

**Hunter, Rosemary and Tyson, Danielle (2017) *The Implementation of Feminist Law Reforms: The Case of Post-provocation Sentencing*. Social & Legal Studies, 26 (2). pp. 129-165. ISSN 0964-6639.**

## Downloaded from

<https://kar.kent.ac.uk/71538/> The University of Kent's Academic Repository KAR

## The version of record is available from

<https://doi.org/10.1177/0964663916666628>

## This document version

Author's Accepted Manuscript

## DOI for this version

## Licence for this version

UNSPECIFIED

## Additional information

## Versions of research works

### Versions of Record

If this version is the version of record, it is the same as the published version available on the publisher's web site.  
Cite as the published version.

### Author Accepted Manuscripts

If this document is identified as the Author Accepted Manuscript it is the version after peer review but before type setting, copy editing or publisher branding. Cite as Surname, Initial. (Year) 'Title of article'. To be published in *Title of Journal*, Volume and issue numbers [peer-reviewed accepted version]. Available at: DOI or URL (Accessed: date).

### Enquiries

If you have questions about this document contact [ResearchSupport@kent.ac.uk](mailto:ResearchSupport@kent.ac.uk). Please include the URL of the record in KAR. If you believe that your, or a third party's rights have been compromised through this document please see our [Take Down policy](#) (available from <https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies>).

This article has been accepted for publication in *Social & Legal Studies*.

## **The Implementation of Feminist Law Reforms: The Case of Post-Provocation Sentencing**

**Rosemary Hunter**

Queen Mary University of London, UK

**Danielle Tyson**

Deakin University, Australia

### **Abstract**

In 2005 the Australian State of Victoria abolished the controversial partial defence of provocation. Part of the impetus for the reforms was to challenge provocation's victim-blaming narratives and the defence's tendency to excuse men's violence against intimate partners. However, concerns were also expressed that these narratives and excuses would simply reappear at the sentencing stage when men who had killed intimate partners were convicted of murder or manslaughter. This paper analyses post-provocation sentencing judgments, reviewing cases over the 10 year period since the reforms in order to determine whether these concerns have been borne out. The analysis suggests that at the level of sentencing outcomes they have not, although at the level of discourse the picture is more mixed. While sentencing narratives continue to reproduce the language of provocation, at the same time, post-provocation sentencing appears to provide opportunities for feminist

judging – picking up on the spirit of the reforms – which have been taken up by some judges more than others.

## **Keywords**

partial defence of provocation, feminist law reform, sentencing, judicial attitudes, murder, manslaughter

## **Introduction**

The partial defence to murder of provocation was abolished in the Australian state of Victoria in 2005. Unlike the full defence of self-defence, which, if successfully argued, results in an accused person being acquitted of murder, a successful defence of provocation resulted in a verdict of not guilty of murder, but guilty of manslaughter. The elements that were required to be proven in order for the defence of provocation to succeed were: the deceased must have said something and/or acted in a way that was provocative; the accused must have lost self-control as a result of the provocation and killed the deceased while experiencing that loss of self-control; and the provocation must have been such that it was capable of causing an ordinary person to lose self-control and form an intention to inflict grievous bodily harm or death (VLRC, 2004: 23).<sup>1</sup> While the partial provocation defence remains available in Victoria for offences committed prior to 22 November 2005, it can no longer operate to reduce murder to manslaughter for homicides committed on or after that date. Provocation will, however, still be relevant to the task of the sentencing judge when sentencing an offender for murder or manslaughter.

Feminist critiques of the partial defence of provocation have been well rehearsed (e.g. Bandalli, 1995; Fitz-Gibbon, 2014; Horder, 1992; Howe, 1994, 1997, 2000, 2013, 2014; Morgan, 1997; Nourse, 1997; Radford, 1987; Tarrant, 1996; Tyson, 1999, 2013). The abolition of provocation in Victoria was part of a comprehensive package of reforms introduced by the *Crimes (Homicide) Act 2005* (Vic). The reforms sought to address long-standing concerns about the gendered operation of the defences to homicide – namely, that the availability and operation of the partial defence of provocation has tended to privilege men who kill their intimate partners and to blame women for inciting their own deaths. Men in this context often argued that the provocative conduct was that their partner had been unfaithful or had taunted them about their sexual performance. However, such claims tended to mask actual motivations of jealousy, possessiveness or a need for control, and the killing tended to occur when the deceased was attempting to leave or had left the relationship (Morgan, 1997: 247-250, 2002: 21-30). In contrast, women rarely kill in the same circumstances as men; rather, when women relied on the defence, they were often responding to a prior history of abuse perpetrated against them by their partners (VLRC, 2004: xxv).

The way the full defence of self-defence was interpreted and applied was also seen to disadvantage women. Men are most often successful in raising self-defence when they kill in a confrontational situation, usually a stranger, acquaintance or friend. As women rarely kill in these circumstances, they often face a number of barriers to establishing their actions as self-defence (VLRC, 2004: xxvi). In addition to the abolition of provocation, the reforms included the codification of self-defence as a defence to murder and expansion of the scope of the defence so that it is more capable of accommodating the experiences of abused women. The offence of defensive homicide was also introduced, which, up until its

abolition in 2014 by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic), provided a partial defence for defendants who killed in circumstances in which they believed their actions were necessary in order to defend themselves from death or really serious injury, but they did not have reasonable grounds for that belief. Finally, the Act introduced a new section into the *Crimes Act 1958* (Vic) (originally s 9AH, since 2014 s 322J) which provides for the admission of evidence highlighting the relationship and social context of family violence in cases of homicide where family violence is alleged.

The abolition of provocation was one of the key recommendations made by the Victorian Law Reform Commission (VLRC) in its *Defences to Homicide: Final Report* (VLRC, 2004). In considering whether the partial defence of provocation should be abolished and/or a new partial defence should be introduced, the VLRC's general approach to the factors that reduce or eliminate criminal culpability, was that these should be informed by the empirical literature on the social contexts in which homicides typically occur (2004: 4). The VLRC were also guided by substantive equality principles (2002: 66, 2003: xvii-xviii, 95-96; see also Morgan, 2002). In their report, the VLRC were concerned that 'the moral basis of provocation' was 'inconsistent with contemporary community values and views on what is excusable behaviour' (2004: 56). Of particular concern was how provocation operated as a legitimate excuse for a person to kill another person, usually a woman, who was exercising her 'personal rights, for instance to leave a relationship or to start a new relationship with another person' (2004: 56). Accordingly, the VLRC were of the view that '[p]eople should be expected to control their behaviour—even when provoked' and that retention of the defence of provocation 'also sends a message that the homicide victim is somehow to blame for their own death' while the male defendant's 'violent loss of self-control [was] partly excusable' (2004: 56). In agreement with key feminist commentators that the partial

defence of provocation was ‘beyond redemption’ (Howe, 2002: 43), the VLRC recommended that it should be abolished (VLRC, 2004: xlvi), and concluded that ‘[d]ifferences in degrees of culpability for intentional killing should be dealt with at the sentencing stage’ (2004: 4).

The partial defence of provocation has also been abolished or modified in a number of other jurisdictions. It was first abolished in the Australian state of Tasmania in 2003 (*Criminal Code Amendment (Abolition of the Defence of Provocation) Act 2003 (Tas)*) and was subsequently abolished in Western Australia in 2008 (*Criminal Law Amendment (Homicide) Act 2008 (WA)*). In 2007, the New Zealand Law Reform Commission (NZLRC) recommended abolition of provocation and changes to the law on self-defence. The NZLRC also recommended that priority should be given to the development of sentencing guidelines to ensure ‘full and fair account’ is given to provocation mitigation at sentencing (2007: paras 2.04 and 2.08). Provocation was abolished by the *Crimes (Provocation (Repeal)) Amendment Act 2009 (NZ)*, but none of the other recommendations were acted upon. As Wake has observed, the result is that self-defence law in New Zealand remains manifestly inadequate internationally in the way it responds when victims of family violence kill their abusers (2015: 165). The *Coroners and Justice Act 2009 (UK)* abolished the partial defence of provocation, and introduced a new partial defence of ‘loss of control’ applicable to England, Wales and Northern Ireland. Contained within ss 54 and 55 of the Act and retaining a key element of the old partial defence, the ‘qualifying trigger’, the partial defence of ‘loss of control’ includes the stipulation that ‘the fact that a thing said or done constituted sexual infidelity is to be disregarded’ (s 55(6)(c)). Section 54(3) of the Act provides that the qualifying trigger for loss of control can be a ‘fear of serious violence’ from the victim to the defendant or another identified person. Alternatively, s 54(4) provides that the qualifying trigger can be ‘a thing or things done or said (or both) which—(a) constituted circumstances

of an extremely grave character, and (b) caused D to have a justifiable sense of being seriously wronged'. (For overviews of recent debates and criticism of the 'loss of control' defence see Horder and Fitz-Gibbon, 2015; Howe, 2013, 2014; Reed and Bohland, 2011). Shortly after a New South Wales (NSW) Select Committee on the Partial Defence of Provocation published its Final Report (2013) in which it recommended that the partial defence of provocation be 'relabelled' a defence of 'gross provocation', a reform structured along the lines recommended by the Law Commission for England and Wales in 2004, the NSW government responded with a different proposal for a partial defence of 'extreme provocation' (*Crimes Amendment (Provocation) Act 2014 (NSW)*; for a discussion of this proposal see Crofts and Loughnan, 2014).

The VLRC argued that a key benefit of shifting claims of provocation to the realm of sentencing was that it would give greater flexibility to judges about which sentence to impose (2004: 33). However, many remained concerned that this would do little to challenge exculpatory narratives for men's violence against women (Bradfield, 2003; Burton, 2003; Howe, 2002, 2004). As Morgan observed, leaving 'provocative' facts to the discretion of a judge in sentencing 'will do nothing to remove the gendered assumptions embodied in the ... use of the provocation defence by men in situations of "sexual jealousy"' (1997: 275-76). A related concern was whether provocation's victim-blaming narratives would simply be redeployed in the guise of other offences such as manslaughter (Tyson, 2011). These expressions of apprehension are not altogether surprising given the tendency for sentencing in cases of domestic homicide to undermine legal reforms designed to benefit women (Burton, 2003; Easteal, 1993a, 1993b). As Freiberg, Gelb and Stewart have observed, while it is important to bear in mind that '[r]ecognising the objectionable features of the partial defence of provocation does not mean that provocation is not a legitimate mitigating factor

in sentencing that should, in appropriate cases, be acknowledged by the court' (2015: 59), it is crucial that with 'the transformation of the law of provocation, the past should not continue to influence the present in undesirable ways and the partial defence should not re-emerge in a new guise as a particular variety of murder' (Stewart and Freiberg, 2009: vii, 2). This would seem to require judges to draw a distinction between when 'provocative' conduct is not a legitimate mitigating factor (for example in cases of rage, jealousy, infidelity, separation or estrangement), and when it is.

There is no mandatory life sentence for murder in Victoria. Judges, therefore, have a wide discretion in sentencing, taking into account general sentencing principles and weighing up aggravating and mitigating factors in each individual case. To date, with a few exceptions (Burton, 2003; Freiberg, Gelb and Stewart, 2015; Hall et al., 2015; Horder and Fitz-Gibbon, 2015), there has been little research that has examined provocation as an independent factor in sentencing (Stewart and Freiberg, 2008: 285). The general principles of sentencing are to be found in the *Sentencing Act 1991* (Vic) and common law (Freiberg, 2014). The purposes of sentencing – punishment, deterrence, rehabilitation, denunciation and the protection of the community from the offender – are to be found in s 5(1) of the *Sentencing Act 1991* (Vic). Section 5(2) of the *Sentencing Act* sets out the factors that a court must take into account when sentencing an offender, including: the maximum penalty prescribed for the offence; current sentencing practices; the nature and gravity of the offence; the offender's culpability and degree of responsibility for the offence; and the presence of any aggravating or mitigating factors concerning the offender or of any other relevant circumstances.

