Intimate Partner Homicide: Themes in Judges' Sentencing Remarks

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Dr Courtney Field for his supervision in the early stages of my doctorate;

my family, especially Chris, who willingly took this journey with me.
Declaration

I declare that this thesis is my own account of my research and contains as its main content work which has not previously been submitted for a degree at any tertiary education institution.

Signed:

Marion Whittle
Declaration concerning contribution of others

I declare that all original research for this study as reported in this thesis was undertaken by me during my enrolment for the Degree of Doctor of Philosophy.

In addition, I claim the majority of authorship for each article presented in this thesis. In doing so, I declare that the co-authors as recorded below contributed to the relevant article by way of critically analysing and commenting on that article, as necessary, so as to contribute to its interpretation. More specifically, Associate Professor Hall contributed his expertise in relation to the analysis and reporting of the quantitative data presented in Chapter 5. Each author provided their final approval of the relevant article prior to journal submission.

This thesis conforms to the Graduate Research Degrees Thesis Style Guideline: Thesis by Publications/Manuscripts as published by Murdoch University Graduate Research Office; and the Australian Code for the Responsible Conduct of Research (2007). The Murdoch University ethics project number for this thesis is 2014/180.

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Preface

The majority of the work in this thesis is presented as a series of five stand-alone articles currently under review with academic journals which have a double blind peer review system. As the PhD candidate I conducted all of the original research and was the principal contributor to each article, appearing as the first named author on each respectively.

Regarding thesis content and style, this thesis does not follow the traditional literature review→findings→discussion structure, as this did not fit with how the actual research developed. Rather, following on from a critical introduction to the work, and discussion of the methodology adopted, chapters 3 to 6 inclusive contain an article which discusses one of each of the four major themes emanating from the research, in the context of a related literature review. Chapter 7 provides a concluding article. In each case, the article forms the body of the chapter, which is rendered complete with a brief introduction and conclusion to the chapter topic. By exception, Chapter 3 begins with a literature review on the theme of provocation, as the emergence of this theme within the data provided me with a unique opportunity to review the law in this area.

By necessity, a discussion on the research methodology is present in each article, and in this regard, a degree of repetition throughout the thesis is to be expected.

In order to provide consistency in font and spacing throughout the main body of the thesis, a Microsoft Word version of each article as it will likely appear in the chosen journal is presented. In each case, the journal house style has been retained,
including article length, as well as the required referencing style of that publication. This, I believe, lends authenticity to the work. In all other respects the referencing style adopted throughout the thesis follows the *Australian Guide to Legal Citation* (3rd edition).¹

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¹ Transcripts of sentencing remarks follow the medium neutral citation allocated by the court itself.
Abstract

The aim of this study was to undertake a grounded theory analysis of judges’ sentencing remarks for males and females sentenced for intimate partner homicide in Australia between July 2009 and June 2014. The purpose of the study was to compare the themes present when males were sentenced with themes present when females were sentenced.

Four key themes emerged from the data: provocation; domestic violence; the sentencing of Aboriginal offenders; and the use of alcohol and/or drugs as a contributing factor to the offence.

Broadly speaking the data relating to provocation reflect that the defence of provocation continues to be gender biased; favouring males as the main beneficiaries. Pertaining to the theme of domestic violence, the data indicate that judges underestimate the significance of domestic violence and continue to obscure male offender responsibility and deliberate acts of violence towards women.

Regarding the sentencing of Aboriginal offenders, the data show that Aboriginal males predominately kill their partners in a drunken, violent and at times frenzied attack, compared to Aboriginal females who kill their partners against a background of prolonged domestic violence victimisation. Also, in the context of the whole study, a quantitative analysis of the data found that in terms of sentencing penalties, Aboriginal males were, in some ways, sanctioned less harshly than non-Aboriginal males.
Concerning the final key theme, the data show that despite the seriousness of the offence, judges repeatedly fail to clearly attribute a sufficient degree of responsibility to male offenders for their voluntary consumption of alcohol and drugs; and their subsequent violent behaviour. Also, more blameworthiness is attributed to non-Aboriginal female offenders, who, when in an alcohol or drug induced state are judicially considered incapable of taking control of their lives.
Contents

Acknowledgments ........................................................................................................... i
Declaration ...................................................................................................................... ii
Declaration of contribution of others ..................................................................... iii
Preface .............................................................................................................................. v
Abstract ........................................................................................................................... vii
Contents ......................................................................................................................... ix

Introduction

Background ...................................................................................................................... 1
Aim and purpose of this thesis .................................................................................. 2
Methodology: An overview ....................................................................................... 5
Limitations ....................................................................................................................... 6
Thesis structure .............................................................................................................. 7

Chapter One

1. HOW JUDGES APPROACH THE SENTENCING TASK ...................................... 10

1.1 Introduction ............................................................................................................ 11

1.2 The purposes of sentencing ................................................................................ 11

1.3 Sentencing principles – a brief history .............................................................. 12

1.4 Judicial discretion ............................................................................................... 13

