Intimate Partner Homicide: Themes in Judges' Sentencing Remarks

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The aim of this study was to analyse judges' sentencing remarks in cases of intimate partner homicide. Grounded theory methodology was used to undertake a qualitative analysis of the remarks, and the emanating data identified four key themes, as discussed in this article. These themes are: the sentencing of Aboriginal offenders; offender violence; the use of alcohol and/or drugs; and provocation. Broadly speaking, the data reflect that judges' sentencing remarks echo themes of offenders' denial of responsibility, thereby minimising harm and justifying violence against females. Also, judges fail to attribute a sufficient degree of responsibility to offenders for their voluntary consumption of alcohol or drugs and their subsequent violent behaviour. The study also found that, as a defence, provocation continues to favour males as the main beneficiaries. The study provides quantitative data which show that Aboriginal males are sanctioned less harshly than non-Aboriginal males.

Key words: Aboriginal; alcohol; intimate partner homicide; manslaughter; murder; provocation; qualitative; sentencing; violence.

Introduction

The aim of this study was to undertake a grounded theory analysis of judges' sentencing remarks for males and females sentenced for intimate partner homicide in Australia between July 2009 and June 2014. In the study, intimate partner homicide is defined as murder or manslaughter between current or former, legal or de-facto, heterosexual spouses. Although the study provides quantitative data, it is essentially a qualitative analysis of judges' sentencing remarks.

This article presents and discusses the quantitative theme of sentence length, together with the four key qualitative themes emanating from the study data. These themes are: the sentencing of Aboriginal offenders; offender violence; the use of alcohol and/or drugs at the time of the offending; and provocation. The reader should be aware that this is

not a study of these themes per se; rather this article presents research findings that show how judges are dealing with these issues at the time of sentencing, in the context of intimate partner homicide.

Using a grounded theory approach allowed the data to speak for themselves, after which the literature was reviewed to find if the study results were consistent or inconsistent with previous research. Thus, this article is presented in that way: that is, a description of the research and the results followed by a consideration of the results in the context of the literature.

While it is important that the Indigenous issues raised in this article are explored, Aboriginal and Torres Strait Islander readers are advised that this article may contain words, descriptions and names of people who have died.

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The Data

Data were collected from six Australian jurisdictions, namely: New South Wales, Northern Territory, South Australia, Tasmania, Victoria and Western Australia. The selection of jurisdictions was determined by the availability of sentencing remarks either through the court directly or alternatively through the Australian Legal Information Institute database (AustLII). There were no relevant sentencing remarks available to the researchers for either the Australian Capital Territory or Queensland during the specified time period. Given that judges' sentencing remarks are publically available, the researchers had no interaction with the participants, and therefore, no control over the data.

Method

Grounded theory was used in this study because it remains the leading method to analyse qualitative data in the social sciences.¹ This methodology uses a systematic set of methods in order to collect, code and analyse textual data.² Rather than commencing with a theory from which hypotheses are deduced, a grounded theory study begins with either a research question or field of study and arrives at a theory which has been developed systematically from the data collected.³

In drawing the data from the jurisdictions, 52 sets of sentencing remarks were ultimately analysed. Taking the data in order of receipt, each set of male offender remarks were taken randomly and examined one at a time until the saturation point for that set of remarks was reached. Male offender remarks were taken first because statistically males are more likely than females to commit homicide.⁴ Saturation point for a set of remarks was reached when no new ideas within that set of remarks could be found.

During this process, every sentence within each set of remarks was read and coded. Key points within the commentary were compared to other judicial comments

within that set of remarks, with respect to commonalities and differences. Following on, similar concepts were grouped, leading to the development of hypotheses regarding the relationships between categories. This ultimately formed the basis for the creation and grounding of an emerging theory.

Given that grounded theory allows the data to speak for themselves, the subsequent literature review was driven by the results emanating from the themes identified during the analysis of the sentencing remarks. The purpose of the literature review was to identify research from a historical, legal and criminological perspective, which was consistent or inconsistent with the results emanating from the themes identified.

Judges acknowledged an offender's Aboriginality in 40% of the remarks ($n = 21$).⁵ Seventy-six per cent of victims killed by Aboriginal offenders were Indigenous ($n = 16$). However, it is noteworthy that when analysing the sentencing remarks, information concerning victims was more difficult to determine, as judges tended to focus their remarks on matters directly relevant to the offender and their sentencing. Even where it was possible to identify that the victim was Indigenous, it was seldom possible to identify if that victim was of Torres Strait Island or Aboriginal descent. For this reason, victims in this study are referred to as Indigenous throughout the article. Some Indigenous victims may have been recorded as being of unknown race if there was no information in the sentencing remarks to indicate otherwise. Indigenous victims may therefore be under-reported in this study.

Quantitative Results

Theme – Sentence Length

The data illustrate that Aboriginal males were convicted of manslaughter rather than murder at a greater proportion than non-Aboriginal males. This difference was statistically tested for significance. In particular there is a

statistically significant Chi-square result for males: $\chi^2(df = 1) = 6.35$, $p < 0.02$. Follow-up Z-proportion tests demonstrate a significantly greater number of Aboriginal males were convicted for manslaughter relative to non-Aboriginal males: $Z = 2.66$, $p < 0.01$. The test for female offender sentences by Aboriginal/non-Aboriginal status was non-significant: $\chi^2(df = 1) = 1.80$, $p > 0.17$.

Although Aboriginal males received higher head sentences than non-Aboriginal males, when comparing the non-parole period for all offenders for both murder and manslaughter, the data reflect that Aboriginal males receive a significantly lower sentence than non-Aboriginal males: independent sample t-test, $t = 2.19$, $p < 0.05$. On average the minimum term is 64.6 months or 5 years 3 months lower than non-Aboriginal males. In order to understand why these differences occurred, the researchers undertook a more detailed examination of the sentencing remarks through a qualitative analysis of the data.

Qualitative Results

Theme One – The Sentencing of Aboriginal Offenders

Homicidal Violence

Regarding Aboriginal females, all but one used a knife to kill their victim. In comparison, more than half of the Aboriginal males in the sample used bodily force alone, the majority of whom were sentenced for manslaughter. The extent of the male violence was remarked upon by judges in every case. For example:

You repeatedly punched her in the head, chest and torso area while she tried to shield her head with her arms and her hands. You had clenched fists and you were bringing your arms behind your head and slamming down so hard into the victim that the witnesses could hear the blows from a distance away. This went on for a number of minutes. The victim could be heard pleading with you to stop and then she fell silent. The beating continued after she fell silent.⁶

In the following case, the Aboriginal male offender had been drinking heavily for a number of hours prior to the offending. He attacked his wife in the belief that he saw her engaging in sexual intercourse with his brother-in-law. The judge said:

You became angry and assaulted RT and then your wife ... then you kicked your wife hard to her face, four times with the heel and toe of your boot, and that made her unconscious. You also kicked her hard two or three times in the ribs. She was lying down at the time you kicked her. You later told police that you were wearing steel-capped working boots at the time.⁷

In this next example, the victim was three to four months pregnant at the time of her death. The judge particularised the victim's injuries over several paragraphs. For example:

The victim had been severely beaten and suffered severe head injuries, including both sub-dural and sub-arachnoid haemorrhages over the surface of the brain, as well as abdominal injuries involving severe soft tissue damage of the posterior wall of the abdominal cavity. As I said before, approximately 500 millilitres of blood present in the cavity itself. These injuries were consistent with being struck extremely hard a number of times.⁸