The policy issues relating to sentencing for murder and other offences against the person flowing from the abolition of provocation were canvassed in a research report

entitled *Provocation in Sentencing* by Stewart and Freiberg (2008, 2009). In the report, the authors reflect on the need to give effect to the intentions of the VLRC and Parliament and argue that '[i]f the underlying purposes of the legislation are to be achieved, it is imperative that the problems and flaws of the pre-existing law not be transferred from the substantive law into the law of sentencing' (2009: vii, 2). Rather than adopt a traditional approach to provocation mitigation in sentencing, which is to treat it as 'one of the myriad of general mitigating circumstances that a judge must consider', Stewart and Freiberg propose a new normative framework for dealing with provocation in sentencing which draws on a 'reasons-based approach to culpability in sentencing' (2008: 291) 'advocated by the VLRC as well as approaches to provocation in sentencing in other jurisdictions' such as Tasmania (2009: 63). The focus, they argue, should not be on whether 'the offender lost self-control or that the provocation was capable of causing an ordinary person to lose self-control' (2009: 63). Rather, an offender's culpability should be reduced only when the response of being frightened, angry or resentful is for 'good reasons', although they note that fear, anger and resentment in some cases may have led to excessive or inappropriate behaviour. Thus, they conclude that:

[a]lthough there is a need to contextualise provocation, including by reference to the offender's personal characteristics, the overriding consideration should be whether the offender's aggrievement at this conduct is justified in the circumstances. Thus an appropriate approach would be to ask whether the victim's conduct gave the offender a justifiable sense of being wronged, judged not only by reference to the offender's personal circumstances, but also in accordance with equality principles (2008: 298).

This proposal echoes the current English partial defence of ‘loss of control’ in its reference to ‘a justifiable sense of being wronged’, although it adds a broader caveat about how that should be judged – not simply disregarding infidelity, but in accordance with equality principles – in order to transcend traditional, male-centred notions of injury. Stewart and Freiberg thus offer an alternative approach to provocation mitigation focused on the wrongfulness of the victim’s actions and justifiability of the offender’s aggrievement, rather than on whether the offender lost self-control as a result of anything said or done by the victim. It is an approach grounded in the view that lethal violence that arose in response to the deceased exercising (her) equality rights (e.g. an equal right to autonomy and self-determination in relationships, friendships, work or education) should not reduce an offender’s culpability.

The *Crimes (Homicide) Act 2005* has been described as among the most radical of feminist-inspired reforms aimed at remediating gender bias in legal responses to men and women who kill intimate partners (Coss, 2006; Forrell, 2006; Ramsey, 2010). The value of feminist law reform strategies, however, has been the subject of two, related debates. First, feminist critical theorists have argued that law invariably does more harm than good to women; consequently, feminist law reforms are doomed to failure, and feminists ought to resist law’s claims to be a force for good and focus their efforts on challenging legal and wider discursive constructions of gender (Brown, 1995; Frug, 1992; Jhappan, 1998; Smart, 1989, 1990, 1995; Thornton, 1991). While this has been a powerful and influential argument, it has also been contested as being overly pessimistic and essentialist, and as failing to account for potential ambivalence in the meaning of particular reforms (Hunter, 2012; Sandland, 1995). Secondly, feminist socio-legal scholars have argued that feminist

efforts to change legal doctrine must be accompanied by attention to how (and by whom) those reforms are to be implemented (Hunter, 2008; Stanko, 1985; Rhode, 1997; Römkens, 2001). This should involve both consideration of implementation issues at the drafting stage (as indicated, for example, by Morgan's concerns cited above), and empirical investigation of the implementation process after reforms have been enacted. In Hunter's words, before we can announce the success or otherwise of feminist reforms, 'it is necessary to determine how [they] are actually operating in practice' (2008: 6).

This article locates itself primarily within the second of these debates. Acknowledging that the implementation of the *Crime (Homicide) Act* 2005 depends upon the 'internal legal culture' (Friedman, 1985; Hunter, 2008) of the lawyers and judges involved in cases of intimate partner homicide, we set out to examine the degree of congruence between the aspirations of the feminist reformers and the attitudes of the legal enforcers as to the wider implications of the abolition of provocation as a defence to murder. Although it is not the primary focus of the article, our findings do also make some contribution to the first debate, in providing a nuanced account of the outcomes of law reform, and in particular by showing how alternative representations of women's lives and gender relations may be generated within as well as outside law. We should also stress that our aim in this article is to investigate the application of the provocation reforms to men who kill. We do not discuss their application to women who kill abusive partners, which raises different issues and has been the subject of separate research (see Kirkwood et al., 2013; Tyson et al., 2015; Tyson et al., 2016).

To determine whether, and to what extent, provocation's 'exculpatory narratives of excuse for male violence' (Tyson, 2013: 126) are being redeployed at the sentencing stage following the enactment of the *Crimes (Homicide) Act* 2005, we undertook a systematic

examination of sentencing judgments, reviewing all cases of men who were found guilty of domestic homicide (as defined below) over the 10-year period since the 2005 reforms. In the following section we describe our methodology, before going on to examine the guidance on provocation mitigation in homicide cases given to sentencing judges by the *Victorian Sentencing Manual* and by the post-abolition jurisprudence of the Victorian Court of Appeal. We then discuss the findings of our analysis of sentencing judgments, both in terms of judicial responses to provocation mitigation arguments in domestic homicide cases, and more general judicial attitudes towards the reforms to homicide law.

## **Methodology**

In this study, we were interested in determining the extent to which problematic provocation-type narratives have reappeared in the sentencing process in cases involving a man who killed a female intimate partner. We define provocation-type narratives as either explicit or implicit claims that the defendant killed the deceased as a result of a sudden or spontaneous loss of self-control in response to some form of provocation by the deceased, including nagging, wounding the defendant's pride, expressing a desire or making arrangements to leave the relationship, entering a new relationship with another man, or admitting to or describing sexual activity with another man.

Cases were identified via the Australasian Legal Information Institute (Austlii) database, which is a comprehensive on-line database of Australian legislation and case law. The one limitation of this database is that a small number of sentencing judgments are restricted and hence not published online to protect individuals involved in the case. Cases used for analysis were selected using the following procedure. First, all sentencing judgments for murder or manslaughter between 22 November 2005 and the end of 2015

were identified. Second, we filtered out any cases where the killing was committed prior to 22 November 2005 as we wanted to focus on those judgments delivered in respect of deaths which occurred after the abolition of the partial defence of provocation. Thirdly, we included those judgments involving a male defendant who killed either an intimate female partner or a male sexual rival, following Morgan's insight that 'some instances of men killing men share much in common with some instances of men killing women and should be connected, notwithstanding the different gender of the victims' (2002: 23). We excluded cases where the defendant was charged with incitement to murder rather than the killing itself, since these cases by definition involve pre-mediation and are not susceptible to provocation-type arguments. We also excluded two cases in which gay men killed male sexual partners, because the gender issues involved in these cases would have required significant further analysis, drawing us away from our main focus on the gendered narratives constructed around heterosexual relationships. Finally, as indicated above, we excluded cases in which women killed men or other women, since the kind of victim-blaming and excuses for men's violence that the provocation reforms were designed to eliminate do not generally appear in cases in which women kill.<sup>2</sup>

In total, we analysed 76 judgments. Of these, 61 cases were sentences following convictions for domestic homicide (i.e. homicide in an intimate context as just described) committed by men in Victoria and 15 were appeals (see Table 1). Of the 61 domestic homicide sentencing cases, the victim was the defendant's partner in 51 cases and another man in 10 cases (see Table 2). In 41 cases the defendant was found guilty of, or pleaded guilty to, murder. This figure includes one defendant who was convicted of murder twice, having been originally convicted at trial, successfully appealed against his conviction, and convicted again on a retrial (*R v. Azizi*, 2010; *Azizi v. R*, 2012; *DPP v. Azizi*, 2013). There was

one other case where the defendant was found guilty of murder but his conviction was quashed on appeal and a verdict of manslaughter was substituted (*R v. Mocenigo*, 2012; *Mocenigo v. R*, 2013). In 16 cases the defendant was found or pleaded guilty to manslaughter; in one case the defendant pleaded guilty to arson causing death; and in two cases the defendant was found or pleaded guilty to defensive homicide, the new offence introduced simultaneously with the abolition of provocation by the *Crimes (Homicide) Act* 2005. The outcome of the second defensive homicide case (*R v. Middendorp*, 2010) caused a public outcry, as the defendant was taken to have been defending himself against a victim to whom he had previously been seriously violent on a number of occasions, who was much smaller and weaker than him, and whom he stabbed in the back (Capper and Crooks, 2010; Howe, 2010; Tyson, 2011: 214-216). The crime of defensive homicide has subsequently itself been abolished by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic)).<sup>3</sup>

In one quarter of the cases (15 of the 61) the defendant appealed against his conviction and/or sentence or the Office of Public Prosecutions appealed against the leniency of the sentence to the Victorian Court of Appeal. Two thirds of the appeals were dismissed (10 out of 15). In three cases, the defendant's appeal against sentence was allowed and the appellant received a reduced sentence (*R v. Jagroop*, 2009; *Bayram v. R*, 2012; *McPhee v. R*, 2014). In the remaining two cases already mentioned, the defendant's appeal against conviction was successful (*Azizi*, 2012; *Mocenigo*, 2013) (see Table 1).

Discussion of how judges approach the task of sentencing and how we understand judicial pronouncements in their published sentencing decisions is largely absent from the sentencing literature. As Mackenzie has observed, 'there have been few attempts worldwide to discern judicial methodology by interviewing judges' and 'discussion of these

issues is often limited to senior judges', or is 'not necessarily representative of the range of views within the judiciary' (2005: 2). Sentencing involves some of the most important decisions in society: it is the moment in the criminal justice process when 'not only must justice be done; it must also be seen to be done' (*R v. Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256). Yet, there is little in the way of research into judicial attitudes and perceptions of sentencing (Mackenzie, 2005: 3). While sentencing is a quintessential exercise of discretion, that discretion is also bounded by sentencing legislation and guidelines, principles established by appellate decisions, and the submissions made by the prosecution and defence as to how the various sentencing factors should apply in the instant case. In their sentencing decisions, judges must respond to the arguments put to them, especially the defendant's plea in mitigation, as well as paying due regard to authorities, taking into account victim impact statements, weighing aggravating and mitigating factors, and arriving at a final disposition.

Of the few studies that do examine judicial reasoning and decision-making in formal published reasons in cases of homicide (see Burton, 2003; Hall et al., 2015; Horder and Fitz-Gibbon, 2015; Kirby, 1999), there has been a tendency to focus only on appellate court decisions. A recent example can be found in a study by Horder and Fitz-Gibbon in which they undertook an examination of the small number of appellate decisions on sentencing in cases raising issues of provocation by infidelity, both before and after the 2009 reforms in England and Wales. In assessing the impact of the English homicide law reforms, Horder and Fitz-Gibbon conclude that the reforms 'have not been followed in spirit' by the English courts in their approach to sentencing for murder post-2009, a failing they attribute in part to the policy underlying the 2003 sentencing legislation and guidance governing minimum starting points for murder in England and Wales (2015: 21; cf Howe, 2014). While we agree

it is important to approach the question of whether reform has achieved meaningful change in practice through a consideration of ‘not only the substantive law of homicide, but also sentencing legislation and guidance’ (Horder and Fitz-Gibbon, 2015: 21), we go a step further than Horder and Fitz-Gibbon and examine first instance sentencing decisions rather than only appellate decisions. As discussed below, if we had restricted our focus to Victorian Court of Appeal decisions post-legislative reform, we might have reached the same conclusion as Horder and Fitz-Gibbon. However, systematic empirical analysis of all sentencing judgments after the abolition of provocation reveals rather a different picture.

Initially, we undertook a systematic content analysis of the 76 sentencing and appeal judgments (Bohours and Daly, 2007). We used the method of content analysis because it is one that Hall and Wright propose ‘resembles the classic scholarly exercise of reading a collection of cases, finding common threads that link the opinions, and commenting on their significance’ (2008: 64). This method, they argue, ‘is more than a better way to read cases’. It ‘meets both the rigorous standards of social science’, enriching ‘our understanding of case law [and] creating a distinctively legal form of empiricism’ (Hall and Wright, 2008: 64, 66). The judgments were entered into NVivo and coded according to a coding scheme to record defined elements of each case. We coded for judicial statements concerning explicit provocation (where the language and concept of provocation was discussed explicitly); implicit provocation (where language and/or concepts of loss of control were discussed without explicit reference to the words ‘provocation’ or ‘provoked’); infidelity and sexual jealousy; men’s anger and rage; and mutual violence between the defendant and victim. By way of contrast, we also coded statements concerning women’s rights, autonomy and equality. In each case we noted whether these statements were made in response to

arguments raised by the prosecution or defence, or whether the language of provocation or women's rights appeared to have been introduced by the judge of his or her own initiative.

