsecutorA).

Scrutiny and criticism of the female victim in *Sherna* can be specifically evidenced in

[44] In the trial of Anthony Sherna the jury were instructed to consider a verdict of defensive homicide alongside other defences to murder. While Sherna was not convicted of defensive homicide – rather, the jury found him guilty of the alternative verdict of manslaughter – researchers have often linked the case to the operation of the new law.

the judge's reflection at sentencing of the defence's portrayal of the victim throughout the trial: 'you painted a picture of the deceased as an aggressive, difficult and controlling person who completely dominated you' (*Sherna*, per Beach J:3). Additionally, in his closing address the prosecutor in *Sherna* argued that throughout the trial the defence had continuously introduced negative depictions, 'however small', of the victim, and that such evaluations of her character may serve to 'obscure the reality of what it actually was that this man did to his wife' (*Supreme Court Transcript of Anthony Sherna* 28/10/09, Address by Mr Tinney: 767). One commentator reflected on this evaluation and subsequent assessment of the victim's character in *Sherna* as follows:

> Sadly, whenever a man kills his partner or ex-partner she is always to blame. There just seems to be no legal impediment to what the prosecutor in the *Sherna* case described as the 'blackening' of the dead woman's character. From start to finish this was a case where a casual observer might have asked whether it was the killer or the dead woman who was actually on trial. (Cleary 2009)

This statement highlights one of the key concerns relating to the *Sherna* trial, and intimate femicide trials more generally, about the continuing trend for the female victim of homicide to be put on trial and her character denigrated. While it can be reasonably expected in an adversarial system that the defence legal team would be invested in diminishing the victim in order to advance the case of their client, what makes these cases notable is that both explicit and implicit gender stereotypes are mobilised to promote these constructions of the victim and offender. The legal narrative mobilised throughout the *Sherna* trial, via techniques of evasion and deflection, serves to displace responsibility for the act of intimate homicide from the defendant to the victim. When coupled with the mobilisation of the aforementioned technique of victim denial, such narratives act to deny the victim legitimacy as a victim (Sykes & Matza 1957). As previously acknowledged in research by Erez and Laster (1999: 456), techniques of victim denial allow for a 'redefinition of the victim as someone who is not a real victim'.

This displacement of responsibility can also be seen throughout the sentencing in *Sherna*, whereby the victim was portrayed using descriptions such as 'controlling and domineering' (*Sherna*, per Beach J: s. 18), and as requiring the defendant to 'sleep on a camp bed for many years, requiring you to change your name, limiting your use of the toilet at home, limiting your access to money'[45] (*Sherna*, per Beach J:3). These depictions of the victim's behaviour sharply contrast with traditional understandings of femininity, and masculine needs to protect a more vulnerable female partner, and it is arguable that they serve to further minimise the seriousness of the harm perpetrated against her. Additionally, and as previously noted by Douglas (2008: 463), the comments made by the judge in sentencing are 'symbolically important in providing an opportunity to state publicly where the responsibility for violence lies'. Where this opportunity is taken to legitimise a portrayal of the victim that implies blame a narrative of victim denial and blame minimisation is further enforced.

Similar concerns emerged during the Victorian interviews and out of the case analysis in relation to the *Middendorp* case, in particular surrounding the mobilisation of narratives of victim blame through the operation of defensive homicide. As commented by one prosecutorial respondent, the *Middendorp* trial adopted 'all the features that we saw in provocation, which was an unsatisfactory partial defence' (VicProsecutorH). Another respondent described the case as 'just a classic provocation verdict under another guise' (VicProsecutorG). In bringing the critiques of these two Victorian cases together, a policy respondent commented that:

> It was illogical to say it was lack of intent in *Sherna* and it was ridiculous to say it was due to defensive homicide in *Middendorp*, it was all about provocation. Both cases were run like that, it was about a wild girl in *Middendorp*; she was wild, she was irrational, she was unpredictable. (VicPolicyA)

As was seen in *Sherna*, the courtroom narrative mobilised in *Middendorp* was based on victim blame and denial. Specifically, the two key problems that emerge from the *Middendorp* trial relate to the legal casting of the female victim into easily consumed,

[45] It should be noted that in sentencing Sherna the judge commented that at times the account given of the deceased's behaviour by the defendant was 'exaggerated' and 'overemphasised' (*Sherna*, per Beach J:19).

and often negative, gender stereotypes during both the trial and sentencing phases of the court process and the subsequent trivialisation of the male perpetration of lethal violence. As evidenced in the analysis of *Sherna*, the undertone of victim denigration that runs throughout the *Middendorp* trial and sentencing can be understood as a form of denial whereby the victim is denied legitimate victim status, thus minimising the perceived seriousness of the harm perpetrated against her.

This denial of victim status in *Middendorp* can be seen in the descriptors used to portray the victim. The victim is repeatedly described as a 'truculent' and 'difficult' woman by the defence, prosecution and judicial representatives involved. These descriptors are heavily coded with gendered meaning and create a dominant representation of the victim as contributing to her own death. This characterisation of the victim is first evidenced in the prosecution's opening address to the jury:

> She wasn't any good as a student, she was a very difficult child … she tried a number of careers without any success and she drifted from one thing to another … At various times, members of the jury, she was living on the streets. She had involvement with illegal drugs and generally was leading an irregular and somewhat difficult kind of life. That's who she was. (*Supreme Court Transcript of Luke Middendorp* 05/03/10, Address by Mr Horgan: 17–18)

Following this description, the prosecution goes on to state to the jury, 'I've given you an idea of her background and the sort of person she was, you can probably imagine it', and reminds them later that 'she was of course no angel' (*Supreme Court Transcript of Luke Middendorp* 05/03/10, Address by Mr Horgan: 18–19). For a woman to be 'no angel' is very different to a man who is 'no angel': for a woman this contrasts with popular gender stereotypes and promotes the problematic perception that the woman was partly responsible for the violence inflicted upon her. Additionally, the comment 'You can probably imagine it' (as quoted above) is arguably an implicit message to the jury to evoke their own past experiences with so-called difficult women, inviting them to share this understanding using a gendered vocabulary.

This gendered depiction of the victim in *Middendorp* is also evident in the defence counsel's closing address to the jury, in which prior to describing the victim he warns the jury that it is not in his nature to 'speak ill of the dead but at times it is our duty to do so. This is one of those times' (*Supreme Court Transcript of Luke Middendorp* 12/03/10, Address by Mr Walsh: 515). The defence then goes on to describe the victim as 'obviously a very volatile person, who is quick to anger and physical violence' (*Supreme Court Transcript of Luke Middendorp* 12/03/10, Address by Mr Walsh: 526). In light of the dominant ideal that women should possess a more even temperament than their male counterparts, the victim's depiction here is particularly suggestive that she is in part responsible for the perpetration of lethal violence against her. By positioning the victim as acting in opposition to stereotypical expectations the mobilisation of victim denying tactics is further evidenced throughout this trial.

The prosecution in *Middendorp* does attempt to overcome the denigration of the victim's character in his closing address by focusing the jury on the lethal violence perpetrated against her:

> What's happened here is that an angry, aggressive man, and maybe he is dealing with somebody who is truculent, given to mouthing off and a difficult woman in that way, but so what? Who stabbed whom in this? Who finished up dead? The woman. (*Supreme Court Transcript of Luke Middendorp* 12/03/10, Address by Mr Horgan: 484)

Despite this, and in recognition of the victim denial that occurred throughout the trial, at sentencing the judge conceded that the verdict of defensive homicide might be partially representative of the jury's perception of the victim: 'Her reliability was put in doubt at the trial, and she, of course, not cross-examined. It may be that the jury were distrustful of her version of these earlier events' (*Middendorp*, per Byrne J: 7). Despite this clarification, the judicial remarks later serve to further this unfavourable representation of the victim, by the subsequent description of her as a 'troubled young woman' (*Middendorp*, per Byrne J: 17). Such descriptions, while not explicitly denying the defendant's perpetration of lethal violence upon the victim, do serve to minimise the significance, and consequently the seriousness, of the violence perpetrated. Through the employment of such techniques of implicatory denial these

comments and descriptions implied that the victim was somewhat responsible for the violence herself, raising the problematic question of how this trial narrative differs from those previously identified as problematic in the operation of provocation. This trend of harm minimisation and victim denial manifest in *Middendorp* has been previously explored within the Swedish criminal justice system by Burman (2010), who examined the use of gendered stereotyping by judges in response to violent crimes perpetrated by a male upon a female victim. Burman (2010: 184) observed that the law's response to these cases meant that:

> Violence is constructed as a part, or as a consequence, of a relationship characterised by quarrels, noise, troubles, and psychological stress for the man, and as a reciprocal fight between two equals in which the distinction between perpetrator and victim becomes indistinct and vague.

As captured by Burman, and as illustrated in *Middendorp,* the effect of this problematic construction of the victim and the sympathetic representation of the male offender is that the legitimacy of the status of the victim is denied. Additionally, through this victim denial the harm of male violence against women is inadequately recognised by a reconstruction of the event that fails to condemn the male's use of violence.

Furthermore, in the *Middendorp* case, the unfavourable descriptions of the victim, Jade Bownds, are prioritised over accounts of the history of domestic violence, in the relationship in which Bownds 'was assaulted by the accused on a number of occasions and the police attended. She was seen with lacerations to her head and bruising on various occasions, and on more than one occasion she was sent to hospital' (*Supreme Court Transcript of Luke Middendorp* 05/03/10, Address by Mr Horgan: 19). This history of domestic violence is further described throughout the trial as initiated by the victim, despite her inability to defend such allegations, as seen during the cross-examination of the accused:

> Yeah, very, very, very, heated. Violent … Yeah, we'd get to the point where it got physical and basically we would be wrestling with each other and I'd do my best to try and stop her from hitting me with whatever she was trying to

> hit me with or whatever. It was always a different circumstance but basically I'd try to protect myself and in the course of it we'd always, probably always both be injured, equally injuries in it. (*Supreme Court Transcript of Luke Middendorp* 11/03/10, Accused evidence: 378–9)

Locating the responsibility for the violence with the victim is furthered in the defence's closing address to the jury, in which it is clarified that 'It was a violent relationship but she was the initiator of the violence when it occurred, the physical violence … There would be no doubt that he started arguments on occasion, but when they descended into violence, it would be Jade that initiated it' (*Supreme Court Transcript of Luke Middendorp* 11/03/10, Address by Mr Walsh: 526). This account again serves to legitimise the harm eventually perpetrated upon the victim and diminish the responsibility of the male defendant's perpetration of this harm. The effect of this displacement of responsibility from the offender to the victim can be explained with reference to Sykes and Matza's (1957: 668) technique of victim denial, such that the injury is not denied, but is repositioned as a 'form of rightful retaliation' upon an arguably deserving victim.

Furthermore, alongside the representation of the victim's character, this narrative is employed to either distract from or neutralise the severity of the history of domestic violence. As such, it creates a context in which domestic violence is not adequately addressed but rather is implicitly represented as an inevitable consequence of a relationship with a 'difficult woman'. As argued by Capper and Crooks (2010: 21), the *Middendorp* case 'raises the sobering thought that Victorian law is still not adequately contending with the grim, gendered realities of family violence'. These comments are particularly relevant given that at the time of the intimate killing the defendant was on conditional bail and had been previously charged with assaulting his victim, Jade Bownds. The mobilisation of techniques of denial in the context of the law's response to domestic violence has been previously explored by Cohen (2001) and is further discussed in the latter sections of this chapter.

The respondents' concerns about the *Middendorp* and *Sherna* trials build on critical media commentary that has emerged since the offence of defensive homicide was implemented in 2005, with one scholar commenting that:

> I think a lot of these cases look a little bit like provocation killings. They really look very similar a lot of them, to the old provocation cases. But now we're looking at them as defensive homicides … they sound more like provocation in some ways than they do defensive homicide. (Douglas 2010)

In agreement, a commentator described the offence as 'basically provocation in a different form' (Lowe 2010: 6), while another has argued that the reforms have not 'prevented lawyers from invoking the still widely held view that women provoke men to kill them' (Howe 2010: 15). Also advancing this view, a social commentator posited that while 'the law of provocation has gone, the excuses for "whitefella" violence towards women have not' (Cleary 2006b: 17).

Furthermore, a broader examination of all cases of defensive homicide in Victoria during the period studied supports the contention that the problems previously associated with the partial defence of provocation have continued to manifest through the operation of this newly created category of homicide. As shown in Table 6.1, in just over one third of the cases in this period (seven of the 19 cases), an incident of physical violence initiated by the victim upon the offender preceded the homicide. In the remaining cases it was either a threat of violence, a verbal insult, sexual assault or an event the nature of which remained unclear that was identified as causing the fear of death or really serious injury. As shown below, in six of these cases a verbal exchange was identified as having induced the defendant's fear prior to the use of lethal violence. As argued in critiques of the provocation defence, any defence or offence, that allows the words or actions of the victim to be 'put on trial' is highly concerning (Morgan 1997; Naylor 2002; Wells 2000).

Table 6.1: Defensive homicide convictions in Victoria, November 2005 – November 2011

Defendant name (trial year)	Plea/ trial	Defendant sex – victim sex	Relationship between victim and defendent	Words or violence that induced fear	Sentence max/min
Smith (2008)	Plea	Male–Male	None	Violence	7yrs/5yrs
Edwards (2008)	Plea	Male–Male	Victim dating offender's ex-partner	Verbal exchange including threat of violence	9.5yrs/ 7.5yrs
Giammona (2008)	Plea	Male–Male	Prison Inmates	Violence	8yrs/6yrs
Smith (2008)	Plea	Male–Male	Friends	Unclear	7yrs/4.5yrs
Taiba (2008)	Plea	Male–Male	Acquaintances	Neither	9yrs/7yrs
Baxter (2009)	Plea	Male–Male	None	Violence	8.5years/ 5.5yrs
Tresize (2009)	Plea	Male–Male	Mutual friends	Unclear	8yrs/4yrs
Spark (2009)	Plea	Male–Male	Victim was offender's uncle	Verbal exchange	7yrs/ 4yrs 9months
Wilson (2009)	Plea	Male–Male	Acquaintances	Violence	10yrs/7yrs
Parr (2009)	Verdict	Male–Male	Acquaintances	Unclear	10yrs/8yrs
Doubleday (2009)	Verdict	Male–Male	Acquaintances	Verbal exchange including threat of violence	9yrs/6yrs
Evans (2009)	Plea	Male–Male	Acquaintances	Violence	10yrs/7yrs
Middendorp (2010)	Verdict	Male–Female	Intimate relationship	Verbal exchange including threat of violence	12yrs/8yrs
Black (2011)	Plea	Female–-Male	De facto Relationhip	Verbal exchange including threat of violence	9yrs/6yrs
Creamer (2011)	Verdict	Female–Male	Married	Verbal exchange	11yrs/7yrs
Ghazlan (2011)	Plea	Male–Male	Strangers	Minor physical altercation	10.5yrs/7.5yrs
Martin (2011)	Plea	Male–Male	Friends	Sexual assault	8yrs/5yrs
Svetina (2011)	Verdict	Male–Male	Victim was the offender's father	Unclear[46]	11yrs/7yrs
Jewell (2011)	Plea	Male–Male	Acquaintances	Violence	8yrs/5yrs

Additionally, in nine of the defensive homicide cases only the victim and the offender were present during the homicide, allowing the offender's version of events to remain relatively uncontested at trial. This was also a problem previously identified in

[46] In sentencing Svetina the judge was unable to determine what had induced fear in the offender prior to the perpetration of lethal violence. The judge noted that 'I am uncertain as to whether you then took him by surprise or he ambushed you. It is not improbable that you were waiting for him and that, when he came downstairs, you confronted him. That would be consistent with your objective of "flushing him out". On the other hand, I cannot exclude the possibility that he somehow got downstairs in the dark without you being aware of it and took you by surprise' (*R v Svetina* [2011] VSC 392, per Nettle JA: sec 20).

critiques of the provocation defence and cited to support arguments for its abolition (Cleary 2004; Morgan 1997).

The case analysis of Victorian trial and sentencing narratives in the five years following the implementation of these reforms would suggest that change is not yet evident in practice. Specifically, an analysis of the descriptors used to represent the victim in recent defensive homicide trials in Victoria illustrates how members of the criminal justice system can be complicit in promoting narratives of victim denial. Such explicit examples of victim blaming as those discussed above are particularly concerning given that one of the key aims of the 2005 homicide law reform package was to overcome the influence of gender bias through the operation of the law of homicide.

6.1.2 NSW: The Continuation of Provocation

Given the level of national and international attention paid to the use of the provocation defence by men who kill an intimate partner, this research sought to examine whether similar concerns can be identified in relation to the continued operation of provocation in NSW. While a report produced by the NSW Judicial Commission in 2006 observed that between January 1990 and September 2004 there were no cases of provocation manslaughter defended in the NSWSC in which the problems associated with *Ramage* were mirrored (Indyk et al. 2006), the case analysis conducted for this research of more recent provocation defences suggests otherwise. Additionally, the case analysis questioned whether the mobilisation of narratives of denial, as seen in Victoria, were also evident in NSW. As in the Victorian analysis, Cohen's conceptualisation of implicatory denial was found to be particularly relevant in analysing the mobilisation of this form of denial in the NSW trials of men convicted for the killing of a female intimate partner. In observing the mobilisation of similar forms of denial at trial and sentencing, this research suggests that, despite differing legal contexts between the three jurisdictions, uniform concerns emerged regarding the mobilisation of denial in intimate femicide trials.

An examination of successful provocation defences in the five years following the report of the NSW Judicial Commission (Indyk et al. 2006) illustrates how members

of the legal system can be complicit in promoting a culture of victim blame and gender stereotyping. Additionally, and in contrast to the findings of that report, it identifies unresolved issues surrounding the continued operation of the provocation defence similar to those evidenced, and widely critiqued, in *Ramage* and more broadly in Victorian cases in which the defence was used prior to its abolition. The NSW case analysis specifically reveals the continuing use of provocation in this jurisdiction to excuse the use of lethal male domestic violence, while promoting a legal culture of denial that blames the victim and allows words alone to constitute sufficient provocation.

Table 6.2 includes all convictions of provocation manslaughter in the NSWSC over a five-year period under examination (January 2005 – December 2010). The table illustrates what provocative incident led to the perpetration of lethal violence in each case. As seen in Table 6.2, of the 15 successful cases of provocation manslaughter, five were accepted where the provoking conduct was a non-violent confrontation, often a verbal insult targeted by the victim at the defendant, in the period immediately prior to the killing. In three of these cases the victim was a current or estranged female intimate partner of the male defendant. Furthermore, in two of these cases – *Stevens* (*Regina v Stevens* [2008] NSWSC 1370, hereinafter *Stevens*) and *Hamoui* (*R v Hamoui* [no 4] [2005] NSWSC 279, hereinafter *Hamoui*) – the non-violent confrontation arose from the defendant's allegation of the victim's infidelity.

Table 6.2: Successful provocation defences in NSW, January 2005 – December 2010[47]

Defendant name (trial year)	Verdict/ plea	Defendant sex– victim sex	Relationship between victim and defendant	Provocative incident – general category	Judicial determination of degree of provocation[48]
Goundar (2010)	Verdict	Male–Male	Victim was in a sexual relationship with the offender's estranged wife	Planned confrontation[49]	Very high level of provocation
Lynch (2010)	Plea	Male–Male	Acquaintances	Violent confrontation	Significant level of provocation
Gabriel (2010)	Verdict	Male–Female	Married	Violent confrontation	Not high level of provocation
Lovett (2009)	Verdict	Male–Male	Victim was in a sexual relationship with the offender's estranged wife	Non-violent confrontation	*Not cited*
Chant (2009)	Plea	Female–Male	Married	Violent confrontation	*Not cited*
Stevens (2008)	Plea	Male–Female	De facto relationship	Non-violent confrontation	Low level of provocation
Mitchell (2008)	Plea	Male–Male	Acquaintances	Violent confrontation	Not of an extremely gross nature
Forrest (2008)	Plea	Male–Male	Acquaintances	Violent confrontation	Significant level of provocation
Frost (2008)	Plea	Male–Female	Divorced	Non-violent confrontation	*Not cited*
Berrier (2006)	Verdict	Male–Male	Acquaintances	Violent confrontation	Significant level of provocation
Russell (2006)	Plea	Female-Male	De facto relationship	Violent confrontation	*Not cited*
Bullock (2005)	Verdict	Male–Male	Acquaintances	Violent confrontation	Significant level of provocation
Dunn (2005)	Verdict	Male–Female	Close acquaintances – lived together	Non-violent confrontation	Not a significant level of provocation
Ali (2005)	Verdict	Male–Male	Former acquaintances	Violent confrontation	Considerable provocation

[47] The successful use of the provocation defence in *R v Jones & Others* [2007] NSWSC 1333 has not been included in this table given that multiple offenders were involved in the case, of whom only some were sentenced on the basis of provocation manslaughter.

[48] In several cases within this period the judge did not directly state the degree of provocation when sentencing – for this reason these cases have been marked '*not cited*'.

[49] In the case of *Goundar*, the defendant had planned for his wife to bring the victim, his best friend, to the home she shared with the defendant. The defendant was aware that the victim and his wife had been involved in a sexual relationship prior to this incident. The defendant was sentenced on the basis that he had become provoked upon realising that the victim intended to have sexual intercourse with his wife and that this realisation was further heightened by cultural factors (see *R v Munesh Goundar* [2010] NSWSC 1170: s. 59).

Hamoui (2005)	Verdict	Male–Female	Estranged girlfriend	Non-violent confrontation	*Not cited*

Additionally, in the period prior to these cases, 1990–2004, there were an additional 11 cases of provocation manslaughter where the provocation resulted from either the breakdown of an intimate relationship or was related to a situation of infidelity (Indyk et al. 2006). The use of provocation within this context was also discussed in the NSW interviews, with one respondent describing the 'classic' provocation case as one between 'a husband and a wife' (NSWJudgeG).

The successful use of the provocation defence in this context raises serious questions pertaining to the viability of this partial defence in NSW, given its potential to trivialise the male perpetration of lethal violence against women. As highlighted by the VLRC (2004: xx) in its review of the partial defences to murder, the criminal justice system has an important 'symbolic function' in serving to set the 'limits of acceptable and unacceptable behaviour'. As such, and as previously discussed in Chapter 2, when the law is seen to legitimise the use of male violence in a particular context a standard of acceptable violence against women is enforced. As Morgan has commented (1997: 273), through such cases judges send a problematic message 'about male culture, and a particular message about the inequality of women' that acts to excuse the use of lethal male violence against women who attempt to leave or are unfaithful within an intimate relationship. In agreement, Burman (2010: 181) has also argued that, 'by accepting the men's feelings that they were affected [provoked] by the women's behaviour, the courts confirmed violent men's views and moral judgments about women's behaviour'. These trials are also further evidence of the mobilisation of techniques of implicatory denial in the courtroom, whereby provocation narratives that defame the character of the victim are engaged to deny the seriousness of the harm perpetrated by the male defendant upon a female intimate partner.

The diminution of the seriousness of lethal domestic violence, and the mobilisation of implicatory denial, is most clearly seen in the 2008 NSW provocation manslaughter

sentencing of Bradley Stevens[50]. *Stevens* provides an illustration of how the provocation defence has been used by men who have a history of violence against their victim to avoid being charged, prosecuted and sentenced for murder. *Stevens* also illustrates how techniques of implicatory denial are mobilised within such trials to justify the use of lethal violence in response to alleged relationship infidelity. Stevens had a long history of inflicting violence against his de facto partner, a fact that was largely uncontested at trial given the number of witnesses who testified to having seen the deceased with injuries in the period prior to her death. As reflected by the judge at sentencing:

> Since 2003, on several occasions, the deceased had been observed by witnesses to have facial and other injuries. The deceased gave conflicting versions as to how these injuries were caused … The deceased complained to some people about the offender's violence and drug use and stated that she felt unsafe at home. (Stevens, per Hall J: ss. 12–14)

The prior violence perpetrated by the offender upon the victim was further described by the prosecution as 'ongoing' and having occurred over a 'lengthy period of sustained violence' (*Stevens,* per Hall J: s. 104). Despite establishing this significant history of violence, the defendant was able to use accusations of the victim's inadequate mothering and alleged infidelities to counterbalance his prior perpetration of violence upon the victim and to justify his use of lethal violence at the time of the killing. Specifically, Stevens argued that the victim's 'persistent failure to look after the children' alongside her alleged confessions of infidelity had caused his 'escalation of emotion' prior to the killing and that, most importantly, the violence was neither 'planned [n]or organised' (*Stevens*, per Hall J: ss. 85–95). This denigration of the victim's character, through descriptions of her inadequate mothering and adulterous behaviour, is thus mobilised to advance the victim's portrayal as 'provoker' while at the same time justifying the defendant's perpetration of lethal violence against her and undermining the prior history of violence within the relationship. As also illustrated in the analyses of *Middendorp* and *Sherna*, the effect of such representations is to deny

[50] Stevens killed his de facto girlfriend, Katrina McMahon, at their shared home in February 2007. The Crown accepted a plea to manslaughter on the basis of provocation (see *Regina v Stevens* [2008] NSWSC 1370).

the victim legitimate victim status and consequently to promote the perception that the violence was somewhat warranted as a form of retaliation.

Despite the gravity of the victim's injuries[51], alongside the uncontested history of domestic abuse, Steven's justification gained legal support through the Crown's acceptance of a plea to manslaughter by reason of provocation and the judicial imposition of a head sentence of eight years and nine months for the offence. In comparison to the average head sentence for murder in NSW in 2008 of 16.8 years, this sentence was highly favourable to the defendant (NSW Bureau of Crime Statistics and Research 2009).

There are other recent examples from the NSWSC of the disturbing use of the provocation defence in cases of male-perpetrated intimate homicide. The cases of *Williams (Regina v Williams* [2004] NSWSC 189, hereinafter *Williams)* and *Hamoui* are both further examples of such. In *Hamoui*, the defendant was able to successfully argue provocation based on the victim's infidelity, despite a detailed and documented history of domestic violence within the relationship perpetrated by the male offender upon his victim. In *Williams,* the defendant was also able to successfully obtain a conviction for manslaughter by provocation after he beat his de facto partner to death with a metal pole following a disagreement between the two. The conviction was obtained despite his prior history of 'hostility and aggression' towards his victim and prior criminal convictions for offences involving violence (*Williams,* per O'Keefe J: s. 18). The mobilisation of narratives of victim blame in cases such as *Stevens, Williams* and *Hamoui* act to deflect from the harm perpetrated upon the victim, and consequently displaces responsibility for the perpetration of lethal violence back onto the victim themselves (Cohen, 2001). As such, while these cases did not attract the same high level of publicity as the Victorian *Ramage* trial, they do raise significant concerns surrounding the ongoing operation of the provocation defence in NSW, particularly in relation to the successful use of the partial defence of provocation by men who kill a female intimate partner.