However, while deciding the offender's actions typified a serious example of negligent manslaughter, his Honour viewed the offending as less serious given the absence of a weapon:

This is a serious example of negligent manslaughter. ... On the other hand, this is not a case where a weapon was used, such as a knife, or a blunt instrument.⁹

In the following case, while discussing the male offender's violent past, the judge considered that convictions from 17 years ago had reached their expiry date:

Of significance for present purposes are two matters from the early 1990's. In

1992 you were convicted of aggravated assault and sentenced to imprisonment for six months. In 1993 you were again convicted of aggravated assault, this time causing bodily harm, and sentenced to imprisonment for nine months. Those offences were obviously serious cases of violence. You have not been convicted of an offence of violence since that time and I bear in mind that the convictions are now somewhat old.¹⁰

In this final example the judge discussed the violence inflicted on the female victim over eight paragraphs. This equated to 20% of the sentencing remarks. For example:

The force required to cause the injuries to her ribs at the front and the side was moderate force. The force required to fracture the ribs at the rear causing them to shear away from where they joined the spine would have required a lot of force on your part, for example a hard kick. Alternatively it would have required the force of a reasonably heavy person, such as yourself, flopping onto your wife with your full body weight directed through your knees. Considerable force would have been required to fracture the sternum. ... Those injuries or combination of injuries were sufficient to cause your wife's death within approximately 30 minutes of their being inflicted.¹¹

His Honour continued:

Your wife also sustained fatal injuries to her abdominal area. These injuries included extensive lacerations and tearing of the liver and spleen, and tearing of the mesentery and the mesenteric arterial cascade with bruising around the kidneys.¹²

[Y]our deceased wife lost clumps of hair from her head caused by the hair being pulled out, or possibly the force exerted by her being dragged by her hair. I should also mention that your wife lost three teeth as a result of the trauma. Two of the teeth were taken out completely and the third still had part of its root system in place.¹³

Concluding his remarks on the violent offending, his Honour said:

Your violent conduct represented a great falling short of the standard of care that a reasonable person would have exercised in the circumstances.¹⁴

Turning to the offender's previous criminal history, his Honour remarked as follows:

You first offended in 1986 when you were 20 years old. You were convicted of assault causing bodily harm. ... In December 1986 you were convicted of rape in the Supreme Court ... I note that you were next convicted in January 1990 of a relatively minor matter, fighting in a public place. ... On February 2009 you committed three offences: driving at a speed and in a manner dangerous, driving with a high range blood alcohol content, and being armed with an offensive weapon.¹⁵

His Honour concluded:

Although you have committed a very violent and cruel offence you have not otherwise been a violent offender and your prospects for rehabilitation are good.¹⁶

The above offender was sentenced in the Northern Territory for manslaughter, receiving a head sentence of 11 years with a non-parole period of 5 years and 9 months. At the time of sentencing, the maximum penalty for manslaughter in this jurisdiction was life imprisonment.

Alcohol

The majority of Aboriginal female offenders were affected by alcohol at the time of the offence; however, a diminutive amount of discussion took place in this regard. Rather, judges focused their attention on the male victim's alcohol intake, and did so for all Aboriginal females in the sample.

All Aboriginal female offenders were victims of domestic violence at the hands of their victim. In one such case, where the female picked up a knife laying on the kitchen table in order to kill her victim, the judge considered that the offender's actions should be moderated in view of her intoxication:

I consider you took it as something at hand without particularly, in your alcohol induced state, appreciating how lethal it could be.¹⁷

There was no case example where the female offender's alcohol intake was considered aggravating to the offence; however, a female's alcohol intake was explicitly articulated as a mitigating factor in one instance:

Lastly, I take into account that whilst drunkenness is not normally a mitigating factor, where, as in your case, the abuse of alcohol by an offender reflects the social circumstances and the environment in which you have grown up in, that can and should be taken into account to some extent as a mitigating factor: *R v Fernando* (1992) 76 A Crim R 58, *R v Churchill* [2000] WASCA 230, and *State of Western Australia v Munda* [2012] WASCA 164.¹⁸

Regarding Aboriginal males, the majority of these offenders were also affected by alcohol at the time of the offence. While judges discussed male offenders' state of intoxication, commentary regarding the alcoholic state being aggravating or mitigating to the offence was rarely made. However, it is apparent from the remarks that judges were taking intoxication into account. In the following example, the judge explained that the male offender's intoxication moderated the seriousness of the offending:

It is an extremely serious offence. It is moderated to a degree by your background and your extreme intoxication at the time which explains, if not excuses, your offence.¹⁹

Conversely, in this next example, the judge determined that alcohol affected the offender's insight into his offending:

In my assessment your state of intoxication prevented you from having insight that death could result from your conduct.²⁰

Further, judges linked the male offender and the female victim through their joint

consumption of alcohol leading up to the offence, however, the vulnerability of the intoxicated victim contributing to the gravity of the offence was discussed in only one case.²¹

The Difficulty of Sentencing for Manslaughter

When sentencing Aboriginal offenders for manslaughter, judges across multiple jurisdictions expressed the difficulty they experience in finding a starting point for manslaughter sentencing, given the wide variety of circumstances in which the offending can occur. For example:

The maximum penalty specified in the Criminal Code for the crime of manslaughter is imprisonment for life. However sentencing for the crime of manslaughter is a most difficult task. The crime is committed in a very wide variety of circumstances from negligent stupidity to conduct falling just short of murder. The maximum sentence is in many cases of very limited guidance since by definition every case of manslaughter involves the death of a victim. Sentencing principles require a judge to assess where on the imprecise scale of criminal culpability a particular offence lies.²²

Nonetheless, despite the offence involving a wide range of criminality, judges agreed that manslaughter was a serious offence. For example:

The Parliament, which binds us all, has passed a law which increases the penalty for the crime of manslaughter. ... Courts must give effect to that in sentencing so that sentences now for this sort of criminal behaviour within relationships is likely to be more seriously treated than may have been in the past.²³

Also in male manslaughter cases in particular, judges discussed the high value society places on human life. For example:

The protection of human life and personal safety is a primary objective of the system

of criminal justice. The sentence of this Court must provide a real demonstration that society cannot tolerate criminal offending resulting in the taking of a human life.²⁴

Deterrence

For Aboriginal female offenders, despite victimisation from domestic violence, judges in certain cases acknowledged that general deterrence must assume some weight in the sentencing process.

Despite the prevalence of violent alcohol-fuelled male offenders, judges remarked on the need for general and specific deterrence in only a few cases. For example:

Sentences imposed for drunken violence against Aboriginal women within Aboriginal communities, especially sentences for drunken violence which results in death must properly reflect sentencing factors relevant to protecting vulnerable women; personal deterrence and general deterrence. ... The sentence to be imposed on you must reflect the need to deter other Aboriginal men from committing acts of violence to Aboriginal women.²⁵

Also for males in particular, judges used their remarks to send a message to the community that drunken violence, especially against Indigenous women, would not be tolerated, and that the sentence imposed must reflect this. For example:

The sentence I impose must send a message that such drunken violence is totally unacceptable. It must give emphasis to the need for general deterrence, community protection, punishment and to reflect the abhorrence the community feels for such violence.²⁶

There must be a significant sentence of imprisonment to punish you for what you did and for the purposes of general deterrence. There must also be an element of special deterrence in your case because of your prior convictions of assault.²⁷

Notwithstanding such commentary, the average head sentence for an Aboriginal male killing his partner is 9 years and 6 months,

with an average non-parole period of 6 years and 4 months.