1.5 The sentencing process – Instinctive synthesis ............................................. 14

1.5.1 Instinctive synthesis and the rule of law ...................................................... 16

1.6 Consistency in sentencing: A lack of empirical research in Australia .......... 17

1.7 Prior research on how judges approach the sentencing task ....................... 19

1.8 Applying grounded theory methodology to legal research ......................... 20

1.9 A grounded theory approach to analysing judges’ sentencing remarks ...... 22

1.10 Conclusion ............................................................................................................ 25
Chapter Two

2 QUALITATIVE ANALYSIS OF SENTENCING REMARKS ............ 26

2.1 Introduction ............................................................................................................. 27

2.2 Grounded theory – A qualitative research method ........................................... 27

2.2.1 The two schools of grounded theory ......................................................... 29

2.3 Data Collection ........................................................................................................ 31

2.3.1 Public access to judges’ sentencing remarks ........................................... 31

2.3.2 Access to judges’ sentencing remarks for the purpose of this research .......... 31

2.3.3 Requesting the research data ........................................................................ 34

2.3.4 Obtaining the research data ........................................................................... 34

2.3.4.1 Research data response from the Supreme Court (NT) ......................... 35

2.3.4.2 Research data response from the Supreme Court (Tas) ......................... 35

2.3.4.3 Research data response from the Supreme Court (ACT) ......................... 35

2.3.4.4 Research data response from the Supreme Court (Vic) ......................... 36

2.3.4.5 Research data response from the Supreme Court (SA) ......................... 37

2.3.4.6 Research data response from the Supreme Court (WA) ......................... 37

2.3.4.7 Research data response from the Supreme Court (NSW) ....................... 37
2.3.4.8 Research data response from the Supreme Court (Qld) .......................................................... 38

2.3.5 Conclusion .................................................................................................................. 38

2.4 Data analysis ................................................................................................................. 39

2.4.1 Coding the data ......................................................................................................... 39

2.4.2 Open coding of the data ......................................................................................... 40

2.4.2.1 Development of the codebook ......................................................................... 41

2.4.2.2 Constant comparison of the data ..................................................................... 42

2.4.2.3 Memoing ........................................................................................................... 43

2.4.3 Selective coding ....................................................................................................... 44

2.4.4 Theoretical saturation .............................................................................................. 45

2.4.5 Theoretical coding .................................................................................................. 46

2.4.6 Conclusion .............................................................................................................. 47

2.5 The literature review ...................................................................................................... 47

2.5.1 The role of the literature review in grounded theory ............................................. 47

2.5.2 The literature review in this study ......................................................................... 48

2.6 Quality issues in qualitative research .......................................................................... 49

2.7 Criticisms of a grounded theory approach .................................................................. 50

Chapter Three

3. THEME ONE - PROVOCATION .................................................................................... 52

3.1 Introduction ................................................................................................................. 53

3.2 The doctrine of provocation – An overview .............................................................. 53

3.2.1 The demise of provocation? .................................................................................. 57

3.2.2 The gendered use of the defence ......................................................................... 59
3.2.3 The role of provocation in reducing an offender’s culpability .... 61
3.2.4 The defence of provocation: Abolish or reform? ...................... 63

3.3 Article – Intimate Partner Homicide: The Theme of Provocation in Judges’ Sentencing Remarks in Australia ................................................................. 68
3.4 Conclusion ......................................................................................... 97

Chapter Four

4. THEME TWO – DOMESTIC VIOLENCE .............................................. 98
4.1 Introduction .................................................................................... 99
4.2 Article – Domestic and Homicidal Violence between Intimate Partners: Themes In Judges’ Sentencing Remarks in Australia .......................................... 100
4.3 Conclusion ..................................................................................... 146

Chapter Five

5. THEME THREE – THE SENTENCING OF ABORIGINAL OFFENDERS . 148
5.1 Introduction .................................................................................... 149
5.2 Quantitative results ...................................................................... 150
5.3 Article – Intimate Partner Homicide: Themes in Judges’ Sentencing Remarks for Australian Aboriginal Offenders ......................................................... 151
5.4 Conclusion ..................................................................................... 191

Chapter Six

6. THEME FOUR – THE USE OF ALCOHOL AND/OR DRUGS AS A CONTRIBUTING FACTOR TO THE OFFENDING ........................................... 193
6.1 Introduction .................................................................................... 194 

xii
6.2 Article – The Use of Alcohol and/or Drugs in Intimate Partner Homicide:

Themes in Judges’ Sentencing Remarks ................................................................. 195

6.3 Conclusion ........................................................................................................... 217

Chapter Seven

7. CONCLUSION ....................................................................................................... 218

7.1 Introduction ......................................................................................................... 219

7.2 Article – Intimate Partner Homicide: Themes in Judges’ Sentencing Remarks
............................................................................................................................... 220

7.3 Conclusion ........................................................................................................... 264

Appendices ................................................................................................................. 266

Appendix A Example of letter to judges ................................................................. 267

Appendix B Email from the Supreme Court (NT) .................................................. 268

Appendix C Email from the Supreme Court (Tas) ................................................ 269

Appendix D Email from the Supreme Court (ACT) ............................................... 270