The coded extracts relating to each kind of statement were then analysed using discourse analysis. Discourse analysis 'stresses the constitutive role of discourse in legal activities and the ways in which language constructs versions of reality, the rhetorical consequences of which may have serious implications for social justice' (MacMartin and Woods, 2005: 141). For example, we identified whether the judge endorsed or rejected provocation-related arguments put by the defence and the language and discursive devices they used to do so, whether they revealed any apparent hostility to the reforms, or whether, conversely, they appeared positively to endorse the spirit of the reforms and how they did so. In the course of the analysis, we checked back against the full judgments in many instances to ensure we understood the context for the coded comments and were not misrepresenting judicial attitudes. As such, our focus was on the ways in which judicial descriptions are both situated and rhetorical; that is, they are 'embedded in a larger discussion of the judge's reasons for sentence, which collective serve to argue that the penalty is appropriate in this case' (MacMartin and Wood, 2005: 141), and also 'constructed from words, figures of speech, descriptions, narratives, and so on, which can be studied in order to understand how the discourse is built to perform certain actions' (MacMartin and Wood, 2005: 141).

We also looked for any patterns of gender difference between judges, or any judges whose sentencing remarks stood out as being noticeably different from those of their colleagues. The sentencing dataset included four different women judges and 18 different male judges, some of whom gave multiple sentences (see Tables 1 and 2). Appeals are heard by a bench of three judges. The 15 appeals were heard by a total of 15 men and five

women judges. Due to promotions and the practice of trial judges sitting occasionally as Acting Justices of Appeal, there was some overlap between the two groups, with seven men and two women judges sitting both at first instance and on appeals.

### **The Victorian Sentencing Manual**

The Judicial College of Victoria (JCV) provides judicial education and keeps judicial officers abreast of developments in law and related social issues. It publishes a number of judicial reference manuals, including a *Search Warrants Manual*, *Victorian Criminal Proceedings Manual*, *Sexual Assault Manual*, *Uniform Evidence Manual*, and the *Victorian Sentencing Manual*. These publications are produced under the guidance of Judicial Editorial Committees, based on case law of the Victorian Court of Appeal, and updated regularly. However updates may consist of a listing of recent Court of Appeal decisions rather than amendments to the text of the relevant sections. The aims of the *Victorian Sentencing Manual* are expressed in its Introduction to be to 'promote consistency of approach by sentencers in their exercise of their discretion', to provide ready access to the law to sentencers whilst in court, and to provide guidance in interpreting and assessing the weight of factual matters relevant to the instant case (JCV, 2014: section 1).

In relation to the issue of provocation in sentencing, the *Victorian Sentencing Manual* is not up to date and generally does not reflect on the potential impact of the abolition of the partial defence of provocation on sentencing. Its general statement on provocation in sentencing reads:

Provocative conduct by the victim will generally be a relevant consideration when assessing offence seriousness, primarily by offering a mitigatory explanation for the offending. In so doing it may reduce the moral culpability of the offender, and also

have an impact on the purposes of sentence. ... While provocative conduct may in some circumstances reflect negatively upon the character of the victim, perhaps even taking him or her out of the class of ‘innocent victims’, it is not generally to be regarded as reducing the significance of any harm suffered by the victim (JCV, 2014: section 9.12).

While this statement applies generally to sentencing for any offence and might be seen as unexceptionable, no authority is cited for it, and there is no reference to or flagging of the fact that different considerations might apply in the homicide context. Under the sub-heading ‘Recent cases alert’, there is a reference to ‘Effect of provocation in murder sentencing’, but the case reference is to *R v. Tran* (2008), a pre-abolition case. There is no reference to the Court of Appeal’s post-abolition decisions.

From a doctrinal point of view, the *Tran* case arguably offers no assistance to a post-abolition sentencing judge, both because it is a pre-abolition case, and because, while the Crown raised the question of whether provocative conduct by one member of a group could be considered as a mitigating factor in sentencing the defendant for the murder of another member of the group, the Court did not find it necessary to decide the issue. Its inclusion is of some concern, however, both because the allegedly provocative conduct consisted of ‘mere words’<sup>4</sup> (the defendant engaged in a heated argument with his wife during which she accused him of stealing money and insulted him with a Vietnamese epithet indicating stupidity) which would have come nowhere near the threshold for provocation had she been the victim of his homicidal rage, and because of the implication that pre-abolition thinking about sentencing, and particularly the much lower threshold for provocative conduct at that stage, continues to be relevant to post-abolition cases.

Two further sections of the *Victorian Sentencing Manual* deal specifically with provocation in homicide cases. The first of these is ‘Provocation at sentence and provocation manslaughter’ (JCV, 2014: section 9.12.1). This section was last updated in June 2005. It refers to the partial defence of provocation and makes no reference to its abolition. It cites pre-abolition case law to the effect, as indicated in the *Tran* case, that when provocation is being considered at the sentencing stage, it is taken more broadly than the kind of provocation required to meet the requirements of the partial defence of provocation. In other words the kind of ‘provocation’ which may be taken into account in sentencing is provocation in its ordinary meaning rather than in its specialised legal meaning (*R v. Okutgen*, 1982, per Starke J; *R v. Aboujaber*, 1997, per Ormiston J). This point is reinforced in a subsequent section titled ‘Nature of provocation’ (JCV, 2014: section 9.12.2), which states that a defendant’s loss of self-control in response to some form of provocation will have the greatest impact on sentence, but this may not always be a necessary factor. It cites another pre-abolition decision, *R v. Kelly* (2000), in which Chernov JA simply emphasised the need for proximity between the provocation and the response. That is, provocation may be taken into account if there are words or acts which incited or induced the defendant to respond almost immediately while in an agitated or angry state.

The sub-section titled ‘Provocation and murder’ (JCV, 2014: section 9.12.1.1) does mention the abolition of the partial defence of provocation. However its main point is to note that despite this, ‘Where provocation is not available as a defence to murder, the existence of provocative acts will still be relevant to the task of the sentencing judge in sentencing the offender for murder’ – again citing pre-abolition case law (*R v. Foley*, 1999). It goes on to refer to the ‘discussion of possible approaches to post-abolition provocation murder’ in the *Provocation in Sentencing* research paper discussed above (Stewart and

Freiberg, 2009), but it is clear that nothing in the *Victorian Sentencing Manual* is consistent with or endorses Stewart and Freiberg's proposals as to how arguments about provocation should be assessed in the post-abolition sentencing process.

Other relevant sections of the *Victorian Sentencing Manual* include 'Provocation reducing murder to manslaughter' and 'Relationship killings' (sections 27.6.8.1, 26.6.7). The former notes the abolition of the partial defence of provocation but the section relates to the few cases in which it may still apply because the offence occurred before 22 November 2005. The latter notes that killing in the context of a relationship is an aggravating factor, calling for a sentencing response in terms of community condemnation and general deterrence. Again, however, this section was last updated on 2 November 2005, hence all authorities cited are pre-reform cases.

In summary, if one were only to read the *Victorian Sentencing Manual*, one would barely grasp that the partial defence of provocation has been abolished in Victoria, and would certainly not gain the impression that this might have had any effect on the approach to sentencing. In Horder and Fitz-Gibbon's words, the *Victorian Sentencing Manual* treats 'the change in the substantive law as a purely "technical" one, relevant only to the legal grounds on which murder may or may not be reduced to manslaughter' (2015: 2). It does not contemplate whether 'the spirit of the reforms' may demand 'a more general shift in moral thinking concerning the relative seriousness of murders' committed in response to alleged provocation (Horder and Fitz-Gibbon, 2015: 3).

### **The Court of Appeal**

Although, as noted above, there were 15 appeals in the domestic homicide cases in our post-provocation sentencing database, most of those appeals related to issues other than

provocation, such as the contested admission of certain evidence at trial, the judge's alleged failure to take sufficient account of the defendant's psychological state, or, in DPP appeals, the alleged leniency of the sentence given the nature of the offending. Only two cases dealt directly with the question of provocation as a mitigating factor in sentencing.

The leading case is *Felicite v. R* (2011), in which the defendant had sought treatment for difficulties controlling his anger and had previously made threats to his wife. When she announced at a marriage counselling session that she intended to leave him to pursue a relationship with another man, he at first responded calmly. However the next day, he stabbed her to death in a frenzied attack with two kitchen knives. The Court of Appeal (Redlich JA, with whom Harper JA and Robson AJA agreed) expressed the view (at para. 21) that:

The existence of great emotional strain within a domestic or spousal relationship which plays upon the offender's emotional susceptibilities and results in a spontaneous act may bear upon the offender's degree of criminality.

Accordingly, a murder committed on the spur of the moment in a domestic environment as a consequence of a volatile mixture of emotions, whether or not in response to what was previously recognised as provocation in law, may attract a lesser sentence. This clearly does not draw the kind of distinction Stewart and Freiberg called for. On the contrary, it seems to revive the problematic aspects of provocation in terms of excusing men's jealous and controlling violence against women, and to give them broader scope at the sentencing stage.

At the same time, however, the court in *Felicte* stressed that ‘murders that occur in such circumstances are not to be approached as if they fall into a discrete and less serious category of the offence’ (at para. 19):

The taking of a domestic partner’s life undermines the foundations of personal relationships and family trust upon which our society rests. The sentence must reflect both the sanctity of human life and societies’ [sic] abhorrence of violence towards vulnerable and trusting partners who could legitimately have expected the offender to be the protector, not the perpetrator of violent abuse. An outburst of homicidal rage in such contexts is totally unacceptable. The community expectation is that the punishment assigned to such conduct must be condign so as to denounce in the strongest terms the abhorrent nature of domestic murder and to deter others from taking a similar course. Accordingly the principles of general deterrence, denunciation and just punishment will ordinarily be given primacy in sentencing for the murder of a partner in a domestic setting even where there are present, circumstances of provocation or great emotional stress (para. 22, footnotes omitted).

These two paragraphs appear to reflect the kind of mixed messages on ‘relationship killings’ found in the *Victorian Sentencing Manual*. On the one hand, killing within a relationship may be mitigated by ‘provocative’ words or conduct acting on emotional susceptibilities. On the other hand, killing a domestic partner is considered an aggravating factor which should be strongly condemned. The court went on to specify that whether a reduction in sentence was available would depend upon the circumstances of each individual case (at para. 36), and they also agreed with the trial judge that the instant case was not one in which the sentence should be mitigated for this reason.

The second post-abolition Court of Appeal decision of relevance is *McPhee v. R* (2014). Mr and Mrs McPhee had long-standing marital difficulties and were making arrangements to separate. There was evidence of his possessiveness, jealousy and harassment of her, and one evening, after she told him she no longer trusted or loved him, he claimed to have ‘snapped’ and stabbed her to death. He pleaded guilty to murder and was given a sentence of 20 years with a non-parole period of 16 years. He successfully appealed against this sentence. The Court of Appeal quoted the above two paragraphs from *Felicite* but seemed to be paying only lip service to the second paragraph, as they considered that the offence fell within the lowest category of seriousness of the offence of murder, and at the lower end of that category (*McPhee*, 2014: para. 14). Without singling out particular factors, they suggested that the trial judge had possibly misjudged the objective gravity of the offence by giving insufficient weight to the mitigating factors in the case, and failing to take into account the absence of aggravating factors that would elevate the offending to a more serious category (at para. 14). This hardly reflects an ‘abhorrence of violence towards vulnerable and trusting partners’.