Theme Two – Offender Violence

Male Offenders

An analysis of all offenders in the sample shows that men and women kill their domestic partners for different reasons. Males are usually motivated by jealousy and possessiveness with a strong desire to control their partner. Females, on the other hand, primarily kill in response to male violence perpetrated over an extended period of time.

The study also shows that although Aboriginal and non-Aboriginal males kill with the same motivations, they kill their female partners in different ways. In contrast to Aboriginal males, non-Aboriginal males rarely used bodily force to kill their victims. For non-Aboriginal males, the weapon used to kill their partner was predominantly a knife, a gun or strangulation device. In contrast to the lengthy judicial descriptions of Aboriginal male violence, commentary regarding non-Aboriginal male violence towards their partner was for the most part unremarkable. However, as with Aboriginal males, rather than resting responsibility for non-Aboriginal male violence squarely with the offender, judges opine that males often lack the emotional resources to deal with relationship problems and become overwhelmed by emotion. For example:

I am satisfied that the offender was an immature individual who became caught up in a situation which he was unable to effectively handle. He was far from his family and friends in India and had no resources to draw upon for emotion support. When it became apparent that his marriage had failed, he did not have the personal maturity or capacity to remove himself from the situation and avoid the conflict which ultimately took place.²⁸

[A]s is apparent, he was ultimately overwhelmed by the situation.²⁹

In the following example, while the judge commented on the non-Aboriginal male offender violence over a number of paragraphs, more than twice as much commentary was attributed to the dysfunctional childhood suffered by the offender, specifically the offender's childhood experiences of violence. Consequently, the judge proceeded to discuss the offender's childhood trauma over eight consecutive paragraphs. For example:

[He was] raised in an unstable home life, marred by domestic violence towards his mother, as well as his mother's alcoholism. He recalled her [his mother's] behaviour as vacillating between neglect and abuse; her behaviour could alternate from kicking Mr. Bolt and his younger step sister out of the home to standing over them with a knife in an alcohol induced rage. For Mr. Bolt, this resulted in his belief that he had to protect the women in his life, both his sister as well as his mother, not only to protect her from herself, but from the violent men in her life. **Mr. Bolt identified that he came from an environment where violence towards women was not only common, but extreme; he stated his biological father was serving a gaol sentence for attempted murder of his partner, and his stepfather murdered his mother. Domestic violence was present in each of Mr. Bolt's relationships.**³⁰

For Aboriginal and non-Aboriginal male offenders alike, judges provided positive descriptions of offenders' employment history, community contributions and family commitments, thereby highlighting male offenders' ordinariness in the context of their offending. For example:

Aboriginal Male Offender:

You have had a good work history. ... You were a respected man in your community. You were in an established long term relationship with your deceased partner and you lived in a family unit which included your wife, your daughter, your adopted son and your grandson.³¹

Non-Aboriginal Male Offender:

In the community you were seen as a hard-working, empathetic person who helped

new migrants. You are well respected in the community. You have had the support of your family and members of the community. In determining the non-parole period I have had regard to those matters and the support you have.³²

Female Offenders

Compared to male offenders in the sample, females primary killed in response to male violence perpetrated upon them over an extended period of time. The sample also shows that, compared to males, females used different weapons to kill their partner. All but two of the females in the sample were sentenced for manslaughter. In the majority of manslaughter cases, some form of domestic knife was the weapon. However, the two female murderers in the sample were found to have been motivated by the financial gain they would receive on the death of their partner. No male offender in the sample killed their partner for financial benefit. Where females were found to have killed their partner for financial gain, judges considered that this motive carried a significantly higher level of criminality:

It was a deliberate killing for the purpose of some sort of personal gain. It warrants a heavier sentence than most murders.³³

The judge also took the opportunity to express his views on the offender's character. The following paragraph represents the only comments made about the offender in the remarks:

I have had the opportunity to observe Ms Neill-Fraser during two very long police interviews. ... She seems to me to be clever, very cool-headed, and well able to control her emotions. ... It was an intentional and purposeful killing.³⁴

Domestic Violence

A significant number of the sentencing remarks show a history of domestic violence between the offender and the victim;

however, the length of the judicial commentary in this regard is sparse. Males sentenced for intimate partner homicide were, for the most part, also perpetrators of long-term domestic violence upon their partner. Only one male in the sample was considered a victim of domestic violence at the hands of his partner.³⁵ Female offenders were in all but one case victims, as opposed to perpetrators, of long-term domestic violence at the hands of their victim. In all instances where a violence restraining order was in place at the time of the offending, the order had been issued against the male in the relationship.

For female offenders, judges at times neutralise³⁶ the violence perpetrated by the male victim by commenting on the female's behaviour:

There were occasions of physical violence towards each other. You suffered physical injuries after you and the deceased had quarrelled.³⁷ ... There were other occasions when you were extremely aggressive towards the deceased. There were times when you physically assaulted him.³⁸

[O]n occasions you would physically assault Mr Brabham in the course of one of your arguments and on other occasions he would assault you, sometimes simultaneously.³⁹ ... In the past you have been, as your counsel put it, perfectly capable of giving as good as you get in the course of the many arguments which you have had with Mr Brabham.⁴⁰

Neutralisation of male violence is at times also extended to female victims. For example:

This is a domestic violence situation ... violence was perpetrated on each side of the relationship.⁴¹

In addition, judges acknowledge a lack of understanding regarding the difficulties experienced by female victims of domestic violence. For example:

I doubt that it is possible for persons who have not experienced it to truly comprehend

the impact of being the victim of a violent abusive relationship.⁴²

Misconceptions concerning domestic violence are evident in a number of sentencing remarks. For female victims of domestic violence, whether they were offenders or victims of intimate partner homicide, judges often appear unable to explain why a woman would not reach out for assistance or leave a violent relationship. For example:

There is simply no need for this cycle of abuse and violence to continue in your life.⁴³

[T]he order was for Ms Kupsch's protection it appears that she did not want that protection so far as all contact with him was concerned.⁴⁴

For one Aboriginal female offender, the judge perceived that as a victim of domestic violence, the offender simply did not understand the serious nature and consequences of the violence continually perpetrated upon her by the male victim:

[D]omestic violence in their home and in the broader community in Kalgoorlie has desensitised you to the seriousness and unacceptability of domestic violence.⁴⁵ ... When he was released from prison, you voluntarily recommenced your relationship with him.⁴⁶

Where there was a history of domestic violence in the relationship, the male offender's remorse was discussed by the judge in almost all cases, and was, for the most part, considered as genuine. For example:

I accept that you have good prospects for rehabilitation, considering your remorseful contrition.⁴⁷

[Y]our genuine contrition and your conduct since the shooting occurred, satisfy me that special reasons do exist in this case.⁴⁸

In a number of cases, judges opine that the male offender had demonstrated a high

level of remorse. In each instance the judge links this remorse, among other things, to the offender's immediate actions following the offence. For example:

[Y]ou are plainly remorseful for what has occurred. You demonstrated that sense of remorse when you first spoke to the police at the scene of your offence.⁴⁹

Mr Bolt offered to assist. Some of those words are significant. He said: 'Just bring her back; I know I've done the wrong thing. I flogged her but I love her. I'm going away for a long time; just save her'.⁵⁰... Mr Bolt displays high levels of remorse.⁵¹

In this example, the judge acknowledges the offender's remorse and points to the offender's denial of culpability:

It seems that the remorse is genuine and intense and that the offender himself feels very keenly the loss of his partner, the victim.⁵²... There is a detailed analysis of the offending which leads to a conclusion by the psychologist that Rosewood has a tendency to minimise the severity of the violence that he perpetrated and that he has a tendency to transfer the responsibility for his conduct, at least in part, to others.⁵³

A history of domestic violence between the female offender and the male victim was present in all manslaughter cases, as well as in one murder case. The female offender's remorse at killing her partner was accepted by the judge in almost all instances. At times judges also commented on the offender's continued pain, regret and suffering post offence. In the following example, the female offender received a wholly suspended sentence:

I accept that you are truly remorseful and have suffered personally since your husband's death. You punish yourself by fasting regularly and sleeping on the floor at home. You live a simple life of looking after your family and spending time with your church and doing community work.... As to punishment, it seems that you have suffered a great deal already and to send you to

gaol might have a greater effect on punishing others than you.⁵⁴

However, in *R v Helen Ryan* [2011] NSWSC 1249, ('*Ryan*') the female offender was sentenced for murder after hiring a 'hitman' to gun down her estranged husband. Regarding the offender's lack of remorse, Latham J commented as follows:

It is clear that the offender refuses to take responsibility for the murder of her husband and must therefore be sentenced on the basis that she demonstrates no remorse or contrition.⁵⁵

For this offender, at the time of sentencing, the offence of murder carried a maximum (non-mandatory) sentence of life imprisonment and a standard non-parole period of 20 years. While no male or female offenders in the sample were sentenced to non-mandatory life imprisonment, this female offender received a head sentence of 36 years with a non-parole period of 27 years. This sentence represented the second-highest head sentence (non-mandatory life) and highest non-parole period for all murderers in the sample. By considering the offender 'deliberately chose to exact revenge upon her husband'⁵⁶ for instigating divorce proceedings against her, his Honour said:

[T]he offence is worthy of the description 'wicked' and 'gravely reprehensible'. To contemplate and carry out such a plan for purely selfish and largely financial motives demonstrates heinousness to a significant degree.⁵⁷

Latham J remarked upon the domestic violence experienced by the offender as follows:

The evidence in the trial established that Mr Ryan had complained to family members and friends of minor assaults upon him by Helen Ryan. There was evidence of minor bruising to Mr Ryan's upper arm, consistent with such assaults. Similar claims were

made by Helen Ryan against her husband, although the extent and severity of the assaults said to have been committed upon her were a matter of some contention.⁵⁸

Latham J outlined that in the lead-up to the offence the police had applied for an apprehended violence order against the male victim for the protection of his 13-year-old daughter and noted that the female offender's claims of domestic violence at the hands of the male victim were 'grossly exaggerated':

I am satisfied beyond reasonable doubt that Helen Ryan's claims in respect of the assaults upon her by her husband, and his general behaviour towards her and towards their daughter, were grossly exaggerated.⁵⁹ ... It was these asserted episodes of violence or threats of violence that were said to justify Helen Ryan's actions.⁶⁰

His Honour continued:

I accept that there were episodes of pushing and shoving between Helen Ryan and the victim, and that on occasions, the victim's greater strength resulted in the offender sustaining bruising. On one occasion, the victim pushed Helen Ryan against the wall, resulting in a break in the gyprock.⁶¹

Furthermore, Latham J summed up his opinion of the offender as follows:

Far from the cowering, oppressed and terrorised wife that she attempted to portray, Helen Ryan embarked on a cold-blooded plan to get rid of her husband.⁶²

General Deterrence

Judges frequently discuss the requirement for an offender's sentence to reflect an ongoing need to protect the community. In the following case, the Aboriginal male offender had pleaded guilty to reckless manslaughter in relation to the death of his wife. While the judge noted that the maximum penalty for the offence was imprisonment for life, based on the offender's plea of guilty, the judge

applied a sentencing discount of 25% to a starting point of 12 years, and handed down a head sentence of 9 years with a non-parole period of 6 years. At the time of the offence, the offender was considered to be 'heavily intoxicated'⁶³ with 'no real recollection of the attack'.⁶⁴ The judge considered the viciousness of the offender's attack upon his wife, and commented as follows:

By any measure, this was a brutal assault committed upon a woman who was not able to defend herself. She was pleading with you to desist, but you continued on. Others called on you to stop but you did not do so. The violence was unrelenting and brutal. It only came to an end when you were informed that the police had been called. As a consequence of the vicious attack, your victim died.⁶⁵

Regarding the violence perpetrated by the offender, the judge commented on the need for general deterrence on a number of occasions throughout the sentencing remarks, and in drawing his conclusions, his Honour stated that there was a particular need for general deterrence in this instance. His Honour commented as follows:

There is little that can be done by the Courts to deal with this issue other than to impose sentences designed to reflect the abhorrence of the community and hopefully provide some deterrence to others who may be inclined to offend in this way.⁶⁶

In the present case, the sentence I impose is one which must reflect a strong element of general deterrence and retribution. Men like you who may be inclined to offend in this way must know that significant sentences of imprisonment will follow.⁶⁷

The need for general deterrence was also expressed by judges for female offenders. In the following case, the judge qualified his statements regarding general deterrence by pointing out that the Aboriginal female offender had acted on the spur of the moment.⁶⁸ Nonetheless, the judge commented as follows:

Significant weight must be given to punishment, denunciation and deterring others from committing the same or similar offences in the future.⁶⁹

Theme Three – Alcohol and Drugs

Commentary on offenders and victims under the influence of alcohol and/or drugs at the time of the offence was remarked upon in a significant number of cases in the sample. Discourse concerning alcohol use was most frequent, particularly for Aboriginal offenders.

Aboriginal Male Offenders

Judges used their remarks to draw attention to two factors they considered an integral part of the sentencing matrix; first, the connection between the male offender and the female victim through their mutual intoxication at the time of the offence; and second, the history of alcohol addiction suffered by the male offender.

In some instances, rather than viewing the Aboriginal male offender as choosing to be violent, sentencing judges explain that the offender's homicidal actions were as a direct consequence of a force outside of his control. For example:

[Y]our wife was intoxicated to the extent that she was incapable of walking back to your home at the Binjarri Community. She fell over on several occasions. You unsuccessfully tried to carry her but you fell over. At a certain stage, with your wife asleep and lying on your lap, you became frustrated that you could not get the both of you home. ... [Y]ou then beat your wife.⁷⁰

[I]t would appear that you did not fully appreciate the seriousness of what had occurred due to your intoxication.⁷¹

Aboriginal Female Offenders

Judicial commentary on the alcohol intake of females was unremarkable. In each instance

where females were affected by alcohol, judges focused the extent of their remarks on the male victim's alcohol intake.