Appendix E Letter from the Supreme Court (Vic) ................................................ 271

Appendix F Email from the Supreme Court (SA) .................................................. 272

Appendix G Email from the Supreme Court (WA) ................................................ 273

Appendix H Email from the Supreme Court (NSW) .............................................. 274

Appendix I List of content-driven codes ............................................................... 275

Appendix J Codebook Extract No.1 ....................................................................... 280

Appendix K Codebook Extract No.2 ....................................................................... 281

Appendix L Article submission details - Feminist Criminology ......................... 282

Appendix M Article submission details - Law & Policy ........................................ 283
Appendix N  Quantitative analysis of the data ................................. 284
Appendix O  Article submission details – Justice Quarterly .................. 287
Appendix P  Article submission details - Psychiatry Psychology & Law .... 288
Appendix Q  Article submission details - Psychiatry Psychology & Law .... 289

References ........................................................................................................ 290
A  Journal Articles, Conference Papers and Reports ................................. 291
B  Books........................................................................................................... 299
C  Book Chapters ........................................................................................... 300
D  Government Publications ......................................................................... 301
E  Internet Resources ..................................................................................... 301
F  Cases .......................................................................................................... 302
G  Legislation .................................................................................................. 305
H  Other .......................................................................................................... 306

List of Tables
Table 2-1  Key differences between the Glaserian and Straussian approaches to grounded theory ................................................................. 30
Table 2-2  Public access to judges’ sentencing remarks ................................. 33
Table 5-1  All offenders sentenced for murder and manslaughter .................. 284
Table 5-2  All offenders sentenced for murder ................................................ 285
Table 5-3  All offenders sentenced for manslaughter .................................... 286
List of Figures

Chapter 6 Article Fig 1  Intimate Partner Homicide – By Offender Race : alcohol considered as a contributing factor to the offence .............................................. 198

Chapter 6 Article Fig 2  Intimate Partner Homicide – By Offender Race : alcohol considered as a contributing factor to the offence (percentages) ........................................... 199
INTRODUCTION

Background

Sentencing offenders is considered a difficult and complex task. Yet, how judges go about the task of sentencing is not usually known. While how judges approach sentencing has been explored in a number of key studies both in Australia and overseas, none of these studies address intimate partner homicide as a specific sentencing concern. This thesis compares judges’ sentencing remarks when males kill females and females kill males in the context of a domestic relationship. Sentencing remarks are a verbatim transcript of judges’ comments at the time of sentencing an offender.

The genesis for the thesis lays in the observations of my principal supervisor, Associate Professor Guy Hall, and his professional experiences connected to prisoners sentenced to life imprisonment for murder in Australia. Associate Professor Hall’s observations stem from his membership of the Life and Indeterminate Sentenced Prisoners panel of the Western Australian Prisoners Review Board. In particular, Associate Professor Hall observes that it appears that women receive longer sentences for murdering their domestic partners than men who murder their domestic partners. Specifically relating to women who killed after being subjected to extreme violence by their partner, the Hon. James McGinty, Attorney-General (as he was then) commented in the Western Australian Parliament as follows:

3 See discussion in [1.7].
... Out at Bandyup Women’s Prison there must be somewhere between half a dozen and a dozen women there who are middle-aged; they are grey, they are grandmothers, they are the victims of shocking domestic violence and abuse and they are not posing a threat to anyone. They were given mandatory imprisonment. Where is the justice in that? ...

Frankly, in my view, they should not be there.4

My discussions with Associate Professor Hall regarding his observations became the impetus for my Honours thesis which was completed at Murdoch University, Perth, Western Australia, in 2011. These research findings were subsequently published in 2016.5 The aim of that study was to compare judges’ sentencing remarks when males killed females, and females killed males in the context of domestic murder. In that study, two Australian jurisdictions were examined; namely New South Wales and Victoria. The study was a grounded theory analysis of judges’ sentencing remarks between 2001 and 2009. Broadly speaking the data show that judges used more exculpatory remarks for male offenders, while making damning and at times vilifying statements about female offenders.6 However, the restriction of that study to two jurisdictions raises caution with regard to drawing conclusions about other jurisdictions. Second, the sample only considered offenders found guilty of murder rather than manslaughter in the wider context of homicide.

Aim and purpose of this thesis

The aim of this doctoral research was to undertake a qualitative analysis of judges’ sentencing remarks when males kill females and females kill males in the context of intimate partner homicide, for the purpose of comparing the judicial remarks made

6 Ibid 395.
for male offenders with those made for female offenders. For the purposes of the research intimate partner homicide is characterised as murder or manslaughter between current or former, legal or de-facto, heterosexual spouses. Other forms of intimate partner relationships such as dating or homosexual were difficult to identify within the sentencing remarks, and were therefore omitted for research purposes. Thus, given that the honours research only examined two Australian jurisdictions in the context of domestic murder, between 2001 and 2009, this thesis expands upon that research, and provides a more complete understanding of judicial reasoning at the time of sentencing intimate partners in Australia. However, the current study does not repeat data from the previous study, although a brief discussion concerning aspects of the previous study occurs in the article at 4.2.