Arguably, in its judgments in *Felicite* and *McPhee* the Victorian Court of Appeal has not embraced the feminist spirit of the reforms, but has effectively invited defendants in domestic homicide cases to continue to deploy gendered provocation narratives in an effort to reduce their sentences. This is consistent with similarly disappointing case law from the England and Wales Court of Appeal following the reforms to provocation in that jurisdiction (Horder and Fitz-Gibbon, 2015). Freiberg, Gelb and Stewart (2015) note that even prior to the abolition of the partial defence of provocation, some trial judges had been reluctant to put the defence to the jury in domestic homicide cases, but had been directed to do so by the Court of Appeal. The *Felicite* and *McPhee* decisions seem consistent with the Court of

Appeal's earlier disposition. However, it appears that in practice, defendants have not had much success in persuading trial judges (as opposed to juries) that they should have the benefit of this factor in reducing their sentences.

### **Trial judges' attitudes**

#### *Explicit provocation*

The language of provocation was raised explicitly in 13 of the sentencing judgments, but in nine of these cases it was mentioned by the judge only to be summarily dismissed. In three of those nine cases, any form of provocation was specifically *not* established in circumstances in which there were no witnesses to the killing and the evidential record was scanty. In *DPP v. Lam* (2007: para. 5), Justice Bernard Teague noted:

As to what passed between you that night, we have only your account to the police to add to the forensic picture. What seems to have been troubling you most was her silence in the face of your pressure to know more about the other man. As to matters other than a persistent silence on her part, you said to the police only that at one stage she slapped you. You did not claim to have lost self-control as a result of the slap or otherwise. The notion of there having been the kind of provocation that could cause an ordinary man to lose self-control is quite unsupportable.

It is interesting that Teague J here refers to the meaning of provocation as embodied in the abolished partial defence ('the kind of provocation that could cause an ordinary man to lose self-control') rather than any broader conception, but beyond that provocation is present only by its absence. Similarly, in *R v. Chalmers* (2009: para. 49), Justice Robert Osborn observed that: 'the fact that no motive has been proven for the killing does not assist you, because there is no apparent specific trigger for your actions or explanation by way of

provocation or other psychological mechanism. On the evidence this was a cold-blooded killing'. And in *Mocenigo* (2012: para. 10), Justice Lex Lasry stated: 'I am not able to say whether provocation played any part in your resorting to fatal violence. On such evidence as there is, there is nothing mitigating about the circumstances in which the jury have found that Ms Hall died'. In two of the nine cases, *R v. Kelly* (2012) and *R v. Wentholz* (2013), the defendant had formed alcohol-fuelled delusions that the victim had been having an affair with his partner or was interested in his girlfriend, respectively. Each judge noted in passing that there was no suggestion that the attacks on the victims had been provoked (*Kelly*, 2012: para. 16; *Wentholz*, 2013: para. 21). In the remaining four of the nine cases, *R v. Baxter* (2009), *R v. Wilson* (2011), *R v. Delich* (2013) and *R v. Cook* (2015), the judge mentioned the lack of provocation rhetorically to emphasise the senseless nature of the killing, for example: 'It is a pointless, unprovoked, dreadful murder of a woman who was doing no more than enjoying her life' (*Wilson*, 2011: para. 21); 'She was defenceless and had done nothing to provoke your extraordinarily vicious attack' (*Baxter*, 2009: para. 2).

By contrast, in *R v. Neacsu* (2012), the defendant killed his wife's new partner and sought to rely by way of mitigation on the allegedly provocative actions of his wife in taking up with the new partner and refusing to tell the defendant where and with whom she was living. Justice Betty King accepted that (at para. 43):

the fact that a crime is a crime of passion can mitigate, to a limited extent, the gravity of the offence. What that means is that it may demonstrate that the offence was not in any way premeditated, pre-planned, but came about as a loss of self control, due to circumstances that were not of your making.

But, she continued (at para. 43):

Here you have chosen to pursue the issue of whom your wife was living with, and decided to pursue it whilst armed with a knife ... Accordingly, whilst this may be a crime of anger or rage, I do not accept that it was a crime of passion in the ordinary mitigatory sense.

Similarly, in a second case decided by a woman judge, *McPhee* (2013), Justice Elizabeth Curtain, gave short shrift to the defendant's claim that his wife must have said something to cause him to 'see red', grab a knife and stab her to death. On her view of the evidence (at para. 24):

Although your actions were unpremeditated and spontaneous, you clearly acted out of anger and, no doubt, alcohol played its part. It was not news to you that your wife wanted a separation, although you may not have wanted one. You went along with the idea of it and, indeed, up until that day, had acted reasonably and somewhat responsibly in working on your marital issues and working towards a trial separation. You had spent that afternoon with your wife convivially enjoying each other's company and, it seems, to a point, discussing the state of your marriage without rancour. Your wife did nothing to provoke you, although you say she must have said something. She was defenceless and must have been taken utterly by surprise by your attack. She was doing no more than lying on the couch in the sanctuary of her own home.

Only in one case, *R v. Budimir* (2013), another killing of a wife's new partner, did the judge, Justice Geoffrey Nettle, 'recognise' (at para. 41) that the defendant was 'in some sense, provoked by the deceased's association with' his wife, 'and by the deceitful way in which both he and she had treated [the defendant] concerning the affair'. He stated (at para. 55), in line with the Court of Appeal in *Felicite*:

I accept that your mental state at the time of the killing was to some extent compromised by the effects of your wife's infidelity, the consequent breakdown in your marriage and the resultant destruction of the family life which you valued greatly. ... On that basis, I find that your capacity to make rational judgments at the time of the killing was to some extent affected and, to that extent, that the level of your moral culpability is reduced. But the reduction is not large. There is no longer much scope for the recognition of a reduction in moral culpability in crimes resulting from idiosyncratic (even if, in some quarters, still entrenched) psycho-social attitudes to the rights and roles of women.

In the event, on the facts of the case, including the brutality of the murder on the one hand, and psychological evidence on the other, the provocation issue appears to have had little or no influence on the sentence imposed.

In the final case in which the defendant made an explicit appeal to provocation as a mitigating factor in sentencing, *R v. Freeman* (2015), the alleged provocation did not stem from the defendant's sexual jealousy or desire to control his partner or prevent her from leaving him. The defendant and victim had been having sex, when the victim suddenly asked 'what's it like fucking a 13-year-old?' (at para. 1). The defendant had been sexually abused as a child, and claimed to have been so upset by this (apparently baseless) allegation that he had himself sexually abused a child that he left the room, grabbed a knife from the kitchen and stabbed the victim once in the neck. He was found guilty of murder by a jury, and at the sentencing stage, Justice Michael Croucher was required to decide the disputed questions of whether the defendant had been provoked to act as he did, and if so, what effect that would have on the sentence to be imposed.

In relation to the first question, Croucher J was satisfied that the defendant had lost control as a result of the victim's remark, which he considered to be 'provocative in nature' and also 'had a particular sting for him' because of his history of sexual abuse (at para. 31). The judge was further satisfied that the defendant had stabbed the victim while in a state of loss of control. As to the second question, Croucher J noted that both parties had submitted that provocation could be a mitigating factor in sentencing for murder, and he relied on the authorities cited by the Crown in considering how it ought to be taken into account.

Strangely (perhaps in reliance on the Victorian Sentencing Manual), the Crown appears not to have cited the passages from the Victorian Court of Appeal's decision in *Felicite* discussed above. Rather, they referred to a decision of the Tasmanian Court of Criminal Appeal following the abolition of the defence of provocation in that State, and to Stewart and Freiberg's proposal (2008, 2009) that the test ought to be whether the defendant had a justifiable sense of being wronged. The Tasmanian decision, *Tyne v. Tasmania* (2005) 15 Tas R 221, stood for the propositions that sentencing for murder mitigated by provocation should not be in line with sentencing in previous manslaughter by provocation cases; that the defendant bears the onus of proving provocation as a mitigating factor; and to establish mitigation, it is not necessary to show that an ordinary person would have lost self-control in the same circumstances (*Freeman*, 2015: paras 36-37).

In the event, Croucher J did not need to decide between the various possible tests for provocation since he was satisfied all of them were met: the defendant had acted under an actual loss of self-control, the victim's words were capable of causing an ordinary person with the defendant's history of sexual abuse to lose self-control, and the words were such as to cause the defendant to have a justifiable sense of being wronged (at para. 40). As a result, he found that the defendant's moral culpability was reduced, which should in turn

result in a lower sentence (at para. 41). At this point Croucher J did refer to the facts of *Felicite*, and considered that the provocation faced by the defendant in this case was likely to be more stinging and was more likely to cause an ordinary person to lose self-control than one partner telling another of past infidelity or that their relationship was over (at para. 89). Nevertheless, taking all the sentencing factors into account, the sentence he imposed was squarely within the range of murder sentences found in our study (see Table 1), and the total sentence was identical to that in *Felicite*, with only a lower non-parole period of 15 rather than 16 years.

The *Freeman* case arguably illustrates Stewart and Freiberg's distinction between cases in which a defendant simply became enraged and claimed to have lost control in response to a partner's assertion of autonomy (as in *Felicite* and *Budimir*), and cases in which the defendant has a justifiable sense of being wronged, judged by reference to both their particular circumstances and equality principles. Here, the defendant's sense of being wronged was justifiable both because of his past sexual abuse and because recognition of the victim's words as provocative would not diminish her equality or her right to make choices about her own life. Regrettably, however, the decision was expressed in the old language of provocation rather than in these alternative terms, and contains unfortunate echoes of victim-blaming and the notion that 'mere words' might cause ordinary men to lose control and kill.

#### *Implicit provocation*

An implicit provocation argument, suggesting that the defendant had lost control and killed the victim as a result of some kind of provocative act on her part, was raised in 15 sentencing cases. However the argument of loss of control was accepted by the judge in

only three of these cases, and in two of them (*R v. Diver*, 2008; *R v. Foster*, 2009) it was closely associated with evidence that the defendant was in some kind of abnormal psychological state. In the third case, *R v. Brooks* (2008), there were no direct witnesses to the killing and the defendant had no real recollection of what had occurred. There was evidence that the defendant and victim had been arguing, and the victim had died from a single stab wound. Justice Paul Coghlan concluded (at para. 18):

It follows from that analysis of the evidence that the events which led to the murder were brief, no longer than minutes. In that sense I find that the murder occurred in circumstances of a sudden loss of self-control. What triggered the events is unknown, and unless at some stage your recollection improves, it will never be known.

This imputation of loss of control seems gratuitous, given that all the judge needed to say was that he was satisfied the killing was unpremeditated. There appears to be some stereotypical view about men's killing of domestic partners operating here, in that a brief argument resulting in death must necessarily have involved some form of provocation by the victim and a corresponding loss of control by the defendant. But such stereotypes do not appear to have been shared by other members of the court.

In the remaining 12 cases, the implicit provocation argument was rejected by the judge. In six of these cases, the judge explicitly or implicitly rejected the notion that the defendant had experienced a sudden loss of control. For example, in *R v. Piper* (2008), Justice Robert Osborn maintained (at para. 41):

your conduct involved protracted, brutal and deliberate violence. You were not satisfied with the initial manual strangulation which you inflicted, but persisted in the deliberate murder of Ms Chow with a ligature. I do not accept that you simply

'snapped' as your counsel submitted, if that term is meant to imply that what occurred was some momentary loss of control. This was an attack of sustained and deliberate viciousness.

In *R v. Mahoney* (2009), Justice Elizabeth Hollingworth, commenting on the defendant's history of violence towards the victim prior to killing her, noted (at para. 20):

This was not an isolated incident. Your counsel quite properly conceded that you had a history of violence towards Ms Tilley. Whilst I am mindful of the need not to sentence you for past conduct for which you have not been charged, the fact is that your behaviour cannot be dismissed as simply being out of character or arising from a spontaneous eruption of emotion.

In *R v. Singh* (2015), the defendant had recently discovered his wife's relationship with another man, and stabbed her to death in her sleep. Justice Lex Lasry was unimpressed by the defendant's claim to have had 'some kind of black out' around the time of the attack and not to be able to recall the details of what had occurred. He expressed the view (at para. 35) that the defendant's actions in killing his wife constituted an exercise of control to ensure she did not share her life with anyone else and added (at para. 41):

Domestic violence is rightly the subject of significant public interest after decades of it being ignored or trivialised. This is an extreme example of domestic violence.

Nikita Chawla did nothing whatsoever to in any way contribute to what you did to her. Whilst it appears that you were acting spontaneously, in my opinion you acted with some degree of vengeance and control.