[51] The extreme nature of the injuries inflicted on the victim are evident in the judge's remarks at sentencing: 'Blood stains were found in the lounge room, the main bedroom, hallway and bathroom … There were 76 separate injuries observed and the more severe contusions were located on the head and on the face' (*Stevens*, per Hall J: ss. 47–54).

Throughout the interviews, NSW respondents from both the prosecutorial and judicial samples also recognised that in operation the law of provocation in NSW has led to the production of problematic courtroom narratives that allow the female victim to be put on trial. As described by one NSW prosecutorial respondent:

> when provocation is raised it very much puts the victim on trial. You get things from the victim's past being raised that sometimes no one is in a position to refute … nobody is around to say that that is complete rubbish. So it's a free kick sometimes. (NSWProsecutorD)

This observation was supported by other respondents from the NSW ODPP, who posed that this area of homicide law has 'always been difficult' given the inevitable absence of the victim to defend themselves (NSWProsecutorE), and that the partial defence 'can often put a slant on it and place blame in other directions and that often happens' (NSWProsecutorA). In agreement, a member of the NSWSC judiciary reflected that this aspect of the law is 'problematic' and 'certainly very worrying' (NSWJudgeE). In illustrating the problematic influence that these narratives can have at the verdict stage of the trial process, a NSW judicial respondent reflected on a recent case, which had resulted in a manslaughter by reason of provocation conviction:

> The jury mainly, I think, penalised her [the victim] because she was pretty out there in terms of her sex life and so on. And she had multiple boyfriends. She was unbeknownst to the accused a prostitute part time, which she did for fun I think. And she was an unusual girl and the jury just basically took the view, in a rough justice sort of way, well she had it coming to her I think. (NSWJudgeB)

This respondent reflection provides a clear example of the harmful effect that narratives of victim denigration and denial can have on impeding the achievement of justice in an individual case.

The case analysis also identified the successful use of the partial defence in cases in which the provocative conduct of the victim was words alone[52]. A precedent for accepting words alone as sufficient provocation in NSW was set by the NSW Criminal Court of Appeal (NSWCCA) decision in *Lees* (*R v Lees* [1999] NSWCCA 301:30, hereinafter *Lees*), in which it was stated that:

> 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. (*Lees*, per Wood CJ: s. 30)

While it is clarified later in the judgement that such words should be of a 'sufficient[ly] violent, offensive, or otherwise aggravating character' (*Lees*, per Wood CJ: s. 37), the precedent does allow for a victim's words alone to be used as a justification for lethal violence perpetrated against them. An analysis of cases in which provocation was successfully raised in NSW over the period examined (see Table 6.1) reveals that in one third of cases the defendant was provoked by a non-violent confrontation with the deceased. As aforementioned in relation to defensive homicide, the problems associated with accepting words alone as sufficient provocation to reduce a charge of murder to manslaughter are well documented in the research (Morgan, 1997; Yule, 2007) and were also raised throughout the discussions in the NSW interviews, with one judicial respondent commenting that 'it is very easy for an accused to say what a dead person said to them' (NSWJudgeE).

In justifying why this may be relevant to the defence, and subsequently the trial, one NSW defence counsel respondent explained that such information about the victim:

> is very important because in some instances it is totally interrelated with the defence so whether the victim was acting violent or sexually inappropriately or was blameworthy in some way is often a relevant fact of the case. Also, you need to help the jury see it from the viewpoint of the accused who will rarely have been a sociopathic, cold-blooded killer and will often have good reasons to have felt some antipathy towards the deceased. Of course you just

[52] These cases are categorised in Table 6.2 as a 'non-violent confrontation'.

> can't go out and say it because there is an accepted protocol that you don't speak ill of the dead, especially in a murder case if you are seen to trash the reputation of the dead person you can easily do harm to your client's case. Often it is really necessary to weave that narrative in. Provocation, self-defence – it crops up in all sorts of ways. (NSWDefenceA)

This comment illustrates a nuance that emerged from the NSW interview responses, whereby acknowledgement of the role that the provocation defence can play in putting the victim of homicide on trial was not always met by criticism among the defence respondents, but rather justification of its relevance, and even importance, to the trial process. This highlights that while the majority of respondents from NSW – and other jurisdictions – explicitly recognised the danger of narratives based on victim denial, there was less recognition of such among the defence respondents in NSW, where provocation is still available.

6.1.3 England: Loss of Control as Provocation

While the capacity of the recent English homicide law reforms to overcome the problems historically associated with the gendered operation of the defence of provocation remains unclear in case law, the interviews did reveal a widespread concern that through the implementation of the new partial defence of loss of control similar problems would emerge at the trial and sentencing stages of the court process. As overviewed in Chapter 2 and considered in the previous chapter, in October 2010 the British Government introduced *The Coroners and Justice Act* 2009, which served to abolish the partial defence of provocation and replace it with a two-limbed partial defence of loss of control (s.54–6). Intended to overcome the problems linked to the operation of the provocation defence, the new partial defence includes a provision to exclude situations of sexual infidelity from giving rise to a successful defence of loss of control as well as covering situations where the loss of control results from a fear of serious violence.

Interviews with legal respondents in the period immediately prior to the implementation of this new partial defence in England revealed a widely shared view across all sample groups that the new partial defence would merely act as a rebranding of the provocation defence, rather than a significant change in practice. In

arguing this, one English judicial respondent contended that the partial defence of loss of control is merely putting provocation 'under a different label' (UKJudgeB), while a policy respondent argued that 'rebranding is effectively what we are talking about' (UKPolicyA). This view was also echoed by current practising legal counsel, who commented that 'it's the same old defence with some of the same features and others not' (UKCounselE), 'I actually think there is no difference in fact' (UKCounselH), and 'the new reform is more or less the same as the old' (UKCounselG).

These perceptions of the new reform package contrast sharply with the intended purpose of the reforms, which UK Minister for Women Harriet Harman argued would signify the end of a 'culture of excuses' surrounding provocation cases of sexual infidelity arising from domestic murders (Verkaik 2008). Such a disparity between the expectations for the reform package and the actual changes that have occurred in practice highlights the importance of ongoing monitoring and examination of the law of homicide in England, particularly in relation to the initial operation of this partial defence of loss of control. Additionally, if the new partial defence of loss of control is to operate in essentially the same manner as the former provocation defence, it is important that this ongoing monitoring and analysis be used to ensure that there is no continued production of problematic narratives of victim blame and denigration through its operation, particularly in the law's response to intimate homicides.

6.2 The Gendered Effects of Homicide Law Reform

In addition to the perpetuation of the problems previously attributed to the operation of the partial defence of provocation, this research also examined whether homicide law reform in Victoria, NSW and England had served to minimise the broader influences of gender bias in the operation of the law. Challenging gender stereotypes and minimising gender bias in the operation of the law of homicide has been a key goal of relevant law reform initiatives over the past decade (Hulls 2005; Law Commission 2007; VLRC 2004). Therefore, it is essential to consider the success of such law reform in this regard across the three criminal jurisdictions. This evaluation is particularly important given the bank of past research that has recognised the difficulty of achieving change in legal responses to violence against women through the implementation of reform (Bachman & Paternoster 1993; Daly & Bouhours 2009; Goldberg-Ambrose 1992; Graycar & Morgan 2005; Kaspiew 1995;

Mackinnon 1991; Nourse 2000; Tang 1998). In examining this question during the interviews and case analysis, uniform concerns emerged suggesting that whether abolishing, replacing or reforming the defence of provocation, key gender stereotypes continue to be mobilised in relation to the law's response to lethal male violence and the experiences of battered women who kill.

Across the three jurisdictions, the interviews and case analyses revealed two main concerns related to the gendered effects of homicide law reform in this area: first, the continued legitimisation of lethal male violence; and second, the continued inability of the law to adequately respond to the circumstances within which women kill in response to prolonged family violence. The implications of these unintended effects of law reform are examined with reference to Sykes and Matza's (1957) framework of the technique of denial of the victim, and Cohen's (2001) concept of interpretive denial. Specifically, an analysis of the law's response to men who kill is undertaken with reference to the goals of law reform and a consideration of whether the law has continued to trivialise the male perpetration of lethal violence in the period studied. Conversely, the examination of the gendered effects of law reform involves an analysis of whether, following reform, the law has been able to better cater for battered women who kill or whether through the mobilisation of techniques of neutralisation and interpretive denial the law continues to inadequately represent these forms of lethal violence.

6.2.1 Legitimising Lethal Male Violence

> Every time a man gets away with murdering a woman, justice miscarries.
> (Howe 2010: 15)

Concerns surrounding the legal legitimisation of lethal male violence are particularly evident in the operation of defensive homicide in Victoria since its implementation in November 2005. As partly explored in the previous section, the operation of the offence over this period has led commentators of the homicide law reforms to question whether through the new offence Victorian homicide law is continuing to diminish the seriousness of lethal male violence through convictions other than murder (Capper & Crooks 2010; Fyfe 2010; Howe 2010). Although

implemented specifically to ensure justice for persons who kill in response to prolonged family violence, over the first six years the offence has operated in the majority to provide a lesser offence than murder for male defendants who have been convicted of killing a male victim in a one-off violent confrontation. As shown below in Table 6.3, of the 19 convictions for defensive homicide to date, 16 have resulted from homicides perpetrated by a male upon a male victim.

Table 6.3: Defensive homicide convictions with gender and age of defendant and victim in Victoria, November 2005 – September 2011

Defendant name (trial year)	Plea/ trial	Defendant sex–victim sex	Defendant age – victim age	Relationship between victim and offender	Sentence max/min
Smith (2008)	Plea	Male–Male	34 – 34	None	7yrs/5yrs
Edwards (2008)	Plea	Male–Male	43 – unknown	Victim dating offender's ex-partner	9.5yrs/ 7.5yrs
Giammona (2008)	Plea	Male–Male	31 – 29	Prison inmates	8yrs/6yrs
Smith (2008)	Plea	Male–Male	19 – 31	Friends	7yrs/4.5yrs
Taiba (2008)	Plea	Male–Male	32 – unknown	Acquaintances	9yrs/7yrs
Baxter (2009)	Plea	Male–Male	25 – unknown	None	8.5years/ 5.5yrs
Tresize (2009)	Plea	Male–Male	21 – 20	Mutual friends	8yrs/4yrs
Spark (2009)	Plea	Male–Male	39 – 60	Victim was offender's uncle	7yrs/ 4yrs 9months
Wilson (2009)	Plea	Male–Male	26 – 32	Acquaintances	10yrs/7yrs
Parr (2009)	Verdict	Male–Male	29 – unknown	Acquaintances	10yrs/8yrs
Doubleday (2009)	Verdict	Male–Male	23 – unknown	Acquaintances	9yrs/6yrs
Evans (2009)	Plea	Male–Male	25 – 37	Acquaintances	10yrs/7yrs
Middendorp (2010)	Verdict	Male–Female	26 – 22	Intimate relationship	12yrs/8yrs
Black (2011)	Plea	Female–Male	53 – 56	De facto relationship	9yrs/6yrs
Creamer (2011)	Verdict	Female–Male	53 – unknown	Married	11yrs/7yrs
Ghazlan (2011)	Plea	Male–Male	61 – unknown	Strangers	10.5yrs/7.5yrs
Martin (2011)	Plea	Male–Male	30 – 79	Friends	8yrs/5yrs
Svetina (2011)	Verdict	Male–Male	54 – 74	Victim was the offender's father	11yrs/7yrs
Jewell (2011)	Plea	Male–Male	24 – 19	Acquaintances	8yrs/5yrs

The predominant use of the offence by male defendants was criticised by the Victorian respondents, with one judicial respondent reflecting that 'it is disturbing that defensive homicide has been resorted to by men in circumstances that the Law

Reform Commission didn't really envisage' (VicJudgeG). In agreement, a Victorian defence respondent commented that 'it's a bit ironic that the intention of this seems to have been to protect women' (VicDefenceH).

The unforeseen categorisation of several of these cases of male-on-male lethal violence as defensive homicide is most clearly captured in an analysis of the sentencing of Zlatko Svetina for the defensive homicide of his father (*R v Svetina* [2011] VSC 392, hereinafter *Svetina*). Svetina was convicted following trial of the defensive homicide of his elderly father. During the trial the defendant claimed that after approaching his father's house he turned the power to the house off and entered, only to be confronted with his father yielding a tomahawk[53]. The defence in *Svetina* was focused upon the defendant's purported belief that in using lethal violence he was acting out of self-defence, after prising the tomahawk from his father, while acknowledging that this belief was unreasonable. Recognition of the inappropriate classification of this offence as defensive homicide by the jury is evident in the judicial remarks made at sentencing:

> the fact is that you struck him at least 10 times, three of which when he was crouching or lying on the floor. Given that you were confronted by nothing more threatening than a man of 74 years of age, of limited strength and restricted physical capacity, who you have managed to disarm, your reaction was grossly disproportionate to any threat you may have faced and, even if you believe it was necessary, was in fact so far in excess of the way in which a reasonable man would have reacted in the circumstances as to merit very substantial criminal punishment. (*Svetina*, per Nettle JA: s. 30)

Additionally, in drawing upon similar issues to those often evidenced within Victorian provocation trials prior to the abolition of the partial defence, this case raises the concerning question of whether an offender's alleged loss of self-control is continuing to operate to excuse murder. As commented by the judge at sentencing:

> [this] does not mean that the way in which your father behaved excuses you. For no matter how much he provoked you, you have committed an awful

[53] The victim had previously told a family friend that he had started keeping a tomahawk next to his bed for protection against his son.

> crime of killing him – a 74 year old man of significant physical infirmity – by striking him dead many times with an axe at night in his own home in the circumstances I have stated. Perhaps you convinced yourself that it was necessary to do what you did because you feared death or really serious injury. For that reason, you have not been convicted of murder. But it does not much lessen the gravity of what you did. The most that can be said in your favour, as your counsel put it on the plea, is that, as a result of all the pressures to which you were subjected in the months leading up to the killing, you snapped and lost control. (*Svetina*, per Nettle JA: s. 42)

The inappropriate categorisation of this offence as defensive homicide, rather than murder, is further evidence of the influence of a more subtle form of victim denial at play in the Victorian criminal justice system. While the remarks at sentencing do emphasise that the victim's behaviour should not be seen as excusing the use of lethal violence, they nonetheless contribute to a narrative of victim blame that was present throughout the trial. Furthermore, the possibility that verdicts, such as that obtained in *Svetina*, are more reflective of the current confusion among juror members and their propensity to produce a compromised verdict, rather than a proper application of the law, is explored in more detailed in the following section which considers the complication of jury directions in homicide trials in Victoria since 2005.

Convictions for defensive homicide in these cases also conflict with the recently expressed intentions of the Victorian Government to show a 'tough on crime' approach to knife crime among young males (Austin 2010; Cameron 2010; Craven 2010; Hulls 2010). This political campaign was implemented in a bid to minimise the perceived increasing knife culture within Victoria; however, the acceptance of guilty pleas to defensive homicide – arguably one of the most extreme forms of knife crime – both undermines and trivialises the seriousness of these types of offences. Acknowledgement of the need to deter knife crime in Victoria is also evident in the sentencing of Scott Jewell in September 2011, in which the judge noted the Crown's argument that the sentence imposed for defensive homicide must be reflective of 'community concern about young men wielding knives when engaged in alcohol-related violence' (*R v Jewell* [2011] VSC 483, per Williams J: s. 51). While it is recognised that within Australia the weapon most commonly used in homicide cases

is a knife (Virueda & Payne 2010) (and thus not surprising that knives were used in 14 of the 19 cases of defensive homicide within the period studied), it is concerning that in several of these cases there is an inference that the weapon was brought to the location of the homicide and not merely accessed out of convenience[54]. In light of this, it is questionable why such defendants are evading a murder conviction largely because of the Crown's acceptance of a guilty plea prior to trial.

More broadly, the Crown's acceptance of guilty pleas in cases of defensive homicide is additionally concerning as the process through which these deals are obtained obscures the ability to discern why these cases are being categorised as deserving of a conviction other than murder. This is primarily due to the informal nature of plea bargaining discussions in Victoria, where the process is at present not recognised in, or controlled by, any statute. In particular, given that plea bargains have been used to resolve 14 cases of defensive homicide since 2005 (see Table 6.3 above), this absence of transparency in the plea bargaining process hinders current understandings of how decisions are being made about what constitutes defensive homicide, and why the circumstances surrounding these cases allow for them to be categorised by the Crown as a less serious form of homicide[55].

Furthermore, and as shown in Table 6.3, thus far only one female defendant, Eileen Creamer, has been convicted following trial of defensive homicide. This highlights a significant disparity between the types of cases for which the offence was designed to cater and those it has actually attracted in practice. This trend has been described as 'very disturbing' (Douglas 2010), and has led legal commentators to question whether 'the key beneficiaries' of the Victorian law reform package have been 'young violent men' (Fyfe 2010: 5). As commented by one scholar:

> What has gone wrong – and what was entirely predictable – is that introducing a partial defence to assist women who kill in the context of domestic violence opens the door for the far more frequent cases involving male killers. (Howe 2010: 15)

[54] See, for example, *R v Smith* [2008] VSC 87; *R v Ghazlan* [2011] VSC 178.
[55] For a more detailed analysis of the use of plea bargaining throughout the initial operation of defensive homicide in Victoria, see Flynn and Fitz-Gibbon (2011, forthcoming).

Similar concerns also arise in NSW with regard to the continued operation of the partial defence of provocation, where the question emerges as to whether the defence is operating to effectively excuse lethal male violence occurring in both domestic and non-domestic contexts. In relating this to the problems identified in the Victorian operation of defensive homicide, one respondent from the NSW judiciary commented that men who are 'just picking fights with each other in pubs' should not receive a manslaughter by provocation conviction for something that is 'nothing other than a deliberate killing' (NSWJudgeE). As shown in Table 6.2 above, the provocation defence has been successfully used in NSW recently in cases that mirror such circumstances[56], suggesting that the trend of diminishing the seriousness of male-on-male lethal violence with a conviction other than murder is not unique to the Victorian jurisdiction. This also links in with the above Victorian and NSW analysis and further indicates that the legal legitimisation and trivialisation of male violence is not exclusive to the perpetration of violence by men against women.

6.2.2 Homicide law for Battered Women who Kill

> Although women's (and some men's) efforts at changing the operation of the law and ousting institutionalised misogyny have made discernible gains, the denial of women's voice in the courtroom and failure to hear when women do speak remains real. (Scutt 1998: 168)

The second key theme that emerged throughout both the interviews and the case analysis relating to the gendered effects of homicide law reform concerned the law's treatment of women who kill in response to prolonged family violence. Attempts to reform the law of homicide have often prioritised creating better avenues through which the experiences of women who kill in response to prolonged family violence can be heard and understood (Law Commission 2007; Office of the Attorney-General 2005; QLRC 2008; VLRC 2004). Such reforms can be evidenced across all three jurisdictions examined within this research, particularly in relation to the 1982 reforms to the provocation defence in NSW, the implementation of defensive homicide as a 'safety net' for such defendants in Victoria, and the inclusion

[56] See, for example, *R v Lynch* [2010] NSWSC 952.

of 'fear' as a trigger in the newly formulated English loss of control partial defence[57]. Therefore, it is critical to question whether, in the period following the implementation of these reforms, the law has been able to better respond to the often sensitive and nuanced contexts within which women kill in response to ongoing family violence.

In examining the effect of law reform within this context this research also considers how the inability to adequately categorise female offenders who kill in response to prolonged family violence represents another form of denial in the criminal justice system. In doing so, this research draws upon Cohen's (2001) conceptualisation of interpretive denial. As previously overviewed in Chapter 3, interpretive denial occurs where an event is acknowledged but the interpretation of the event absolves a key party of blame. As described by Cohen (2001: 7), while the key facts of the event are not denied they 'are given a different meaning from what seems apparent to others'. Using the concept of interpretive denial, this section considers whether the current law of provocation in NSW is adequately catering for these types of homicides and whether the implementation of defensive homicide in Victoria has provided an effective safety net for female defendants who kill within this context in the period following the abolition of the provocation defence.

Additionally, research has recently recognised that techniques of neutralisation have rarely been applied to female offending (Adshead 2011), and as such this research seeks to build upon understanding in this area by examining the role of techniques of denial in the operation of the law of homicide for battered women who kill. In examining female violent offenders within a mental health facility, Adshead (2011: 61) questioned:

> Is women's capacity for violence neutralized because the violation of the gender stereotype is intolerable? Or does it allow those working with the women (many of whom will be female) to feel sympathy, not antipathy, for female offenders? ... Understanding does not entail excuse.

[57] An analysis of respondents' initial perceptions of the inclusion of 'fear' within the new partial defence was undertaken in the previous chapter, and as such is not included within this chapter.

Through an analysis of the current adequacy of the law of homicide in NSW and Victoria in catering for the situations within which battered women kill, this research argues that it is not sympathy that is afforded to such offenders but rather a form of interpretive denial which, when mobilised, leads to the inappropriate classification of their use of lethal violence in a way that obscures acknowledgement of the prior perpetration of domestic abuse against them.

An analysis of provocation within this context is particularly relevant to NSW given that the use of this defence by women who kill their male abusers was a central focus of the reforms implemented to remove the 'sudden' requirement in 1982. As overviewed in Chapter 2, however, since the implementation of these reforms research suggests that the reforms have lessened, but not eradicated, the problems that such women face when accessing the partial defence of provocation (Horder 1992). Most notably, in 1997 the NSWLRC highlighted that the ongoing requirement of a 'loss of control' was problematic for such defendants, even without the requirement for that loss of control to be sudden:

> There is a concern that the defence is not readily accessible to women who kill their assailant partners because it is not defined in terms which are appropriate to those women's experiences of domestic violence … whilst some women may kill their aggressors as a result of losing self-control, others may not. Some women may kill in cold blood, but in an attempt at self-preservation. (NSWLRC 1997: 86–9)

Despite such findings, several of the NSW interview respondents believed that the partial defence of provocation does play a key role in providing a halfway house for women who kill in response to prolonged family violence and that without this defence there would be a potential for such women to be unjustly convicted of murder. As explained by one NSW judicial respondent, 'the battered wife issue is very hard to get in under self-defence but less difficult to get in under provocation and as a consequence that's a good example of why you need it' (NSWJudgeD).

An examination of successful provocation defences between 2005 and 2010 (see Table 6.1) shows that two female defendants in this period were able to successfully

raise provocation and were convicted of the manslaughter, not murder, of their abusive male partners – see *Chant* (*R v Joyce Mary Chant* [2009] NSWSC 593, hereinafter *Chant*) and *Russell* (*R v Russell* [2006] NSWSC 722, hereinafter *Russell*). However, the question arises as to whether a conviction of manslaughter by reason of provocation is the appropriate categorisation for such killings or whether such cases would be better addressed under the complete defence of self-defence. In both *Chant* and *Russell* an examination of the judicial remarks at sentencing reveals the significant history of violence that both the female defendants in these cases had been the victim of prior to their use of lethal violence. In *Chant* the agreed facts tendered by the defence stated that 'The deceased had "been bashing" and verbally abusing the offender regularly for many years' and that the violence had 'increased markedly' in the period prior to the homicide (*Chant*, per Howie J: s. 12). Additionally, on the night of the killing the agreed facts were described as follows: 'the offender believed that the deceased was going to kill her. She was "out of her mind with fear and lost her self control"' (*Chant*, per Howie J: s. 15)[58].

Given the Crown's acceptance of the significant and prolonged history of domestic violence in *Chant*, the question presents itself of whether the female defendant might have been better catered for under the complete defence to murder of self-defence in NSW homicide law and also whether the incorrect categorisation of the case as provocation manslaughter allowed a platform for techniques of interpretive denial to be mobilised throughout the trial. As discussed previously, when mobilised, interpretive denial allows for a reinterpretation of the event whereby the incident itself is not denied but is given a different meaning. In cases such as *Chant*, this revised meaning arguably fails to adequately recognise, or account for, the significant history of violence perpetrated against the female defendant prior to her act of lethal violence. As commented in relation to the Queensland context, a conviction of murder for defendants who kill within this context 'might be thought unjust because it would be a disproportionate response to the wrong which has been committed when all the circumstances, including the suffering experienced in the abusive relationship, are taken into account' (Mackenzie & Colvin 2009: 30).

[58] It should be noted that in sentencing Chant, the sentencing judge did note that he did not agree with the agreed facts given following the accepted plea to manslaughter by provocation and that he felt that 'the offender ha[d] consistently tried to minimise her responsibility for the killing' (*Chant*, per Howie J: s. 20).

Similar concerns arise in relation to the 2005 sentencing, following the acceptance of a plea to manslaughter by reason of provocation, of Cherie Russell. In *Russell*, the agreed facts tendered at sentencing described the de facto relationship between the victim and the offender as one 'characterised by alcohol abuse and violence, such violence occurring mostly when the deceased was inebriated' (*Russell*, per Newman AJ: s. 5). It was agreed that, on the night of the killing, following significant verbal abuse, the 'deceased took a knife and flashed it in the face of the offender and said "I'll kill you stone dead"' – an incident which the defendant responded to by fatally stabbing the deceased once in the chest (*Russell*, per Newman AJ: s. 20). It is important that this incident is placed within the context of an 18-month abusive relationship, about which prior police reports revealed that:

> the offender complained that the deceased, who was drunk, had called her a slut and a whore, had threatened to kill her and had choked her before ramming her head into a cupboard … Police statements record a large number of kicks, leaving the deceased bleeding … Police records indicate that the deceased was classified as a high risk offender of domestic violence incidents and that all domestic violence incidents involving the deceased should be thoroughly investigated. (*Russell*, per Newman AJ: ss. 55–66)

Given this significant, and uncontested, history of violence within the relationship it should be questioned why the defendant was not able to draw upon the complete defence of self-defence. The implications of the inappropriate categorisation of the offence as provocation manslaughter in both *Chant* and *Russell* can be further understood within the context of historical trends of the law's failure to understand and acknowledge the harm of domestic violence. Furthermore, by giving the offence 'a different meaning from what seems apparent', techniques of interpretive denial are mobilised throughout these cases to absolve a key party – the deceased – of blame (Cohen 2001: 7). Arguably, this is advanced through the mobilisation of sentencing narratives that fail to legally recognise the level of harm perpetrated upon the victim and the defensive nature of her subsequent act of lethal violence.

While a history of domestic violence in itself is not enough to successfully raise a complete defence of self-defence and the technical requirements of the defence must still be met, the reliance on provocation in *Chant* and *Russell* illustrates that such cases are not adequately represented when treated under the category of manslaughter by provocation. The complete law of self-defence needs to better cater for this context of homicide so that genuine cases of intimate killings that occur in self-defence do not require a safety net of manslaughter. This analysis therefore also opposes the argument put by some of the NSW respondents that provocation should be retained as a 'safety net' for women who kill within the context of family violence.