A common criticism within the community is that there are disparities in the sentences imposed by courts. That is to say similar offences and offenders appear to receive quite different penalties from different courts or different judicial officers. Undertaking this thesis by publication provides a wide audience with a comprehensive understanding of judges’ sentencing remarks pertaining to intimate partner homicide in a social context, as well as allowing the broader community, including researchers and state governments, to understand exactly how judges are applying sentencing principles in the courts today.

Specifically in relation to the judiciary, the data emanating from the research will provide judges, who often work, and undertake the sentencing decision making

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8 Ibid.
process in isolation with practical information regarding the decision making processes as undertaken by their brother and sister judges in this research project.

Overall, these research findings add to the body of work calling for increased consistency in the sentencing process; and heighten judicial accountability to the public. In addition, the findings will make a valuable contribution to greater transparency and honesty in the sentencing process; a point of particular importance, as expressed by Kirby J in Markarian v The Queen (2005) 215 ALR 213 as follows:

Judicial officers engaged in sentencing should be encouraged to reveal their processes of reasoning. Simply to assert that they have considered a list of relevant matters, without identifying, in general terms, the weight that has been given to the most important of them, may represent an error in sentencing. The generalised assertion by the sentencer that he or she has acted on “instinct”, “intuition” or personal experience or the experience in the courts, is not now enough, in my opinion, to meet the standards of reasoning in sentencing that we have come to expect in Australia. Honesty and transparency in the provision of reasons is the hallmark of modern judicial administration. Not judicial “instinct”.

On the whole, analysis of judges’ sentencing remarks in Australia has received little attention from researchers so far. Specifically, in the context of intimate partner homicide, any analysis of judges’ sentencing remarks appears sparse at best. As such this thesis provides a greater understanding of judicial reasoning at the time of sentencing, for one of the most serious of crimes.

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10 See discussion at [1.7].
11 Ibid.
Methodology: An overview

To achieve the research aims grounded theory methods were used. Grounded theory is a leading social sciences methodology, and is perhaps best considered as a research strategy, the purpose being to generate theory from the research data itself.\(^\text{12}\) Therefore, the theory generated in this research project is developed from the data, namely the sentencing remarks for males and females sentenced for intimate partner homicide in Australia between July 2009 and June 2014. In order to generate the theory a particular set of scientific techniques and procedures was utilised. This approach allowed for the collation, coding and analysis of textual data. Specifically, while in a traditional research methodology the literature review forms the basis of the study, generating a series of hypotheses which are then tested; the use of grounded theory required that data, namely the sentencing remarks, were collected and analysed first. Then, once a theory came out of that data, the literature was reviewed to see if the results of the data were consistent or inconsistent with previous research in the field. Thus, the articles appearing in chapters 3 to 7 inclusive are presented in this way: that is, a description of the research and the results followed by a consideration of the results in the context of the literature. This approach is consistent with grounded theory methodology, and best reflects the focus and natural development of the study.\(^\text{13}\)

Given the small number of intimate partner homicide cases across multiple jurisdictions incorporating different sentencing regimes, any statistical analysis of the range of sentences imposed was limited. Thus, while the thesis presents some


\(^{13}\) Ibid 37.
quantitative data which is discussed in chapter 5,\textsuperscript{14} the thesis essentially conveys a qualitative analysis of the judges' sentencing remarks.

Outhwaite, Black and Laycock comment that given the lack of research methods and methodologies in law beyond the doctrinal or theoretical approaches, an increased interest in empirical legal studies exists.\textsuperscript{15} As such, by undertaking a thorough analysis of the data using grounded theory methods, this research project provides the most comprehensive picture of judges' sentencing remarks in the context of intimate partner homicide currently available in Australia; and, contributes to the development of empirical legal studies both in Australia and internationally.

\textbf{Limitations}

Given that homicide is a rare event in almost all western, industrial countries,\textsuperscript{16} undertaking research generally on this type of crime presents numerous challenges. First, regarding the quantitative and qualitative analysis of sentencing remarks, it can be problematic accumulating sufficient data to recognise trends associated with the complex dynamics relating to the circumstances surrounding the offence, and the interaction of events and life circumstances between a victim and an offender. Second, sentencing regimes operate within an arena of ever changing criminal law within multiple Australian jurisdictions. Finally, there is a persistent argument amongst many Aboriginal people that issues surrounding violence and homicide in

\textsuperscript{14} See discussion at [5.2].
their societies should not be discussed in public forums.\textsuperscript{17} Thus, the availability of statistics and research examining the extent and nature of family and more specifically, intimate partner violence in Aboriginal communities is limited.\textsuperscript{18}

**Thesis structure**

**Chapter 1** presents a short review of how judges approach the sentencing task in Australia. This review is not intended to be a literature review for the content of the research; rather, the purpose of the review in this chapter is to serve both as a backdrop to, and a platform for, the themes emanating from the research data; essentially contextualising the doctoral study. Thus, detailed engagement with the literature in the field is presented within each stand-alone article in chapter 3 to chapter 7 inclusive, only after a description of the research and the resultant themes have been expounded.