In the other six cases, the judge, while accepting that the defendant's actions had been spontaneous, unplanned or unpremeditated, rejected the notion that the victim had done anything to provoke him to lose self-control. For example in *R v. Bayram* (2011),

Justice Betty King found that the defendant's killing of his wife had resulted from an argument about the division of property following their impending separation, and that he had 'severely overreacted to her desire for the fair and equitable sharing of the joint assets' (at para. 10). In other words, she constructed the wife as reasonable rather than provocative and the defendant as unreasonable rather than provoked. Likewise, in *Azizi* (2010), King J was satisfied that the defendant's wife, while she had been generally expressing her desire to leave the marriage, had not done anything to cause the defendant to lose control and attack her (at para. 43). Following the retrial in *Azizi* (2013), Justice Stephen Kaye likewise considered that the defendant's actions were an unreasonable reaction to his wife's assertion of her rights, but he did find that the defendant had lost control of his emotions and killed her in a fit of uncontrollable rage (at para. 32). By contrast, King J did not characterise Azizi as having lost control, and more generally avoided the use of language associated with or suggestive of provocation.

#### *Infidelity and sexual jealousy*

Overall there were 21 cases which raised issues of (alleged) infidelity or sexual jealousy, including seven cases in which the defendant killed a male rival, but as the discussion above indicates, this was almost never accepted as a sufficient basis on which to found an argument for mitigation of sentence due to provocation/loss of control. The only two cases in which such an argument succeeded were *Budimir* (2013), discussed above under 'explicit provocation', and *Foster* (2009), discussed above under 'implicit provocation', but in which the defendant's mental illness was the most salient factor. Of more note in these cases were statements made by two of the women judges condemning the defendants' extreme reactions to their partners' relationships – real or imagined – with other men. Justice Betty

King's comments in *Neascu* (2013) were noted above. In *R v. Ahmadi* (2013), Justice Elizabeth Curtain stated (at para. 25):

...you killed your wife, you say by strangling her, apparently by pulling a cord around her neck until she did not move, which must have been a sustained act, requiring significant pressure, and all because she told you she was going away with another man. ... It is in these circumstances that the crime here committed is properly to be regarded as a significant example of the crime of manslaughter.

Curtain J's remarks in *R v. West* (2013) were equally forthright in response to a defendant who had killed a man who was unknown to him but who was one of two male friends who had been staying with the defendant's ex-girlfriend. In the days leading up to the event, the defendant had become increasingly jealous of the two men and had repeatedly texted, called and emailed his ex-girlfriend saying that he wanted to see her, expressing animosity towards the two male friends and accusing her of using drugs. In sentencing the defendant, Curtain J said she was satisfied that he was 'driven by uncontrollable rage and jealousy' (at para. 38) and described his act in killing the deceased as 'truly a gratuitous act of extreme violence', and the death as 'as pointless and senseless a death as one could imagine' (at para. 32).

These comments by women judges may be contrasted with the rather more limited remarks about (alleged) infidelity or sexual jealousy in the cases heard by male judges. In *R v. Baxter* (2009), Justice John Forrest condemned the defendant's belief that his wife was having an affair as a form of controlling behaviour (at para. 13). However in two other cases, *Singh* (2010) and *Felicite* (2010), he made no further comment on the defendant's sexual jealousy, and Justice Terence Forrest likewise made no further comment in *Wentholt* (2013), even though in both the *Singh* and *Wentholt* cases the defendant's jealousy was based on

entirely imagined suspicions. In *R v. Daing* (2015: para. 29), T Forrest J made a fairly conventional remark about the need to deter ‘inadequate’ and jealous men from terrorising their weaker female partners. In *Kelly* (2012: para. 19), Justice Stephen Kaye said he was satisfied that the defendant’s assault on the male victim ‘was not premeditated; rather it was product of the suspicion which dawned on you, when you were intoxicated, that [the victim] was having an affair with your girlfriend’. But while he was concerned to ensure that the sentence imposed was ‘of sufficient severity...to constitute a clear message to the community that this Court will not tolerate drunken violence of the kind in which you indulged in this case’ (at para. 50), he did not see fit to express equal intolerance of violence driven by possessive jealousy.

#### *Men’s anger and rage*

Anger or rage, without more, and whether or not in some way provoked or precipitated by the victim, was never accepted as an excuse or justification for killing or a factor that might reduce the defendant’s moral culpability. Indeed, killings motivated by anger or rage were universally condemned. In six cases, the judge rejected the defendant’s explanation for his actions and found instead that he had acted out of anger or rage. For example, in *R v. Pennisi* (2008), Justice David Harper considered that the killing of the victim had been a result of the defendant’s anger rather than an accident as the defendant claimed (at para. 5). In *Baxter* (2009), Justice John Forrest stated (at para. 36):

Whilst I accept that you were in a low mood and had a degree of frustration about your wife’s failure to respond to your questions about the phone records, none of this provides even a glimmer of an explanation for your behaviour. I think that your actions flowed not only from your rage about your wife’s affair, but more

importantly from the fact that you could not control the unfolding of the impending separation.

In *Neacsu* (2012), as noted above, Justice Betty King stated that the killing was ‘a crime of anger or rage’ rather than ‘a crime of passion in the ordinary mitigatory sense’ (at para. 38). And in *McPhee* (2013) Justice Elizabeth Curtain considered that ‘Your explanation that you “snapped” masks the reality that you acted out of anger when you stabbed your wife not once but twice, and in the face of her cries for you to stop’ (at para. 25).

Moreover, women judges in particular suggested that anger was something men needed to learn to control. In two cases, *R v. West* (2013: para. 41) and *R v. Drummond* (2012: para. 29), Curtain J asserted that the defendant’s inability to control his anger made him an ongoing danger to the community and affected his prospects of rehabilitation (a similar point was made by a male judge, Forrest J, in *Felicite*, 2010: para. 25), while in *R v. Carolus* (2011: para. 54), Justice Elizabeth Hollingworth expressed the view that although the defendant had begun to address his underlying behavioural problems, ‘it is likely to take a lot more work to address your long history of alcohol abuse and anger management’. In *R v. Mulhall* (2012), King J noted the defendant had previously been served with an intervention order and faced criminal charges for assaults on the victim, and stated that this history should have meant he took more care to exercise control and not put himself in a position to lose his temper (at para. 32). On this view, men’s anger and rage (and consequently violence) are seen as *avoidable*. Far from victim-blaming, these judges are careful to hold angry and violent men to account. Indeed, King J also held the defendant in *Azizi* (2010) to account for a further expression of anger (at para. 44):

her death clearly resulted because of your belief that, you were entitled to dominate and dictate to your wife, what she could and could not do. Her growing resistance to

your dominance must well have angered you, an anger which I noted flashed in this court room when you were giving evidence, and I interrupted you to allow the interpreter to catch up with the translation. Your reaction to my stopping you, was very evident to any observer, and involved you raising your voice, and telling me to be quiet.

### *Mutual violence*

There were six cases in which the defendant claimed that it was the victim who was the aggressor on the night of her death. In *DPP v. Sherna* (2009: paras. 18, 20), Justice David Beach accepted that the victim was controlling and domineering of the defendant, but found that the unhappy history of the relationship did not in any way justify or excuse the defendant's killing of her. In the other five cases, the judge rejected the defendant's attempt at victim-blaming. For example in *R v. Middendorp* (2010), the defensive homicide case, Justice David Byrne accepted that it 'was a tempestuous even violent relationship' (at para. 3). The jury's finding of defensive homicide also meant that they had accepted that the defendant honestly believed he was at risk of death or serious injury when the victim came at him with a knife in her hand. However Byrne J emphasised the significant disparity in size and weight between the two of them, and stated (at paras 17 and 27):

Jade Bowndes appears to have been a troubled young woman but she deserved better than the treatment you gave her on 1 September 2008.

...

Your history has been a history of violence towards a woman less strong than you. Notwithstanding your professed love for her, you subjected her to indignity. You flouted the restraints imposed by the law to protect her.

Both Byrne J in *Middendorp* (at para. 10) and Justice Ross Robson in *R v. Lubik* (2011: para. 65) commented on the disparity in size and strength between the defendant and the victim, and tended to use the language of chivalry, suggesting that these defendants should have been protecting their partners rather than attacking them. On the other hand, the woman judge who decided two of these cases, Justice Elizabeth Curtain, appeared to comment more from the victim's perspective, affirming her right to feel safe in her own home (*Drummond*, 2012: para. 27) or her right to express a desire to leave the relationship (*Ahmadi*, 2013: para. 25).

### **Positive endorsement of legislative reform**

The recent feminist judgment projects (Douglas et al., 2014a; Enright et al., 2017; Hunter et al., 2010; Stanchi et al., 2016; Women's Court of Canada, 2006), and theorising around them (e.g. Davies, 2012; Fitz-Gibbon and Maher, 2015; Hunter, 2008, 2010, 2012, 2013, 2015a, 2015b; Hunter et al., forthcoming; Rackley, 2012), have identified a variety of practices which might be identified as 'feminist' judging. One key insight from these projects is that a feminist approach is at least as, if not more, likely to be found in judicial reasoning than in the outcome of a case. In her case study of a feminist judge on the Victorian Court of Appeal, for example, Hunter (2013) found that Justice Marcia Neave rarely arrived at a different result from her male or female colleagues, however in a number of cases it was possible to discern an identifiably feminist approach in her reasons for decision. As Hunter found, '[t]his was not usually due to a different legal analysis, but rather, in the application of the law to the facts, she told the story differently or expanded the law's stock of common knowledge in a way that wrote the realities of women's lives into the legal text' (2013: 417). Secondly, while feminist judging might often involve creative or expansive interpretations of

legal texts (Hunter and Carr, 2010; Munro and Shah, 2010), it may also be found in the careful and ‘correct’ application of feminist-inspired legislative reforms, in circumstances in which judicial interpretation might otherwise undermine or fail to give full effect to the reforms. This has been observed, for example, in relation to anti-discrimination legislation (Douglas et al., 2014b: 33-34) and to legislation concerning the protection of vulnerable witnesses (Hunter, 2015a: 139). In our post-provocation sentencing dataset, we observed a similar phenomenon in cases concerning women’s autonomy and equality.

There were 21 cases which raised issues of women’s autonomy and equality, in particular, women’s right to leave an unsatisfactory relationship, or men’s attempt to control them and prevent the exercise of their autonomy. Five of the 21 cases were decided by Justice Betty King, one was decided by Justice Elizabeth Curtain, four were decided by Justice Lex Lasry, and the remaining 11 were decided by eight different male judges. King J’s judgments were notably different from those of all her judicial colleagues, in that she went much further than the other judges in making explicit comments affirming women’s rights to autonomy and equality, in line with the reforms. In *Azizi* (2010: para. 18), she noted how the defendant’s wife wished to attend English classes and mix with the community, but this was prevented by him. Adopting the victim’s perspective and a broad understanding of family violence as ‘both of an emotional and physical nature’, King J found that the defendant had ‘treated her as a person lacking in individual rights, and a person that must do what she was told to do by you’. She further commented (at para. 20) that:

It is clear that you were unable to accept that your wife had rights, which rights included the ability to leave you, if that was what she desired, to seek an

intervention order against you, if that was what she required and to be supported to live separately and apart, if that was what she required.

In *Bayram* (2011: paras 5, 10), King J asserted that '[n]ot surprisingly, your wife wanted what she was entitled to, which was at least half of the assets acquired during the marriage'; 'I therefore am prepared to act on the basis that that was the reason why your wife was killed, not that it was planned or premeditated but that you severely overreacted to her desire for a fair and equitable sharing of the joint assets'. King J made similar comments in *Neacsu* (2012: para. 43), asserting that:

Our community, parliament and the courts have repeatedly said that women are not chattels, they are not something that is owned by a man, any man. Your wife was entitled to leave you. You may not have liked that, but she had the right to do so. She did not have to tell you where she was going, or if she was pursuing a relationship with another man. You had no right to know this, and you had no right to control what she did, but particularly you had no right to kill the man with whom she had formed a relationship because of your anger at being, as it was described, 'cuckolded'. Your relationship had been well and truly over and our society has moved forward and does not excuse any person on the basis of the crime being a 'crime of passion'. Provocation has been abolished in this State, and rightly so.