Non-Aboriginal Male Offenders

For non-Aboriginal males and females, judges at times held different views regarding an offender's alcoholic or drug-induced background, its effect on the offender's homicidal actions and the subsequent sentence imposed. In the following example, the male offender was sentenced to five years imprisonment with a non-parole period of three years following his conviction for the manslaughter of his domestic partner:

You were raised in a loving and caring family, though both of your parents were heavy drinkers. You adopted that habit at an early age. ... In 1991 you were placed on a disability pension when, as your counsel explained, 'alcohol got the better' of you.⁷² ... I accept that imprisonment will be a greater burden on you than on others by reason of your state of health. I take that into account.⁷³

Non-Aboriginal Female Offenders

In comparison to the above example, females affected by alcohol and/or drugs at the time of the offending were frequently painted as dysfunctional women, with an inability to form positive personal relationships. For example:

There were other relationships, it would seem all of them disastrous, and ultimately you formed a relationship with a man named Caine who also has substance abuse problems, who apparently still visits you in prison. You have a history of exceedingly poor choices in male companions.⁷⁴

Nonetheless, judicial narratives did, at times, indicate that females had the potential to perform to society's expectations of being a good mother with the ability to lead a productive life. For example:

[T]he most powerful sign of real contrition will be if in the months and years ahead you do make the decision to break that cycle of violence and abuse in your own life and decide to become the person you are undoubtedly capable of being and the mother your children need you to be.⁷⁵

By comparison, in the following example, the judge took a different view of the offender's alcoholic background. In this case, the offender was convicted for the manslaughter of her ex-husband who at the time of his death was under police investigation following a report of sexual abuse towards a child of both the offender and the victim. The offender had also suffered domestic violence at the hands of her victim throughout their relationship:

You informed Dr Sullivan that you commenced using alcohol from the age of 12 and more heavily from the age of 15. After you lost custody of your children you became a serious binge drinker, drinking anything you could lay your hands on, and, when drunk, you became nasty and aggressive.⁷⁶ ... You have a relatively recent history of psychiatric issues. You have overdosed on heroin. You had previous episodes of depression, you have had derogatory auditory hallucinations, together with associated symptoms of poor concentration, and poor sleep. You are also a person who becomes angry and violent with unstable moods and low impulsivity[sic]. ... Your inability to think clearly or make calm or rational choices due to the disinhibition of alcohol and your difficulties in handling anger, he found can be causally associated with the offences. I do not find that that is in any way ameliorating of the appropriate penalty that should be imposed.⁷⁷

In the context of this offender's drug abuse, the judge proceeded to discuss the offender's parenting skills:

You reported to Dr Sullivan that you enjoyed being stoned but agreed that it made you paranoid and was partly to blame for the loss of custody of the children because you were classified as an ineffectual and non-productive parent.⁷⁸

While condemning the offender's actions leading to the death of her ex-husband, the judge took the opportunity to praise the male victim's parenting skills. The judge remarked as follows:

Your actions are reprehensible. You have deprived your children of their father. Even if he had been found to have committed the indecent act in the presence of one of the children, it would not necessarily have followed that he could and would not have been a good father to the other children.⁷⁹

Theme Four – Provocation

The sentencing remarks show that as a defence, provocation continues to favour males as the main beneficiaries. In each instance where, at the time of sentencing the male offender, the partial defence of provocation was not abolished, the provocative actions of the female victim were accepted by the judge. This was regardless of whether the male offender was sentenced for murder or manslaughter. Judicial commentary regarding provocation was present in the data regardless of whether or not the partial defence had been abolished at the time of the male offender's conviction. Judicial commentary regarding provocation as it pertains to female offenders was largely absent.

For male offender cases containing judicial commentary on provocation, there is an absence of remarks regarding cold-bloodedness or premeditation. Rather, judges painted a picture of males being tortured by sexual jealousy, taunted or derided by their female victims. For example:

Ultimately, being told that his wife never loved him and was going to leave him, accompanied by the offensive remarks of the deceased's brother-in-law was the trigger for the offender losing his self-control.⁸⁰

At the time you committed the assault, that led to her death, you intended to cause her serious harm but it is accepted that you lost control as a result of seeing her and RT together, believing at the time that they

were engaged in sexual intercourse, so the savagery of the attack, that is, the intention to cause serious harm was not planned, it was a result of that loss of control.⁸¹

You fired on the spur of the moment, having heard your partner, who had recently given birth to your son, arranging to meet another man for sex.⁸²

Judges also articulate that the provocative behaviour of the female victim is central to the explanation for the male offender's violent actions:

I accept that the deceased was both controlling and domineering of you and that from time to time this involved significant episodes of unpleasantness on her behalf.⁸³

I am also satisfied that the actions of the deceased were provocative and were sufficient to have occasioned an ordinary person in the offender's position to have lost his self-control.⁸⁴

Additionally, where provocation is an issue for males, judges at times consider that the offence is 'out of character'. For example:

I have received a large number of letters or references in support of you. They all attest to your otherwise good character, either as a relative, friend, work colleague, parishioner or community worker. This offence is clearly out of character for you.⁸⁵

I accept that the defendant was in a very distressed state and had been for a time, and that violence was out of character for him.⁸⁶

In contrast, for females sentenced for murder, judges focus on the cold-blooded nature of the offenders' behaviour. For example:

[T]he offence is worthy of the description 'wicked' and 'gravely reprehensible'. To contemplate and carry out such a plan for purely selfish and largely financial motives demonstrates heinousness to a significant degree.⁸⁷

Also, when comparing male offenders to female offenders in the sample, males are

more likely to be considered ill-equipped to manage conflict within the domestic relationship, with females' emotions perceived by male offenders as unpredictable:

I agree with the assessment contained in the submissions made on behalf of Mr Bolt and, in my view, resulting from the limited emotional resources available to him from his background and the degree to which it was affected by constant abuse of women, that Mr Bolt's actions and the fatal assault 'was the result of the inability of the offender to deal with the deceased's emotionally labile state'.⁸⁸

As events unfolded, his expectation of a continuing and happy relationship was lost and without the necessary personal resources and family support he was vulnerable to the provocation that ultimately caused him to take the life of the deceased.⁸⁹

Literature Overview in the Context of the Results

What follows is a consideration of the themes found in the study in the context of the literature review. In this regard, the purpose of the literature review was to identify previous research which was either consistent or inconsistent with the themes emanating from the study. This approach is consistent with grounded theory.

Qualitative Results

Sentence Length

Aboriginal offenders represented 40% of the sample, with 76% of Aboriginal offender victims identified as Indigenous. The data are consistent with the widely acknowledged over-representation of Indigenous Australians in the criminal justice system. Statistics show that despite comprising only 3% of the Australian population, Indigenous people constitute 11% of homicide offenders and 13% of homicide victims.⁹⁰ The majority of intimate partner homicides involving an Indigenous offender also involved an Indigenous victim.⁹¹

Regarding females in the study, despite some variations in sentencing between Aboriginal and non-Aboriginal females, the sample size was too small for statistical analysis.

For males, the data show that Aboriginal males received higher head sentences than non-Aboriginal males. This finding corresponds with Jeffries and Bond's analysis of sentencing in South Australian higher courts.⁹² Jeffries and Bond found that when facing a court in similar circumstances, Indigenous offenders were sentenced to longer periods of imprisonment than their non-Indigenous counterparts.⁹³ The current study diverges from Jeffries and Bond's findings when non-parole periods are considered. In the current study, compared to non-Aboriginal males, Aboriginal males received significantly lower non-parole periods. The current study also found that Aboriginal males received a lesser sentence prior to parole eligibility than non-Aboriginal males. In sum, Aboriginal males served shorter sentences than their non-Aboriginal male counterparts when sentenced for manslaughter.