Chapter 1 begins by examining the purposes and principles of sentencing and includes a discussion on the role of judicial discretion in the sentencing process.

Following on, there is a discussion on instinctive synthesis which is the prevailing sentencing process used in Australia today. The chapter concludes with an overview of prior research on how judges approach the sentencing task, as well as a short introduction to grounded theory which is the research methodology used in the research.

\textsuperscript{17} David F Martin, 'Aboriginal and non-Aboriginal Homicide: same but different', in Heather Strang and Sally-Anne Gerull (eds), *Homicide: Patterns, Prevention and Control*, (conference proceedings 12-14 May 1992 Australian Institute of Criminology, Canberra) 167, 168.

\textsuperscript{18} Liesl Mitchell, 'Domestic violence in Australia – an overview of the issues' (Background Note 23 November, Parliamentary Library, Parliament of Australia, 2011) 12.
Chapter 2 focuses on the use of grounded theory in order to achieve the research aims. The chapter commences with a discussion of grounded theory, and in particular the 'Glaserian' approach\(^9\) which is the particular school of grounded theory adopted to undertake the research. Next the chapter outlines the processes involved in data collection, followed by a discussion on the systematic approach taken to analyse the data. The chapter continues by discussing the role of the literature review in grounded theory and how this approach was applied to the research data. The chapter concludes by reviewing and discussing some of the key criticisms surrounding a grounded theory approach to qualitative research.

Chapter 3 to chapter 6 inclusive each present one of the 4 key themes emanating from the data. In chapter order, the themes are: provocation; domestic violence; the sentencing of Aboriginal offenders; and the use of alcohol and/or drugs as a contributing factor to the offence. In each chapter, following a short introduction, an article, as submitted to a double blind peer reviewed academic journal, discusses the ways in which each theme is considered by sentencing judges in the study.

Therefore, this thesis is not an analysis of these themes per se; rather the thesis presents research findings which show how judges are dealing with these issues at the time of sentencing, in the context of intimate partner homicide. Chapter 5 also provides some background data regarding the quantitative analysis of sentence length. Given the relevant journal’s restrictions on word count, the bulk of this data, by necessity was omitted from the submitted article. Each chapter is brought to a close with some final commentary, including where appropriate, recommendations for future research in a particular area of law.

Chapter 7 is the final chapter in the thesis. Following the format of chapters 3 to 6 inclusive, this chapter presents one final article which reviews and discusses the key findings of the study overall.

Finally, it should be noted that while this thesis primarily discusses qualitative data, a quantitative analysis of sentence length for all offenders in the study was undertaken. In doing so, a statistically significant difference was found between some Aboriginal and non-Aboriginal offenders. In order to understand why these differences occurred, a more detailed examination of the sentencing remarks was undertaken through a qualitative analysis of the data. Thus, the issue of Aboriginal and non-Aboriginal male and female offenders will be discussed in Chapters 4, 5, 6 and 7 of this thesis.
Chapter One

How Judges Approach the Sentencing Task
1. HOW JUDGES APPROACH THE SENTENCING TASK

Introduction

This chapter presents a short review of how judges approach the sentencing task, as this provides a background to, and platform for, the research. Accordingly, this chapter should not be regarded as a literature review for the entire study.

With the above in mind, this chapter will now set out the key features of the judicial approach to the sentencing task in Australia, and provide an overview of prior research in this area. First, the chapter examines the purposes and principles of sentencing together with a discussion on the role of judicial discretion in the sentencing process. Next, the chapter discusses instinctive synthesis which is regarded as the prevailing sentencing process used in Australia today. Following on, the chapter provides an overview of prior research on how judges approach the sentencing task together with a brief introduction to the research methodology of grounded theory and its application in law generally, and more specifically, its application as the empirical legal research methodology employed in this thesis.

1.2 The purposes of sentencing

Broadly speaking the sentencing process aims to achieve five main objectives. These are: punishment and retribution; rehabilitation; removing the offender from society in order to protect the community; general deterrence; and specific deterrence to discourage the offender from committing future crimes.1 Regardless of

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any one jurisdiction’s sentencing scheme, these main objectives are at the core of both sentencing law and sentencing practice throughout Australia.²

1.3  Sentencing principles— a brief history

Sentencing is partly a matter of statute and partly a matter of common law. During the early years of the High Court the focus of the Court’s concern lay in the interpretation of the Australian Constitution and the application of the law to the mechanisms of government.³ Accordingly, the formulation of sentencing principles was by in large left to the states’ appeal courts.⁴ Consequently major sentencing principles such as consistency, parsimony, proportionality and totality were all developed by the state courts.⁵ However, a series of rapid changes within Australian society in the 1960’s and 1970’s brought with it significant changes to the law, as well as to the volume of legislation which was enacted by Parliaments across the country.⁶ Today, for the majority of Australian jurisdictions, sentencing laws list both the purposes and principles of sentencing,⁷ which sit alongside legislative schemes such as guideline judgments, mandatory sentencing and sentencing grids, all of which are intended to act as regulators of judicial discretion in sentencing.⁸ As