In *Mulhall* (2012: para. 43), King J placed the case in the broader context of legal and extra-legal efforts to combat violence against women:

Women are entitled to have domestic relationships with people that do not result in their death simply because their partner loses their temper or has too much to drink or a combination of cannabis and alcohol reduces their inhibitions. It is inexcusable and the law will do all it can to protect women from violent domestic partners.

Murder is a serious crime it carries the maximum penalty of life imprisonment. The courts have consistently stated in relation to the crime of murder that killings of a domestic nature are no less serious than killings involving unrelated or stranger killings. Accordingly, whilst women are still dying at the hands of their domestic partners, the issue of general deterrence, in my view, remains very important.

Most recently, in *R v. Misalis* (2014: paras. 72-73), King J commented that:

She is another victim of domestic violence... The courts and our community have said that women in particular must be protected from their partners. We have white ribbon days, we have marches in our streets in support of women and their right to not be abused or have their lives taken by their partners, but still it continues.

...

She was killed in a savage and brutal manner. ... She was in her home, according to the material, going about her business in an ordinary way, caring for you. She should have been safe. She probably felt safe. Our community and our courts have consistently said, and more particularly in recent times, that women will be protected by the courts. That they have the right to feel safe from serious injury or death being caused by their partners. Your wife had the right to continue to enjoy her life, her future, her grandchildren, her retirement years, and you took all of those things from her. She is the victim in this case, not you.

King J's comments can be compared to the lack of equivalent comments made by male judges. For instance, as noted earlier, Nettle J in *Budimir* (2013: para. 56) made only a very limited and abstract comment about outdated attitudes towards the roles and rights of women; Osborn J in *Piper* (2008: para. 59) made a limited comment about the taking of a partner's life in the context of relationship breakdown; while Coghlan J. in *Penglase* (2011)

made no comment on the wife's desire to leave the relationship. As discussed above, there was also a notable lack of comment by Forrest J in *Singh*, T Forrest J in *Wentholt* and Kaye J in *Kelly* on the defendant's baseless sexual jealousy. Justice Michael Croucher in *R v. Stoneham* (2013: para. 51) did refer to women's autonomy, but treated it simplistically. In his view, although there were 'features of the relationship that suggested an attempt at controlling behaviour by Mr Stoneham ... each time the relationship broke down', the victim had successfully exercised her autonomy by ending the relationship. The fact that the defendant continued to engage in threatening behaviour towards her following the breakup and ultimately killed her were not, apparently, seen by the judge as attacks on her autonomy. Forrest J in *Baxter* (2009) made limited reference to how the deceased's 'unhappiness' with the relationship was due to the defendant's controlling and domineering behaviour (at para. 7), as well as referring to the defendant's 'growing sense that you could not control [your wife's] determination to leave' (at para. 13) and 'the fact that you could not control the unfolding of the impending separation' (at para. 33).

Only two male judges made explicit comments positively endorsing the reforms, and in both cases they appear to have been strongly influenced by King J in doing so. In *Azizi* (2013: para. 35), in sentencing the defendant after his retrial, Kaye J reiterated several of King J's comments at the first trial, and included specific reference to some of her remarks which had been endorsed by the Court of Appeal. In *Singh* (2015), Lasry J concluded his judgment (at para. 40):

What can be said about this murder as an extreme example of family violence that has not already been said in so many other cases? You murdered someone you professed to love. You murdered someone who had no capacity to defend herself

from the attack you launched against her. Despite feeling betrayed, you murdered someone who was completely entitled to end her marriage to you and form a relationship with someone else if she wished to.

This statement is unlike anything in any of Lasry J's other judgments, where he had sometimes dismissed the relevance of a history of violence (e.g. *R v. Campbell*, 2015), or stuck closely to the Court of Appeal's statements in *Felicite* (e.g. *R v. Browning*, 2015: para. 15). Moreover, it is so reminiscent of King J's phrasing that it seems fair to conclude she was the inspiration for this adoption of a feminist perspective.

## **Conclusion**

An examination of sentencing decisions by Victorian trial judges and judgments of the Victorian Court of Appeal following the abolition of the partial defence of provocation in that State reveals something of a mixed picture in relation to concerns about the reintroduction of problematic, gendered provocation narratives at the sentencing stage. In practice, it is clear that such narratives have had almost no effect on the sentencing of male defendants in domestic homicide cases. Only five out of 61 sentencing judgments accepted an argument that the defendant had killed after having lost control in response to provocation and that his sentence should be mitigated as a result. Moreover, none of the successful appeals against sentence succeeded on this basis. Two of the five cases in which the provocation argument succeeded involved the victim's alleged infidelity (*Foster, Budimir*), two involved triggering words or an argument not relating to infidelity (*Diver, Freeman*), and one involved an unknown trigger with the judge assuming provocation in the circumstances (*Brooks*). *Foster* and *Budimir* were the only two out of 21 cases raising issues

of alleged provocation by reason of infidelity or sexual jealousy in which this was held to constitute a mitigating factor in sentencing, albeit to only a minimal degree in both cases. In general, without articulating it as such, the approach of Victorian sentencing judges appears to have been consistent with Stewart and Freiberg's proposal that alleged provocation should only operate as a mitigating factor in homicide sentencing when the defendant killed in response to a justifiable sense of being wronged, and they have either found that the defendant had no real sense of being wronged, or if he did, it was not justifiable.

On the other hand, at the level of discourse, problematic provocation-type narratives continue to pervade post-provocation sentencing judgments. The Court of Appeal's failure to articulate a new provocation standard along the lines suggested by Stewart and Freiberg, and its endorsement of a more permissive standard in *Felicite* and *McPhee*, has meant that defence counsel continue to be encouraged to raise provocation arguments in sentencing submissions. While a few male judges appear to retain some commitment to the notion of provocation by female partners as an excuse for male violence, in most instances sentencing judges have dealt with the issue of provocation only in response to pleas in mitigation. In a classic case of the return of the repressed, the language of 'provocation', 'loss of control', 'crime of passion', 'emotional strain', 'volatile' relationships and uncontrollable anger continues to be used and hence to be normalised in sentencing judgments, even as the defence arguments are rejected.

The discursive effect of this repetition should not be overestimated, however. While this article has focused exclusively on the issue of provocation in sentencing, in fact, reading the sentencing judgments as a whole, that issue forms a relatively minor theme. By contrast, the dominant narratives that appear in the sentencing judgments in our database concern

lives blighted by alcohol and drug abuse, and claims that the defendant suffers from some form of psychiatric illness – a subject we propose to explore in a future article.

At the same time, it is possible to discern in the sentencing judgments the emergence of new discourses which contest traditional provocation narratives and present alternative accounts of women's lives and gender relations. This has occurred when judges in their sentencing remarks have gone beyond simple rejection of provocation arguments put by defendants and have positively denounced men's violence towards their intimate partners or sexual rivals, condemned men's extreme reactions to their partners' or former partners' relationships with other men, held men to account for their failure to control their anger and rage, and strongly asserted women's rights to autonomy, equality and protection from male violence. It is notable that women judges have been more likely to do this than male judges, and further, that among the women judges, Justice Betty King stands out as the most vocal supporter of the homicide reforms, with her sentencing judgments providing a strong feminist counter-narrative to the victim-blaming narratives of pre-abolition provocation case law.

This pattern is consistent with previous studies which suggest that while women judges often bring their gendered life experiences to the bench, not all women judges are or are willing to be feminists (see Hunter, 2015a). Nevertheless, what we see in some of the post-provocation sentencing judgments is the creation of alternative accounts of gender within law – something which earlier critiques of feminist law reform efforts may not have predicted, and which provides a more positive prognosis for such efforts. Indeed, on the evidence of its first 10 years, it appears that the abolition of the partial defence of provocation in Victoria has largely met its feminist objectives. Men are no longer 'getting away with murder'. Sentences generally reflect the seriousness of domestic homicides and

are only rarely mitigated by reference to claims of provocation. While problematic, victim-blaming narratives still persist in sentencing discourse, they are almost always rejected in sentencing outcomes, and distinctly feminist counter-narratives have emerged to contest this space.

### **Acknowledgements**

We would like to thank the anonymous reviewers for their helpful comments on an earlier version of the article. This research received no specific grant from any funding agency in the public, commercial or not-for-profit sectors.

### **References**

- Bandalli S (1995) Provocation - a cautionary note. *Journal of Law and Society* 22: 398-409.
- Bohours B and Daly K (2007) Youth sex offenders in court. *Punishment and Society* 9(4): 371-394.
- Bradfield R (2003) Contemporary comment: The demise of provocation in Tasmania. *Criminal Law Journal* 27: 322-324.
- Brown W (1995) *States of Injury: Power and Freedom in Late Modernity*. Princeton, NJ: Princeton University Press.
- Burton M (2003) Case note. Sentencing domestic homicide upon provocation: Still 'getting away with murder'. *Feminist Legal Studies* 11: 279-289.
- Capper S and Crooks M (2010) New homicide laws have proved indefensible. *The Sunday Age*, 23 May, 21.
- Crofts T and Tyson D (2014) Homicide law reform in Australia: Improving access of women who kill their abusers to defences. *Monash University Law Review* 39(3): 864-893.

- Crofts T and Loughnan A (2014) Provocation, NSW style: Reform of the defence of provocation in NSW. *Criminal Law Review* 2: 109-125.
- Coss G (2006) The defence of provocation: An acrimonious divorce from reality. *Current Issues in Criminal Justice* 29: 133-138.
- Davies M (2012) The law becomes us: Rediscovering judgment. *Feminist Legal Studies* 20: 167-181.
- Department of Justice, Victoria (2010) *Defensive homicide: Review of the offence of defensive homicide: Discussion paper. Criminal law—Justice statement*. Melbourne: DOJ Victoria.
- Department of Justice, Victoria (2013) *Proposals for legislative reform: Consultation paper—Criminal law review*. Melbourne: DOJ Victoria.
- Douglas H, Bartlett F, Luker T and Hunter R (eds) (2014a) *Australian Feminist Judgments: Righting and Rewriting Law*. Oxford: Hart Publishing.
- Douglas H, Bartlett F, Luker T and Hunter R (2014b) Reflections on rewriting the law. In: Douglas H, Bartlett F, Luker T and Hunter R (eds) *Feminist Judgments: Righting and Rewriting Law*. Oxford: Hart Publishing, pp. 19-36.
- Easteal PW (1993a) *Killing the Beloved: Homicide Between Adult Sexual Intimates*. Canberra: Australian Institute of Criminology.
- Easteal PW (1993b) Sentencing those who kill their sexual intimates: An Australian study. *International Journal of the Sociology of Law* 21: 189-218.
- Edwards SSM (1987) 'Provoking her own demise': From common assault to homicide. In: Hanmer J and Maynard M (eds) *Women, Violence and Social Control: Essays in Social Theory*. Basingstoke: Palgrave Macmillan, pp. 152-168.

- Enright M, McCandless J and O'Donoghue A (eds) (2017) *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity*. Oxford: Hart Publishing.
- Fitz-Gibbon K (2014) *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective*. Basingstoke: Palgrave Macmillan.
- Fitz-Gibbon K and Maher JM (2015) Feminist challenges to the constraints of law: Donning uncomfortable robes? *Feminist Legal Studies* 23: 253-271.
- Fitz-Gibbon K and Pickering S (2012) Homicide law reform in Victoria, Australia: From provocation to defensive homicide and beyond. *British Journal of Criminology* 52(1): 159-180.
- Forell C (2006) Gender equality, social values and provocation law in the United States, Canada and Australia. *Journal of Gender, Social Policy and the Law* 14(1): 27-71.
- Freiberg A (2014) (3rd edn) *Fox and Freiberg's Sentencing: State and Federal Law in Victoria*. Sydney: Thompson Reuters.
- Freiberg A, Gelb K and Stewart F (2015) Homicide law reform, provocation and sentencing. In: Freiberg A and Fitz-Gibbon K (eds) *Homicide Law Reform in Victoria: Prospect and Retrospect*. Sydney: Federation Press, pp. 57-76.
- Friedman L (1985) Legal culture and the welfare state. In: Teubner G (ed) *Dilemmas of Law in the Welfare State*. Berlin: Walter de Gruyter, pp. 13-27.
- Frug MJ (1992) *Postmodern Legal Feminism*. New York: Routledge.
- Hall G, Whittle M and Field C (2015) Themes in judges' sentencing remarks for male and female domestic murderers. *Psychiatry, Psychology and Law* 22: 1-18.
- Hall MA and Wright RF (2008) Systematic content analysis of judicial opinions. *California Law Review* 96(1): 63-122.
- Horder J (1992) *Provocation and Responsibility*. Oxford: Clarendon Press.