Similar concerns arise in relation to the operation of defensive homicide in Victoria. As previously noted, defensive homicide was implemented within the Victorian criminal justice system with the aim of creating a safety net for battered women who kill by providing a 'halfway house' between murder and manslaughter (Office of the Attorney-General 2005). However, this is arguably a misguided categorisation for these types of homicides as it does not accurately represent the situations within which such persons kill. A conviction for defensive homicide in such cases suggests that the defendant did not have reasonable grounds for believing that they were defending themselves or another from death or really serious injury. However, homicides occurring in self-defence within the context of family violence do meet the reasonable belief requirement, and thus should be adequately dealt with under self-defence laws with the potential for a complete acquittal of murder, rather than an alternative conviction. A conviction of defensive homicide, in such cases, sends a problematic message to the community that the actions of these female defendants are not reasonable and allows for a misinterpretation of the lethal violence that has occurred.

Additionally, and as reported in the Victorian DOJ (2010) *Discussion Paper*, the new family violence evidence provisions also implemented in 2010 have allowed for evidence of family violence to be better heard within the Victorian court system, and as such it should now be possible for the experiences of women who kill within this context to be heard and appropriately addressed within the law of self-defence. Although not the focus of this research, these reforms were praised by the respondents during the Victorian interviews, with one defence respondent commenting that it has

allowed for the greater inclusion of the experiences of women who suffer violence within the discursive realm of the law:

> Self-defence has become a lot more easy under the new legislation. It has removed the requirement of the immediacy of the threat. It's allowed much more analysis of the circumstances as to what constitutes domestic violence, family violence, those sorts of things. (VicDefenceA)

Additionally, the legislated removal of the 'immediate' requirement in cases of self-defence, similar to the reform previously implemented in NSW in relation to provocation, should also increase access to the complete defence for persons who commit homicide within this context. If these amended provisions are adequately and strictly implemented in the Victorian court system, then genuine cases of self-defence should receive a complete acquittal and not require a 'halfway house' alternative, such as defensive homicide, or loss of control as is the case in England. As stated by the VLRC (2004: 68), the law of self-defence should be formulated and implemented in a way that 'takes adequate account of women's experiences of violence' without the need for a separate partial defence, or offence.

Further to the issues related to the suitability of defensive homicide as a half-way house for battered women who kill, the interviews also revealed a concern that the 2005 homicide law reforms have served to disadvantage such female defendants. Although the provocation defence was most commonly criticised as a partial defence for jealous and controlling men who kill a female partner, a smaller sample of respondents from the Victorian defence counsel and judicial samples expressed the view that in practice battered women had been disadvantaged by the abolition of the partial defence of provocation. As one respondent reflected, 'I warned that ultimately it will be to the disadvantage of women, not having a defence of provocation' (VicDefenceI). In support of this, another respondent argued that, 'Like so much, the parliament has interfered, made some things a lot harder, made things a lot harder for the battered woman, which I don't think was their intention' (VicDefenceA). In reflecting specifically on the use of provocation by women who kill an abusive husband, a Victorian defence respondent explained that:

> it worked well for women – provocation. It was a really handy thing … women who kill their husbands usually do it when they're in bed, or they're drunk and asleep in the chair … women aren't as physically powerful as men. Plus they're intimidated by them. (VicDefenceC)

However, in opposition to this argument a policy respondent argued that it was a 'cop out' to keep provocation for women given that it was an incorrect labelling of such homicides (VicPolicyC), highlighting that the half-way categories of defensive homicide and provocation manslaughter do not sufficiently recognise and cater for the contexts within which these types of homicides occur. However, despite this, the concerns communicated by Victorian defence and judicial respondents also suggest that the current structure of Victorian homicide law, whether in relation to the implementation of defensive homicide or the abolition of provocation, may still be inadequate for dealing with homicides where persons kill in response to prolonged family violence.

6.3 Complicating the Law of Homicide: The Undesired Effect of Homicide Law Reform

A third key effect of the homicide law reforms recognised by legal respondents across all three jurisdictions was the over-complication of the law of homicide following the implementation of reforms targeted at the partial defence of provocation. The interviews revealed that in practice aspects of homicide law in all three jurisdictions are now perceived to be complicated beyond what lay-members of the jury can be expected to understand and apply to their verdict decision-making. This excessive complication of homicide law was observed specifically in relation to the Victorian law of self-defence following the implementation of defensive homicide, the new English partial defence of loss of control (specifically, the provision that excludes situations of sexual infidelity), and third, in relation to the continued operation of the partial defence of provocation in NSW.

6.3.1 Victoria: Defensive Homicide and the Law of Self-defence

> Self-defence is a simple idea, but as with many things simple, it is an idea that lawyers have managed to complicate. (Paciocco 1999: 272)

Throughout the Victorian interviews a large number of respondents stated their belief that the homicide law reforms, and specifically the introduction of defensive homicide, has served to overly complicate the Victorian law of self-defence by creating multiple avenues through which self-defence can be argued. This argument was advanced by respondents across all legal samples, and was often linked to respondent discussion around whether this new offence should be abolished or further clarified. As explained by one Victorian judicial respondent, 'Our experience as judges is that there are lots of problems and that maybe we haven't got the solution to the problem. I don't think we are making it worse but it's very complicated, very, very complicated' (VicJudgeD). In looking at Victorian homicide law more broadly, another judicial respondent commented that 'the current system is too complex' (VicJudgeC).

In examining the implications of the complex nature of the law of homicide in Victoria, respondents questioned whether juror members could be expected to understand the law of self-defence as it presently stands. As one VSC judicial respondent reflected, 'it's probably almost impossible to charge a jury on defensive homicide as it was on self-defence, without getting into a huge mass of double negatives, and that must make it very difficult for a jury' (VicJudgeG). In agreement, another judicial respondent explained that 'we are the ones who have to explain it to a jury, it's not easy and I'm sure it's very difficult for them to understand' (VicJudgeA).

Respondents from the Victorian OPP also expressed this concern, with one prosecutorial respondent commenting that:

> The introduction of the law of defensive homicide has been a complete debacle and because of that law being introduced juries now … need to be given instructions about concepts that are just completely bamboozling to lawyers. And honestly the juries must be looking at us and thinking we're absolutely mad. (VicProsecutorA)

Jury directions, under the new laws, were further described by prosecutorial respondents as 'mind boggling' (VicProsecutorB) and 'unbelievably convoluted'

(VicProsecutorA), and by respondents from the judiciary as 'incomprehensible' (VicJudgeA), 'too complex' (VicJudgeC) and as 'just in a mess' (VicJudgeF). These interview findings support earlier research conducted in Victoria with Supreme Court and County Court judicial members by Najdovski-Terziovski et al. (2008). Their research examined judicial perceptions of the directions given to jury members, and found that the 'over-intellectualisation of criminal law' has served to reduce the effectiveness of judicial communication with members of the jury (Najdovski-Terziovski et al. 2008: 80). In confirming the findings of that study, this research provides an additional layer of understanding by also considering the opinions of defence and prosecution representatives as to the over-complication of the law and the subsequent unintended consequences that this can have upon the decision-making capabilities of the jury.

Respondents' recognition of the complication of the Victorian law of homicide post-reform was often accompanied by their emphasising the need for clarification of this aspect of the current law of self-defence. Indeed, respondents from all Victorian samples interviewed discussed this need, as is captured in the comments of one judicial respondent:

> I think they just need to work it out, by amending the Act, whether the statutory version of self-defence with the accompanying alternative of defensive homicide was meant to cover the field, or not. Is that what self-defence is? ... or not? Do you know? (VicJudgeA)

While the beginnings of this clarification process can be seen in the 2010 Victorian Supreme Court of Appeal (VSCA) decision in *Babic* (*R v Babic* [2010] VSCA 198), a respondent from the VSCA judiciary observed that even there the decision has not overcome the problem in a 'neat and readily comprehensible way' (VicJudgeG). Without clarification, and simplification of the law, as previously argued, it is unclear whether juries can adequately comprehend the nuances of this offence and thus whether a jury verdict is based upon the elements of the offence as set out by the law or a tendency to compromise to a lesser offence – an effect that is discussed in more detail below.

The importance of ensuring accurate juror understanding of the law, despite the complicated avenues for self-defence to be argued, has been previously highlighted by the DOJ (2010: 183) in relation to Victorian homicide law, in commenting that 'jurors have a weighty and challenging task in homicide cases in which the issue of self-defence is raised. It is essential that the law be sufficiently clear so that judges can clearly explain it to jurors'. In attempting to overcome these complications, and improve juror understanding, a respondent from the VSC judiciary highlighted that it would be 'of great assistance, if not essential' for self-defence directions to now be provided in writing for jury members to refer to throughout the deliberation process (VicJudgeG). Given dominant perceptions surrounding the current over-complication of homicide law in Victoria, such strategies are arguably essential if juries are to adequately understand the law that they must apply to their decision-making.

6.3.2 NSW: The Complicated Provocation Defence Continues

The ongoing operation of the partial defence of provocation in NSW raises concerns similar to those that emerged in relation to the Victorian context surrounding the overly complicated nature of homicide law, and the need for future law reform to minimise such complications, particularly in terms of the judicial directions given to the jury in trials in which provocation is raised. As described by one NSW prosecutorial respondent, the directions on provocation often 'involve very difficult concepts for a jury, they are quite complex and ultimately they're value judgements for a jury … it's a very complex issue' (NSWProsecutorD). This respondent further explained that:

> The difficulty with provocation is to explain it to a jury. Even now, it's a very complex concept to explain to a jury of non-lawyers … one wonders just how much of it they really understand. There are a lot of lawyers who don't understand the rules so how do you expect a group of non-lawyers coming into court for the first time to understand it. It's really hard. (NSWProsecutorD)

Another prosecutorial respondent similarly commented that, 'its hard enough for lawyers to understand it, or explain it, let alone for jurors with no experience of the law to start understanding how those different tests relate to a particular person'

(VicProsecutorA). The law of provocation was also described by NSW prosecutorial and judicial respondents as 'difficult to explain to a jury' (NSWProsecutorE), 'particularly difficult' (NSWProsecutorA) and 'very complex' (NSWJudgeG). Furthermore, the judicial directions relating to provocation were described by a judicial respondent as 'very complex' (NSWJudgeG), while a defence counsel respondent questioned, 'they are not lawyers, they've never been in a courtroom before and they've got to go through all these directions – how can juries possibly take it all on?' (NSWDefenceH).

These opinions surrounding the complicated nature of NSW homicide law in relation to the operation of provocation have been previously noted in NSW case law, where in 2001 Justice Smart commented that the ordinary person test in the provocation defence had:

> 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 difficult, prolonged deliberation by juries. (*R v Mankotia* [2001] 120 A Crim R 492, per Smart J: ss.18–9)

Additionally, further support for this argument can be found in past reviews of the provocation defence carried out by scholars and law commissions (Hemming 2010; Jerrard 1995; NZLC 2007; Paciocco 1999; Tolmie 2005; Yule 2007), where researchers have commented that the partial defence of provocation requires jurors to perform 'mental gymnastics' (Jerrard 1995: 25). In reviewing reforms to the provocation defence in Australia, Canada and the UK, Yule (2007) commented that:

> The test used in the defence of provocation is conceptually difficult for the jury to understand. The jury is told they can take certain characteristics into consideration in one part of a test but not in another part. This has the potential for injustice.

Additionally, and in relation to the now abolished partial defence of provocation in New Zealand, Tolmie (2005: 26) has argued that 'the partial defence of provocation is itself notoriously difficult to understand and apply in its present form'.

6.3.3 England: The Complicated Partial Defence of Loss of Control

> When I look at the reforms as set out in the new Act, to some extent my heart sinks because they remain extremely complicated. When I look at section 54 and I think about actually explaining that to a jury and the number of hoops that have to be gone through … I can see juries struggling with this quite a lot. It certainly doesn't to my eye simplify the law. (UKCounselE)

In line with concerns surrounding the over-complication of homicide law in Victoria and NSW, and as alluded to in the previous chapter, the formulation of a new partial defence of loss of control by the British Parliament in England has led to respondent concerns that in practice the reforms will serve to further complicate the law of homicide. These concerns expand upon the general perception among the English respondents that the law of homicide in England has developed into a 'higgledy-piggledy fashion over a century, and the result is a system which is frankly incoherent' (UKJudgeA). Prior to the implementation of the most recent reforms, the 2003 review of the partial defences to murder conducted by the Law Commission recognised the importance of simplifying the English law of provocation by stating that a key goal of the reform exercise would be 'to see whether a version [of provocation] can be found which is coherent, sound in principles, workable in practice and would command public support' (Law Commission 2003: 12.7). However, the observations made by those charged with the daily implementation of the law of homicide, specifically in relation to the loss of control partial defence and its inclusion of a sexual infidelity provision, suggest that these goals have yet to be realised.

In considering whether the new reforms have served to further complicate English homicide law, one judicial respondent commented, 'I've always been old fashioned in trying to simplify, not complicate, things' (UKJudgeE). This view was supported by a policy respondent, who argued that the law 'at the moment it is quite frankly a bit of a mess' and that the new partial defence of loss of control is 'far too complex and I

would take a lot out, I would have wanted to simplify what was there' (UKPolicyC). In agreement, another judicial respondent described the partial defence as an 'incredibly complicated piece of legislation' (UKJudgeF), while a legal counsel respondent referred to it as 'a dog's breakfast' (UKCounselE).

Mirroring the concerns that emerged from the Victorian and NSW interviews, this perception was expressed particularly in relation to the judicial directions given to the jury and the increasingly complex role required of the jury, such that respondents questioned whether juries would be able to understand the complex judicial directions that would need to be given in relation to this new partial defence. This questioning is clearly captured in the comments made by one English counsel respondent, who asked, 'Are we completely kidding ourselves when we say these things to juries and expect them to understand?' (UKCounselR). Similar sentiment is evident in the description offered by a respondent from the English judiciary:

> Superficially it looks very straightforward but I think the reality of a direction to the jury and the hoops through which people are going to have to jump are almost as complicated, if not more complicated, than the existing law. There are some very funny little twists and for a lawyer you have to analyse it, so precisely how a jury is going to sort it out – I have no idea. (UKJudgeF)

In agreement, another judicial respondent conceded that under the new legislation 'juries are going to be given problematic directions' (UKJudgeA). The English policy respondents interviewed concurred, with one commenting that the complex nature of the new legislation was 'not desirable in this sort of area where you are so dependent on the jury understanding correctly what you are telling them and what you want them to do … So it's not going to be an easy matter,' and that it would make 'the jury task more complicated than it already is' (UKPolicyA). Another policy respondent reflected that he 'wouldn't be surprised if eventually, say within 10 years time, they have to rethink it' because of its complex nature (UKPolicyC). These views align with the initial perceptions of the reforms by stakeholders involved in the consultation process, who submitted that the government's proposals for reform 'would be more complex than the current law' (MOJ 2009: 9).

6.3.4 Impacts of Complicating Homicide Law: Compromised Justice

> This area of the law, perhaps above all others, needs to work effectively and command the confidence of the criminal justice system and society as a whole. (MOJ 2008: 1)

The interviews revealed a common perception among the respondents across all three jurisdictions that the further complication of the law following the implementation of reform can have a range of counterproductive impacts. Specifically, the interviews revealed that the unnecessary complication of homicide law often obscures the dissonance between the intent of the law reform package and its application in practice. Throughout the interviews respondents described this dissonance as always leading to a particularly unintended outcome: juries seeking to take a compromised position. Where the law provided for judges to outline a range of options for juries, respondents consistently reported that juries wanted to make a compromise by taking what has been regarded as a middle road – neither finding guilty to murder or not guilty to any offence – and preferring to convict of manslaughter.

The effects of such compromises are particularly problematic because they impact upon the achievement of justice in individual cases. As explained by Tadros (2008: 40, author's own emphasis):

> in cases where a conviction of murder would be warranted, a manslaughter conviction is at least regrettable. Hence, the distinction between murder and manslaughter marks a significant limit of the offence of manslaughter: it determines which cases are *only* manslaughter and *not* murder.

In explaining why multiple alternatives to murder can lead to an increased likelihood of juror compromise, an English legal counsel respondent considered that 'a jury will always run away with the idea that because we're shown these two things on the indictment and told there are alternatives, there must be a bit of doubt about whether he has done the more serious one' (UKCounselN). In agreement, a Victorian defence counsel respondent highlighted that the danger of providing more alternatives to

murder is that there is an increased 'likelihood that a jury will go the soft option … when it really should have been a full-on murder' (VicDefenceG). This view was supported by other respondents who felt that juries 'may well be tempted' by alternate categories to murder (UKCounselI), and that they 'will often go where there is a miniscule of doubt, they'll go for the lesser offence as a compromised verdict' (VicJudgeG). These respondent viewpoints are supported by research on the Canadian law of self-defence conducted by Paciocco (1999: 272), who has argued that:

> It is so technical that it is impossible to believe that many judges, let alone juries, understand it. In the end, self-defence cases are probably decided more according to human instinct than law. Its complexity leaves the application of the law prone to manipulation, politics and emotion.

An examination of case law in the period immediately following the implementation of reforms to homicide law supported this perception of the prevalence of such compromises, particularly in relation to the implementation of the new offence of defensive homicide in Victoria. During the 2009 sentencing of Ricky Doubleday for defensive homicide (*R v Croxford/Doubleday* [2009] VSC 593, hereinafter *Doubleday*), the judge remarked that 'it may be, and some may say, that the verdict of the jury was merciful, and that may be so' (*Doubleday*, per Coghlan J: s. 13). One of the key problems identified by the respondents was that in cases such as *Doubleday*, it is difficult to know whether upon the strict letter of the law justice has been attained.

The respondents also considered that compromised verdicts were particularly likely in domestic killings, in which case jury members often did not perceive that the defendant posed a danger to the community. As described by one English respondent, 'You just feel this pull on trying to find a compromised way. Especially in the domestic killings where they don't believe the defendant is dangerous or is going to do it again' (UKCounselD). In terms of the combination of the problem of comprised verdicts and the operation of provocation and homicide law more generally, respondents from both the NSW and English samples believed that often in trials in which some blame is displaced onto the victim juries are particularly susceptible to producing a compromised verdict to manslaughter. As explained by one NSW prosecutorial respondent, 'in cases where there are concerns that the victim gets put

on trial, it becomes then, "well I didn't much like the victim anyway and I felt a bit sorry for this person, so we'll find him guilty of manslaughter"' (NSWProsecutorE). In agreement, a NSW defence counsel respondent reflected that:

> It's a compromise … that's generally what they do – if they've got a bit of sympathy for the fellow then I can't let him kill his wife and walk out of here so we'll give him manslaughter. Or he stabbed someone so we'll give him manslaughter. I don't know … I think juries tend to be sympathetic to the person who has been cuckolded. I do think they tend to be sympathetic. (NSWDefenceH)

Commenting on the trend to compromise in domestic homicides within the English context, an English counsel respondent drew upon their experiences with the formerly available partial defence of provocation, reflecting that:

> That last moment when she came in and said, 'I've hated you for all these years' and so on, the jury decided that he shouldn't be found guilty of murder and it's often a sympathetic view that they didn't really want to call him a murderer … it's a sympathetic verdict. Adopting provocation where in a sense lawyers can't see it. (UKCounselA)

Supporting this view, another English counsel respondent commented that:

> Once upon a time a woman killed by her husband people would take that very seriously but nowadays there is an element of 'oh well it's between them and it's behind closed doors, well if he's saying she behaved like that' and they've got a bit of a doubt, then they'll give a manslaughter. A real sense of trying to get a compromise … manslaughter is a compromised verdict. My client couldn't believe his luck. I think in domestic killings if there is a hint that there may have been problems on both sides then manslaughter becomes the verdict. (UKCounselC)

In providing an explanation for why juries may seek such a compromised position, a counsel respondent explained that where there is a sympathetic defendant a conviction for manslaughter allows the juries to leave court with their conscience clear, saying

"we didn't convict him of murder because we didn't want to, but on the other hand we convicted him of manslaughter so we've given the prosecution something" (UKCounselR).

These experiences described by the respondents highlight the problems apparent in both the over-complication of the law of homicide and those previously recognised in the operation of the partial defence of provocation, whereby the representation of the deceased victim and the subsequent influence of techniques of denial can have arguably significant and detrimental effects at the verdict point within these trials. Additionally, these respondent viewpoints build upon the findings of prior research that has found that at different stages of the criminal justice process – during charging, conviction and sentencing – men who victimise an intimate partner are often treated more leniently than those who victimise a stranger (Dawson 2004; Dawson 2005–2006; Rappaport 1996).

Conclusion: Creating a Model of Better Practice

> Like so many attempts to patch an old garment, that patch was only partially successful. (UKJudgeA)

An examination of the effects of homicide law reform in Victoria, NSW and England suggests that overcoming the problems historically associated with the operation of the partial defence of provocation is not easily achieved through legislative change, and that uniform effects are evident in practice across these three jurisdictions despite the different approaches taken to reform. While the reforms undertaken have sought to better cater for the experiences of women who kill in response to prolonged family violence and to minimise the avenues through which men who kill a female intimate partner can escape the full judgement of the law, the resulting effects evidence the continuation of the problems historically associated with the partial defence of provocation within a framework of homicide law that has been further complicated in the period post-law reform.

The dangers of these effects become particularly apparent when analysed within the framework of Cohen's implicatory and interpretive denial, and against Sykes and

Matza's conceptualisation of the techniques of neutralisation, whereby a problematic displacement of responsibility for the male perpetration of lethal domestic violence occurs in these trials, while female defendants who commit intimate homicide in response to prolonged family violence continue to be inadequately understood and catered for within the confines of the current law of homicide in each of these jurisdictions. More specifically, throughout this chapter the effects of discourses of denial have become evident in different forms and to different extents both within and across each of the jurisdictions, despite the divergent approaches to reform adopted in each of the justice systems under study.

An analysis of the influence of implicatory denial and the technique of denial of the victim in the operation of defensive homicide in Victoria and of provocation in NSW reveals the extent to which denial can be mobilised to reverse the onus of blame in intimate homicide trials. In particular, the analysis highlights that while the mobilisation of narratives of victim blame, denigration and denial had become associated in the research with the operation of the partial defence of provocation, these narratives may in fact be equally evident in the recent operation of other alternative offences or partial defences to murder. This is most clearly evident in the analysis of the Victorian trials of Luke Middendorp and Anthony Sherna, in which the continued influence of these explicit narratives of denial provide an illustration of the gendered operation of the law beyond provocation.

The analysis also reveals that the influence of denial and techniques of neutralisation is not unique to the trials of men who kill a female intimate partner, but are also evident in different forms in the trials of women who kill in response to prolonged family violence. In examining this unique context of homicide, the research reveals that the mobilisation of more subtle forms of interpretive denial and denial of the victim serves to inadequately represent these cases at both the conviction and sentencing stages of the court process. The effects of these narratives of denial highlight that when these types of homicide are considered within the bounds of provocation or defensive homicide the law fails to adequately sympathise with the female perpetrator while at the same time absolving the male victim of blame for the perpetration of prior, often long-term violence within the relationship. Most

problematically, the mobilisation of these victim-denying narratives allows for the continuation of the historic trend of victim denial in cases of domestic violence.

Comparable criminal jurisdictions that seek to reform the partial defences to murder, particularly the partial defence of provocation, can certainly learn from the experiences of these three jurisdictions and the resulting observations of legal respondents charged with the daily implementation of these legislative changes. Importantly, both the Victorian and the English experiences illustrate that the creation of alternative offences, or additional partial defences to murder, should always be approached with caution as they can often have unintended effects in practice. In this regard, the introduction of new categories of homicide must be accompanied by a system of continual monitoring and evaluation of the law's operation in practice to ensure that the original intentions of the law reform package are being met.

CHAPTER 7 Homicide Law Reform and the Challenge of Sentencing for Murder

> Sentencing is as much about politics as it is about law or criminology. (Freiberg 2008: 148)

Examinations of the law of homicide, and specifically the role of the partial defences to murder, have often been expanded to consider the viability of moving consideration of provocation to the sentencing stage of the court process. Throughout the interviews conducted in this research, discussions of the partial defence of provocation raised key concerns across the three jurisdictions relating to the broader role of sentencing policy and reform. This chapter examines the relationship between sentencing practices and homicide law reform in Victoria, NSW and England. The value of a jurisdictional comparison of sentencing reforms has been previously recognised by Ashworth (1992: 181–2):

> Although one must guard against the assumption that sentencing reforms are simply transferable from one criminal justice system to another, the techniques used in one jurisdiction might be suitable, albeit in a modified form, for adoption in another.

Central to this comparative analysis is an examination of respondents' evaluations of the viability of reform packages that propose moving consideration of provocation to the sentencing stage of the court process. Specifically, this involves an investigation into the possibility of moving provocation to sentencing in NSW and England, while also considering Victorian legal respondents' reflections on the Victorian Government's decision to do so in November 2005.

Additionally, while this research was not originally intended to address the workability of broader sentencing practices in relation to murder within these jurisdictions, this did emerge as a key theme throughout the NSW and English interviews. For this reason, the perceived effects of restrictive sentencing legislation in NSW and England on reforms to the partial defence of provocation are examined within this chapter, alongside a broader analysis of the implementation of minimum

and mandatory sentencing regimes for the offence of murder in these jurisdictions. Specifically, this chapter examines the respondents' perceptions of the 2003 introduction in NSW of the standard non-parole periods for murder and the ongoing legislation of a mandatory life sentence for murder in England alongside the 2003 implementation of minimum starting points for murder.

The viability of relocating consideration of provocation to sentencing and the recent implementation of restrictive sentencing legislation in NSW and England are considered throughout this chapter with reference to key research on the impact of law and order politics and penal populism within the realm of sentencing. The need to consider the political influences on the formulation of sentencing policy is more apparent now than ever before (Freiberg & Gelb 2008; Garland 2000; Mackenzie 2005). As acknowledged by Freiberg and Gelb (2008: 2), over the past two decades:

> The judiciary is coming under increasing attack as the public claims a greater voice in the criminal justice system; politicians feel that elections cannot be won without a tough 'law and order' stance; yet, paradoxically, crime rates are decreasing.

As overviewed in Chapter 3, law and order sentencing is characterised by policies that advocate harsher sentences for violent and sex offenders, prioritise punishment over rehabilitation and seek to redress the public mistrust of members of the criminal justice system (Brown 2002; Casey & Mohr 2005; Garland 1996; Garland 2000; Gelb 2008a; Loader 2009; Palmer 2005; Pratt & Clark 2005; Reiner 2000). The importance of political influence within this context was also recognised throughout the interviews, with one Victorian respondent commenting that 'Provocation is as much a political issue as it is an emotional issue and emotions are highly influential in the development of public policy' (VicPolicyB).

As illustrated in Table 7.1 below, and as was outlined in Chapter 3, this chapter draws upon a variety of different law and order frameworks to consider the influence of political motivations and a law and order climate on the development of criminal justice and sentencing policy across the three jurisdictions. The law and order context

for the purposes of this chapter uses the combination of criminological work on law and order presented in Table 7.1.