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⁶ McClennan, above n 3, 24.
⁷ See Crimes Act 1900 (ACT) ss 429, 429A; Sentencing Act 1995 (NT) s 5; Crimes (Administration of Sentences) Act 1999 (NSW); Crimes Legislation Amendment (Sentencing) Act 1999 (NSW); Crimes (Sentencing Procedure) Act 1999 (NSW); Penalties and Sentences Act 1992 (Qld) s 9; Criminal Law (Sentencing) Act 1988 (SA) s 10; Sentencing Act 1997 (Tas) s 3; Sentencing Act 1991 (Vic) s 5; Sentencing Act 1995 (WA) s 6.
a consequence, both the length and complexity of judges' reasons for sentence have increased exponentially.⁹

1.4 Judicial discretion

Under the umbrella of sentencing purposes and principles, judicial discretion allows sentencers to ensure penalties imposed fit individual offenders according to all of the circumstances of the case.¹⁰ However, this discretion is not completely unfettered, rather, it is exercised subject to appellate review as well as common law and legislative principles which have been developed to maintain consistency, and where necessary, limit the choice of sentence imposed.¹¹ These principles demand that the sentencing discretion be applied in line with specific criteria relative to both the offender and the nature and gravity of the offence they commit.¹² The impact of the offence on the victim must also be taken into account.¹³

Factors which aggravate or mitigate the offending are also examined. An aggravating factor renders an offence more serious and increases an accused's culpability.¹⁴ The burden lies on the prosecution to prove such factors beyond reasonable doubt.¹⁵ On the other hand a mitigating factor is one which is favourable to the accused and has the potential to reduce the sentence imposed.¹⁶ In this instance the defence has the onus of proving such factors, on the balance of

⁹ McClenman, above n 3, 24.
¹² Ibid.
probabilities. Factors considered aggravating or mitigating can include the offender’s intention, their previous history of offending, any alcohol or drug addiction, as well as their response to previous court orders. The offender’s use of weapons during the offending, and any breach of trust may also be considered.\(^{17}\) However, not all sentencing legislation sets out aggravating or mitigating factors. In addition, the interplay between aggravating and mitigating factors is more problematic given that the opposite of a mitigating factor is not necessarily an aggravating factor, and vice versa.\(^{18}\)

Furthermore, a judge cannot sentence an offender in a manner inconsistent with a jury’s verdict\(^ {19}\) or an offender’s plea.\(^ {20}\) Also, the penalty should not adversely affect the offender and where applicable their family; and should reflect parity in offenders’ sentences where offenders are jointly charged.\(^ {21}\) It follows, therefore, that both the purposes of sentencing and the relevant considerations have an impact on how homicide is ultimately explained by a judge at the time of sentence.

1.5 The sentencing process – Instinctive synthesis

The origins of the prevailing sentencing process in Australia today\(^ {22}\) are found in the obiter dicta\(^ {23}\) of the majority of the Full Court of the Supreme Court of Victoria decision of \textit{R v Williscroft} [1975] VR 292 (‘\textit{Williscroft}’).\(^ {24}\) Known as ‘instinctive

\(^{17}\) McKenzie et al, above n 13.
\(^{19}\) \textit{R v Webb} [1971] VR 147.
\(^{21}\) Casey and Wilson, above n 11.
\(^{22}\) \textit{Markarian v The Queen} (2005) 215 ALR 213, [35-37], [51], [84], [136]-[140] (Gleeson CJ et al).
\(^{23}\) Obiter dicta: Judicial remarks and observations that do not form part of the reasoning of a case.
\(^{24}\) Although the court in \textit{Williscroft} first coined the phrase ‘instinctive synthesis’, the Court at 300 acknowledged the term’s inspirational origins lay in \textit{R v Kane} [1974] VR 759 where that court
synthesis', the Full Court ascertained that 'ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process.' Specifically, in *Williscroft* Adam and Crockett JJ opine that such an approach to the practice of sentencing is both subjective and intuitive. However, it is argued in some quarters that this judicial commentary only serves to endorse the position that such subjectivity is an acceptable platform from which judges can make sentencing determinations. That said, in *Wong v The Queen* (2001) 207 CLR 584 ('Wong') the joint judgment of Gaudron, Gummow and Hayne JJ provided further insight into the meaning of the term 'instinctive synthesis' as follows:

[T]he task of the sentencer is to take account of all of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an 'instinctive synthesis'. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which ... balances many different and conflicting features.' (emphasis in the original) (citations omitted).

Indeed, when the High Court considered criticisms of the instinctive synthesis approach in the decision of *Markarian v The Queen*, in the absence of legislative guidance, the Court supported the methods employed in the instinctive synthesis approach.