Quantitative Results

The Sentencing of Aboriginal Offenders

Homicidal Violence

The majority of Aboriginal male offenders sentenced for manslaughter used bodily force alone to kill their victim. While judges provided extensive and graphic details of victims' injuries, the data reflect that judges view this type of force as less serious when compared, for example, to the use of a knife. In Lloyd's study of intimate partner violence within Indigenous communities in Central Australia,⁹⁴ she found that in the majority of cases of male violence, the weapons used were the offender's body or heavy blunt objects such as rocks, with knives used on only three occasions. Lloyd argues that the use of such weaponry has been misinterpreted as signifying this type of violence is

opportunistic, and as such, not only normalises and diminishes both the nature and the extent of this form of domestic violence, but has played a part in 'similar fact' homicides being treated as manslaughter, which in real terms, according to Lloyd, attract a much lighter sentence.⁹⁵ Consistent with Lloyd's argument, in the current study, the quantitative data show that Aboriginal males are significantly more likely to be found guilty of manslaughter rather than murder. When comparing non-parole periods for all offenders, the data also show that, in contrast to non-Aboriginal males, Aboriginal males receive significantly lower sentences.

Alcohol

Indigenous homicide is frequently connected with a high incidence of family violence as well as high rates of alcohol consumption.⁹⁶ In the current study, the majority of Aboriginal offenders were affected by alcohol at the time of the offence. However, it was difficult to tell from judges' comments whether the alcoholism was considered aggravating or mitigating in the context of the sentencing matrix. For the six jurisdictions examined in this study, not all legislation pertaining to the sentencing of homicide offenders sets out aggravating or mitigating factors. However, for certain criminal offences in several jurisdictions, family violence is now recognised to some extent.⁹⁷ For example, in Western Australia, if the offender is in a 'family and domestic relationship with the victim' an offence against the person is treated as aggravated.⁹⁸ South Australia has a similar provision.⁹⁹

In one example in the sample, the judge determined that the Aboriginal male offender's intoxicated state had in fact affected his insight into his offending.¹⁰⁰ Warner considers that treating intoxication as a mitigating factor allows offenders to avoid taking responsibility for their violence.¹⁰¹ Newton asserts that a court's preparedness to view a male offender's alcohol abuse as

mitigating only proliferates the victimisation of Aboriginal women.¹⁰² This victimisation is evident in the data, as in almost all Aboriginal male offender cases, judges linked the offender with the victim through their joint consumption of alcohol leading up to the offence, frequently discussing their mutually intoxicated state.

In this study, although judges did not generally appear to excuse offenders' intoxicated behaviour, judges frequently sought to explain the intoxication. Warner argues that such explanations do not give clear direction as to how offender intoxication is being judicially considered.¹⁰³

The Difficulty of Sentencing for Manslaughter

During the study period, the maximum penalty for manslaughter varied considerably between jurisdictions: from 20 years to life imprisonment. The study data show that while judges remain cognisant of Parliament's increased penalties for manslaughter, as well as the judiciary's duty to remain bound by legislative directives, judges remarked on the limited guidance a maximum penalty can offer. Snowball and Weatherburn comment that while the maximum penalty for an offence should indicate the seriousness of that offence, it often acts as a poor guide to the realities of actual sentencing practices.¹⁰⁴ This observation is reflected in the data. Aboriginal males who killed their partners in extremely violent circumstances received significantly lower sentences than non-Aboriginal males. This is despite judges in all Aboriginal male cases expressing the seriousness of the offending.

Deterrence

In an alcohol-related homicide study, Dearden and Payne found that in the context of intimate partner homicide, Indigenous on Indigenous homicide incidents were more than 13 times as likely to be classified as alcohol related than other intimate partner

homicides.¹⁰⁵ In the current study, despite the prevalence of violent alcohol-fuelled Aboriginal male offenders, judges seldom remarked on the need for general and specific deterrence. As a fundamental principle of sentencing, general deterrence¹⁰⁶ is considered to be particularly important where an offence is prevalent.¹⁰⁷

Offender Violence

Consistent with previous homicide studies,¹⁰⁸ the current study shows that males and females kill for different reasons, and in different ways, with women remaining in the majority as intimate partner homicide victims.¹⁰⁹

The data show that rather than resting responsibility for male violence squarely with the offender, judges focus on male offenders' dysfunctional childhoods or the inability of male offenders to manage domestic relationships effectively, in order to explain the offending. Judges also look towards the female victim to take some responsibility for the offending. Behaviours such as intoxication and violence leading up to the offence were judicially perceived as being mutual to the offender and the victim. Coates and Wade argue that judicial language that 'mutualises' offender/victim violent behaviour suggests partial victim liability for the offending, obscuring the fact that the offender is entirely responsible for their own violent behaviour.¹¹⁰

Domestic Violence

In almost all cases in this study, judges remark upon the mutuality of the domestic violence between the offender and the victim. This finding is consistent with Hunter's examination of judicial knowledge concerning domestic violence within Victoria's Magistrates' Courts. Hunter found that magistrates perceived violence as 'a product of spousal conflict' arising out of the stresses

of the relationship; and that both parties were likely responsible for the violence.¹¹¹

Hunter also observed that, at times, when women spoke up about being a victim of domestic violence, they were construed as either 'bad mothers' or 'vindictive ex-wives'.¹¹² In the current study, the case of Ryan,¹¹³ is instructive. Despite reports and visible signs of domestic violence at the hands of the victim, as well as the apprehended violence order in place against the victim at the time of the offending, Helen Ryan's claims of abuse were largely disbelieved and her conduct considered 'wicked' and 'gravely reprehensible'. In the context of battered woman syndrome, some academics have commented that women who are neither passive nor helpless, or do not conform to accepted stereotypical roles, may be judged more severely.¹¹⁴

Remorse

As a discretionary variable, remorse can act to significantly reduce the severity of an offender's punishment.¹¹⁵ Judges discuss offender remorse in almost all cases in the study where there was a history of domestic violence between the offender and the victim. Judges also frequently link a high level of remorse to, among other things, an offender's immediate actions following the offence. This is particularly evident in male offender cases within the sample.

Bagaric and Amarasekara argue that remorse is perhaps the easiest mitigating factor to claim, requiring no obvious behavioural change on the part of the offender, and 'being purely subjective it is almost impossible to rebut'.¹¹⁶ Bagaric and Amarasekara conclude that there is no doctrinal basis for treating a remorseful offender more leniently than any other offender, and as such, remorse should be discarded in the sentencing matrix.¹¹⁷

General Deterrence

General deterrence is considered particularly important when an offence is prevalent.¹¹⁸ As

the data show, judges frequently discuss the requirement for an offender's sentence to reflect an ongoing need to protect the community. Judges in the study also comment on the requirement for general deterrence in respect of female offenders. This is remarkable given that females make up only 15% of homicide offenders.¹¹⁹ Studies continue to show that males are predominately driven to kill their partner out of jealousy and a desire to control, while females primarily kill their partner as a retaliatory action or as a means of self protection. Given that 85% of homicide perpetrators are male, and in the context of intimate partner homicide 76% of victims are female,¹²⁰ arguably males should be sentenced more punitively.

Alcohol and Drugs

A common narrative for judges sentencing Aboriginal male offenders is to point out that the homicide was preceded by the mutual intoxication of both the offender and their victim. This finding is consistent with that of Coates who, when researching the connections between language, violence and responsibility (in the context of judges sentencing individuals convicted of sexualised violence), identified that certain judicial 'linguistic representations of violence' allowed perpetrator responsibility to be reduced by shifting the focus away from the offender and onto the victim.¹²¹

Judges frequently questioned the ability of non-Aboriginal female offenders to be good and caring mothers, loyal and supportive wives or form lasting personal relationships in the wake of their alcohol or drug use. The negative descriptors pertaining to domestic incompetence attributed to these offenders are consistent with Chan's findings which say that women's treatment in the criminal justice system is determined by long-standing myths and stereotypical views of women, rather than the circumstances surrounding their offence.¹²² Recent research has identified that strategies critical to both the prevention of

domestic violence and intimate partner homicide involve addressing attitudes towards women, as well as the promotion of gender equality.¹²³

Provocation

Themes relating to provocation were present in sentencing remarks across five of the six jurisdictions in the sample. This included jurisdictions whereby, following the abolishment of provocation as a partial defence to murder, the judiciary could place provocation in the sentencing matrix in order to impose a sentence which reflected the culpability of the offender.