Table 7.1: Sentencing and homicide law reform in a law and order climate

	Specific focus of reform	**Law and order framework**
Relocating provocation to sentencing	Relocating provocation to sentencing in Victoria	McCarthy (2008) and gender-based violence in sentencing
	Relocating provocation to sentencing in NSW and England	
Restrictive sentencing practices	NSW – standard non-parole periods	Hogg and Brown's (1998) themes of law and order commonsense
	England – formulaic and mandatory life sentencing for murder	Garland's (2001) indices of change

In considering the role of provocation in sentencing, the first half of this chapter draws upon the work of McCarthy (2008: 166) and her consideration of the 'potential gains [that] are possible through open engagement between gender-based violence advocates, the judiciary and the community … [and] the potential role of sentencing policy in the prevention of gender based violence'. Through her examination of the role that can be played by members of the judiciary in sentencing crimes of gender-based violence, McCarthy (2008: 172) has highlighted the importance of 'clear and unequivocal messages at the point of sentencing that are consistent and that communicate abhorrence of the violence itself'. While McCarthy's (2008) research largely focuses upon the role to be played by the Victorian SAC, this chapter extends upon this by investigating whether gender-based violence can be adequately accounted for at sentencing in cases where questions of provocation are raised.

The second half of this chapter draws upon the work of Hogg and Brown (1998) and Garland (2001) to examine the implementation of restrictive sentencing practices for murder in NSW and England. Specifically, respondent evaluations of the recent implementation of standard non-parole periods for murder in NSW are considered with reference to the conceptualisation of law and order commonsense proposed by Hogg and Brown (1998). As described by Hogg and Brown (1998: 4):

> In law and order commonsense, crime is depicted as a problem of ever-increasing gravity set to overwhelm society unless urgent, typically punitive measures are taken to control and suppress it. It generates the aura of a permanent state of emergency in which extraordinary measures are needed to defend society against the exceptional threat of rising crime rates … short-term populist measures are frequently adopted at the expense of more informed and effective policies to combat or reduce crime problems.

This climate of law and order commonsense, in which crime is perceived as a growing social problem that demands a punitive response, is particularly relevant to the respondent evaluations of the effect of this sentencing policy in practice. Additionally, law and order commonsense is often focused upon a specific type of crime – 'sudden, random and impersonal crimes' – and as such, its influence on the political approaches taken to sentencing for murder in NSW is highly applicable (Hogg & Brown 1998: 11).

As shown in Table 7.1 above, the influential work of David Garland (2001) in *Cultures of Control*, specifically his conceptualisation of the indices of change, is applied in this chapter to an analysis of respondent views of the continued implementation of a mandatory life sentence and the introduction of minimum starting points for murder in the English criminal justice system. As overviewed in Chapter 3, Garland (2001) conceptualises what he terms the indices of change as comprising key conditions that have affected the development of crime and justice policy over the past three decades. The 12 indices of change are:

1. The decline of the rehabilitative ideal.
2. The re-emergence of punitive sanctions and expressive justice.
3. Changes in the emotional tone of crime policy.
4. The return of the victim.
5. Above all, the public must be protected.
6. Politicization and the new populism.
7. The reinvention of the prison.
8. The transformation of criminological thought.
9. The expanding infrastructure of crime prevention and community safety.
10. Civil society and the commercialisation of crime control.

11. New management styles and working practices.
12. A perpetual sense of crisis.

(Garland 2001: 8–20)[59]

Within this research, these indices of change are used to aid an understanding of respondent perceptions of the motivations for, and effects of, sentencing legislation for murder within the English context. Specifically, they provide an explanation for the implementation of recent sentencing policy in England, despite significant criticism of these policies by members of the justice system and researchers.

7.1 Provocation in Sentencing

As canvassed in Chapter 2, proposals to move any consideration of provocation to the sentencing stage of the court process have animated debate and discussion among national and international scholars over the past decade (Bradfield 2003; Fitz-Gibbon 2009; McSherry 2005b; Morgan 1997; Stewart & Freiberg 2008; Tolmie 2005). This body of research has often questioned the viability of considering provocation at sentencing, the framework through which it should be applied and the extent to which it should mitigate a sentence for murder. Within Australia, consideration of provocation was transferred to sentencing in Tasmania in May 2003, in Victoria in November 2005 and in WA in August 2008. Internationally, provocation is considered only at sentencing in NZ and France[60].

Given the recency of these reforms, as yet research has been largely absent or at best inconclusive on identifying the effects of moving provocation to sentencing, and for this reason this research sought to understand the legal respondents' perceptions of transferring provocation to the sentencing stage within the Victorian context. This research also draws upon the Victorian experience in order to question whether respondents from the NSW and English interview samples would support the implementation of a similar model of reform within their own jurisdictions.

[59] For a more detailed description of each of the indices of change proposed by Garland (2000) see Chapter 3.
[60] For a more detailed examination of the national and international context of reforms to the partial defence of provocation see Chapter 2.

These discussions are considered with reference to McCarthy's (2008) analysis of the need for sentencing to adequately account for, and reflect the seriousness of, gender-based violence. Given that the use of provocation at the trial phase of the court system has often led to controversial verdicts in intimate homicide trials, the application of McCarthy's work to this context appears particularly relevant in a climate in which government and law commission bodies are seeking to implement reforms that overcome gender bias in the law of homicide. As described by McCarthy (2008: 165), governments are currently encountering 'the challenge to forge sentencing policy that eradicates violence-supportive attitudes, racism and xenophobia in relation to rape and other gendered violence'. It is with this goal in mind that the following sections consider the respondents' evaluations of the viability of relocating the consideration of provocation to sentencing.

7.1.1 Victorian Perceptions of Provocation in Sentencing

Alongside its recommendation to abolish the partial defence of provocation, the VLRC (2004) recommended that issues pertaining to provocation should continue to be considered by judges at sentencing[61]. Five years after the implementation of this reform, the interviews reveal that there is strong support among members of the Victorian legal community for the continued consideration of provocation at the sentencing stage of the court process. Specifically, the Victorian respondents who favoured considering provocation at sentencing rather than at trial often discussed the important role that provocation should play in mitigating a sentence for murder. As described by one prosecutorial respondent, there is a 'legitimate foundation' for the courts to recognise at sentencing where 'a person kills in a situation of extreme stress' (VicProsecutorH). This view was also evident among members of the VSC judiciary, with one respondent commenting that 'the question of a trigger for actions is always a significant issue in sentencing' (VicJudgeC), while another stated that:

> it would be most unfortunate if people who did act under the sort of provocation which the ordinary person would experience and feel the need to respond to, were not given some recognition of that circumstance and the best way to do that is in the sentencing area, I think. (VicJudgeG)

[61] For a more detailed discussion of the recommendations of the VLRC, see Chapter 2.

Also supporting this reform, other Victorian respondents commented that 'I don't think there is anything wrong with handing that over to the judge to deal with' (VicPolicyB) and that 'anything that helps explain a murder should be considered in sentencing' (VicProsecutorF), while a defence respondent also believed that 'it's probably going to be sentenced accordingly even on murder so I don't think we've lost much by getting rid of that [provocation]' (VicDefenceG). However, as McCarthy (2008) warns, it is important that in attempting to provide an understanding of triggering behaviours, judgement during sentencing does not ignore the aetiology and nature of the contexts within which gender-based violence occurs. This marks recognition of the need to include within the law's response to these cases an individualised understanding of the context within which these homicides occur.

In addition to acknowledging the importance of provocation as a sentencing factor, one respondent highlighted that without the historical constraints of mandatory sentencing and capital punishment there was no longer 'a justification for allowing' provocation to reduce the offence of murder to manslaughter, and as such any determinations about provocation were better suited to the sentencing stage of the court process (VicPolicyD). In agreement, a judicial respondent reflected that:

> Logically, it really is a sentencing issue and of course its origins were historical and justifiably, I think, it was an amelioration of the death penalty … but I think in modern times it probably should be in the sentencing arena. (VicJudgeH)

Considerations of the influence of the mandatory life sentence on respondents' views of the necessity of provocation as a partial defence to murder also emerged as critical to the English respondents' evaluations of whether consideration of provocation could be moved to the realm of sentencing. These opinions are examined in detail in the following section of this chapter.

The Victorian respondents who favoured moving decisions about provocation to sentencing also believed that a conviction for murder, with a potentially mitigated sentence, would better reflect the culpability and intent present in such offences. As described by one respondent:

> I thought it was an intentional killing with a lawful justification or excuse and that's murder. So I thought having it as a mitigator, if indeed it was mitigating, was right. To have it reflected in the sentence but not to have it treated in the same way as say somebody who killed in self-defence, who committed an intentional killing but had a lawful justification or excuse for doing so. (VicPolicyD)

The intent present in provocation killings has also been previously acknowledged by various law reform commissions in Australian and international jurisdictions (NZLC 2007; VLRC 2002). Additionally, in 2003 this was raised as a key reason supporting the abolition of provocation in Tasmania at a parliamentary debate, where it was argued that:

> The main argument for abolishing the defence stems from the fact that people who rely on provocation intend to kill. An intention to kill is murder. Why should the fact that the killing occurred when the defendant was acting out of control make a difference? All the ingredients exist for the crime of murder. (Jackson 2003: 59)

Similarly, in its review of the defences to murder the VLRC (2002: 67) questioned why such killings should be mitigated to manslaughter given the presence of an intention to kill:

> On the one hand it can be argued that those who rely on provocation as a defence have generally formed an intention to kill. Why should the emotion of anger reduce moral culpability more than other emotions such as envy, lust or greed? ... Why should it make a difference to the level of criminal responsibility that a person who intends to kill does so as a result of loss of self control?

The importance of labelling lethal violence that is provoked as murder has also been recognised in the research. For example, Yule (2007) has previously argued that 'Murder should be labelled murder. If there is an intention to kill someone then it should be named murder. Why should the loss of self-control be the basis of a

defence? … Violence should not be condoned. Self-control should be encouraged'. This point is also important in light of the analysis presented in Chapter 6, which illustrated the importance of the correct categorisation of an offence.

However, a smaller sample of Victorian respondents – predominantly from the defence (seven of the 10 respondents) and judicial (two of eight respondents) samples – were opposed to the transfer of provocation to sentencing, and questioned the role that it might play at this stage of the court process. These respondents expressed concern that at sentencing for murder 'provoked' killings would not receive adequate mitigation. As one defence respondent commented, 'A sentencing judge these days isn't going to say, "oh well, there was such provocation and I'll take that into account." They'll give a fairly straightforward murder type sentence' (VicDefenceJ).

Equally, there was a concern among respondents who opposed moving decisions about provocation to sentencing because they believed that it would be easy for provocation to become hidden at this stage of the court process. As questioned by one judicial respondent, 'we got rid of it and everybody thinks it should be in sentencing but where is it in sentencing? We've lost it. That's the problem' (VicJudgeA). Another judicial respondent also expressed this concern, commenting that 'now we don't know what's happening in those cases' (VicJudgeH). This argument is particularly relevant to McCarthy's (2008) work, which emphasises the importance of the judicial comments made at sentencing, not only the numerical length of the sentence imposed. As examined in the previous chapter, without a change in the justifications provided by members of the judiciary in these cases, there is little hope that moving provocation to sentencing can overcome the historical problems of gender bias, regardless of the length of sentence imposed.

Victorian policy respondents also recognised that it was not enough to simply move consideration of provocation to sentencing, but rather that the reform would need to be accompanied by cultural change to ensure that the problematic narratives of victim blame often associated with provocation do not continue to be produced, albeit at a different stage of the Victorian court process. In expressing this concern, one policy respondent admitted that there was a fear that 'the ghosts of the past would rise up and we would get a reproduction of all of the issues' previously associated with

provocation (VicPolicyB). In agreement, another policy respondent expressed concern that the same problematic narratives would 'just become hidden in sentencing' (VicPolicyC). These concerns align with a key foundation of McCarthy's (2008) argument, where an emphasis is placed on achieving actual change in the comments made at sentencing, not only in the verdict implemented, in order to adequately reflect the nature and aetiology of gender-based violence. In proposing this, McCarthy (2008: 170) argues that judicial comments at sentencing must 'reflect an intolerance of violence', which she proposes can be achieved if adequate attention is paid to the Victorian sentencing principles of denunciation and deterrence[62]. Referring back to the use of provocation in intimate homicide trials, the adoption of McCarthy's (2008: 171) argument would mean that sentencing must 'communicate to the community an abhorrence of [the] gender-based violence' that occurs in situations of alleged provocation.

These concerns also highlight the need for a clear and transparent framework for how provocation should be considered, and taken into account, at sentencing. While this was not provided by the VLRC (2004) in its final report, such a framework has since been established in the extensive work of Stewart and Freiberg (2008, 2009). Thus, there is now a need for an examination of whether that framework is being applied in practice and, if so, how effectively. This is particularly important given the initial concerns raised in this research that the production of problematic narratives have continued into the sentencing stage of the Victorian court process, most notably through the initial operation of the offence of defensive homicide, rather than in sentencing for murder. As McCarthy (2008: 171) has argued, it is important that members of the justice system involved in sentencing be proactive in 'challenging attitudes that trivialise violence and its impacts'. This suggests that, within this climate, if Victoria is to adequately adopt a model that relocates the consideration of provocation to sentencing and overcomes the gender bias historically associated with the partial defence, then members of the judiciary should take an active role in ensuring that the victim blame narrative previously associated with the use of the provocation defence, and with defensive homicide, does not continue to gain legitimacy within the Victorian courtroom.

[62] The principles of denunciation and deterrence are set out in the *Sentencing Act 1991* (Vic.) (ss. 5(2)(a) and (d)).

In relation to sentencing for murder, research to date has suggested that in the five years following the abolition of provocation as a partial defence to murder in Victoria the issue of provocation has had little influence on the sentencing of murder offenders. As described by Stewart and Freiberg (2009: viii):

> The full impact on sentencing outcomes of the reforms initiated by the Victorian Law Reform Commission for offenders who otherwise might have been convicted of provocation manslaughter is still uncertain and will only become apparent in years to come.

The conflicting viewpoints evident throughout the Victorian interviews surrounding the transfer of provocation to sentencing are reflective of the fact that this reform is in its initial phases, so that, as yet, it is unclear exactly how influential provocation is and will continue to be as a sentencing factor in Victoria. This uncertainty is highlighted in the respondents' views, with one member of the VSC judiciary commenting, 'how it will work in practice, I'm not sure' (VicJudgeC). Most importantly, this uncertainty also highlights the need for continual evaluation and monitoring of the 2005 reforms to determine the ongoing effects of considering provocation at sentencing rather than at trial, and to examine whether the seriousness of gendered violence is being adequately recognised at this stage of the court process.

7.1.2 Relocating Provocation to Sentencing: The NSW and English Experience

In contrast to Victoria, questions relating to provocation and a defendant's loss of self-control continue to be considered by a jury in mitigating murder to manslaughter in the NSW and English criminal justice systems. Therefore, this research questioned whether respondents from these two jurisdictions would support the implementation of a reform package, similar to that introduced in Victoria, which moved consideration of provocation to the sentencing stage of the legal process. In these two jurisdictions, responses to this question were varied across all sample groups interviewed, highlighting the often contentious nature of law reform.

Specifically, respondents from the NSW ODPP, as well as a smaller number of respondents from the NSWSC judiciary, English judiciary and English policy

samples, favoured the transfer of provocation to sentencing. These respondents often discussed the degree of flexibility in sentencing for murder in NSW, as well as their belief that such a reform would act to simplify the current law of homicide. In opposing this argument, other respondents from the NSW defence sample, alongside a smaller sample of NSW judicial respondents and English counsel respondents, argued that given the important role of the jury, provocation should not be transferred to the sentencing stage of the court process. These conflicting respondent views are considered with reference to McCarthy's (2008) argument for the importance of recognising the harms of gender-based violence at sentencing.

In NSW, the majority of respondents from the ODPP, as well as a smaller number of judicial respondents, expressed the belief that, given the relatively flexible sentencing practices for murder in NSW, and the need to recognise the intent present in these offences, the partial defence of provocation should no longer play a role in reducing murder to manslaughter. These respondents argued that abolishing the provocation defence and moving the issue of provocation to sentencing would be a 'a better way to go about it' (NSWProsecutorE), and that it 'would be much more sensible to have the reason for those partial defences reflected in the penalty aspect rather than in the nature of the offence' (NSWProsecutorA). This is certainly attainable, and desirable if in reflecting the reason for provocation members of the criminal justice system do not reproduce the gender biases that have been associated with these trials at the sentencing stage of the court process[63]. In relation to rape trials, McCarthy (2008: 171) suggests ways in which this could be achieved, noting that at sentencing:

> A court that challenges attitudes that trivialise violence and its impacts would not tolerate violence-supportive attitudes in legal argument or mitigation. Attributing blame to the victim in a plea might not be allowed (for example, remarks about dress or consent on an earlier occasion), just as justifying rape or providing excuses that diminish men's responsibility would be frowned upon.

[63] For a detailed analysis of the production of gendered narratives in NSW provocation trials, see Chapter 6.

These approaches can easily be adopted within sentencing for murder, whereby transferring the consideration of provocation to sentencing would be a preferable model if the responsibility for the perpetration of gendered violence was appropriately located with the offender and the harms inflicted upon the victim were adequately recognised. As such, this research supports McCarthy's (2008: 172) argument that 'sentencing tariffs in this respect might be less important than sentencing comments'.

NSW prosecutorial respondents also considered that moving provocation to sentencing would simplify the law, as one prosecutorial respondent commented, 'it makes it a lot simpler because the trial judge can hear all the evidence, you can still have a plea and the accused can still get the benefit of a plea. It's certainly a lot simpler' (NSWProsecutorD). Given the current complication of the law of provocation in NSW, as explored in Chapter 6, any reform that could potentially simplify the law is arguably desirable.

In contrast, respondents who favoured the retention of provocation as a partial defence to murder in NSW and England often recognised that in practice it has produced gender bias, yet argued that it was a right of the accused. This argument was advanced predominantly by respondents from the NSW defence counsel sample, as well as a small sample of respondents from the NSWSC judiciary and English counsel samples. As explained by one NSW defence respondent, 'I think that it seems to me to be a realistic defence. I think that it fits with ordinary human behaviour in a way that I think genuinely reduces the moral culpability of the behaviour of the homicide. I think it should be kept' (NSWDefenceF). In contrast to earlier arguments posed in favour of the transfer of provocation to sentencing in Victoria, these NSW respondents also argued that such defendants should not incur the label of 'murderer'. These respondents questioned whether the label of murder can adequately represent the nuanced experiences of persons who kill an intimate partner. In further explaining this, a NSWSC judge commented that:

> Ultimately the criminal law is based upon free will and we assume as judges that people have the capacity to control their actions so when people don't have the capacity to control their actions then the law has to make allowance

> for it … I think it's fair to say in my view, for what it's worth, that provocation is necessary. (NSWJudgeD)

In support of this, and in providing an argument for why provocation should not be moved to sentencing, another NSW judicial respondent explained that:

> For my part though I still think there is a different resonance in being convicted of murder, on the one hand, and manslaughter, on the other. I think the community still feels that murder has a particular label attached to it, whatever the circumstances, whereas people understand that manslaughter means that you've killed but in some way you're not a murderer, there is something about the killing that mitigates it in the law's eyes. (NSWJudgeH)

There is certainly validity to these viewpoints, which are also supported by previous research; however, the argument for mitigation in these cases is undermined if that mitigation is attained at the expense of recognising the circumstances within which gender-based violence occurs. Additionally, these perspectives also raise the broader question of whether an evaluation of the culpability of a person who kills within this context is best recognised at trial with a verdict of murder or at sentencing with a harsher sentence for manslaughter.

Furthermore, and as analysed in Chapter 5 in relation to the Victorian interview data, in opposing the abolition of provocation as a partial defence to murder, respondents – predominantly from the NSW defence and English counsel samples – believed that provocation was best considered by a jury as representatives of the community than by a single judge at sentencing. As argued by one NSW judicial respondent, 'it's necessary as a society question. The reality is that I'm a great believer in the jury system and jurors most of the time apply their commonsense to it' (NSWJudgeD). In agreement, other NSW judicial respondents commented that provocation was 'really a jury matter ... I think the injection of community values is not a bad thing' (NSWJudgeB), and 'I think important questions like that that have to be assessed by community values and community experience are probably best left to the jury … I think it's important that juries make that decision' (NSWJudgeH). This argument was also put by defence counsel respondents from NSW, with one respondent

commenting, ‘I think it is more adequately and better determined by the jury’ (NSWDefenceD).

Arguments for the importance of the jury were also evident from the interviews conducted with English legal counsel. One respondent reflected that, ‘I’ve always felt in every provocation case that I’ve done that juries got it right. We don’t give juries enough credit I don’t think’ (UKCounselK). In agreement, another English counsel respondent believed that ‘the jury are the best people to decide for themselves whether it [provocation] brings it back from murder to manslaughter, so I approve I have to say’ (UKCounselR). Another English respondent questioned whether consistency could be achieved if consideration of provocation were relocated to sentencing:

> Let’s suppose that every judge who is ever asked to think about provocation says, ‘yes it was’ – the public then would think ‘hang on why is it that every time we have a murderer caught red-handed with his hand on the gun, he goes to court and the judges say no problem, provocation?’ You’d end up with a huge lack of confidence in it. On the other hand, if every time you went before the judge he said, ‘no, this is a straightforward murder, you’re going to get a full whack’, that would then result in defendants thinking, ‘I’ve not been given a fair crack’. (UKCounselN)

This respondent viewpoint highlights the questions surrounding who is better placed within the criminal justice system – judge or jury – to appropriately determine matters of provocation. In intimate homicide trials in which provocation is raised, this extends to the question of who the respondents perceive to be more capable of evaluating the culpability for the gender-based violence committed in these trials. While research has illustrated the influence of gender bias in judicial comments at sentencing (Burman 2010; Hunter 2006; Kaspiew 1995), less research has considered the role members of the jury play in either accepting or rejecting provocation defences that are entrenched in gender bias. Given the importance of the judge or jury question to considerations of whether to relocate the matter of provocation to sentencing, it is critical that we improve our understanding of the latter issue.

In further opposing the relocation of provocation to sentencing, other English respondents commented that it involves 'taking away from the jury important decisions about a case' (UKCounselS) and 'I think the jury are pretty good arbiters of what the public think and what they consider to be acceptable' (UKJudgeB). These respondent views mirror those previously analysed in Chapter 5, expressed by Victorian defence counsel respondents, illustrating that despite jurisdictional differences and nuances, uniform views emerged across the legal samples interviewed from Victoria, NSW and England.

However, in countering this argument, a NSW prosecutorial respondent highlighted that provocation already influences sentencing given the role that judges have in evaluating the degree of provocation. As explained by one prosecutorial respondent:

> in the end, the judge has to determine the effect of the provocation in sentencing, because they have to try and gauge what the jury were finding and the degree of provocation to set an appropriate sentence. So it plays a role there. Maybe we could go straight to that without having the trial and jury to determine. (NSWProsecutorE)

This point was also made by another NSW prosecutorial respondent, who commented that, 'even where partial defences are successful, the judge still has to make a decision as to how that affects the sentence' (NSWProsecutorD). Thus, given the role already played by provocation in sentencing, these respondents believed that moving provocation completely to the sentencing stage of the court process would be a preferable model.

These conflicting viewpoints – both across and within jurisdictions – on whether provocation is best considered by jurors as representatives of community values or by a single judge at sentencing raise broader questions surrounding the role of members of the criminal justice system in evaluating these cases. Most prominently, this debate raises the question often grappled with by law commission and government bodies of whether provocation is a value judgement best decided upon by representatives of the community – whom respondents have described as often hard to convince on issues of

provocation[64] – or whether justice can be more simply and predictably achieved when such decisions are moved to the realm of sentencing and decided upon by professional judges. Additionally, by drawing on the work of McCarthy (2008), this chapter also considers who is better placed to evaluate the culpability for gender-based violence, and to what extent the criminal justice system should provide an avenue of mitigation for violence that is provoked, while still recognising the seriousness of violence that occurs within intimate contexts. In seeking to address the latter question, this chapter has so far emphasised the importance of the judicial comments made at sentencing, rather than the length of sentence imposed or the label of the conviction recorded.

7.1.3 England: Provocation and the Mandatory Life Sentence

> Every practitioner on the planet knows that the mandated life sentence governs everything. The way that homicide law works is restricted by that. (UKPolicyB)

Central to the English respondents' evaluations of whether provocation could be considered at sentencing rather than at trial was also the continued implementation of a mandatory life sentence for murder. The mandatory life sentence for murder was introduced into the English criminal justice system following the abolition of capital punishment in 1965[65]. Described by Roberts (2008: 23) as the 'most visible example' of penal populism, the mandatory life sentence for murder was imposed as a symbolic contract with the public that murders would continue to be taken seriously by the justice system and would routinely receive the most serious form of punishment available. Its implementation was also based upon the belief that imposing a sentence less than life would decrease public confidence in the operation of the criminal justice system (Mitchell & Roberts 2010, 2012; Roberts 2003).

Over the past two decades, this continued implementation of a mandatory life sentence for murder in England has been a point of significant discussion among legal

[64] For a more detailed analysis of the respondents' perceptions of provocation as a hard defence to run in front of a jury, see Chapter 5.
[65] Under section 1(1) of the *Murder (Abolition of the Death Penalty) Act 1965*, all offenders over the age of 21 years convicted of murder in England must be sentenced to life imprisonment. Where an offender is under 21 years old at the time of their conviction for murder, they must be sentenced to custody for life, under section 93 of the *Powers of Criminal Courts (Sentencing) Act 2000.*

practitioners, scholars and media commentators (Anderson 2010; Cotton 2008; Cowdrey 1999; Gibb 2005; Hoel & Gelb 2008; Mitchell & Roberts 2012; Morris & Blom-Cooper 2000; Pannick & Cooper 2004; Roberts 2002; Roberts 2003; Stern 1991). Despite several calls for its abolition, the life sentence continues to be applied to all cases resulting in a murder conviction, with the MOJ (2011: 10) recently describing it as an 'essential part of the sentencing framework' for murder in England, emphasising that there 'are no plans to change this'. Within this research, the existence of the mandatory life sentence emerged as central to the English respondents' evaluations of the viability of considering provocation at sentencing, rather than at trial.

Several respondents from the judicial and policy samples expressed support for moving provocation to sentencing were the mandatory life sentence for murder to be abolished. As captured in the opinion of one judicial respondent, 'As a general approach I would favour, and other judges would favour, dropping the mandatory life sentencing and then of course, provocation would not need to be a defence' (UKJudgeE). In agreement, a policy respondent commented that:

> The hope would be that we get rid of the mandatory life sentence so where you have a case and there is some evidence of provocation, never mind whether it would have jumped through the hoops of the old law, if you think it should reduce the seriousness of the offence then you could reflect that in the sentence. (UKPolicyB)

Another policy respondent similarly believed that problems relating to provocation and its role in mitigating murder to manslaughter would 'melt away to a certain degree if you got rid of the mandatory life sentence' (UKPolicyA). This view reflects that while the respondents were often supportive of a murder label being applied to these homicides, this view was largely conditional, depending primarily on the ability of the criminal justice system to then reflect variances in culpability in the imposition of a discretionary sentence.