- Horder J and Fitz-Gibbon K (2015) When sexual infidelity triggers murder: Examining the impact of homicide law reform on judicial attitudes in sentencing. *Cambridge Law Journal* 74: 307-328.
- Howe A (1994) Provoking comment: The question of gender bias in the provocation defence. In: Grieve N and Burns A (eds) *Australian Women: Contemporary Feminist Thought*. Melbourne: Oxford University Press, pp. 225-235.
- Howe A (1997) More folk provoke their own demise: Homophobic violence and sexed excuses - Rejoining the provocation law debate, courtesy of the homosexual advance defence. *Sydney Law Review* 19: 336-365.
- Howe A (2000) Homosexual advances in law: Murderous excuse, pluralized ignorance and the privilege of unknowing. In: Stychin C and Herman D (eds) *Sexuality in the Legal Arena*. London: Althone, pp. 84-99.
- Howe A (2002) Provoking polemic - Provoked killings and the ethical paradoxes of the postmodern feminist condition. *Feminist Legal Studies* 10: 39-64.
- Howe A (2004) Provocation in crisis - Law's passion at the crossroads? New directions for feminist strategists. *Australian Feminist Law Journal* 21: 53-77.
- Howe A (2010) Another name for murder. *Sydney Morning Herald*, 24 May. Available at: <http://www.smh.com.au/opinion/society-and-culture/another-name-for-murder-20100523-w3w0.html> (accessed 28 June 2015).
- Howe A (2013) 'Red mist' homicide, sexual infidelity and the English law of murder (glossing *Titus Andronicus*). *Legal Studies* 33: 407-430.
- Howe A (2014) Fatal love. *Griffith Journal of Law and Human Dignity* 2(1): 1-24.

- Hunter C and Carr H (2010) *YL v Birmingham City Council and others*. In: Hunter R, McGlynn C and Rackley E (eds) *Feminist Judgments: From Theory to Practice*. Oxford: Hart Publishing, pp. 318-328.
- Hunter R (2006) Narratives of domestic violence. *Sydney Law Review* 28: 733–776.
- Hunter R (2008) *Domestic Violence Law Reform and Women's Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings*. Cambria Press: New York.
- Hunter R (2010) An account of feminist judging. In: Hunter R, McGlynn C and Rackley E (eds) *Feminist Judgments: From Theory to Practice*. Oxford: Hart Publishing, pp. 30-43.
- Hunter R (2012) The power of feminist judgments? *Feminist Legal Studies* 20: 135-148.
- Hunter R (2013) Justice Marcia Neave: Case study of a feminist judge. In Schultz U and Shaw G (eds) *Gender and Judging*. Oxford: Hart Publishing, pp. 399-418.
- Hunter R (2015a) More than just a different face? Judicial diversity and decision-making. *Current Legal Problems* 68: 119-141.
- Hunter R (2015b) The feminist judgments project: Legal fiction as critique and praxis. *International Critical Thought* 5: 501-508.
- Hunter R, McGlynn C and Rackley E (eds) (2010) *Feminist Judgments: From Theory to Practice*. Oxford: Hart Publishing.
- Hunter R, Roach Anleu S and Mack K (forthcoming) Judging in lower courts: Conventional, procedural, therapeutic and feminist approaches. *International Journal of Law in Context*.
- Jhappan R (1998) The equality pit or the rehabilitation of justice. *Canadian Journal of Women and the Law* 10: 60-107.
- Judicial College of Victoria (2014) *Victorian Sentencing Manual*. Melbourne: Judicial College of Victoria.

Kirby M (1999) Judging: Reflections on the moment of decision. *Australian Bar Review* 18: 4-22.

Kirkwood D, McKenzie M and Tyson D (2013) Justice or judgement? The impact of Victorian homicide law reforms on responses to women who kill intimate partners. Domestic Violence Resource Centre Victoria, Discussion Paper 39: 3-53. Available at:

[http://www.dvrcv.org.au/sites/default/files/DVRCV-DiscussionPaper-9-2013-web\\_0.pdf](http://www.dvrcv.org.au/sites/default/files/DVRCV-DiscussionPaper-9-2013-web_0.pdf)  
(accessed 29 June 2015).

MacKenzie G (2005) *How Judges Sentence*. Sydney: Federation Press.

MacMartin C and Wood L (2005) Sexual motives and sentencing: Judicial discourse in cases of child sexual abuse. *Journal of Language & Social Psychology* 24(2): 139-159.

Morgan J (1997) Provocation law and facts: Dead women tell no tales, tales are told about them. *Melbourne University Law Review* 21: 237-276.

Morgan J (2002) *Who kills whom and why: Looking beyond legal categories*. Melbourne: Victorian Law Reform Commission.

Munro V and Shah S (2010) *R v Dhaliwal*. In: Hunter R, McGlynn C and Rackley E (eds), *Feminist Judgments: From Theory to Practice*. Oxford: Hart Publishing.

New South Wales Select Committee on the Partial Defence of Provocation (Legislative Council) (2013) *The partial defence of provocation, Final Report*. Available at:

<http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/61173C421853420AC A257B5500838B2E> (accessed 28 June 2015).

Nourse V (1997) Passion's progress: Modern law reform and the provocation defense. *Yale Law Journal* 106: 1325-1408.

- Rackley E (2012) Why feminist legal scholars should write judgments: Reflections on the feminist judgments project in England and Wales. *Canadian Journal of Women and the Law* 24: 389-413.
- Ramsey CB (2010) Provoking change: Comparative insights on feminist homicide law reform. *Journal of Criminal Law & Criminology* 100(1): 33–108.
- Rhode D (1997) *Speaking of Sex: The Denial of Gender Inequality*. Cambridge, MA: Harvard University Press.
- Römkens R (2001) Law as a Trojan horse: Unintended consequences of rights-based interventions to support battered women. *Yale Journal of Law and Feminism* 13: 265-290.
- Sandland R (1995) Between ‘truth’ and ‘difference’: Poststructuralism, law and the power of feminism. *Feminist Legal Studies* 3: 3-47.
- Smart C (1989) *Feminism and the Power of Law*. London: Routledge.
- Smart C (1990) Law’s truth, women’s experience. In: Graycar R (ed) *Dissenting Opinions: Feminist Explorations in Law and Society*. Sydney: Allen & Unwin, pp. 1-20.
- Smart C (1995) *Law, Crime and Sexuality: Essays in Feminism*. London: Sage.
- Stanchi KM, Berger LL and Crawford BJ (eds) (2016) *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*. Cambridge: Cambridge University Press.
- Stanko E (1985) *Intimate Intrusions: Women’s Experience of Male Violence*. London: Unwin Hyman.
- Stewart F and Freiberg A (2008) Provocation in sentencing: A culpability-based framework. *Current Issues in Criminal Justice* 19(3): 283-309.
- Stewart F and Freiberg A (2009) *Provocation in Sentencing* (2<sup>nd</sup> ed). Melbourne: Sentencing Advisory Council.

- Thornton M (1991) Feminism and the contradictions of law reform. *International Journal of the Sociology of Law* 19: 453-474.
- Tyson D (1999) 'Asking for it': An anatomy of provocation. *Australian Feminist Law Journal* 13: 66-86.
- Tyson D (2011) Victoria's new homicide laws: Provocative reforms or more stories of women 'asking for it'? *Current Issues in Criminal Justice* 23(2): 203-233.
- Tyson D (2013) *Sex, Culpability and the Defence of Provocation*. London: Routledge.
- Tyson D, Kirkwood D, McKenzie M and Naylor B (2015) The effects of the 2005 reforms on legal responses to women who kill intimate partners. In: Fitz-Gibbon K and Freiberg A (eds) *Homicide Law Reform in Victoria: Prospect and Retrospect*. Sydney: Federation Press, pp. 76-94.
- Tyson D, Kirkwood D and McKenzie M (2016) Family violence in domestic homicides: A case study of women who killed intimate partners post-legislative reform in Victoria, Australia. *Violence Against Women*. Epub ahead of print 18 May. DOI 10.1177/1077801216647796.
- Ulbrick M, Flynn A and Tyson D (2016) Abolishing defensive homicide: A step forward for populist punitiveness at the expense of mentally impaired offenders. *Melbourne University Law Review* 40(1): forthcoming.
- Victorian Law Reform Commission (2002) *Defences to homicide: Issues paper*. Melbourne: Victorian Law Reform Commission.
- Victorian Law Reform Commission (2003) *Defences to homicide: Options paper*. Melbourne: Victorian Law Reform Commission.
- Victorian Law Reform Commission (2004) *Defences to homicide: Final report*. Melbourne: Victorian Law Reform Commission.

Women's Court of Canada (2006) Special issue: Rewriting equality. *Canadian Journal of Women and the Law* 18: 1-371.

### Cases cited

*Barrett v. R* [2010] VSCA 133

*DPP v. Azizi* [2013] VSC 16

*DPP v. Jagroop* [2008] VSC 25

*DPP v. Lam* [2007] VSC 307

*DPP v. Kelly* [2012] VSC 398

*DPP v. Sherna* [2009] VSC 526

*Felicite v. R* [2011] VSCA 274

*Masciantonio v. R* [1995] 183 CLR 58

*McPhee v. R* [2014] VSCA 156

*R v. Aboujaber* [1997] VSC 470

*R v. Ahmadi* [2013] VSC 293

*R v. Azizi* [2010] VSC 112

*R v. Baxter* [2009] VSC 180

*R v. Bayram* [2011] VSC 10

*R v. Brooks* [2008] VSC 70

*R v. Browning* [2015] VSC 556

*R v. Budimir* [2013] VSC 149

*R v. Campbell* [2015] VSC 181

*R v. Carolus* [2011] VSC 583

*R v. Chalmers* [2009] VSC 251

*R v. Cook* [2015] VSC 406

*R v. Daing* [2015] VSC 440

*R v. Diver* [2008] VSC 399

*R v. Drummond* [2012] VSC 505

*R v. Ellis* [2008] VSC 372

*R v. Felicite* [2010] VSC 245

*R v. Foley* [1999] VSC 278

*R v. Foster* [2009] VSC 124

*R v. Freeman* [2015] VSC 506

*R v. Kelly* [2000] VSCA 164

*R v. Kelly* [2012] VSC 398

*R v. Lubik* [2011] VSC 137

*R v. Mahoney* [2009] VSC 249

*R v. McPhee* [2013] VSC 581

*R v. Middendorp* [2010] VSC 202

*R v. Misalis* [2014] VSC 617

*R v. Mocenigo* [2012] VSC 599

*R v. Mulhall* [2012] VSC 471

*R v. Neacsu* [2012] VSC 388

*R v. Okutgen* (1982) 8 A Crim R 262

*R v. Pennisi* [2008] VSC 498

*R v. Piper* [2008] VSC 569

*R v. Singh* [2010] VSC 299

*R v. Singh* [2015] VSC 738

*R v. Sok* [2012] VSC 229

*R v. Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256

*R v. Tran* [2008] VSCA 80

*R v. Weaven* [2011]

*R v. Wentholt* [2013] VSC 540

*R v. West* [2013] VSC 737

*R v. Wilson* [2011] VSC 123

*Tyne v. Tasmania* (2005) 15 Tas R 221

**Table 1 - Cases of murder, manslaughter and defensive homicide by men who killed women, 2005-2015 (n = 51)**

Case citation and Judge	Plea or Trial	Relationship between person who killed and deceased	Sentence Total/ Non-parole period
<i>DPP v. Lam</i> [2007] VSC 307  Justice Bernard Teague	Plea-murder	Married	18 yrs/13 yrs
<i>R v. Brooks</i> [2008] VSC 70  Justice Paul Coghlan	Trial-murder-FG  murder	Cohabiting	17 yrs/13 yrs
<i>R v. Blaauw</i> [2008] VSC 129  Justice John Forrest	Plea-murder	Married	11 yrs/7 yrs <sup>5</sup>
<i>R v. Ellis</i> [2008] VSC 372  Justice Paul Coghlan	Trial-murder-FG-  murder	Separated	21 yrs/17 yrs