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27 Ibid.
28 Edney and Bagaric, above n 2, 19.
31 Ibid [37].
However, any rational evaluation of a sentencing decision is likely impossible if the ‘how’ and the ‘why’ of a particular sentencing conclusion remains unknown. \(^{32}\)

Indeed Ashworth states:

> Sentencing is a vital realm of public policy, and it should not be shrouded in secrecy simply because of fears about the possible reactions to research findings of the press and of politicians ... The details of sentencing practice are a matter of deep social concern, and they cannot ever be discussed properly until they are made known. \(^{33}\)

Moreover, in calling for greater transparency and honesty in the sentencing process, in *Wong*, Kirby J took the position that sentencing judges should disclose more clearly their approach to the task of sentencing. \(^{34}\) Arguably, not only does the instinctive synthesis approach provide judges with tremendous latitude in determining an offender’s sentence, but such a process also permits a significant amount of leeway for a sentencing judge’s personal sentiments. \(^{35}\)

### 1.5.1 Instinctive synthesis and the rule of law

The rule of law relates to the concept that every person and organisation, including the government, is subject to the same laws. \(^{36}\) As a core principle of the Australian legal system, a major aspect of the rule of law is that the day-to-day operation of the

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\(^{32}\) Edney and Bagaric, above n 2, 31.


\(^{34}\) (2001) 207 CLR 584, 622 (Kirby J).

\(^{35}\) Edney and Bagaric, above n 2, 16, 28.

\(^{36}\) Butt, above n 14, 385.
law should lead to consistent outcomes. Arguably, as a sentencing process, instinctive synthesis violates the rule of law.37

In *Wong*, Gleeson CJ commented on the importance of consistent outcomes in the criminal justice system:

The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, among other things, reasonable consistency.38

In addition, speaking extra-curially Chief Justice Spigelman of the New South Wales Supreme Court commented that the absence of consistency threatens the ‘maintenance of the rule of law’39 thus undermining the integrity of sentencing as a judicial activity.40

1.6 Consistency in sentencing: A lack of empirical research in Australia

In its 1980 study on the sentencing of federal offenders, the Australian Law Reform Commission (‘ALRC’) concluded that when comparing the differing rates at which federal offenders across Australia were sentenced to imprisonment, there was compelling evidence of *inconsistency* (emphasis added) in sentence length.

37 Edney and Bagaric, above n 2, 29.
40 Edney and Bagaric, above n 2, 30.
Furthermore, the ALRC believed that this disparity was very possibly due to judges' holding differing viewpoints concerning punishment.\textsuperscript{41}

Twenty six years later, in the ALRC's most recent study, again regarding the sentencing of federal offenders, the commission highlighted the distinct lack of Australian research concerning inconsistencies in sentencing.\textsuperscript{42} In highlighting the randomness of the sentencing process, the ALRC found that on the basis of the evidence currently available to them there were strong indications that an unjustified disparity in sentencing continued to exist.\textsuperscript{43}

In addition, legal scholars are also increasingly voicing their concerns regarding viewpoints expressed and comments made, or not made as the case may be, by judges in the course of sentencing.\textsuperscript{44} By example, \textit{R v Raby} [1994] VSC 725 was the first case in Victoria where 'battered woman syndrome' was used to form part of the defence of provocation. In an in-depth analysis of Margaret Raby's trial, McCarthy discusses the judge's sentencing remarks; in particular, the lack of any kind of condemnation in those remarks for the violent acts perpetrated by Margaret Raby's husband, towards her. Through this omission, McCarthy argues that a critical opportunity was missed to communicate an intolerance of violent men by the law.\textsuperscript{45}


\textsuperscript{43} Ibid 392.


\textsuperscript{45} Therese McCarthy, 'Battered women syndrome: some reflections on the invisibility of the battering man in legal discourse, drawing on \textit{R v Raby} (1995) 4 \textit{Australian Feminist Law Journal} 141.
Arguably, by utilising empirical studies, decisions within the criminal justice system not only become more visible, but can potentially hold the judiciary’s decision makers more accountable for their actions.\textsuperscript{46}

1.7 Prior research on how judges approach the sentencing task

Within the legal profession many different types of people write about the law including lawyers, judges, legislative drafters and academics. However, in the context of legal scholarship, two forms of legal writing, namely doctrinal and theoretical, dominate the quality and quantity of the legal research landscape. As such, only a small amount of academic research and writing is committed to collecting new evidence concerning the operation of the law on a day-to-day basis and its effect on society.\textsuperscript{47} Legal research and scholarship therefore tends to be ‘law-centred’, and is usually undertaken by individual researchers, who carry out an in-depth analysis of the law as stated in its primary sources, namely legislation and case law.\textsuperscript{48} Thus, the primary focus of legal research is on influencing legal reasoning rather than evaluating or seeking to influence law’s practices and policies.\textsuperscript{49}

With the focus among lawyers, legally trained academics and the judiciary placed on the ‘black letter’ of the law, the majority of commentary on the remarks judges make during the sentencing process is focused on an analysis of the processes judges use

\textsuperscript{49} Ibid.
to determine the appropriate sentence in a particular case. Nonetheless, how judges approach the sentencing task has been explored in a number of key studies on sentencing both in Australia and overseas. While the primary mode of research in these instances was either by interview or questionnaire directed to the judiciary, across a variety of topics of interest, none of these studies used grounded theory as the research methodology; nor did they address intimate partner homicide as a sentencing concern specifically.51