English counsel respondents also recognised the viability of moving consideration of provocation to sentencing if the mandatory life sentence were abolished. As one respondent observed:

> If you abolish that [mandatory life sentence] so that a trial judge is then given discretion over whether or not to pass a determinate or indeterminate sentence for a case of murder, the need to obtain from the jury a verdict distinguishing between the two disappears because a judge would be entitled to have regard to the crime of passion element of it in mitigating the sentence he passes. (UKCounselS)

These respondent views support the findings of existing research, which has identified the difficulty of abolishing the defence of provocation while retaining a mandatory life sentence for murder (Cotton 2008; Freiberg & Stewart 2011; Hemming 2010). Cotton (2008: 292) has contended that 'if the mandatory life sentence for murder was abolished and replaced with a discretionary sentence awarded by the court, both these defences[66] could be superfluous; the context of the killing could be reflected in the sentence'. Acknowledging the influential role of the mandatory life sentence, Hemming (2010: 1) has also argued that in examining the partial defence of provocation 'the heart of the problem' is mandatory life sentencing for murder and, as such, that 'it is the sentencing regime that needs to be adjusted'. In explaining why the continued implementation of a mandatory life sentence for murder often impedes the abolition of provocation, Freiberg and Stewart (2011: 107) note that:

> While one object of provocation reform is to ensure that some killers do indeed serve a more severe sentence, the lack of judicial discretion for those who are deserving of mercy is a barrier to reform. Sentencing reform is thus an essential prerequisite to reforming the law of provocation.

However, in contrast to this argument, some English respondents expressed the opinion that even if the mandatory life sentence were abolished there would still be a need for partial defences, such as provocation, to reduce murder to manslaughter. As commented by one policy respondent:

[66] Provocation and Diminished Responsibility.

> Even if we abolish the mandatory penalty, I would still be in favour of retaining both provocation and diminished responsibility because I do think it's unacceptable for people who were properly provoked to lose self-control to have them convicted of murder. (UKPolicyC)

This respondent view connects to earlier debates concerning whether a person who has been provoked to use lethal violence should be labelled as a murderer, or whether a categorisation of manslaughter is more fitting to such lethal violence. This distinction between murder and manslaughter becomes particularly important in jurisdictions such as England where the mandated penalty of life continues to be implemented.

7.1.4 NSW: Provocation and the Standard Non-parole Periods

As was the case in England, throughout the NSW interviews the recent implementation of a restrictive sentencing scheme for murder was central to the respondents' considerations of whether the issue of provocation should be relocated to the sentencing stage of the court process. Specifically, the NSW respondents often highlighted the 2003 implementation of standard non-parole periods as an impediment to any reform that proposed transferring provocation to sentencing. The standard non-parole periods were introduced in February 2003 through Part 4, Div 1A of the *Crimes (Sentencing Procedures Act) 1999*, which legislated specific recommended non-parole periods for a variety of serious offences[67]. For the offence of murder, the legislation requires that judges adopt a standard non-parole period of 20 years except in cases where the victim is under 18 years old or is a specified member of the community[68], in which case the standard non-parole is increased to 25 years[69]. In all other cases, the standard non-parole period must be implemented except in circumstances where a sentencing judge can justify setting a minimum term that is shorter or longer than the standard non-parole period by reference to the established

[67] For the purposes of this research, the standard non-parole periods implemented for murder are focused upon.
[68] This includes where the victim is a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions, and the offence arose because of the victim's occupation or voluntary work.
[69] The standard non parole periods do not apply to defendants who were under the age of 18 years old at the time that the offence was committed.

mitigating and aggravating factors included within section 21 of the *Crimes (Sentencing Procedures Act) 1999*.

Throughout the interviews, NSW respondents often highlighted the implementation of this restrictive sentencing legislation as a key reason for why the consideration of provocation could not be transferred to sentencing. As observed by one defence respondent, 'with a standard non-parole period system it makes it very difficult. That's why these defences are so important – to avoid murder' (NSWDefenceH). This illustrates a common problem with punitive sentencing policies, which pander to law and order ideals based on the desire to have certain and swift punishments, and entail an increased reliance upon half-way mechanisms like the partial defences which subsequently come to represent an avenue though which to avoid the increasingly punitive stance on sentencing for murder. Similarly highlighting these problems, another defence respondent commented that:

> In NSW where there are special sentencing provisions that attach to sentencing for murder, indeed in many jurisdictions there are particularly nasty sentencing ramifications for murder, it's just not realistic to say it can all be dealt with by way of submission on sentencing when the sentence law themselves are set up to reflect different patterns of sentencing for different patterns of homicide. (NSWDefenceA)

Other respondents believed that given the significant difference between sentences imposed for murder and manslaughter post-2003, provocation should remain a partial defence that mitigates to manslaughter. This difference in sentencing range was noted by one defence respondent, who commented that 'the difference in sentencing someone for murder or someone for manslaughter – there is a huge difference … murder has got to be something like 20 years to life. Very problematic' (NSWDefenceG). In agreement, another defence counsel respondent commented that 'the problem is, because we have standard non-parole periods, the difference between getting a not guilty to murder and a manslaughter conviction is enormous' (NSWDefenceB). In linking this to the question of whether consideration of provocation should be moved to sentencing, a judicial respondent explained that:

> In NSW with the standard non-parole period for murder it is much easier to sentence someone for manslaughter with provocation than to sentence for murder and then take provocation into account in sentencing because you'll end up being too light with the standard non-parole period and you'll get rolled in the Court of Criminal Appeal. (NSWJudgeD)

These views illustrate the difficulty of considering reforms to the law of provocation without looking at the structure of homicide offences and sentencing policy more broadly. Within the current law and order climate, in which the implementation of sentencing reform is increasingly based upon evaluations of public favourability and demonstrated punitiveness (Garland 2001), this is particularly relevant as the respondents' evaluations of the viability of relocating provocation to sentencing were based largely on the recent implementation of punitive sentencing policies within both the English and NSW jurisdictions.

7.2 Restrictive Sentencing Practices: The NSW and English Experience

As alluded to in the analysis above, evaluations of the possibility of moving the issue of provocation to the sentencing stage in England and NSW often gave rise to a broader evaluation of current sentencing practices and legislation for murder in these two jurisdictions. In contrast to the discretionary sentencing model currently utilised in Victoria, interviews with NSW and English respondents elicited significant discussion surrounding the continued implementation of sentencing legislation that significantly restricts judicial discretion when sentencing a defendant for murder in these two jurisdictions. The implementation of restrictive sentencing practices, such as those evident in England and NSW, is a hallmark of law and order campaigns often targeted at offences involving serious violence or sexual predators (Brown 2002; Loader 2009; Palmer 2005; Pratt & Clark 2005). Specific to this research, the implementation of mandatory minimum and maximum sentencing legislation has often been introduced in response to perceptions of an ever-more-punitive public (Freiberg & Gelb 2008). As explained by Freiberg and Gelb (2008: 3):

> Most of these initiatives have not come from law reform commissions, parliamentary committees or other governmental advisory bodies; they have come from public pressure expressed sometimes directly on the streets, more

> often through the print and electronic media, through political pressure directly applied to political parties and indirectly through the ballot box at election time.

The following analysis considers respondent evaluations of the implementation of presumptive minimum and mandatory maximum sentencing policies in the NSW and English criminal justice systems[70]. Specifically, these two sections examine the respondents' perceptions of the workability of recommended and mandatory sentencing policies for murder within these two jurisdictions utilising Hogg and Brown's (1998) themes of law and order commonsense and Garland's (1996; 2001) 'indices of change' as a framework for analysis.

While it was not within the scope of this research to consider all reforms to sentencing within each jurisdiction, the implementation of the standard non-parole periods in NSW, as well as the historical inclusion of a mandatory life sentence for murder and the recent introduction of a prescriptive schedule of recommended starting points for murder in England, are examined given the predominance of these issues in the interviews. While each jurisdiction is considered separately in the following two sections, the resulting analysis reveals the emergence of uniform concerns among the respondents across both professional roles and jurisdictions, further highlighting the troubling effect of restrictive sentencing schemes in practice.

7.3 NSW: Standard Non-parole Periods

> I think standard non-parole periods generally work a great disservice to the course of justice in New South Wales. (NSWDefenceA)

The implementation of presumptive minimum sentencing legislation in the form of standard non-parole periods in NSW, alongside respondent beliefs that such policies were largely politically motivated and serve to increase sentences for murder, is examined with reference to Hogg and Brown's (1998) conceptualisation of the

[70] Hoel and Gelb (2008: 2) define presumptive minimum sentencing as a system of sentencing where 'parliament prescribes both a sanction type and a minimum level of severity for a given offence which the court must impose unless there is a demonstrable reason—which may be broadly or narrowly defined.'

seven themes of law and order commonsense. Three of these themes are particularly relevant to this analysis: 'soaring crime rates', 'soft on crime: the criminal justice system does not protect its citizens', and 'we need tougher penalties' (Hogg & Brown 1998: 21). These catchcries are typical of law and order campaigns over the past two decades (Casey & Mohr 2005; Garland 1996; Hogg & Brown 1998; Pratt & Clark 2005; Reiner 2000). As described by Hogg and Brown (1998: 38), calls for 'tougher penalties' have become a 'perennial theme of law and order debate', where political parties volley for the stand on who can be tougher on crime and responses to criminal offending. Throughout the interviews the influence of 'tough on crime' politics, and specifically of these three themes of law and order commonsense[71], was particularly relevant to the NSW respondents' perceptions of the motivations for, and their evaluations of, the implementation of the standard non-parole periods for murder.

In general, the NSW respondents were overwhelmingly critical of the 2003 implementation of the standard non-parole periods for murder. Opposition to their implementation was evident in discussions with over half of the NSW interview respondents. These critiques are captured in the defence respondents' descriptions of the legislation as 'bizarre' (NSWDefenceB), 'shocking' (NSWDefenceF), 'foolish stuff' (NSWDefenceH), 'absolutely abhorrent' and 'ludicrous' (NSWDefenceG). Additionally, another NSW defence respondent commented that 'I don't think standard non-parole periods have been a good development for sentencing full stop, let alone in murder. There are a lot of reasons' (NSWDefenceA). Judicial respondents also characterised the scheme as 'hard to fathom' and 'a bit arbitrary' (NSWJudgeC), 'very punitive' (NSWJudgeB), 'havoc' (NSWJudgeD) and 'too technical' (NSWJudgeG). These negative responses are arguably typical of legal professionals' views of policies implemented within a law and order climate. Research has recognised that in responding to the increasingly dominant voice of the public, there is a growing gap between well considered and legally supported policies, and those characterised by penal populism (Brown 2005).

[71] For a more detailed overview of Hogg and Brown's (1998) conceptualisation of these three themes of law and order commonsense, see Chapter 3.

Judicial respondents also expressed resentment towards the implementation of sentencing policy that decreases, and is arguably taking steps towards removing, judicial discretion in sentencing. As one respondent commented:

> Judges do resent limitations on their discretion, not unreasonably, but we reckon we know how to do it and how to consider all the competing factors. By and large intervening legislation is either stating the obvious or it is introducing a complication we just don't need, which is likely to cause injustice in many cases, that's just what happens. But you've got to live with it, it's the law and if parliament speaks, we must jump. (NSWJudgeH)

The judicial respondents believed that the imposition of sentencing policy that restricts judicial discretion minimised their ability to adequately respond to the individual circumstances of each case. In voicing this concern, one respondent from the NSWSC judiciary commented that 'each case in my view should be dealt with on its own facts. So in terms of concern about homicide that is probably the most significant issue that I've got' (NSWJudgeC). Garland (2000: 358) has previously listed the 'curtailment of discretion' as typical of penal policies within a culture of crime control.

Given this dominant critique of the standard non-parole periods which emerged from the NSW interviews, the research sought the respondents' views on what they believe had motivated the implementation of this reform. Perhaps unsurprisingly, NSW respondents overwhelmingly attributed the implementation of the standard non-parole periods to political motivations and the promotion of law and order justice. As described by one prosecutorial participant, 'it's because of political pressure of governments over many, many years. It's not one single government. It's not one single period' (NSWProsecutorD). In further emphasising the political motivations underpinning this policy, a defence respondent commented that:

> Most of the legislation is driven by the perception that we are not doing enough about law and order. You have weak politicians that inhabit most state parliaments and they just react to the law and order drum. There is no

> quick solution for that, building jails and locking people up doesn't fix crime. (NSWDefenceD)

This view was also evident among respondents from the NSW judiciary, with one respondent describing the standard non-parole periods as 'all part of the law and order option' (NSWJudgeB). The political motivations for the formulation of sentencing policy in NSW, as identified by the respondents from all of the NSW samples interviewed, evidence the frustrating influence of calls for tougher penalties and anti–'soft on crime' policies within the NSW context. Moreover, the prominence of law and order motivations in crime and justice policy development has built over the past two decades (Hogg & Brown 1998; Pratt & Clark 2005), with Hogg and Brown (1998:116) explaining that 'law and order is an issue that arouses powerful community passions. Increasingly it has also become an issue of considerable electoral significance'.

Two key themes of law and order commonsense which are particularly relevant to this analysis are calls for tougher penalties and greater rates of imprisonment (Hogg & Brown 1998). The respondents perceived that an increase in the length of sentences imposed has been a major effect of the standard non-parole periods and was also linked by the respondents to the political motivations for their introduction. As described by one defence respondent:

> It's politics. Every time we have an election one party will say sentences are too light, we will bring in this and then the other one will say something harsher. It becomes an auction. It has done in this state for years. It has been ridiculed by the Director of Public Prosecutions but it culminated in standard non-parole periods for sentencing. (NSWDefenceH)

This respondent description mirrors Hogg and Brown's (1998: 118) characterisation of the law and order auction, whereby they describe how political elections now frequently include references to 'who can offer the toughest penalties and the most police' – an auction that they contend 'no party aspiring to win government can afford not to participate in' (Hogg & Brown 1998: 118).

Perceptions of the existence of this type of law and order auction were also evident from the discussions with members of the NSW ODPP, with one respondent questioning the benefit of this sentencing policy through a critique of its political motivation:

> A lot of the politicians want to be seen as being tough on crime. At election time a lot of the commentators in the media come and jump on the bandwagon and the police going along with it … it comes at a cost, enormous financial cost for the taxpayer, but it comes at a human cost too – are you needlessly incarcerating people without getting any benefit for it? That's a value judgement I suppose. (NSWProsecutorD)

In further recognition of the influence of law and order commonsense on NSW sentencing policy, defence counsel respondents made the following comments: 'the political agendas are just extraordinary. It all comes back to law and order and being seen by the electorate as having the iron fist and going to get rid of crime. What do statistics show? It makes no difference' (NSWDefenceG); and in recent years, 'we've had a Dutch auction. Every time we have a state election everybody says, "I'll send them to jail for 20 years", "I'll send them for 30", "I'll send them for 40" and so it goes on' (NSWDefenceB). Hogg and Brown (1998: 4) pose that the impact of this law and order commonsense is that 'short term populist measures are frequently adopted at the expense of more informed and effective policies to combat or reduce crime problems'.

A smaller sample of NSW respondents expressed the opinion that the standard non-parole periods had been implemented to avoid even more restrictive sentencing policy, such as mandatory sentencing schemes. As commented by one judicial respondent:

> I think at the time there was a fear that some red-ragging government would introduce minimum sentencing but I don't think it will ever happen. But it was certainly a reaction to a law and order political campaign and unfortunately most of what passes as reform of the criminal law is a series of knee-jerk reactions at a political level. (NSWJudgeH)

This view was also evident in the interviews with defence counsel respondents, with one respondent explaining that 'I understand why they developed the standard non-parole periods as a measure to pre-empt even more harsh sentencing regimes where there is no discretion in sentencing' (NSWDefenceA). In agreement, another defence respondent claimed that 'There was a big push some years ago to introduce grid sentencing and the judiciary didn't like the grid sentencing but they were prepared to go with this in order to stave off the mandatory minimums' (NSWDefenceF). These opinions indicate a level of resignation among the respondents in the face of the problematic influence of law and order policies, where in an effort to stave off more punitive sentencing policy respondents describe a subjugation to the system of standard non-parole periods.

Beyond recognising the political motivations for this policy, NSW respondents also critiqued the numerical values at which the standard non-parole periods have been set and the role these values play in further complicating the sentencing process for murder in NSW. These views were expressed by NSW respondents from all samples interviewed, and sat alongside the almost unanimous perception that the implementation of the standard non-parole periods was fuelled by political motivations to appear tough on crime.

7.3.1 Increasing Sentences through Non-parole Periods

> The reason it was done plainly was the government wanted to increase the sentences for those sorts of offences and you can increase the standard non-parole period by regulation but you can't increase the maximum sentence without an act of parliament, so I think it was done because it was easier but it distorts the sentencing process in some areas. (NSWJudgeD)

An overwhelming number of NSW respondents commented that, in the seven-year period since the standard non-parole periods were implemented in 2003, the scheme had led to an unnecessary increase in the length of sentences imposed for offences covered under the legislation. Such an increase in sentences imposed, alongside a consequential increase in prison populations, is a recurring theme of law

and order agendas, which attempt to overcome a public perception that the government is 'soft on crime' (Hogg & Brown 1998; Pratt & Clark 2005; Roberts 2008). As Hogg and Brown (1998) have explained, in the lead-up to an election politicians commonly adopt punitive sentencing campaigns with the aim of garnering public support by increasing rates of imprisonment.

Specifically, respondents across all NSW samples were often critical of the numerical point at which the standard non-parole periods had been set, believing that their implementation had significantly, and unnecessarily, increased the lengths of sentences imposed for murder handed down since 2003. This was particularly evident in the comments of one judicial respondent, who claimed that:

> The effect has been an increase in sentencing because with an increase in the average non-parole periods, up goes the head sentence too of course. I think the standard non-parole periods, the figures themselves are very ill considered … Some of them are patently stupid … So I don't know who is fixing these figures, but whoever it is has no idea how sentencing works – not a clue. (NSWJudgeH)

In highlighting these perceptions of an increase in the length of sentences imposed, one defence respondent commented that 'the sentences are so high for murder. That's it and it's bringing a lot of unfairness in' (NSWDefenceH). Expanding on this critique, this respondent stated that in increasing the length of sentences imposed for murder the standard non-parole periods also fail to allow sentencing to occur on a case-by-case basis, ensuring proportionality:

> In some murders you are entitled, I think, to get 28 years, 30 years, never to be released but in other cases it should be 10, 11, six years. But when you have a standard non-parole period of 20 years it's very hard to get around it – judges think they are being lenient giving 15 years. Before the standard non-parole came in you might get six years for murder. (NSWDefenceH)

In agreement, another defence respondent commented that the standard non-parole period of 20 years for murder had increased sentences 'substantially'

(NSWDefenceA). NSW prosecutorial respondents also believed that sentencing had increased because of the scheme, with one respondent commenting that 'it's certainly made a change; some offences have increased quite dramatically for the sentencing range. Even in murder it has probably made quite a big difference' (NSWProsecutorE), and another observing that since 2003 the sentences 'have become ridiculously high in New South Wales' (NSWProsecutorD). Reflecting on how this operates in practice, one prosecutorial respondent commented that:

> Sometimes I'm faced with a situation where I feel that the standard non-parole period is really what the judge is obliged to give and yet it just seems to me to be way too high so the judge has no option. (NSWProsecutorD)

This opinion reflects a concern that emerged from the interviews that, in attempting to appease a perceived dominant public fear of crime and a desire for punitive sanctions, politicians implement law and order policies that undermine the key principle of proportional sentencing. As such, while intended to deliver on a promise to implement tougher penalties, these policies actually serve to undermine the operation of sentencing in NSW. As explained by Palmer (2005: 29), a 'tough on crime' approach to punishment leads to the implementation of sentences that are 'proportional to the anger and resentment the public feels toward criminals, rather than proportional to the crime'.

Members of the NSWSC judiciary also considered that since the non-parole periods were implemented 'sentencing has become significantly more severe' (NSWJudgeC) and that 'certainly the 20-year non-parole period has increased the range of sentences for murder quite dramatically' (NSWJudgeD). In agreement, another judicial respondent commented that 'We have a system of non-parole periods, unfortunately, and the standard non-parole period for murder is 20 years, which I think is too high' (NSWJudgeH). Expanding on these critiques, another judicial respondent reflected:

> the only thing that I would say troubles me is the severity of our sentencing because of the non-parole period situation. It's not something that I can do anything about; it's a law that I have to apply. It's part of my job. (NSWJudgeC)

This perceived increase in sentences imposed is particularly concerning given that past research has often identified that the implementation of restrictive sentencing practices, such as these standard non-parole periods in NSW, as well as mandatory sentencing schemes, rarely leads to a reduction in or deterrence of offending (Brown 2001; Hoel & Gelb 2008; Pannick & Cooper 2004; Roberts 2003; Tonry 1992; Tonry 2009; Wood 1993), raising the question of what benefits such policies actually have in practice.

7.3.2 An Over-complication? An Unintended Effect of Sentencing Reform

As discussed in Chapter 6, a uniform effect of the reforms to the law of homicide in these jurisdictions has been a subsequent over-complication of the law in practice – an effect which this research observed was not unique to the trial phase of the court process. Throughout the NSW interviews, respondents expressed a concern that in addition to increasing sentences, the implementation of the standard non-parole periods have had the effect of over-complicating the sentencing phase of the criminal justice process. As described by one respondent:

> In NSW the law about what it [sentencing] means has become very complicated, many judges and counsel misunderstand the significance of the standard non-parole periods. The sentencing tasks are much more difficult. (NSWDefenceA)

Similarly, other respondents commented that the introduction of the standard non-parole period 'causes no end of difficulty in terms of running trials' (NSWDefenceG), and that the scheme 'complicates sentencing again … [and] over-complicates sentencing' (NSWJudgeG). This over-complication of the sentencing process is particularly worrying given that it may arguably undermine one of the key goals of such law and order sentencing policies: to increase public confidence in the members of the criminal justice system.

A specific complication that respondents across all NSW samples identified was the difficulty of discerning what a murder case in the 'mid-range of objective seriousness' actually was. This difficulty is captured in the observations of several respondents,

who conceded that, 'I find it almost impossible to visualise what a mid-range offence would actually be' (NSWDefenceB), and that it is 'very difficult to say what is mid-range seriousness' (NSWProsecutorE). In agreement, a defence respondent commented:

> Now I find, for example, something like murder – what is a mid-range objective seriousness in a murder? They're not very dead? How do you judge that? You've got the same inquiry and outcome in all cases. Sure you can take out the contract killings, the execution style – they're in a category of their own. But within the normal range of murders what is mid-range objective seriousness? It's a meaningless phrase to me. (NSWDefenceB)

In building on this critique, another respondent believed that 'it's a slightly bizarre concept when you are talking about homicide' (NSWDefenceF). One judicial respondent did attempt to provide a definition for the concept of a 'mid-range' offence:

> It's entirely notional. What is clear, and the authorities make it clear, is that it's not necessarily the typical case because the typical case might not be that grave. It's a notional mid-range within the whole range of possible criminality, so the one that might actually qualify as mid-range seriousness might be anything but typical, it might be relatively rare … the mid-range has got to be pretty serious as far as homicides go. (NSWJudgeH)

However, even this respondent's description – which was the clearest explanation of the legislation offered throughout the NSW interviews – does not define the concept in a neat and readily understandable way. The potentially negative consequences of implementing reforms that serve to over-complicate the justice system were explored in more detail in Chapter 6 in relation to the notion of compromised justice in juror decision-making; however, this analysis reveals that concerns surrounding the complication of the law are not unique to the trial phase of the court process and are also evident in recent examinations of sentencing reforms within these jurisdictions. Most importantly, this over-complication of the law may be an unintended consequence of penal populism – an argument that as yet remains largely unexplored within the significant bank of law and order research.

7.4 England: Formulaic and Mandatory Life Sentencing for Murder

> I think there has been a reluctance to grapple with one issue and that's been the mandatory life sentence. (UKCounselD)

Like NSW, the recent introduction of restrictive sentencing legislation in England, combined with the continued implementation of a mandatory life sentence for murder, was consistently linked by respondents to questions surrounding the viability of moving the consideration of provocation to the sentencing stage of the court process. Beyond provocation, these sentencing policies, their effects in practice and the political motivations behind their implementation also gave rise to considerable discussion throughout the England-based interviews. As previously mentioned, over the past two decades the continued implementation of a mandatory life sentence for murder in England has been a point of significant contention among legal practitioners, scholars and media commentators (Anderson 2010; Cotton 2008; Cowdrey 1999; Gibb 2005; Hoel & Gelb 2008; Morris & Blom-Cooper 2000; Pannick & Cooper 2004; Roberts 2002; Roberts 2003; Stern 1991), and as such it is perhaps not surprising that it emerged as central to the respondents' evaluations of the possibilities for sentencing reform in England.

These respondent opinions are considered within the highly politicised context surrounding the issue of sentencing for murder, and the implementation of other law and order policies, within the English criminal justice system. As covered in more detail in Chapter 3, the dominance of law and order politics within this context is most evident in the successful 1992 Labour government campaign led by Tony Blair, which promised a government that would be 'tough on crime, [and] tough on the causes of crime'. A catchcry of law and order campaigns since, this political desire to be seen by the public as delivering a 'tough on crime' approach to crime and justice is also recognised in Garland's (2001) formulation of the 12 'indices of change'. The influence of these indices of change are discernible in the respondents' arguments both in favour of and for abolishing the mandatory life sentence, as well as their perceptions of the possibilities for future reform in this area.

While the predominant respondent view to emerge from the English interviews recognised the need for the abolition of the mandatory life sentence for murder, there were still a variety of conflicting opinions expressed by respondents both in support of and opposition to this historic sentencing legislation. In examining these arguments, the following sections build upon the body of research that has previously explored the strengths and weaknesses of this sentencing policy. However, this research also contributes a new, unique insight in this area by examining the opinions of senior English legal practitioners on the mandatory life sentence and the viability of its continued role in sentencing for murder.