<i>R v. Diver</i> [2008] VSC 399  Justice Paul Coghlan	Plea-murder	Cohabiting	17 yrs/14 yrs
<i>R v. Piper</i> [2008] VSC 569  Justice Robert Osborn	Plea-murder (plus 2 counts of armed robbery)	Separated	19 yrs/15 yrs
<i>R v. Foster</i> [2009] VSC 124  Justice Robert Osborn	Plea-murder	Cohabiting	14 yrs/10 yrs
<i>R v. Baxter</i> [2009] VSC 180  Justice John Forrest	Trial-murder-FG-murder	Married	20 yrs/16 yrs
<i>R v. Chalmers</i> [2009] VSC 251  Justice Robert Osborn	Trial-murder-FG-murder	Cohabiting	22 yrs/18 yrs
<i>R v. Robinson</i> [2010] VSC 10  Justice Simon Whelan	Trial-murder-FG-murder	Separated	Life/no parole
<i>R v. Dutton</i> [2010] VSC 107  Justice Betty King	Plea-murder	Work colleagues having an affair	16 yrs/12 yrs
<i>R v. Azizi</i> [2010] VSC 112  Justice Betty King  <i>Azizi v. R</i> [2012] VSCA 205	Trial-murder-FG-murder  Appeal vs conviction upheld	Married	22 yrs/ 17.6 yrs

<i>R v. Felicite</i> [2010] VSC 245  Justice John Forrest  <i>Felicite v. R</i> [2011] VSCA 274	Plea-murder  Appeal vs sentence dismissed	Married	19 yrs/16 yrs
<i>R v. Singh</i> [2010] VSC 299  Justice John Forrest	Plea-murder	Married	17 yrs/13.6 yrs
<i>R v. Caruso</i> [2010] VSC 354  Justice Betty King  <i>Caruso v. R</i> [2012] VSCA 138	Trial-murder-FG-murder  Appeal vs conviction dismissed	Married	18 yrs/13 yrs
<i>R v. Bayram</i> [2011] VSC 10  Justice Betty King  <i>Bayram v R</i> [2012] VSCA 6	Plea-murder  Appeal vs sentence upheld	Married	19 yrs/16 yrs  16.6 yrs/ 13.6 yrs
<i>R v. Mamour</i> [2011] VSC 113  Justice Paul Coghlan	Plea-murder	Married	18 yrs/14 yrs
<i>R v. Wilson (Michael)</i> [2011] VSC 123  Justice Betty King	Trial-murder-FG-murder	Cohabiting	22 yrs/18 yrs
<i>R v. Penglase</i> [2011] VSC 356	Plea-murder	Married	22 yrs/18 yrs

Justice Paul Coghlan			
<i>R v. Weaven</i> [2011] VSC 508  Justice Mark Weinberg	Trial-murder-FG-murder	Cohabiting	22 yrs/16 yrs
<i>R v. Hopkins</i> [2011] VSC 517  Justice Betty King  <i>Hopkins v. R</i> [2015] VSCA 174	Plea-murder  Application for extension of time for leave to appeal vs sentence refused	Cohabiting	Life/30 yrs
<i>R v. Caroulus</i> [2011] VSC 583  Justice Elizabeth Hollingworth	Plea-murder	Cohabiting	21 yrs/17 yrs
<i>R v. Mulhall</i> [2012] VSC 471  Justice Betty King	Plea-murder	Cohabiting	19 yrs/16 yrs
<i>R v. Mocenigo</i> [2012] VSC 599R  Justice Lex Lasry  <i>Mocenigo v. R</i> [2013] VSCA 231	Trial-murder-FG-murder  Verdict of murder quashed; manslaughter substituted	Cohabiting	22 yrs/18 yrs  11 yrs/8 yrs
<i>DPP v. Azizi</i> [2013] VSC 16  Justice Stephen Kaye	Retrial-murder-FG-murder	Married	20yrs/16 yrs

<i>DPP v. Grant</i> [2013] VSC 53  Justice Robert Osborn	Plea-murder	Sexual relationship	20 yrs/16 yrs
<i>R v. Delich</i> [2013] VSC 309  Justice Lex Lasry  <i>Delich v. R</i> [2014] VSCA 66	Plea-murder  Appeal vs sentence dismissed	Divorced	20 yrs/16 yrs
<i>R v. McPhee</i> [2013] VSC 581  Justice Elizabeth Curtain  <i>McPhee v. R</i> [2014] VSCA 156	Plea-murder  Appeal vs sentence upheld	Married	20 yrs/16 yrs  18 yrs/13 yrs
<i>R v. Stoneham</i> [2013] VSC 661  Justice Michael Croucher	Plea-murder	Former sexual relationship	19 yrs/14.6 yrs
<i>R v. Meade</i> [2013] VSC 682  Justce Mark Weinberg  <i>Meade v. R; DPP v. Meade</i> [2015] VSCA 171	Trial-murder-FG  murder  D's appeal vs conviction; DPP's appeal vs sentence:  both dismissed	Divorced	23 yrs/19 yrs
<i>R v. Misalis</i> [2014] VSC 617  Justice Betty King	Trial-murder-FG  murder	Married	22 yrs
<i>R v. Klaussner</i> [2015] VSC 296	Plea-murder	Cohabiting	19 yrs/15 yrs

Justice Elizabeth Hollingworth			
<i>R v. Cook</i> [2015] VSC 406 Justice James Elliot	Trial-murder-FG-murder	Cohabiting	21.6 yrs/17.6 yrs
<i>R v. Daing</i> [2015] VSC 440 Justice Terence Forrest	Plea-murder	Sexual relationship	18.6 yrs/14.6 yrs
<i>R v. Freeman</i> [2015] VSC 506 Justice Michael Croucher	Trial-murder-FG-murder	Sexual relationship	19 yrs/15 yrs
<i>R v. Browning</i> [2015] VSC 556 Justice Lex Lasry	Trial-murder-FG-murder	Married	18 yrs/14 yrs
<i>R v. Singh</i> [2015] VSC 738 Justice Lex Lasry	Plea-murder	Married	22 yrs/17 yrs
<i>DPP v. Pennisi</i> [2008] VSC 498 Justice David Harper  <i>DPP v. Pennisi</i> [2009] VSCA 322	Trial-murder-FG-manslaughter by unlawful and dangerous act (UDA)  DPP appeal vs sentence dismissed	Cohabiting	10 yrs/7 yrs
<i>DPP v. Sherna</i> [2009] VSC 4 Justice David Beach	Trial-murder-FG-mans UDA	Cohabiting	14 yrs/10 yrs

<i>Sherna v. R</i> [2011] VSCA 242	Appeal vs sentence dismissed		
<i>R v. Reid</i> [2009] VSC 326  Justice Simon Whelan  <i>Reid v. R</i> [2010] VSCA 234	Trial-murder-FG- manslaughter by criminal negligence (CN)  Application for leave to appeal vs conviction and sentence refused	Cohabiting	5 yrs/3 yrs
<i>R v. Lubik</i> [2011] VSC 137  Justice Ross Robson	Trial-murder-FG- mans UDA	Married	9.6 yrs/6.6 yrs
<i>R v. Lai</i> [2015] VSC 346  Justice Michael Croucher	Trial-murder-FG- mans CN	Sexual relationship	9.5 yrs/6.11 yrs
<i>R v. Middendorp</i> [2010] VSC 202  Justice David Byrne  <i>Middendorp v. R</i> [2012] VSCA 47	Trial-murder-FG- defensive homicide  Application for leave to appeal vs conviction refused; appeal vs sentence dismissed	Cohabiting	12 yrs/8 yrs
<i>R v. Jagroop</i> [2008] VSC 25	Plea-mans CN	Married	10 yrs/7 yrs

Justice Bernard Teague  <i>R v. Jagroop</i> [2009] VSCA 46	Appeal vs sentence upheld		8 yrs/5.5 yrs
Justice John Forrest  <i>R v. Andrew</i> [2008] VSC 138	Plea-mans UDA	Cohabiting	10 yrs/7 yrs
Justice Elizabeth Hollingworth  <i>DPP v. Mahoney</i> [2008] VSC 249	Plea-mans UDA	Cohabiting	9 yrs/6 yrs
Justice Phillip Cummins  <i>DPP v. Rolfe</i> [2008] VSC 528	Plea-manslaughter by suicide pact	Married	2 yrs wholly suspended
Justice Elizabeth Curtain  <i>R v. Drummond</i> [2012] VSC 505	Plea-mans UDA	Cohabiting	10 yrs/7 yrs
Justice Elizabeth Curtain  <i>R v. Ahmadi</i> [2013] VSC 293	Plea-mans UDA	Married	11 yrs/7 yrs
Justice Michael Croucher  <i>DPP v Torun</i> [2015] VSCA 15	Plea-mans UDA  DPP's appeal vs sentence dismissed	Cohabiting	8 yrs/5 yrs
<i>R v. Campbell</i> [2015] VSC181	Plea-arson causing death	Ex-wife and her new partner	13 yrs/10 yrs

Justice Lex Lasry			
-------------------	--	--	--

**Table 2 - Cases of men who killed men (sexual jealousy/male rivalry), 2005-2015 (n = 10)**

Case citation and Judge	Plea or Trial	Relationship between person who killed and deceased	Sentence Max/min
<i>R v. Sok</i> [2012] VSC 229 Justice David Beach	Plea-murder	Friend of D's girlfriend.	18 yrs/14 yrs
<i>R v. Budimir</i> [2013] VSC 149 Justice Geoffrey Nettle	Trial-murder-FG-murder	D's estranged wife's new partner	18 yrs/16 yrs
<i>R v. Neacsu</i> [2013] VSC 388 Justice Betty King	Plea-murder	D's estranged wife's new partner	17.6 yrs/14.6 yrs
<i>R v. Wentholz</i> [2013] VSC 540 Justice Terence Forrest	Plea-reckless murder (+ one count of recklessly causing serious injury)	Deceased appeared interested in D's girlfriend	18.6 yrs/15 yrs
<i>R v. West</i> [2013] VSC 737 Justice Elizabeth Curtain	Plea-murder	Friend of D's ex-girlfriend	20 yrs/16 yrs
<i>DPP v. Borthwick</i> [2010] VSC 613 Justice Katherine Williams	Trial-murder-FG mans CN	D's ex- girlfriend's new partner	7.6 yrs/5 yrs
<i>DPP v. Kelly</i> [2012] VSC 398	Plea-mans UDA	Friend of D's girlfriend	7 yrs/5 yrs

Justice Stephen Kaye			
<i>R v. Sharp</i> [2015] VSC 116 Justice Phillip Priest	Plea-mans UDA	Boyfriend of woman flirting with D	8 yrs/4 yrs
<i>DPP v. Townsend</i> [2015] VSC 456 Justice Stephen Kaye	Plea-mans UDA	Friend of D's girlfriend	7 yrs/5 yrs
<i>R v. Edwards</i> [2008] VSC 297 Justice Simon Whelan	Plea-defensive homicide	D's ex-girlfriend's new partner	10 yrs/8 yrs

---

### Notes

<sup>1</sup> The common law test for provocation is stated in *Masciantonio v. R* (1995) 183 CLR 58 [67].

<sup>2</sup> During the period of our study there were 13 cases in Victoria in which women were convicted of killing intimate partners and one case in which a woman was convicted of killing a female sexual rival. This was less than one quarter of the number of male domestic homicide cases.

<sup>3</sup> While there was much public dissatisfaction surrounding the way in which the offence of defensive homicide operated, '[m]uch of this criticism [was] in response to the number of men who [were] convicted of defensive homicide' for killing other men (Crofts and Tyson, 2014: 887; see also Department of Justice 2010, 2013; Ulbrick et al., 2016).

<sup>4</sup> At common law, mere words without more could never constitute provocation sufficient to reduce murder to manslaughter: see *Holmes v. DPP* [1946] AC 588; *Moffa v. R* [1977] HCA 14.

---

<sup>5</sup> The much lighter sentence imposed in this case was due to the fact that it was a ‘mercy killing’.