For male offenders, judges frequently set out a background of jealousy, infidelity and control to explain the offenders' behaviour, specifically male offenders' reactions to perceived threats from their female victims. The data are consistent with a study undertaken by the Victorian Law Reform Commission ('VLRC') in which men were found to raise provocation frequently 'in the context of a relationship of sexual intimacy in circumstances involving jealousy or an apparent desire to retain control'.¹²⁴

Within the sample, judges frequently articulate that the behaviour of the female victim is central to the explanation for the male offender's violent actions. This finding is consistent with research which demonstrates that when comparing crimes committed between non-intimates with crimes committed between intimates, intimate partner crimes repeatedly have a greater measure of victim responsibility.¹²⁵ As one male offender case in the sample highlights, judges can at times consider an offence is 'out of character' for an individual. As commentators argue, the use of character theory to explain that a person is not themselves at the moment they lose their self-control can lead not only to the offender being excused for their actions, but the possible reduction in weight of sentencing factors such as specific deterrence.¹²⁶

Judicial commentary for offenders also reflects that the actions of males belies their beliefs and attitudes regarding women, together with their sense of male entitlement and proprietorship over their female partner, ultimately leading to male justification for the perpetration of lethal violence towards females. This finding is consistent with Shapland's observations that by claiming factors such as provocation as being beyond their control, an offender is in fact minimising their offending and denying full responsibility for their actions.¹²⁷ Indermaur points out that an offender's belief in this regard is emphasised even more if the judge's sentencing remarks also reflect that the offender's responsibility is moderated.¹²⁸

Comparing females to males in the sample, males are more likely to be considered ill-equipped to manage conflict within the domestic relationship, with females' emotions perceived by male offenders as unpredictable. In order to determine if a victim's behaviour towards an offender is provocative, the law says that the gravity of the deceased's conduct must be assessed from the viewpoint of the accused.¹²⁹ Therefore, amongst other things, account must be taken of the accused's personal characteristics and circumstances, the rationale being that conduct that may not be hurtful or insulting to one individual, may indeed be offensive to another because of their own characteristics and circumstances.¹³⁰

Conclusion

The Sentencing of Aboriginal Offenders

The data show that when sentencing Aboriginal male offenders, judges are saying one thing and doing another. Judges comment that drunken Aboriginal male violence against women will not be tolerated, and that sentences must reflect this, and yet Aboriginal males are sanctioned less harshly than non-Aboriginal males. Judges often excuse the problematic use of alcohol by Aboriginal

males, thereby modifying the seriousness of the offending. At the same time, the vulnerability of an intoxicated victim in the context of the gravity of the offence is rarely recognised.

While one would expect that the prevalence of Aboriginal male violence against women calls for a need for greater deterrence, the data tell us that judges view Aboriginal males as less culpable than their non-Aboriginal counterparts. In particular, the use of bodily force to kill a woman is judicially portrayed as opportunistic, with the nature and extent of the violence perpetrated normalised and diminished in nature, a consideration that Lloyd argues, in real terms, leads to lighter sentences.¹³¹

Offender Violence

In the study, judges' sentencing remarks echo themes of offenders' denial of responsibility, minimising harm, as well as justifying domestic and homicidal violence against females. This commentary reveals that judges are underestimating the significance of domestic violence. The judiciary needs to demonstrate that it is taking this issue seriously and reflect this in their sentencing practices.

Regarding remorse, if there is a history of domestic violence from the offender to the victim, judges can scarcely reason that a sentencing discount on this basis is valid. This reasoning should be removed from the sentencing matrix. Judicial language that mutualises violent behaviour diminishes the fact that the offender is entirely responsible for their own violent actions which ultimately led to the death of the victim. Judges must convey to the offender that they and they alone are the source of their own behaviour and sentence them accordingly. Judges are obscuring male offender responsibility and deliberate acts of violence towards women by reformulating those acts as being 'out of character', inferring that the male offender is less likely to be violent in the future. This is despite the

fact that women remain in the majority as victims of intimate partner homicide.

Ultimately judges must create the platform for an offender to accept full responsibility for their actions by exposing offender violence, honouring the victim's response to that violence, clarifying offender responsibility, and challenging victim blaming.

Alcohol and Drugs

In this study, judges failed to attribute a sufficient degree of responsibility to male offenders for their voluntary consumption of alcohol or drugs and their subsequent violent behaviour. Judicial explanations regarding the effect of intoxication on the offender are unproductive, as they do not provide clear direction as to whether the intoxication mitigates or aggravates the offence.

Also within the sample, judges attributed more blameworthiness to non-Aboriginal female offenders whom they believed were in an alcohol or drug-induced state, unable to take control of their dysfunctional lives. However, rather than reinforce long-standing myths and stereotypical views of women, sentencing remarks are an opportunity for the judiciary to challenge gender-based attitudes and promote a message of equality in the courtroom.

Provocation

The data reflect that as a defence provocation continues to be gender biased, favouring males as the main beneficiaries of the defence. While promoting a culture of female victim-blaming, the availability of provocation as a platform for males to normalise and excuse their offending fosters brutal domestic violence perpetrated by men against women. As the data show, judges continue to excuse male violence towards women, endorsing the view that the female victim is responsible for her own death. As such, the authors add their voices to the many authorities advocating for the abolishment of this flawed defence which

has no place among modern community values and beliefs concerning justice.

As Hemming points out, despite jurisdictional review of the defence, a lack of consistency remains, as does the defence in five Australian jurisdictions.¹³² This commentary is consistent with the data in this study. Bradfield cautions that, given the gender concerns related to the defence, 'care needs to be taken to ensure that the abolition of provocation does not worsen the legal position of battered women who kill and that the accounts of men provoked to kill by jealousy or rejection are not merely repeated and given judicial endorsement at the sentencing stage'.¹³³ Such concern is valid, as the data also show that provocation continues to be a relevant sentencing consideration when sentencing an offender for murder.

Ultimately, even if the partial defence is abolished throughout Australia, as long as provocation remains a sentencing consideration, and commented on without condemnation, male reactions to subjectively perceived provocative behaviour will continue to promote the message to society that male violence against women is a normal part of masculinity, and in this respect, that male violence is justified.