7.4.1 The Need for Life: Arguments to Retain Mandatory Sentencing

> I think it's right, yes. I think if you take a life, you should know what you are going to get. I don't believe in capital punishment, I don't think anybody does anymore, but a life sentence is not a life sentence. It's just a term for political gain and to say to people that you will get life, but in effect it's not really. (UKCounselK)

The English interviews revealed a small sample of legal respondents (six out of 29 respondents) who continued to support the implementation of a mandatory life sentence for murder. These respondents described the mandatory life sentence as 'an important signal for murder being the most serious crime' (UKJudgeF) and 'the ultimate sanction' (UKCounselO). In arguing for the retention of the mandatory life sentence, these respondents often discussed the symbolic importance of this sentence, as well as their perceptions of the available flexibility in sentencing for murder despite the imposition of a mandatory penalty. In doing so, these respondents illustrate the validity of Garland's (2001) second index of change, which recognises the re-emergence of punitive sanctions and expressive justice. Specifically, Garland (2001) explains that in a move away from rehabilitation responses to crime, over the past two decades law and order campaigns have become focused upon the promotion of punitive responses to punishment – such as longer and harsher imprisonment options – that provide an obvious demonstration to the public of an anti-'soft on crime' approach to criminal offending. In this context mandatory sentencing policies – such as the mandatory life sentence for murder in England – fits within the punitive

crime response model as they 'force courts to be tough, hold offenders accountable, denounce criminal acts and show support for victims' (Warner 2007: 342).

This theme is evident among the small sample of English respondents who supported the use of a mandated life sentence for murder, largely emphasising the importance of the justice system being seen to impose the most severe sanction available on defendants convicted of murder. As one judicial respondent commented, 'there are valid reasons for it [murder] to have the most severe sanction that can be imposed in this country: a life sentence' (UKJudgeF). In agreement, another respondent stated, 'I think it is the most serious crime that any court can deal with anywhere, the public – I think rightly – take the view that a life sentence is appropriate if someone has taken someone else's life' (UKCounselL).

In supporting the mandatory life sentence for murder respondents also highlighted that 'life' does not necessarily mean imprisonment for the duration of one's life given the ability of judges to pass a recommended minimum term[72]. This means that despite the imposition of a mandatory life sentence, in the majority of murder cases sentenced within England the offender does not serve a life term in prison[73] (Almandras 2011). As described by Tonry (2009: 66), 'utterance of the words "mandatory life imprisonment" is obligatory; a life spent behind bars is not'. In line with this view, the respondents believed that despite the existence of a mandatory sentencing policy in England there was still *enough* judicial flexibility in sentencing for murder. As explained by one respondent, 'the life sentence as a headline is the right sentence provided that the court has got the ability to temper the effect of the life sentence with the point at which release into the community is appropriate' (UKCounselL). Similarly, another counsel respondent commented that:

> If it were the case that a life sentence meant life every time you sent someone away for life, they never ever came out of the door again, then I think my

[72] In addition to fixing a maximum sentence of life imprisonment, according to section 269 of the *Criminal Justice Act 2003*, the judge must also determine a minimum term of imprisonment that the defendant must serve before becoming eligible to be released on licence.
[73] Between 2000 and 2009 the average length of time spent in prison before being released on licence by an offender convicted of murder was at least 15.5 years (Mitchell & Roberts 2012).

> answer to your question would be very different, but with what life sentence really means in these circumstances I think it's right. (UKCounselN)

Interestingly, this finding reveals that while the courts, and members of the English judiciary, appear to be conforming to the law and order game by continuing to implement the mandatory life sentence for murder, in practice this policy is rarely applied as the public would understand it to be. In addition to these respondent views surrounding the symbolic importance and apparent flexibility of the current mandatory life sentence, debate also emerged throughout the interviews – both in favour of and against – the role that the mandatory life sentence plays in ensuring public confidence in sentencing for murder in England.

7.4.2 Public Confidence in Sentencing: An Argument For or Against the Mandatory Life Sentence?

> It [the mandatory life sentence] recognises very publicly the grave nature of such a crime. So I do think all of us whilst we can intellectually say let's invest greater discretion in judges, I think we have to march hand in hand with the political reality and the public, because when all is said and done we serve them and I'm not elected so I do think we need to keep an eye on that. (UKJudgeF)

The respondents in favour of the mandatory life sentence believed that it plays a fundamental role in ensuring public confidence in sentencing for murder. Research has often recognised the importance of public confidence in the criminal justice system and specifically its relationship to perceptions of the adequacy of current sentencing practices (Gelb 2006). Considering the importance of public confidence in the criminal justice system, Gelb (2008b: 2) has noted that:

> the criminal justice system relies on public confidence as victims need to be sufficiently confident in order to report crime in the first instance; without the co-operation of complainants, witnesses and jurors, prosecutions would not be effective. Public confidence is necessary for the legitimacy and function of the court.

In linking the retention of the mandatory life sentence to the need for public confidence in sentencing for murder in England, one respondent commented that 'the public would be outraged if it were dropped' (UKCounselN). Agreeing with this view, another counsel respondent commented:

> Some people regard it as being a form of contract with the public … the deal was that the contract with the public in exchange for the abolition of the death penalty is that murder should be met with a mandatory life sentence. So there has been a great reluctance, understandably in some circumstances, that even when it can be shown to be legally undesirable, to abandon the mandatory life sentence for murder. (UKCounselS)

Respondent references to public opinion provide recognition of one of the key political motivations for mandatory sentencing laws. As noted throughout the research politicians have often sought to use mandatory sentencing schemes to promote greater public confidence in the sentencing process and the members of the judiciary (Roberts 2003; Warner 2007). Respondent references to public opinion, and arguments surrounding the need for public confidence in sentencing, also draws upon Garland's (2001) sixth index of change which recognises the increasing importance of populism in crime and justice policy. This refers to the influence of what Garland (2001: 13) describes as 'the voice of "experience", of "commonsense", of "what everyone knows"', which according to the small sample of respondents who supported the retention of the mandatory life sentence is a voice that demands its continued use in sentencing for murder if public confidence in the system is to be retained.

In opposition to the above respondent views, respondents who favoured the abolition of the mandatory life sentence for murder questioned whether it did actually serve to increase, or conversely decrease, public confidence in the sentencing process. In doing so, these respondents drew upon previous research that has argued that mandatory life sentencing policies are 'inconsistent with the philosophy of *truth in sentencing*' (Wood 1993, emphasis in original; Mitchell & Roberts 2012) given that 'life' does not actually mean life imprisonment. In drawing out this notion, one judicial respondent highlighted that 'It doesn't mean what it says' (UKJudgeA), while a counsel respondent explained, 'there is a huge public mistrust in sentencing because

very few people understand what a life term actually means and so you end up with headlines saying, "He got life but will only do x"' (UKCounselF). Another counsel respondent commented that:

> If you ask the average member of the public they still don't follow it – it's a real lawyer's jungle because people think that life should mean life. A whole life tariff is quite rare actually and all this explanation that has to be gone into every single time someone gets a life sentence – it's difficult and you have to explain this. (UKCounselD)

This view was also expressed by several respondents from the judicial sample, one of whom commented that:

> It just doesn't seem terribly satisfactory really to have this life sentence but then everybody knows that they are going to be released after a certain time. What the press report of course is what we set as the minimum term so as far as the public are concerned he has got 15 years. (UKJudgeC)

These views support the findings of prior research examining public confidence in sentencing and the operation of mandatory sentencing laws. As noted by Mitchell and Roberts (2012: 15) in relation to the results of their survey of public opinion on sentencing for murder in England and Wales:

> Predictably, when asked about the life sentence, they [participants] generally responded that 'life doesn't mean life' … What was especially notable was the comments made; participants clearly implied that the phrase 'life sentence' (or perhaps 'life imprisonment') is misleading … these reactions highlight the self-defeating nature of a mandatory life sentence with release after a minimum period. Created to ensure maximum denunciation and confidence in sentencing, in reality, it may well have the opposite effect.

Additionally, such research has often found that members of the public, when properly informed, are less punitive than expected[74] (Doob & Roberts 1983; Freiberg

[74] Gelb (2006, 2008b) notes that recognition of the importance of providing members of the public with information has meant that more recently research measuring public confidence in the criminal justice

2003; Gelb 2006; Gelb 2008b; Hough & Roberts 1999; Hutton 2005; Pratt 2008; Roberts 1992; Warner 2007; Warner et al. 2011), and that often 'policymakers and criminal justice professionals believe attitudes to be harsher than they are' (Roberts 1992: 99; Freiberg and Gelb 2008; Gelb 2008b; Hutton 2005; Roberts 2002). As explained by Freiberg and Gelb (2008: 4):

> the extensive body of evidence built by these researchers has convincingly shown that people who seem to be punitive when asked for 'top-of-the-head' responses to simplistic, abstract questions, become far less punitive when allowed to provide a considered, thoughtful response to more detailed information about a specific case. This is the difference between mass 'public opinion' and informed 'public judgment'.

This finding has led Pratt (2008: 33) to comment that 'all the invocations of public opinion regularly made by politicians, sections of the media, the law and order lobby, talk-back radio hosts and so on, as a justification for more severe sentences, may in fact be quite misleading'. Additionally, given these consistent findings, Gelb (2006: 18) has warned that 'Caution should thus be exercised in responding to calls for harsher penalties as a fully informed public could well be quite content with the current level of severity of penalties'.

Specific to the mandatory life sentence for murder, research has found that when provided with details of case examples, members of the public are often hesitant to impose a life sentence in all cases, suggesting that there may be less support for such law and order policies than is often assumed (Hutton 2005; Roberts 2003). Where punitiveness is evident among surveyed members of the public, research has linked this to inaccurate understandings of and low confidence in the criminal justice system – particularly the operation of the courts and sentencing – as well as the public's perceptions of increasing crime rates and consumption of media information that promotes a fear of crime (Gelb 2011b; Gelb 2011c; Roberts & Indermaur 2007; Sprott & Doob 1997).

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system has included the use of crime vignettes that provide greater information, in place of traditional survey questions.

Additionally, research on public confidence has often found that members of the public are more concerned with the notion of proportionality in sentencing than in the need for deterrence and denunciation (Roberts 2003). As explained by Roberts (2003: 504) in his review of public opinion surveys relating to mandatory sentencing conducted between 1982 and 2002, 'By limiting a court's ability to impose a proportional sentence, mandatory minima can violate the principle of proportionality, and this is likely to undermine, rather than enhance, public confidence in the courts'. This commentary, alongside respondent critiques of the misguided influence of public opinion in shaping crime and justice policies, reflects the predominant view of the English respondents that the imposition of a mandatory life sentence for murder was not beneficial to the operation of the English criminal justice system or to public confidence in sentencing practices for murder.

7.4.3 Abolition of the Mandatory Life Sentence for Murder?

> So you have the perfect tension, if you like, between out-of-date legislation, judge-made law and an ever increasingly draconian sentencing policy, all coming together to make a dreadful mess. (UKCounselG)

The discussions with respondents across all samples interviewed gave rise to significant criticism of the continued use of the mandatory life sentence for murder in England, alongside observations of the perceived unwillingness of both the current and the previous governments to consider its abolition. As commented by one respondent, 'all the serious judges over the last 20 years have been calling for this change because it binds the hands of judges unnecessarily and it's confusing' (UKCounselD). Specifically, the respondents who favoured the abolition of the mandatory life sentence for murder in England overwhelmingly called for a model of sentencing that would better reflect the range of circumstances within which the offence of murder is committed, and greater judicial discretion and flexibility in sentencing. These respondent viewpoints suggest that in a climate characterised by the reinvention of the prison and the re-emergence of punitive sanctions, there is little room left for sentencing structures for murder to adequately reflect the variances in the culpability of offenders. As such, in examining this argument, the following section draws upon the two indices of change mentioned above, which Garland (2001:

14) argues have led to a political assumption that '"prison works" – not as a mechanism of reform or rehabilitation, but as a means of incapacitation and punishment that satisfies popular political demands for public safety and harsh retribution'.

In addition to these two focuses, general critiques of the mandatory life sentence were also evident throughout the interviews with respondents from all English legal samples, and are captured in one counsel respondent's description of the mandatory life sentence as 'totally unnecessary' (UKCounselD). Furthermore, a policy respondent commented that:

> I just don't think we should have a mandatory sentence. It's too crude, it's too brutal. It puts so much stress on getting the law right; on getting that definition of murder absolutely right you have to get it bang on. I don't think we're that good. (UKPolicyB)

In agreement, a judicial respondent commented that 'the arguments against the mandatory life sentence are very strong' (UKJudgeA), while another member of the judiciary reflected, 'I've always been firmly in the camp of thinking that it creates problems' (UKJudgeC). Several respondents also believed that these viewpoints were representative of legal views held more widely, with one counsel respondent commenting that 'I think amongst lawyers, those in the know with experience of these cases, the majority would support the removal of the mandatory life term' (UKCounselP). This comment highlights the disparity between the opinions of those described by this respondent as 'in the know' and the members of the public who motivate the penal populist strategies implemented by politicians. Most problematically, this tendency for politicians to favour policies that curry public favour reveals the unlikeliness of a political party supporting a publicly unpopular reform, such as the abolition of the mandatory life sentence for murder – a problem that is explored in more detail in the following section.

One of the specific critiques of the mandatory life sentence that was raised by respondents concerned the perceived need for an open, discretionary sentencing regime that could better respond to the vast range of circumstances within which the

offence of murder is committed. The range of these circumstances is captured in the following description of the offence:

> There are crimes committed for altruistic reasons ... or, more generally, crimes which involve some element of social justification. In marked contrast, there are crimes undertaken for sadistic reasons – out of the desire to cause pain and suffering … there are crimes committed for a variety of motives, and finally there are apparently senseless crimes – crimes committed for no discernable reason at all. (Wood 1992: 250–1)

Discussing this diversity of circumstances, one judicial respondent commented, 'I think that everybody recognises that within murder, as within other types of crime, there are differences of wickedness and I think that it would be much more satisfactory if we didn't have a mandatory sentence' (UKJudgeA). In further recognising the need for a model of sentencing that better responds to individual case situations, a counsel respondent commented that:

> I think that the judge should be able to give a different sentence because in some cases it is murder, because if you intend to cause somebody really serious bodily harm and they die – it is murder but I think the judge should have discretion. Supposing it's a single punch and you really do intend to cause them serious harm but you don't intend to kill them, should you be given a life sentence? I'm not sure about that. I think there should be more discretion. (UKCounselL)

Concurring with this view, another counsel respondent highlighted the difficulty of having a penalty that must be uniformly applied to all murder cases, inclusive of 'the mercy killing and let's say in a domestic situation where someone after many, many years of caring for someone who is dying a horrible death smothers them with a pillow' (UKCounselD). It was the belief of this respondent, alongside others interviewed, that the implementation of one penalty for all defendants convicted of murder did not adequately represent the myriad contexts within which lethal violence is enacted.

These critiques overwhelmingly led to calls by the respondents for greater judicial discretion in sentencing alongside the removal of the mandatory life sentence for murder. Specific proposals for reform suggested by the respondents are explored below. However, regardless of the model of reform proposed, respondents from both the judicial and counsel samples highlighted the need for greater judicial discretion in sentencing for murder. As one respondent commented:

> I think to increase discretion in the hands of the trial judge is more likely to achieve the right result because he has the knowledge and he has the know-how but most importantly because he has seen everything … So I think the answer to fair sentencing is rather than restrict to increase the discretion of the judge. (UKCounselP)

In agreement, other counsel respondents posed that 'there should be flexibility because each case is different' (UKCounselL) and that 'there should be substantial flexibility within sentencing for murder' (UKCounselE).

These respondent views mirror previous research that has recognised the need for discretion in sentencing to adequately reflect the variances in severity of the individual offence committed (Hoel & Gelb 2008; McDonagh 2008; Pannick & Cooper 2004; Potas 1989; Tonry 1992). As argued by McDonagh (2008: 24):

> There are individual cases – they should be judged on their individual merits. And that means – I'm afraid, doing away with the mandatory tariff and giving judges discretion over sentencing. They may be visibly out of touch with how normal people see things, but they can distinguish between a man who smothers his terminally ill wife from someone who kills their neighbour in a rage about his leylandii from another who kills his children to get revenge on his cheating wife.

Similarly, Potas (1989: 4) has commented that 'there is now sufficient evidence to argue that it is wrong, as a matter of justice and of policy, to impose the same punishment on all murderers'. Despite an overwhelming recognition among the English respondents (23 out of 29 respondents) that a discretionary model of sentencing would be preferable in dealing with murder, the vast majority of

respondents believed that the influence of political motivations and election campaigns would prevent any government from seriously considering abolishing the mandatory life sentence.

7.4.4 A Politicised Law: The Mandatory Life Sentence in England

> We are never going to persuade any political party to adopt anything other than the mandatory life sentence for murder. (UKJudgeC)

Overwhelmingly, the English respondents interviewed were of the opinion that the government's lack of willingness to consider abolishing the mandatory life sentence for murder was linked to a political desire to only implement law and order policies that curry public support and promote a punitive, 'tough on crime' approach to criminal justice. Garland's (2001) sixth social current of change, 'politicization and the new penal populism', which recognises the growing influence of politics on crime and punishment in the past two decades, is particularly useful within this discussion as it represents the growing importance of political motivations and strategies within this context. Garland (2001: 13) describes how in recent years:

> crime policy has ceased to be a bipartisan matter that can be devolved to professional experts and has become a prominent issue in electoral competition. A high charged political discourse now surrounds all crime control issues so that every decision is taken in the glare of publicity and political contention and every mistake becomes a scandal.

It is within this climate that Garland's (2001: 13, emphasis in original) sixth index recognises that 'the policy making process has become profoundly *politicized* and *populist*'. In drawing more broadly from Garland's work, this discussion illustrates the influence of a key attitude within Garland's (2001: 163) 'crime complex', whereby he notes that 'crime issues are politicised and regularly represented in emotive terms'. While Garland has largely discussed the influence of this attitude in relation to the formulation of crime and justice policy, this research also explores its influence in the retention of a sentencing policy that promotes law and order ideals. The significance of this issue is most apparent within this context, where

overwhelmingly the English respondents described their frustration that, despite a dominant view among legal practitioners involved in the English criminal justice system that the mandatory life sentence for murder is no longer in the best interests of justice, the political landscape prevents change from occurring.

This dominant perception among the respondents is captured in the comments of one counsel member, who described that 'the only justification for it [the mandatory life sentence] has long since been shown to be political' (UKCounselS). In agreement, a judicial respondent observed, 'I know it's politically not acceptable and no political party is going to abolish the mandatory life sentence for murder … it is out of bounds whatever other changes to the law they will consider but that one is non-negotiable' (UKJudgeC). In further agreement, a counsel respondent characterised it as 'a political issue. It's totally political. There hasn't been a government since they abolished the death penalty that is willing to tackle that one. It's considered a no-no because they think this country would go mad' (UKCounselD). Offering an explanation for this perception, one policy respondent commented that:

> In a way it [the mandatory life sentence] has become a symbol that governments are taking crime seriously … It would be taken by law enforcement authorities and the public more generally that the government is taking a 'weak on crime' approach, it's a symbolic thing … and until that symbolism has disappeared or faded away then I think the sentence will remain as it is. (UKPolicyA)

This explanation provides support for the relevance of Garland's politicisation index within this context. In line with the respondents' views outlined above, Garland (2001: 13) has argued that in this climate 'policy measures are constructed in ways that appear to value political advantage and public opinion over the view of experts and the evidence of research'. Furthermore, these respondent opinions also support prior research which has identified that mandatory sentencing policies are often implemented, and justified, with reference to public demands for increased sentences and the need for public confidence in sentencing (Hogg & Brown 1998; Mitchell & Roberts 2012; Roberts 2003; Tonry 1992; Tonry 2009). In reviewing the political motivations for mandatory sentencing policies, Tonry (1992: 265) has noted:

> Put positively, elected officials want to reassure the public generally that their fears have been noted and that the causes of their fears have been acted on. Put negatively, officials want to curry public favour and electoral support by pandering, by making promises that the law can at best imperfectly and incompletely deliver.

Indeed, research suggests that politicians utilise mandatory sentencing policies to increase their favourability in the lead-up to elections (Roberts 2003; Tonry 2009). As described by Roberts (2003: 487), 'politicians who show that they are "doing something" about rising crime rates and lenient sentencing by creating such [mandatory] laws can reap significant electoral benefits'. Similarly, Morgan (1999: 279) has commented that 'the symbolic power of mandatory's is such that they help politicians win elections'.

This 'tough on crime' political influence on the maintenance of mandatory sentencing policies is particularly problematic given that research has shown that mandatory schemes achieve few of the goals for which they are implemented – namely, deterrence, denunciation and punishment (Brown 2001; Cowdrey 1999; Hoel & Gelb 2008; Morgan 1999; Pannick & Cooper 2004; Roberts 2003; Stern 1991; Terblanche & Mackenzie 2008; Tonry 1992; Tonry 2006; Tonry 2009; Wood 1993). One of the key goals of the mandatory life sentencing scheme is to deter future offenders, yet the deterrent value of mandatory sentencing policies has been shown throughout the research to be 'unconvincing' (Stern 1991). In highlighting why mandatory sentencing policies do not achieve deterrence, Hoel and Gelb (2008: 14) have noted that:

> There is little evidence to suggest that a more severe penalty is a better deterrent than a less severe penalty… it would appear from research to date that making a penalty mandatory rather than discretionary will be unlikely to increase its deterrent value.

Moreover, Stern (1991) argues that, most murderers 'do not normally deliberate sufficiently rationally'. In agreement with this perspective, the Director of the NSW Office of Public Prosecutions has previously commented that:

> There is no evidence that the prospect of a mandatory life sentence deters anyone from committing the type of offence that is likely to attract such a penalty. The worst opportunistic murderers don't stop and think about the possible consequences, if you are caught, before killing. (Cowdrey 1999: 291)

Despite this evidence within the research of the shortcomings of mandatory sentencing policies, English interview respondents overwhelmingly expressed a sense of resignation at the government's apparent inability to consider abolishing the mandatory life sentence in the current political climate. This is captured in the views of the judicial respondents, who commented that 'in the present political circumstances it hardly seems worth debating' (UKJudgeA), and that 'I would welcome a reform of sentencing, [but] whether political reality is going to permit that is another matter' (UKJudgeF). English policy respondents also acknowledged that discussions surrounding abolition are 'probably a waste of time because senior politicians, like Ministers and above, won't go down that line' (UKPolicyB), and that 'there is no current intention to change the mandatory sentence, not in the foreseeable future' (UKPolicyA). In further agreement, a legal counsel respondent explained that the 'mandatory life sentence for murder is a political hot potato. No one wants to go with it' (UKCounselD). When considered alongside earlier critiques of the mandatory life sentence, these views highlight a problematic disjunct between the needs of the justice system and the political reality. Additionally, this analysis lends weight to Garland's (2001: 13) assertion that in the current climate of social change 'the dominant voice of crime policy is no longer the expert or even the practitioner but that of the long-suffered, ill served people – especially of "the victim" and the fearful, anxious members of the public'.

7.4.5 An Additional Formula for Sentencing: Schedule 21

In addition to the mandatory life sentence for murder, current sentencing practices for the offence of murder in England are further prescribed through the 2003 introduction of schedule 21 of the *Criminal Justice Act*. This schedule sets out

provisions by which judges can set recommended minimum terms of imprisonment for defendants convicted of murder, and other selected offences. Specifically, four minimum starting points apply to the offence of murder – 15 years, 25 years, 30 years and a life term – the applicability of which are set out specifically throughout the schedule. The implementation of this sentencing scheme for murder can be seen as further evidence of the influence of several of Garland's (2001) indices of change, namely: the decline of the rehabilitative ideal, the re-emergence of punitive sanctions and expressive justice, and the reinvention of the prison. These three developments in penal policy provide a framework for understanding the recent implementation of this restrictive sentencing policy in England despite a dominant perception among members of the criminal justice system that it is not only unnecessary but also detrimental to the system.

The majority of murder offences are placed within the first category of 15 years; however, the schedule sets out that this sentence should be increased to a minimum term of 30 years if the offence involves the murder of a police officer or two or more persons, involves sadistic conduct or the use of a firearm, is racially or religiously motivated[75], and where the murder is committed for gain or intended to interfere with the course of justice (*Criminal Justice Act 2003*: s. 269(5): s. 5). Most recently, the minimum starting point of 25 years was also legislated for all murders in which the offender used a knife or other weapon to commit the murder and had taken that knife or other weapon to the scene intending to either commit an offence or have it available to use as a weapon (*Criminal Justice Act 2003*: s. 269(5): s. 5A). The schedule also prescribes that a whole life order should be imposed in cases where the seriousness of the offence/s is judged to be 'exceptionally high' and the offender is over 21 years of age at the time of committing the offence (*Criminal Justice Act 2003*: s. 269(5): s. 4). Beyond these minimum starting points, the schedule also sets out a series of recommended aggravating and mitigating factors that the judge should consider in determining the minimum term of imprisonment.

In line with critiques of the influence of politics on the implementation of the mandatory life sentence for murder, over half of the English respondents believed that

[75] This also includes crimes aggravated by sexual orientation (*Criminal Justice Act 2003*: s. 269(5): s. 5.2g).

the motivations for implementing schedule 21 of the *Criminal Justice Act 2003* were primarily political and driven by a desire to implement a law and order policy that would curry public favour. As explained by one counsel respondent, 'It was a political initiative forced through by the Home Secretary to try to achieve political aims' (UKCounselP). Similarly, other respondents commented that 'basically we're cheesed off because you've got these politicians who are interfering and upping the time inside' (UKPolicyB), and that the schedule was implemented because of a political perception that 'Schedule 21 keeps the public happy' (UKJudgeD). Expanding on these critiques, another counsel respondent commented that:

> Part of the problem in this country is that sentencing has become so politicised … There is no doubt that there has been a concerted attempt by parliament, certainly over the past few years by the Labour government through parliament, to reduce and constrain judicial discretion. I think there has been a perception that the judges are frankly soft and that is particularly the case in relation to the minimum terms in murder cases because there is no doubt that the effect of the schedule [21] has been to very significantly increase minimum terms to murder. (UKCounselS)

In further analysing this problematic political influence on the formulation of sentencing policy, a counsel respondent observed that 'any legislation that comes about as a result of pressure … it's never likely to fulfil a real need and it's going to just make things more and more difficult, which is what's happened' (UKCounselR). These viewpoints support Garland's (2001) conceptualisation of the re-emergence of punitiveness in crime and justice sanctions. Describing this re-emergence, Garland (2001: 9) argues that in the past two decades a discourse of retribution has been re-established which has 'made it easier for politicians and legislatures to openly express punitive sentiments and to enact more draconian laws'. Legal respondents' views on the imposition and effects of schedule 21 would arguably suggest that it is a relevant example of one of the politically favoured 'draconian' policies that Garland describes.

Further critiques of the schedule are also captured in the respondents' descriptions of it as 'pretty strict' (UKCounselS), 'ridiculous' (UKCounselD), 'insane' (UKCounselG) and as posing 'very serious problems' (UKJudgeE). In expanding on

these perspectives, an English counsel respondent foreshadowed that 'any regime that set down something inflexible like that is going to have its problems, isn't it?' (UKCounselT). These critiques align with the recent description of the schedule by the MOJ (2010: 51) as an 'ill-thought out and overly prescriptive policy'. Mirroring many of the criticisms evident in the NSW analysis of standard non-parole periods, respondents across all English samples criticised the role that the minimum starting points have played in further increasing sentences for murder and in further limiting judicial discretion in sentencing, as well as its potential implications for defendants' decisions to plead guilty prior to trial.

Additionally, and in referring back to earlier concerns over the excessive complication of the law of homicide following reform, some respondents expressed the view that the implementation of this sentencing policy had served to unnecessarily complicate sentencing for murder. As one respondent commented, 'Personally I think it's too complicated. The very fact that you have five starting points. I think it's unnecessary … It was the previous government's taste, as it seems to a lot of judges, for prescribing things' (UKJudgeE). Counsel respondents also believed that the schedule had over-complicated sentencing, with one commenting that 'our sentencing law is now so archaic and so obtuse that you need a thesaurus and a dictionary to guide your way through' (UKCounselG).

Respondent critiques of schedule 21 largely centred on the numerical values at which the four starting points are set, and a dominant perception among the respondents that such values have had the effect of unduly increasing sentences for murder. In drawing on Garland's (2001) argument that recent crime policies have focused on a reinvention – namely, an increasing use – of the prison, English counsel respondents described the starting points as 'very, very high, pretty much doubled from what they were under the old law' (UKCounselE), and 'far too high' (UKCounselM). In concurring, another counsel respondent described that 'sentencing has gone up quite significantly I think' (UKCounselO), while another counsel respondent claimed that 'you are looking at much higher sentences. Phenomenal sentences now' (UKCounselF). This view was also held by members of the senior English judiciary, who described that the effect of the schedule has been 'to ratchet up the sentencing' (UKJudgeA) and that it has taken sentencing 'out of proportion in some cases'

(UKJudgeE). This dominant perception that the key impact of the legislation has been to increase sentences for murder further illustrates the political promotion of retribution over rehabilitation within a law and order climate. As described by Campbell (2008: 5), 'In the *Culture of Control* the prison is regarded not as a mechanism of reform or rehabilitation but as a means of incapacitation and punishment that satisfies popular and political demands for retribution and public safety'.

English respondents from the legal counsel and judicial samples also criticised the implementation of additional sentencing legislation further restricts judicial discretion in sentencing for murder. As described by one judicial respondent, the schedule:

> hampers our discretion and it creates artificial situations. The more you try to restrict judge's discretion the more likely you are to produce results, which doesn't make sense because you can't predict every conceivable situation. (UKJudgeB)

In agreement, counsel respondents described the schedule as 'formulaic' (UKCounselF), 'very prescribed' (UKCounselC) and 'almost computerised sentencing' (UKCounselG), the effect of which was succinctly captured in one respondent's reflections:

> As soon as the verdict comes in you know what you are going to get because it is so formulaic. It's now that way with a lot of other crimes as well … it's like a computer system, you've done this, like this, so you get that. There is no discretion really anymore and it's more difficult to make an impact on your submissions. (UKCounselK)

Furthermore, and in drawing on earlier arguments for the need to abolish the mandatory life sentence for murder, respondents believed that given the myriad circumstances within which the offence of murder can be committed, 'there is probably room for a less rigid approach' (UKCounselL).

Finally, counsel respondents also expressed the view that the schedule negatively impacted upon defendants' evaluations of whether to plead guilty prior to trial in cases involving a minimum starting point. As explained by one counsel respondent:

> If you are defending, you approach a case on the basis that you tell your client that if he goes down it's a minimum of 30 years and that's it … Those sort of sentences aren't going to encourage someone to plead guilty or to take responsibility because why should they? … What's in it for you? You get a tiny discount for a plea. (UKCounselD)

Supporting this view, another counsel respondent commented that 'you think with some of these sentences that are passed down there is absolutely no point of pleading guilty to some of these. You just get a huge whack' (UKCounselQ). The implementation of sentencing reforms that act to discourage defendants from entering a plea of guilty prior to trial is particularly concerning given the recognised benefits for the justice system, the defendant and the victim of obtaining a plea prior to trial (Flynn 2009; Freiberg & Seifman 2001; McConville 1998).

It is important, however, to also acknowledge that there was a smaller sample of respondents interviewed (four of the 29 respondents) who praised the introduction of the schedule and the subsequent recommended minimum starting points for murder. These respondents believed that the schedule promotes consistency in sentencing while still allowing some discretion in setting the minimum term of imprisonment. As one judicial respondent commented, 'it's got the advantage that it promotes a degree of consistency and still allows sufficient discretion' (UKJudgeE). Furthermore, this respondent noted that through the schedule 'discretion in fixing the minimum term is reduced, not taken away altogether by any means but reduced' (UKJudgeE). These comments draw back to the aforementioned index of change explored in relation to the respondents' support for the mandatory life sentence for murder based on the need for public confidence in sentencing, whereby politicians promote penal policies that ensure definite and swift punishment for offences of a violent or sexual nature (Garland 1996, 2001).

It was not the original intention in conducting the research interviews to explore respondents' opinions of the implementation of sentencing reforms; however, the substantial discussion among respondents surrounding schedule 21 and the continued implementation of the mandatory life sentence for murder within England inevitably gave rise to a consideration of how English sentencing policy could be reformed to better respond to murder, and recognise the many contexts within which the offence is committed. These discussions also acknowledged the extent of the problematic influence of law and order motivations in the operation of sentencing for murder in the English criminal justice system.

7.4.6 Achieving Discretion: Options for Abolishing the Mandatory Life Sentence

> But if you asked me what the single, most important reform of the murder laws could be, I would say to do away with the mandatory sentence. (UKCounselP)

English respondent evaluations of the mandatory life sentence for murder and the implementation of schedule 21 often led to suggestions as to how sentencing policy for murder in England could be reformed to better respond to the situations within which the offence of murder is committed. Central to these discussions were the respondents' proposals for replacing the mandatory life sentence with a discretionary-based sentencing model, similar to that currently operating within comparable jurisdictions, most relevant of which are the Victorian[76] and NSW criminal justice systems.

The difficulty of achieving sentencing reform in a law and order climate has been explored throughout past research. For example, Freiberg and Gelb (2008: 13) have noted that:

> Within the context of penal populism, attempts to develop sentencing policy are fraught with danger for sentencing councils that must find a balance between responsive politicians, an entrenched judiciary, an often

[76] For a detailed description of the discretionary model of sentencing utilised in the Victorian criminal justice system, see Fox and Freiberg (1999), and Hoel and Gelb (2008: 3–5).

> inflammatory press and an increasingly vocal public that is not always well informed.

Additionally, Garland's (2001) conceptualisation of the indices of change enhances understanding of the climate within which any reforms would have to be implemented. Given the historical basis of the mandatory life sentence as a symbolic contract with the public, Garland's (2001) framework recognises the difficulty of proposing abolition of the mandated sentence in a context in which punitive sanctions are increasingly being adopted alongside, alongside a growing influence of populism and a return to a reliance on the prison as a form of punishment.

Throughout the interviews respondents posed that abolition of the mandatory life sentence for murder within the English criminal justice system could arguably be achieved via two different avenues. First, the respondents expressed their strong support for the government adopting the recommendations of the Law Commission (2005, 2006) following its review of the law of homicide in England and Wales; and second, the respondents suggested that the government could implement a system allowing for greater judicial discretion in sentencing through the greater use of guideline judgements from the Sentencing Council. In arguing for these two models of reform, the respondents drew upon their own experiences of the higher level of discretion currently afforded to English judges in sentencing for manslaughter and expressed their general confidence in the senior members of the judiciary who sentence in homicide cases. Importantly, the respondents clarified that in extreme and heinous examples of the offence of murder, regardless of the abolition of the mandatory life sentence, judges would still possess the discretion to impose a maximum life sentence of murder, and where necessary, a minimum life order also.

In 2006, alongside a host of other recommendations for reforming the law of homicide, the Law Commission (2005, 2006) recommended the creation of varying degrees of murder, as exist within the American justice system. The Commission proposed that the offence of murder should be divided into two categories – first- and second-degree murder – whereby the mandatory life sentence for murder would only

apply to intentional killings that can be classified as first-degree murder[77]. Second-degree murder, on the other hand, would be subjected to judicial discretion in sentencing, whereby a discretionary maximum life sentence would apply. The Commission believed that the three tier system could 'make the law clearer, and fairer and make it possible to introduce a rational structure for punishing offenders' (Law Commission 2006: 5). However, in response to the Commission's recommendation, the government announced that it was 'committed to retaining the mandatory life sentence' for murder (MOJ 2007). The unwillingness of the government to adopt the recommended reforms of the Law Commission can be explained as a phenomenon common to law and order climates. In this regard, Garland (1996: 462) has noted that because of the implementation of populist law and order policies 'there is now a recurring gap between research-based policy advice and the political action which ensues'.

While the adoption of this recommendation, entailing a revised structure for the offence of murder, would not signify the complete removal of the mandatory life sentence for murder, English respondents did believe that it would be a welcome step forward in minimising its application to all cases of murder. As commented by one judicial respondent, 'I find that [the Law Commission recommendations are] quite attractive and I think it would better reflect the straightforward justice of the case' (UKJudgeF). In agreement, counsel respondents described the Commission's recommendations as 'a good step in the right direction' (UKCounselL) and a 'superior' model (UKCounselG). Additionally, because it does not propose the complete abolition of the mandated life sentence for murder, within the current law and order climate this option would be preferable to politicians who are unwilling to consider a model of reform that completely abolishes the mandated life sentence.

Alternatively, by abolishing the mandatory life sentence, but keeping the current structure of murder, English respondents proposed that the government could look to implement a system that allows for greater judicial discretion in sentencing alongside the formulation of further guideline judgements by the Sentencing Council. The value

[77] The Commission proposed that first-degree murder consist of two offences: intentional killing and intention to do serious injury where the defendant was aware that his or her actions involved a series risk of causing death. Under the Commission's proposals, only the former would receive a mandatory life sentence.

of using sentencing commissions and councils to provide the courts with guidelines has been established both nationally and internationally. Ashworth (2010: 417) describes the value of using guideline judgements in sentencing as follows:

> although the sentencing decision will always require an element of judgment, that judgment should be exercised within a framework of rules, applying principles and guidelines set out in advance, such that court decisions are consistent in their approach and reasonably predictable.

The English respondents believed that the use of these guideline judgements would arguably provide a checkpoint for judges when applying their own discretion and would require judges to publicly justify through their judgement any decisions that contrasted with the existing guidelines[78]. This approach was proposed by several respondents during the interviews, one of whom commented that:

> If there are Sentencing Council recommended sentences they're [judges] required to say why they are departing from the range if they are departing from the range, which is very helpful because it means that judges have applied their mind and therefore there is more transparency in the decision-making process. (UKJudgeB)

In agreement, a counsel respondent commented that 'I think Sentencing Council is a great body, I am a big believer in that' (UKCounselR). Mirroring these views, Mitchell and Roberts (2012: 154) have recently argued that if the mandatory life sentence were abolished 'courts should not be left alone to develop a jurisprudence around the use of alternate sentencing options', and, as such, that 'a guideline would be needed to assist courts in determining which sentencing option was appropriate, as well as the duration of the custodial term in the event that a definite term was imposed'.

In addition to citing the use of guideline judgements, English respondents often supported their call for greater discretion in murder sentencing with reference to

[78] The use of sentencing commissions and councils to provide the courts with guidelines has been established within England as well as in other comparable jurisdictions, including the United States and Australia (Freiberg and Gelb 2008; Roberts 2011).

current sentencing practices for manslaughter in England. At present, sentencing practices in England for manslaughter allow for wider judicial discretion than that permitted in sentencing for murder as there is no mandatory sentence and no prescribed minimum starting point. Thus, this research asked respondents across all samples to consider whether similar discretion could be afforded to the sentencing of offenders convicted of murder. In response, one judicial respondent commented that 'the great thing about manslaughter sentences is that they are entirely within the discretion of the judge and they respond to public views' (UKJudgeB), while another judicial respondent reflected that sentencing for manslaughter 'does work. I'm all in favour of trusting judges' (UKJudgeF). Counsel respondents also believed that the current discretionary sentencing in manslaughter could be adopted for cases of murder, with one respondent observing, 'having that discretion is a good thing and you should be able to have the same discretion for murder as manslaughter' (UKCounselL).

Moreover, and regardless of their favoured model for reforming the mandatory life sentence, overwhelmingly the English respondents expressed confidence that members of the English judiciary should, and could, be given a higher level of discretion in sentencing without sacrificing ideals of consistency and proportionality. This finding was particularly interesting given one of the key assumptions of Garland's (2001: 163) 'crime complex' that the criminal justice state is 'inadequate or ineffective'. While this may well be the dominant perception among members of the public – and research has certainly evidenced such within a law and order climate (Casey & Mohr 2005; Garland 1996; Pratt & Clark 2005) – the interviews revealed that this perception of the inadequacy or ineffectiveness of members of the justice system was not shared by the majority of legal respondents interviewed.

As such, in advocating for greater discretion in sentencing, respondents from the legal counsel sample often cited the level of experience and competency of the members of the judiciary who try murder cases. As one respondent commented:

> I think if the judge sets out his or her reasons, which will then explain [the sentence] to everybody – the public, the defendant, the parole board – exactly why the sentence is the length it is, and of course the judges that are trying

> murders are vastly experienced, then that ought to be sufficient I think. (UKCounselM)

Furthermore, another counsel respondent commented that:

> The sorts of judges that are dealing with a murder case are so experienced. He has a lifetime of experience and he knows the right tariff, he knows what the offence deserves and I think to try and straightjacket the judge is wrong because you cannot cater for every situation … I just think you should have discretion. You've got to trust your judge and I don't think they get it wrong. (UKCounselL)

Importantly, in arguing for greater discretion, another counsel respondent highlighted that even without the mandatory life sentence there would still be the necessary checks in place to ensure that sentencing for murder maintains consistency and proportionality:

> You should have freedom to properly impose the right sentence in the case. There is the Court of Appeal at the end of the day, it's not final, you've got somebody who can review it and you've got so many hundreds of years of experience combined that you can bring to bear in finding out if it's the right sentence or not. So I think that you shouldn't try to impose limits. (UKCounselL)

Similarly, another respondent highlighted the importance of judicial discretion alongside the current structures in place to ensure consistency without the use of restrictive and formulaic sentencing legislation:

> I certainly accept that there needs to be consistency, that's the point of having a lot of training and a lot of guidelines from the Court of Appeal to help judges achieve consistency. The Judicial Studies Board put in quite a lot of effort in training judges on sentencing issues so there is quite a high degree of consistency, but there has been a huge interference with the level of discretion in sentencing – in particular in homicide cases. (UKCounselD)

English judicial respondents also highlighted the important role of the Court of Appeal and guideline judgements in ensuring consistency in sentencing. As explained by one judicial respondent, 'Obviously if the public start voicing opposition to the level of sentences, we would hear about it and if it is deemed appropriate the Court of Appeal would lay down new guidelines' (UKJudgeB). These viewpoints highlight a dominant view that emerged throughout the English interviews that even without the mandatory life sentence for murder there are already necessary checks in place to ensure that the principles of sentencing continue to be upheld through a discretionary sentencing system. Importantly, these arguments can also be considered in light of discussions surrounding reforms aimed at moving the consideration of provocation to the realm of sentencing. Therefore, as highlighted by the respondents, the current existence of necessary checkpoints, alongside respondents' confidence in members of the judiciary, lends support to the development of a model of reform that transfers provocation to sentencing.

Conclusion: Sentencing Reform and the Law of Homicide

> This is the classic case of the sentencing tail wagging the criminal responsibility dog. (Hemming 2010: 3)

Over the past decade, central to reviews of the law of homicide have been concerns over whether consideration of provocation could be transferred to the sentencing stage of the criminal justice process. While the previous two chapters examined whether provocation should be a question for the judge or the jury, this chapter has explored respondent perceptions in NSW and England of whether this would be a favourable model of reform to the law of homicide, while also considering the perceptions of Victorian respondents as to the current workability of provocation within the realm of Victorian murder sentencing.

In moving beyond the discussion of provocation in sentencing, this chapter has recognised that broader considerations of sentencing practices for murder were central to the respondents' evaluations of how the law of homicide within these jurisdictions is currently operating. While Victoria retains a discretionary approach to sentencing for murder offenders, the implementation of restrictive sentencing reforms in England

and NSW raises uniform concerns similar to those evident in an analysis of the effects of homicide law reform in the same jurisdiction. Specifically, both jurisdictions have witnessed the recent introduction of restrictive sentencing legislation that is perceived to be highly politically motivated and of having the detrimental effect of overly complicating the process of sentencing for murder, while also significantly increasing the terms of imprisonment imposed without adequately catering for the varied contexts within which the offence of murder is committed.

McCarthy's (2008) work highlights the importance of relocating provocation to the realm of sentencing to enable sentencing to discursively recognise the harm of gender-based violence, not merely by increasing the sentence imposed but also through the judicial comments made in judgement. In this respect this reform has the potential to achieve more than purely a political 'tough on crime' stance, but could also allow the inclusion of the female, often othered, victim within the discursive framework of sentencing and provide a redefinition of the harm of provoked violence, particularly within the context of intimate homicide.

Given the dominant critique of these sentencing policies that emerged from the interviews, and which is also proposed throughout the relevant research, an inevitable question arises as to why these schemes were implemented in the first place. In answering this question, this chapter has illustrated the profound influence of political motivations within the realm of sentencing in NSW and England with reference to key themes of law and order commonsense as proposed by Hogg and Brown (1998) and the indices of change conceptualised by Garland (2001). This analysis suggests that when sentencing policies are implemented based upon calls for tougher penalties, a reduction in crime rates and a response to soft on crime approaches to criminal justice, the resulting legislation highlights a significant disjuncture between political desires and the needs of the legal practitioners charged with the daily implementation of these policies.

CHAPTER 8 Beyond Provocation: The Transformative Potential of Law Reform

> What is required of the legal system to uphold the original intent of these law reforms, particularly where there is a history of violence towards the woman and where the woman killed is a victim blamed? (Capper & Crooks 2010: 21)

In sentencing James Ramage in the VSC in 2004, Justice Osborn 'used eloquent judge-speak to state the obvious. The law as it stood, was a crock' (Silvester 2011: 26). In handing down the longest sentence ever to be imposed in Victoria for manslaughter by reason of provocation[79], Justice Osborn commented that 'I, of course, must apply the current law whatever view I may hold as to the desirability of change to it' (*Ramage* per Osborn J: 28). This desire for change, expressed by others in the period following *Ramage*[80], was the impetus for reform in the Victorian criminal justice system (Howell 2005; Kissane 2009; Ramsey 2010).

In the wake of *Ramage*, this research sought to examine the degree of success of reforms targeted at the partial defence of provocation in the Victorian criminal justice system in overcoming the problems posed by the courtroom operation of the partial defence of provocation. In doing so, this research also sought to examine whether contrasting approaches taken to addressing provocation in the English and NSW criminal justice systems have been more or less successful in addressing the problems enshrined in the provocation defence, and so clearly illustrated through its use during the *Ramage* trial.

In examining the need for, and the effect of, homicide law reform within these three contexts, this research has provided a unique examination of the most nuanced aspects of legal reform from the perspective of those directly engaged with the delivery of the law of homicide in each of the three criminal justice systems under study. By drawing upon the voices of 81 members of these three jurisdictions, the research has analysed

[79] Ramage was sentenced to a maximum period of 11 years imprisonment with a non-parole period of eight years. Having served his non-parole period, Ramage was released in July 2011.
[80] In the aftermath of *Ramage*, 2500 letters were written to the Victorian Attorney-General calling for a change in the law of provocation to prevent men like Ramage from being able to successfully access a partial defence to murder in the future.

the operation of the law prior to the implementation of reform, the current operation of the law of homicide in light of recent reforms, and the influence of sentencing upon the law's ability to respond to the myriad circumstances within which the offence of murder is committed. This research has thus been concerned with conceptual questions of gender, politics and the role of denial in the criminal justice system.

By applying these three broad conceptual frameworks throughout the analysis the failure of the law of homicide to adequately respond to the gendered contexts within which the offence of homicide is committed becomes particularly apparent. The resulting analysis suggests that despite the implementation of reform, significant problems persist in the operation of the law of homicide within the Victorian, English and NSW contexts. This is particularly evident in the continued operation of provocation in NSW, in the operation of new categories of homicide in the Victorian and English contexts, and in the law's inadequate response to homicides that occur within an intimate context. As such, while this research was initially focused on the problematic use of provocation in *Ramage*, it has become primarily concerned with the law's response to three people: the jealous man, the female victim of homicide and the battered woman.

8.1 The Law's Response to the Jealous Man

In examining the role of provocation in the 2004 *Ramage* trial, this research began with an examination of concerns surrounding the law's response to men who kill a female intimate partner within the context of relationship separation or alleged infidelity. As such, it is perhaps unsurprising that throughout the research the law's response to male defendants who kill within this context has been critical to an examination of the need for, and the effect of, homicide law reforms targeted at overcoming the problems enshrined in the operation of provocation. In analysing the law's capacity to adequately respond to these male defendants, this research builds upon over two decades of research concerning the role of the partial defence of provocation in such trials (Bradfield 2000; Bradfield 2003; Coss 2006b; Forell 2006; Gorman 1999; Howe 1999; Tyson 2006).

Through a discussion of the current operation of the law of homicide in each jurisdiction, several practitioners highlighted that, despite the implementation of

reforms to the law of homicide, problematically gendered assumptions continue to influence the law's response to lethal domestic violence committed by men against female intimate partners. As asserted by one Victorian respondent, 'despite everything, all the work that's been done, there is still a cultural story that this [type of violence] is okay' (VicPolicyC). The effects of this 'cultural story' were explored throughout this analysis with reference to Cohen's (2001) notions of interpretive and implicatory denial, and Sykes and Matza's (1957) conceptualisation of techniques of neutralisation. The resulting analysis indicates that when dealing with men who have killed a female intimate partner there continues to be a legal legitimisation of the lethal violence in cases where defendants raise relationship separation and infidelity.

The dangers of this cultural story were evidenced through the case analysis conducted in Chapter 6, particularly in relation to the continued production of gendered narratives through the Victorian operation of defensive homicide and the NSW operation of the partial defence of provocation. Specifically, via a detailed analysis of the courtroom narratives presented in the trials of Anthony Sherna and Luke Middendorp, the analysis reveals the continued legal legitimisation of violence against women despite the implementation of reforms in Victoria to counter exactly that. As such, this analysis finds that the law's ability to adequately recognise, represent and ultimately condemn the use of lethal violence by a man upon a female intimate partner is yet to be achieved.

The continued successful use of provocation within this context in NSW supports the need for a reinvigoration of the argument to abolish this partial defence to murder. When considered through the lens of denial, the impacts of the use of the provocation defence by men who have killed a female intimate partner become particularly evident. As argued in Chapter 6, it is important that NSW does not wait for the controversial case that will inevitably eventuate creating public and political demand for a push towards abolition. Even without its own *Ramage* trial, it is possible to recognise that the operation of the partial defence of provocation in NSW is no longer in line with community values and expectations, and in practice does not achieve justice, particularly when used in cases of lethal male domestic violence. If NSW were to abolish provocation as a partial defence to murder, it would be able to draw upon the experiences of comparable jurisdictions that have implemented this reform.

Specifically, NSW could borrow from the framework of provocation in sentencing proposed within Victoria by Stewart and Freiberg (2008, 2009) as well as research that has been examining the effects of abolishing provocation in these jurisdictions (Clough 2010; Fitz-Gibbon & Pickering 2012; Tyson 2011).

However, beyond reforms targeted at the restructure of legal categories, this research highlights the need for actual change in practice so that reforms to the law of homicide may overcome the legal legitimisation of male violence occurring within this context. The experience of the Victorian and English reforms suggests that this is not easily achieved through the creation of alternative legal categories, and as such the need for a re-education of the key stakeholders involved in the production of these trial narratives becomes apparent. In discussing the need for a change in culture, rather than the law alone, the reflections of one Victorian policy respondent are particularly useful:

> It's not simply the law; it's the courtroom narrative that we allow … you can replace one outrageous law, a law that's highly discriminatory and does appear to extinguish the human rights of a woman, you replace it with another law, which you claim affirms the human rights of a woman and you end up with similar verdicts. So there's clearly a problem … until you establish that the criminal justice system is fundamentally misogynist – discriminatory towards women – you cannot move on. (VicPolicyC)

As recognised by this Victorian respondent, this re-education would need to aim to transform the gendered nature of the law by minimising the problematic production of legal narratives that serve to diminish the seriousness and legitimise the use of lethal violence against women.

8.2 The Law's Response to the Female Victim

> Decisions should never be based on the denial or minimisation of violence, or excuses and victim blaming. Neither should they be based on stereotypes of bad mothers, lying/vindictive ex-wives, mad women … These intellectual shortcuts are simply unacceptable in any court purporting to deliver justice to the parties before it. (Hunter 2006: 774)

In seeking to address the concerns evident from an analysis of the law's response to the jealous male, examinations of the law of homicide have become inextricably linked with questions surrounding the law's treatment of the female victim of intimate homicide. These questions build upon three decades of research that has recognised the often unsatisfactory and gendered treatment of female victims of rape and homicide (Currie 1995; Horder & Hughes 2007; Kaspiew 1995; Kennedy 2005; Lees 1997; Mackinnon 1991; McBarnet 1983; Temkin & Krahe 2008). However, in doing so this research also provides a unique contribution by its examination of the ability of three contrasting approaches to homicide law reform to overcome the production of problematic narratives of victim blame and denigration.

By drawing upon Hudson's (2006) principles of justice and undertaking an analysis of discourses of denial, this research suggests that regardless of the approach taken to the problems historically linked to the operation of provocation, the law continues to produce problematic trial narratives that serve to legitimise the male use of violence while simultaneously denigrating and blaming the female victim. The mobilisation of narratives of victim denial was most evident through the operation of alternative categories to murder in each jurisdiction, highlighting that when attempting to evade a conviction for murder a common strategy adopted by defence counsel involves the displacement of blame from the offending party onto the female victim. While this may be expected to a degree within an adversarial court system, what is particularly concerning is the further evidence of the production of these narratives by members of the judiciary at sentencing, when easily digestible gender stereotypes are used to justify a sentence for less than murder.

The trend of victim denial is particularly evident within the Victorian context, where the operation of defensive homicide since its implementation in November 2005 has allowed for narratives of victim blame and denigration to continue beyond the abolition of the partial defence of provocation. In abolishing the partial defence of provocation, former Victorian Attorney-General Rob Hulls announced that a defence that 'promotes a culture of blaming the victim' had 'no place in a modern society' (Office of the Attorney-General 2005). With that acknowledgement in mind, this research has questioned the place of defensive homicide law within Victorian

homicide law, given the propensity to reproduce these cultures of victim blame. In particular, the use of the offence in *Middendorp* and *Sherna*, and the subsequent mobilisation of narratives of victim denial, provides a platform from which to encourage the current Victorian Government to continue the review of defensive homicide begun in 2010. This review, and any subsequent examinations of the law's operation, appears essential to ensuring that the Victorian criminal justice system continues to distance itself from the problems that were widely recognised and critiqued in the operation of the partial defence of provocation.