Notes

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3. Keith F Punch, *Introduction to Social Research – Quantitative and Qualitative Approaches* (SAGE Publications 1998) 28.
4. 'Figuring Violence' [2015] (Autumn/Winter) *Domestic Violence Resource Centre Victoria Advocate* 47, 47.
5. According to the Aboriginal and Torres Strait Islander Commission Act 1989 s 4, 'Aboriginal person' means 'a person of the Aboriginal race of Australia'.
6. *The Queen v Corelius Mollinjin* [2009] NTSC SCC 20907622 (7 October 2009) at [2].
7. *The Queen v Donathan Williams* [2012] NTSC SC 21131552 (12 December 2012) at [10].
8. *The Queen v Damien Hughes* [2010] NTSC SCC 20916792 (30 November 2010) at [14].
9. *The Queen v Damien Hughes* (n 8) at [14], [15].
10. *The Queen v Corelius Mollinjin* (n 6) at [9].
11. *The Queen v Esau Hodgson* [2012] NTSC SCC 21007364 (12 April 2012) at [12].
12. *The Queen v Esau Hodgson* (n 11) at [14].
13. *The Queen v Esau Hodgson* (n 11) at [17].
14. *The Queen v Esau Hodgson* (n 11) at [24].
15. *The Queen v Esau Hodgson* (n 11) at [27], [29].
16. *The Queen v Esau Hodgson* (n 11) at [41].
17. *R v Doolan* [2010] NSWSC 615 (7 June 2010) at [10].
18. *R v Sherridan Rose Hodder* [2013] WASC 211 (5 December 2013) at [25].
19. *The State of WA v Brooking* [2014] WASC 102 (6 June 2014) at [6].
20. *The Queen v Esau Hodgson* (n 11) at [24].
21. *The Queen v Damien Hughes* (n 8) at [14].
22. *The Queen v Esau Hodgson* (n 11) at [31].
23. *The State of WA v Brooking* (n 19) at [4].
24. *The Queen v Esau Hodgson* (n 11) at [32].
25. *The State of Western Australia v Attwood* [2013] WASC 157 at [23], [24].
26. *The Queen v Sebastian Kunoth* [2014] NTSC SC21249438 (11 April 2014) at [19].
27. *The Queen v Damien Hughes* (n 8) at [27].
28. *Singh v R* [2012] NSWSC 637 (7 June 2012) at [39].
29. *Singh v R* (n 28) at [34].
30. *R v Jermaine Bolt* [2013] NSWSC 895 (5 July 2013) at [36] (emphasis in original).
31. *The Queen v Esau Hodgson* (n 11) at [37].
32. *R v Ziaollah Abrahamzadeh* [2012] SASC SCCRM-10-241 (19 April 2012) at [53].
33. *R v Susan Neill-Fraser* [2010] TASSC COPS Report (27 October 2010) at [23].
34. *R v Susan Neill-Fraser* (n 33) at [23].
35. *DPP v Sherna (No.2)* [2009] VSC 526 (20 November 2009).
36. Where an individual who accepts the law's authority removes its restrictions by justifying their actions. Gresham M Sykes and David Matza, 'Techniques of Neutralization: A Theory of Delinquency' (1957) 22 *American Sociological Review* 664, 664 quoted in John E Conklin, *Criminology* (8th edn, Pearson Education 2004) 172.

37. *R v Catherine Therese Collyer* [2012] SASC SCCRM-11-96 (10 October 2012) at [3].
38. *R v Catherine Therese Collyer* (n 37) at [9].
39. *R v Cassandra Lee Dodd* [2011] SASC SCCRN-11-183 (9 September 2011) at [5].
40. *R v Cassandra Lee Dodd* (n 39) at [7].
41. *R v Jermaine Bolt* (n 30) at [43].
42. *R v Debra Patricia Charles* [2013] VSC 470 (1 August 2013) at [14].
43. *R v Cassandra Lee Dodd* (n 39) at [11].
44. *R v Mathew Tunks* [2012] TASSC COPS Report (18 December 2012) at [12].
45. *R v Sherridan Rose Hodder* (n 18) at [11].
46. *R v Sherridan Rose Hodder* (n 18) at [15].
47. *The Queen v Damien Hughes* (n 8) at [28].
48. *R v Mark Scott Bampton* SCSC SCCRM-10-59 (4 June 2010) at [36].
49. *The State of WA v Attwood* (n 25) at [38].
50. *R v Jermaine Bolt* (n 30) at [20].
51. *R v Jermaine Bolt* (n 30) at [38].
52. *The State of Western Australia v Rosewood* [2013] WASCSR 77 (2 May 2013) at [14].
53. *The State of WA v Rosewood* (n 52) [18].
54. *R v Rajini Narayan* [2011] SASC SCCRM-10-66 (13 April 2011) at [46], [48].
55. *R v Helen Ryan* [2011] NSWSC 1249 (21 October 2011) at [35].
56. *R v Helen Ryan* (n 55) at [16].
57. *R v Helen Ryan* (n 55).
58. *R v Helen Ryan* (n 55) at [4].
59. *R v Helen Ryan* (n 55) at [5].
60. *R v Helen Ryan* (n 55).
61. *R v Helen Ryan* (n 55) at [6].
62. *R v Helen Ryan* (n 55) at [14].
63. *The Queen v Corelius Mollinjin* (n 6) at [7].
64. *The Queen v Corelius Mollinjin* (n 6) at [8].
65. *The Queen v Corelius Mollinjin* (n 6) at [15].
66. *The Queen v Corelius Mollinjin* (n 6) at [17].
67. *The Queen v Corelius Mollinjin* (n 6) at [19].
68. *R v Kirsty Smiler* [2013] NTSC SCC 21333003 (23 December 2013) at [40].
69. *R v Kirsty Smiler* (n 68) at [39].
70. *The Queen v Esau Hodgson* (n 11) at [20].
71. *The State of WA v Attwood* (n 25) at [26].
72. *R v Reid* [2009] VSC 326 (10 August 2009) at [19].
73. *R v Reid* (n 72) at [31]–[34].
74. *R v Downie* [2012] VSC 27 (2 February 2012) at [31].
75. *R v Cassandra Lee Dodd* (n 39) at [11].
76. *R v Downie* (n 74) at [27].
77. *R v Downie* (n 74) at [32]–[33].
78. *R v Downie* (n 74) at [28].
79. *R v Downie* (n 74) at [18].
80. *Singh v R* (n 28) at [29].
81. *The Queen v Donathan Williams* (n 7) at [38].
82. *R v Mark Scott Bampton* (n 48) at [35].
83. *Sherna v The Queen* [2011] VSCA 242 at [18].
84. *Singh v R* (n 28) at [36].
85. *The State of Western Australia v Silva* [2013] WASCSR 98 (4 June 2013) at [42].
86. *R v Patrick Daley* [2014] TASSC COPS Report (19 August 2014) at [7].
87. *R v Helen Ryan* (n 55) at [16].
88. *R v Jermaine Bolt* (n 30) at [48].
89. *Singh v R* (n 28) at [43].
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93. Jeffries and Bond (n 92) 67.
94. Jane Lloyd, 'Violent and Tragic Events: The Nature of Domestic Violence-Related Homicide Cases in Central Australia' (2014) 1 *Australian Aboriginal Studies* 99–109.
95. Lloyd (n 94) 103.
96. Jack Dearden and Jason Payne, 'Alcohol and Homicide in Australia' (2009) no 372 *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* 1, 5.
97. Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report no 114 (2010) 565.
98. Criminal Code Act Compilation Act 1913 (WA) s 221.
99. Criminal Law Consolidation Act 1935 (SA) s 5AA(1)(g).
100. *The Queen v Esau Hodgson* (n 11) at [24].
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102. Alex Newton, 'Domestic Violence in Indigenous Communities: Competing Explanations and Criticisms' 2002 13(1) *Polemic* 33, 33.

103. Warner (n 101) 111.
104. Lucy Snowball and Don Weatherburn, 'Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?' (2007) 40(3) *The Australian and New Zealand Journal of Criminology* 272, 277.
105. Dearden and Payne (n 96).
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Declaration of conflicts of interest

Marion Whittle has declared no conflicts of interest

Guy Hall has declared no conflicts of interest

Ethical approval

This article does not contain any studies with human participants or animals performed by any of the authors.