The abolition of defensive homicide in Victoria would arguably ensure that homicides occurring with an intent to kill or cause really serious harm are accurately labelled as murder by the Victorian criminal justice system. Additionally, its abolition would ensure that another avenue through which the law has been able to denigrate and blame the female victim of homicide for the perpetration of lethal violence against her would be closed. Given the level of discretion afforded to members of the Victorian judiciary in sentencing for murder, the varied levels of culpability evident in these offences could be adequately addressed at the sentencing stage, as is the case in the current model for considering any mitigation due to provocation. The dangers of not appropriately recognising the seriousness of the offence with a conviction for murder have been made evident throughout this research, particularly when considered within a framework of denial, whereby a conviction for defensive homicide does not adequately recognise the harm perpetrated upon the victim and allows for a reinterpretation of the event that displaces the responsibility from the offender onto the victim.

The production of narratives of victim blame, as explored throughout this research, is certainly not unique to these jurisdictions or to these categories of homicide. Over 15 years ago, Kaspiew (1995: 367) described how:

> The disempowerment of victims/survivors of rape is consolidated by a legal process in which they are denied an opportunity to make their own authentic narrative … it is not just a genuine opportunity to speak that women need, but a guarantee also that they will be heard.

Kaspiew's argument is important because it highlights the need for the law to provide a discursive space for women's stories of victimisation, but also for the law to ensure that women's voices will be heard within that space and that it will not provide merely another point at which their accounts of men's violence can be silenced. The analysis of the operation of homicide law in Victoria, NSW and England suggests that the creation of this discursive space through the implementation of alternative offences or partial defences to murder is often fraught with difficulty.

8.3 The Law's Response to the Battered Woman

> The challenge then, is to change the legal framework and reshape the narrative structure so that women's stories are both told and heard. Translating this into a law reform strategy raises complex questions. As the experience to date has shown, tinkering at the edge is not enough. (Kaspiew 1995: 381)

This research has also considered the ability of the law of homicide in Victoria, NSW and England to adequately respond to, and represent the experiences of, females who kill in response to prolonged family violence. The law's response to homicides occurring within this context has garnered significant attention throughout past research that has identified the inadequacy of legal responses to these types of defendants (Bradfield 2000; Horder 1992; Morgan 2002; Sheehy et al. 1992; Tarrant 1990b; Tolmie 2005). As such, this research examined whether, in the period prior to reform in Victoria and England, the law was adequately catering for homicides occurring in this context, and subsequently, whether in the period post-reform the law of homicide was able to provide a more accurate representation of and response to the situations within which the battered woman kills. The respondents' views on these matters were then contrasted with an analysis of the operation of the law in NSW, to assess whether the law's response to battered women is better achieved through the continued operation of the partial defence of provocation.

The case analysis and interview data both highlight that recent experiences of the creation of new categories of homicide – specifically the offence of defensive homicide in Victoria and the partial defence of loss of control in England – and their

attempt to reintroduce women's stories into the legal battle have fallen short of expectations in the period immediately following their implementation. For female offenders, these alternative categories of murder could arguably have provided a useful avenue for bringing into the legal domain the complex circumstances of battered women who kill, experiences which under the partial defence of provocation were poorly addressed and understood within the legal realm (Bradfield 2000; Horder 1992; Morgan 2002; Tarrant 1990b; Tolmie 2005). However, the analysis highlights that, in practice, in accessing defensive homicide, provocation or loss of control women who kill in response to prolonged family violence have come to occupy a compromised legal category in all of these jurisdictions. In this scenario, Hudson's (2006) principles of reflectiveness and discursiveness have proven difficult to achieve under the new reforms.

As such, this research suggests that rather than using partial defences or alternative offences to provide a half-way house or 'safety net' for these women, the law should be further reformed to better accommodate their circumstances within an arguably more accurate legal category of self-defence. While at a glance the creation of these alternate safety nets appears valuable for mitigating against the possibility of a murder conviction and the subsequent sentencing ramifications, what these categories fail to achieve is a reflective space for the voices of this traditionally silenced population to be appropriately heard and represented. As previously argued by Graycar (1996: 309):

> So long as the structural barriers remain in place, these outsider narratives will continue to be ignored or minimized or, if heard, have only limited impact. This is because the structures of the law, the legal categories within which problems fail to be dealt with, analysed and determined, continue to serve a powerful exclusionary role.

Most problematically, the creation of these 'half-way' categories of homicide becomes another route through which men who commit lethal violence in a myriad of circumstances can have their perpetration minimised, and even legitimised, with a conviction less than murder.

8.4 The Impeding Factor of Sentencing for Murder

In examining the legal responses to these three categories of persons, questions inevitably emerged surrounding the ability of the realm of sentencing to provide a more suitable point at which these cases can be adjudicated. As was evident in Victoria's approach to reforming the partial defence of provocation, several criminal jurisdictions both nationally and internationally have sought to overcome the problems posed by provocation by abolishing the category as a partial defence to murder and relocating consideration of provocation to sentencing. As such, this research examined whether in the initial period following the reforms this approach was favoured by legal respondents in Victoria, and whether English and NSW respondents viewed it as a viable option within their own jurisdictions.

The resulting analysis has highlighted respondent opinions identifying the often-frustrating inability to consider reforming the law of homicide without taking account of the broader structure of sentencing for murder within that jurisdiction. This became particularly evident in relation to the continued implementation of a mandatory life sentence for murder in England, alongside the recent implementation of minimum sentencing legislation in both the English and NSW criminal justice systems. What this analysis also reveals is the importance of acknowledging the (often impeding) role of political motivations in achieving change within the criminal justice system. Drawing upon the law and order frameworks conceptualised by Garland (2001) and Hogg and Brown (1998), this research notes that in seeking to overcome gender bias in the operation of the law of homicide, the first impediment may not be sentencing but rather a law and order climate that has come to privilege punitiveness over the achievement of justice.

Additionally, within the Victorian context the analysis highlights the propensity for sentencing judgements to reproduce the gendered narratives often evident throughout intimate homicide trials. In this regard, this research suggests that this approach to reform must be combined with a system of evaluation and monitoring to ensure that the problems of provocation's past do not continue to be reproduced at merely a different point in the criminal justice system.

8.5 Beyond Provocation: Where to Next?

> Statutory reform rarely ends anything. It may transform the debate, yet it would be naïve to believe that it could 'end' a matter as ancient as sexism. This does not mean that reform is futile, but may simply mean that reform demands perpetual vigilance. (Nourse 2000: 978)

Throughout the interviews, the respondents from all three jurisdictions identified the need for more far-reaching reforms within this area of the law, and more notably, for a transformation of the legal subject such that problematic gender stereotypes become more difficult to produce within the context of the courtroom. In such circumstances, Hudson's (2006) principles of discursiveness and reflectiveness become arguably more achievable. As Laster and O'Malley (1996) noted over 15 years ago, including the stories of the powerless, or further extending the reach of the law, may only achieve success if the foundational legal subject – the white male – is more comprehensively transformed.

Therefore, the findings of this research suggest that beyond law reform there is a need to initiate cultural change within the legal system through a re-education of those involved in the daily operation of the criminal justice system. The importance of recognising that law reform in itself does not necessarily achieve change is noted by Graycar and Morgan (2005: 395), who argue that 'changes to law can only ever constitute a small part of any profound social change'. Similarly, and in discussing the relocation of provocation to sentencing, Freiberg and Stewart (2011: 120) note that:

> As has been the experience with the long history of the reform of the law relating to sexual assault offences, changing professional and law behaviour and attitudes is not easy. Stereotypes die hard. Reform is not just about changing the words on a page.

This need for reform beyond a restructure of homicide law is also captured in the reflections of one of the Victorian defence respondents, who considered that:

> I think the politicians or the Law Reform Commission have got to carry the

> community forward. I think they're responsible. Judges cop the brunt of this but the Law Reform Commission has got to educate judges and the community that there are different ways we are going to do this. (VicDefenceC)

The question that inevitably emerges concerns the transformative potential of the law, particularly where issues of gender are concerned. Past research has recognised the limitations of law reform in this regard, highlighting that while successes can be achieved these are often accompanied by failures in seeking an avenue through which women's experiences of violence can be better heard and represented within the discursive framework of the law (Armstrong 2004; Graycar & Morgan 2005; Hunter 2006; Nourse 2000; Wells 2004). This research adds to the body of research in this field by highlighting that despite contrasting approaches taken to overcoming gender bias in the law's operation, uniform concerns emerge across jurisdictions which illustrate the danger of law reform achieved simply though changes in legal categorisation.

More broadly, this research has also emphasised the importance of introducing law reform in any jurisdiction with the goal of simplifying and clarifying – rather than complicating – the present structure of the law of homicide. This is particularly evident where reform includes the formulation of new offences or partial defences to homicide. The problems associated with the over-complication of homicide law centre on the question of whether juror members are able to understand and apply the law of homicide in their decision-making without succumbing to the temptation to produce a compromised verdict. It was in light of these concerns that respondents emphasised the need for any future reform to the law of homicide to make simplification of the current state of the law a clear priority.

Comparable criminal jurisdictions that seek to reform the partial defences to murder, and specifically the provocation defence, can certainly learn from the experiences of various attempts to overcome the problems posed by the defence of provocation in the Victorian, NSW and English criminal justice systems. Given the recognition across these three jurisdictions of the uniform effects of these reforms, despite the implementation of vastly contrasting approaches to reform, this research highlights

that challenging the gender operation of the law is a task not easily achieved. As such, this research has revealed that steps towards minimising gender bias in the law's operation should be accompanied by a system of rigorous monitoring and evaluation to ensure that the law can better respond to the gendered circumstances within which men and women kill.

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APPENDIX A: Indicative Interview Schedule

1. **In your experience is provocation problematic as a partial defence to murder?**
   1.1. In your experience is provocation a hard partial defence to successfully run?
   1.2. What types of homicides, in your experience, most commonly raise provocation as a partial defence to murder?
   1.3. Have you observed any differences in the way that male or female defendants raise provocation? Are either – in your opinion – more likely to raise a successful partial defence?

2. **Is provocation needed as a partial defence to murder? Why? Why not?**
   2.1. Could consideration of provocation be relocated to sentencing? (*NSW and English specific*)
   2.2. Do you have any initial concerns with the relocation of provocation to sentencing? (*Victorian specific*)
   2.3. Do you believe that provocation could be adequately catered for at sentencing?

3. **What are your thoughts on the recent changes to the law of homicide?**
   3.1. Specifically, what are your thoughts on the recent reforms to the partial defence of provocation?
   3.2. What impact – if any – do you think these changes will have/have had (dependant on jurisdiction)?
   3.3. Do you believe the changes will have/have had more of an effect on any particular types of homicides or scenarios of homicide?
   3.4. What are your initial perceptions of the introduction of defensive homicide? (*Victorian specific*)
   3.5. What are your initial perceptions of the introduction of a loss of control partial defence to replace provocation? (*English specific*)

4. **Are there any other concerns that you have at present in relation to the operation of the law of homicide and/or the partial defences to murder?**

APPENDIX B: Thematic Interview Data Codes

Table B.1: Thematic Interview Data Codes

Main Themes	Sub-Themes
Provocation	Gender bias Victim blame Jealous man's defence Battered women and provocation Community values and expectations Role of the jury Hard defence to prove Support for provocation Provocation and diminished responsibility Influence of key cases Complicated law
Victorian Homicide Law Reforms	Abolishing provocation Arguments for reform
Defensive Homicide	Support for Arguments against Complicated law As provocation For battered women Arguments to abolish Sentencing for defensive homicide Guilty pleas
England Homicide Law Reforms	Law Commission recommendations Political influences
Loss of Control	Sexual infidelity exclusion Inclusion of fear Complicated law As provocation
Partial Defences to Murder - General	(*no sub-themes*)
Future Needs for Reform	Gender bias Mercy killings Victoria – diminished responsibility
Key Cases	UK case discussions Vic case discussions NSW case discussions
Evaluating Law Reform	(no sub-themes)
NSW Provocation	Complicated jury directions Victim blame For battered women Jealous man's defence Hard defence to run Arguments to abolish Arguments to retain Importance to jury
Jury Verdicts	Compromise in domestic homicides Compromised verdicts
Trial Observations – General	Battered women trials Domestic homicide trials

Victoria – Provocation in Sentencing	Importance of considering provocation at sentencing Critique of Provocation hidden in sentencing
NSW and England Provocation in Sentencing	Support of Critique of Link to mandatory life sentence Link to minimum sentencing schemes
England Schedule 21	Complicated Law Desire for discretion General critique Increase in sentences Political motivations Too restrictive Support for Guilty pleas
Sentencing	Victorian sentencing for murder NSW manslaughter sentences Judicial variance Confidence in the judiciary Deterrence Manslaughter sentencing range

APPENDIX C: Intimate Femicide Case Study List

Table C.1: Victorian Intimate Femicide Case Study List January, 2006 to December 2010

Offender Surname (trial year)	Offender First Name	Case Citation
Baxter (2009)	Robert Gordon	*R v Baxter* [2009] VSC 180
Blaauw (2008)	Donovan Alexandra	*R v Blaauw* [2008] VSC 129
Boyle (2008)	Fredrick	*R v Boyle* [2008] VSC 71
Brooks (2008)	Mathew	*R v Brooks* [2008] VSC 70
Butler (2007)	Christopher Brian	*R v Christopher Brian Butler* [2007] VSC 185
Chalmers (2009)	Neil Cameron	*R v Chalmers* [2009] VSC 251
Davey (2006)	Owen James	*The Queen v Owen Davey* [2006] VSC 173
Diver (2008)	Glenn William	*R v Diver* [2008] VSC 399
Ellis (2008)	Darren John	*R v Ellis* [2008] VSC 372
Foster (2009)	Clayton	*R v Foster* [2009] VSC 124
Duggan (2006)	Travis Grahame	*DPP v Duggan* [2006] VSC 153
Halliday (2007)	Thomas Keith	*R v Halliday* [2007] VSC 586
Jagroop (2008)	Amitesh Bali	*DPP v Jagroop* [2008] VSC 25
Lam (2007)	Hoa Boa	*DPP v Lam* [2007] VSC 307
Margach (2006) Margach (2008)	Paul Jason	*R v Margach* [2006] VSC 77 *R v Margach* [2008] VSC 255
Pennisi (2008)	Ralph Matthew	*DPP v Pennisi* [2008] VSC 498
Piper (2008)	David	*R v Piper* [2008] VSC 569
Prasoeur (2006)	Pisey	*DPP v Prasoeur* [2006] VSC 41
Rhodes (2007)	Dallas	*DPP v Dallas Rhodes* [2007] VSC 55
Reid (2009)	David John	*R v Reid* [2009] VSC 326
Rolfe (2008)	Bernard William	*DPP v Rolfe* [2008] VSC 52
Rye (2006)	Craig Steven	*R v Craig Steven Rye* [2006] VSC 6
Serrano (2007)	Apolonio	*R v Serrano* [2007] VSC 231
Sherna (2009)	Anthony	*DPP v Sherna (No. 2)* [2009] VSC 526
Watson (2009)	Richard James	*R v Watson* [2009] VSC 261

Table C.2: NSW Intimate Femicide Case Study List January, 2006 to December 2010

Offender Surname (trial year)	Offender First Name	Case Citation
Aytugrul (2009)	Yusuf	*R v Yusuf Aytugrul* [2009] NSWSC 275
Christov (2006)	Ivan	*Regina v Christov* [no 2] [2006] NSWSC 1179
Darcy (2007)	Ian Thomas	*R v Ian Thomas Darcy* [2007] NSWSC 1392
Dowley (2009)	Floyd Leslie	*R v Floyd Leslie Dowley* [2009] NSWSC 722
Edwards (2009)	Deon James	*R v Edwards* [2009] NSWSC 164
Faehndrich (2008)	John Harry	*R v Faehndrich* [2008] NSWSC 877
Faulkner (2009)	Michael John	*R v Michael John Faulkner* [2009] NSWSC 1171
Ferguson (2007)	Michael David	*R v Ferguson* [2007] NSWSC 949
Frost (2008)	Peter	*R v Frost* [2008] NSWSC 220

Galante (2008)	Mark	*Regina v Galante* [2008] NSWSC 319
Joyce (2007)	Bevan Phillip	*R v Joyce* [2007] NSWSC 218
Matheson (2006)	William Harold	*Regina v William Harold Matheson* [2006] NSWSC 332
Mehta (2009)	Sanjay	*R v Mehta* [2009] NSWSC 814
Mencarious (2006)	Ashraf	*Regina v Mencarious* [2006] NSWSC 719
O'Connor (2008)	Laurence Bede	*R v Laurence Bede O'Connor* [2008] NSWSC 1297
Paddock (2009)	Albert James	*R v Albert James Paddock* [2009] NSWSC 369
Raju (2007)	Kaniappa	*R v Raju* [2007] NSWSC 1418
Robinson (2007)	Dalley Stuart	*Regina v Robinson* [2007] NSWSC 460
Shepherd (2006)	Glenn Kenneth	*R v Shepherd* [2006] NSWSC 799
Stevens (2008)	Bradley James	*Regina v Stevens* [2008] NSWSC 1370
Thompson (2008)	John Frederick	*R v Thompson* [2008] NSWSC 109
Valiukas (2009)	David Martin	*R v Valiukas* [2009] NSWSC 808
Verslyus (2006)	Lee Thomas	*R v Lee Thomas Verslyus* [2006] NSWSC 188
Wallace (2006)	Michael Anthony	*Regina v Wallace* [2006] NSWSC 897
Walsh (2009)	John	*R v John Walsh* [2009] NSWSC 764
Wilkinson (2009)	Paul James	*R v Wilkinson* (No. 5) [2009] NSWSC 432
Wood (2008)	Gordon	*R v Wood* [2008] NSWSC 1273
Zammit (2008)	Edward David	*R v Edward David Zammit* [2008] NSWSC 317
Zeilaa (2009)	Elie	*R v Elie Zeilaa* [2009] NSWSC 532

Table C.3: England Intimate Femicide Case Study List, January 2006 to December 2010

Offender Surname (trial year)	**Offender First Name**	**Sentencing Date**[81]
Andrews (2009)	David	27 January 2009
Arshad (2007)	Rahan	13 March 2007
Birks (2009)	Christopher	11 December 2009
Booth (2008)	Andrew	1 February 2008
Campbell (2007)	Christopher	12 December 2007
Chenery-Wickens (2009)	David	2 March 2009
Conan (2009)	James	26 January 2009
Cook (2008)	Robert	1 February 2008
Cranston (2009)	William	22 July 2009
DeAsha (2008)	Anthony	6 December 2008
Ellerbeck (2009)	Neil	14 October 2009
Forrester (2009)	Wayne	17 October 2009
Genestin (2008)	Andre	16 May 2008
Gifford-Hall (2006)	Michael	7 November 2006

[81] The sentence date rather than the case citation is used in this table as the case citation of the English cases was not made publicly available in all of the analysed cases.

Harvey (2009)	Paul	18 December 2009
Holtby (2006)	Richard	20 June 2006
Hunt (2006)	Steven	6 November 2006
Jermey (2009)	Alan	6 July 2009
Kelly (2009)	John	24 July 2009
Khan (2007)	Shazad	11 January 2007
Lewis (2009)	Brian	10 September 2009
Lumsden (2006)	Christopher	10 February 2006
Morrison (2009)	Ricardo	28 July 2009
Munro (2006)	Mark	20 January 2006
Neale (2009)	Terrence	25 August 2009
Osbourne (2007)	George	18 December 2007
Pearson (2006)	Thomas	28 September 2006
Pilkington (2006)	Darren	15 December 2006
Richardson (2009)	Edward	23 January 2009
Russell (2009)	Shaun	22 May 2009
Sinclair (2009)	Alisdair	30 October 2009
Taylor (2009)	Brian	24 February 2009
Vinter (2008)	Douglas	21 April 2008
Wicks (2009)	Alan	9 July 2009
Wilson (2008)	Robert	28 November 2008

APPENDIX D: Victorian Defensive Homicide Case Study List

Table D.1: Defensive Homicide Convictions in Victoria, November 2005 – November 2011

Offender Surname (trial year)	Offender First Name	Case Citation
Baxter (2009)	Jason Andrew	*R v Baxter* [2009] VSC 178
Black (2011)	Karen Dianne	*R v Black* [2011] VSC 152
Creamer (2011)	Eileen	*R v Creamer* [2011] VSC 196
Doubleday (2009)	Ricky	*R v Croxford/Doubleday* [2009] VSC 593
Edwards (2008)	Kevin Roy	*R v Edwards* [2008] VSC 297
Evans (2009)	James	*R v Evans* [2009] VSC 593
Ghazlan (2011)	Joseph	*R v Ghazlan* [2011] VSC 178
Giammona (2008)	Rosario Giuseppe	*R v Giammona* [2008] VSC 376
Jewell (2011)	Scott Roy	*R v Jewell* [2011] VSC 483
Martin (2011)	Justin Dennis James	*R v Martin* [2011] VSC 217
Middendorp (2010)	Luke John	*R v Middendorp* [2010] VSC 202
Parr (2009)	Robert Sean	*R v Parr* [2009] VSC 468
Smith (2008)	Callum Zane	*R v Smith* [2008] VSC 617
Smith (2008)	Michael Paul	*R v Smith* [2008] VSC 87
Spark (2009)	Gordon John	*R v Spark* [2009] VSC 374
Svetina (2011)	Zlatko	*R v Svetina* [2001] VSC 392
Taiba (2008)	Mahmoud	*R v Taiba* [2008] VSC 589
Tresize (2009)	Daniel Dwayne	*R v Tresize* [2009] VSC 520
Wilson (2009)	Benjamin James	*R v Wilson* [2009] VSC 431

APPENDIX E: NSW Provocation Manslaughter Case Study List

Table E.1: Successful Provocation Defences in New South Wales, January 2005 – December 2010

Offender surname (trial year)	Offender first name	Case Citation
Ali (2005)	Abbas Mohamad	*Regina v Mohamad Ali* [2005] NSWSC 334
Berrier (2006)	Steven John	*R v Berrier* [2006] NSWSC 1421
Bullock (2005)	Ari Hayden	*R v Ari Hayden Bullock* [2005] NSWSC 1071
Chant (2009)	Joyce Mary	*R v Joyce Mary Chant* [2009] NSWSC 593
Dunn (2005)	Jeffrey	*R v Jeffrey Dunn* [2005] NSWSC 1231
Forrest (2008)	Mark Allan	*Regina v Mark Allan Forrest* [2008] NSWSC 301
Frost (2008)	Peter	*R v Frost* [2008] NSWSC 220
Gabriel (2010)	Harb	*R v Gabriel* [2010] NSWSC 13
Goundar (2010)	Munesh Pravin	*Regina v Munesh Goundar* [2010] NSWSC 1170
Hamoui (2005)	Abdul Razzak	*R v Hamoui* [no 4] [2005] NSWSC 279
Lovett (2009)	Ronnie Phillip	*Regina v Ronnie Phillip Lovett* [2009] NSWSC 1427
Lynch (2010)	Brendon Arron Mark Henry	*R v Lynch* [2010] NSWSC 952
Mitchell (2008)	Beau Steven	*R v Beau Steven Mitchell* [2008] NSWSC 320
Russell (2006)	Cherie	*R v Russell* [2006] NSWSC 722
Stevens (2008)	Bradley James	*Regina v Stevens* [2008] NSWSC 1370

APPENDIX F: Research Explanatory Statement

MONASH University
School of Political and Social Inquiry
Department of Criminology

Homicide and Law Reform in Australian and English courts

This information statement is for the participant to keep.

My name is Kate Fitz-Gibbon and I am conducting doctoral research in Australia and England on homicide law reform and the criminal justice system. This research is being conducted as part of a PhD in Criminology at Monash University.

To complete this research I am seeking to interview legal professionals that are relevant to the case studies that I am undertaking, this will involve interviews with both Supreme Court judges and legal counsel. All participants are required to have at minimum 24 months experience in their role as either a Supreme Court judge or legal counsel.

The aim of this research is to analyse the influences on legal decision-making in cases of homicide across three different climates of homicide law reform.

Where consented to, participation in this research involves a 30 minute audio taped semi-structured interview with the project researcher. Interview audio taping is necessary to ensure that the researcher can accurately transcribe the participant's responses following the interview. Themes discussed in the interview will relate to process of the law, sentencing discretion, law reform, trial narratives, and the defence of provocation.

Where requested, participants will be given the opportunity to review the transcript resulting from the interview prior to that transcript being included within the research.

If you experience any inconvenience or discomfort during the course of the interview, the interview can either be stopped, postponed or can proceed onto a different discussion topic. Participation in this study is entirely voluntary and as such, you are under no obligation to consent to participate and you may withdraw at any stage.

Findings resulting from the data obtained during the interviews will be used in my PhD Dissertation and in any resulting journal articles and conference presentations. In all interview transcripts, resulting publications and reports the interview data will employ pseudonyms for all interview participants to ensure participant confidentiality. Additionally, all data resulting from the interviews will be stored in line with the Monash University regulations and will be kept on University premises in a locked filing cabinet.

If you would like to be informed of the findings of this research, please contact Kate Fitz-Gibbon (email: [redacted]. Following February 2012 findings will be available in hard copy from the Monash University Library Service (contact telephone: [redacted]).

If you would like to contact the researcher about any aspect of this study, please contact:	**If you have a complaint concerning the manner in which this research is being/or was conducted, please contact:**
Ms. Kate Fitz-Gibbon Department of Criminology School of Political and Social Inquiry Faculty of Arts Monash University. Email contact: [redacted]	Executive Officer Monash University Human Research Ethics Committee (MUHREC) Building 3E, Room 111 Research Office Monash University VIC 3800 Tel: +61 3 9905 2052 Fax: +61 3 9905 3831 Email: muhrec@monash.edu

APPENDIX G: Participant Consent Form

MONASH University

School of Political and Social Inquiry
Department of Criminology

Participant Consent Form
Research title – Homicide and Law Reform in Australian and English Courts

In signing this form, I agree to take part in the Monash University research project titled above. This research project has been explained to me through an Explanatory Statement, which I will keep for my own records. I understand that by agreeing to take part in this research:

I agree to be interviewed by the researcher ☐ Yes ☐ No
I agree to allow the interview to be audio-taped ☐ Yes ☐ No

I understand that my participation in this study is voluntary and that I can choose at any stage to withdraw from the research project without being penalised or disadvantaged in any way.

I understand that I will not be identified personally within the research and that in all resulting publications I will be assigned a pseudonym. I understand that any data that the researcher extracts from the interview for use in report or published findings will not, under any circumstances, contain names or identifying characteristics.

The interview transcript will be kept in secure storage that is accessible only to the researcher. I understand that the data will be destroyed after a 5 year period unless I consent to it being used in future research.

Participant Name:

Signature:

Date:

NOTE: This participant consent form will remain with the Monash University researcher for their records.