1.8 Applying grounded theory methodology to legal research

Grounded theory is a leading methodology used by social scientists to analyse qualitative data. Essentially, it is the systematic generation of theory from structured

research.\textsuperscript{52} As an inductive methodology, grounded theory facilitates the generation of theories which are grounded in the data, thus letting the data speak for itself, and allowing researchers to arrive at a theory which has been methodically developed from the data assembled.\textsuperscript{53}

Grounded theory is used in many areas, extending into fields as diverse as the Australian film industry,\textsuperscript{54} software development processes, and nursing; as well as being widely used throughout the healthcare industry.\textsuperscript{55} However, legal research and scholarship is inclined to be 'law-centred',\textsuperscript{56} and so, while grounded theory has been applied to legal inquiry in some contexts, this method of analysis remains an uncommon approach in the context of legal research.\textsuperscript{57}

While the use of grounded theory in the field of law is uncommon, Outhwaite, Black and Laycock undertook an empirical legal study in the field of biosecurity\textsuperscript{58} using grounded theory as their research methodology. The research topic was the investigation of biosecurity law and regulation in developing countries.\textsuperscript{59} The

\textsuperscript{54} Michael Jones and Irit Alony ‘Guiding the use of Grounded Theory in Doctoral studies – an example from the Australian film industry’ (2011) 6 International Journal of Doctoral Studies 95, 95-114.
\textsuperscript{56} Genn, Partington and Wheeler, above n 48.
\textsuperscript{58} The authors define biosecurity as border controls and associated measures to protect human, animal and plant life, and the environment.
\textsuperscript{59} Outhwaite, Black and Laycock, above n 57.
researchers found that the application of grounded theory facilitated the identification of issues that were relevant to the research study, as well as excluding those issues that were not.\textsuperscript{60} In addition they argue that qualitative approaches in general have the ability to enhance the field of empirical legal studies. Specifically in relation to grounded theory the researchers said:

\ldots [T]his itself illustrates the nature of findings derived from grounded theory; the issues raised are not predetermined, and it will not be possible to determine at the outset specifically the influences or issues that will arise. For our purposes this was a benefit of the grounded theory approach.\textsuperscript{61}

By identifying that their study's findings would not have occurred through quantitative inquiry; the authors comment that by using grounded theory methodology:

\ldots the depth and richness of the insights gained depended on enabling identification and understanding of the issues as identified by stakeholders, as opposed to those that we might have assumed to be important.\textsuperscript{62}

1.9 A grounded theory approach to analysing judges' sentencing remarks
Documents can provide a rich source of data for social researchers.\textsuperscript{63} While the data in the majority of grounded theory studies derive from observations and interviews, which helps to minimise bias and establish credibility, complete studies can be

\begin{flushleft}
\textsuperscript{60} Ibid 523.
\textsuperscript{61} Ibid 520.
\textsuperscript{62} Ibid 524.
\textsuperscript{63} Punch, above n 53, 190.
\end{flushleft}
undertaken using documents alone. Atkinson and Coffey consider documents to be ‘social facts’, which can be produced, shared and used in socially organised ways. Documents also have the distinct advantage that they can be recorded without a researcher’s intervention.

Sentencing remarks represent the verbatim transcript of reasons given by a judge at the time of sentencing an offender. In a qualitative study, people’s direct quotations, such as are present in judicial sentencing remarks, are considered a primary source of raw data, and can reveal research subjects’ experiences, perceptions, thoughts, and emotions. However, prior to becoming publicly available, sentencing remarks are edited by the sentencing judge to take account of suppression orders and the statutory prohibitions on the identification of victims of certain offences. Sentencing remarks may also be edited by the judge if the general publication of those remarks is likely to have an adverse impact on victims, witnesses or others connected with the proceedings.

Furthermore, a judge may decline to release sentencing remarks for publication if the judge considers that it is not possible to edit those remarks to take account of any associated adverse impact. Provided these issues are addressed, the sentencing remarks are released into the public domain, either through the relevant court’s

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68 Supreme Court of Western Australia, Explanation of sentences <http://www.supremecourt.wa.gov.au>.
website, publically accessible databases such as the Australian Legal Information Institute database (‘AustLII’), or by application to the court’s Registrar.  

Document analysis has both advantages and limitations. Like many documents, sentencing remarks, are for the most part in the public domain, and when accessible, are obtainable without the author’s express permission; in this case the sentencing judge. Also, the data contained in the sentencing remarks have already been gathered, allowing the researcher to then evaluate the quality and content of those remarks. Sentencing remarks are also unaffected by the research process, hence lacking a researcher’s interference and reactions.  

Adopting Atkinson and Coffey’s notion that documents are ‘social facts’, a grounded theory analysis of judges’ sentencing remarks can provide the opportunity to analyse, amongst other things, the language used by judges in the process of sentencing. This is particularly important in the context of serious cases, such as those involving murder or manslaughter. In essence, a judge’s language can potentially conceptualize the sum total of the events leading up to the moment of sentencing. By coding words, phrases and sentences used by judges in the course of their sentencing remarks, the potentially rich and descriptive nature of a judge’s language may also provide considerable insight into the sentencing decision-making models used by individual judges, providing some understanding as to a particular judge’s approach to the task of sentencing.  

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69 See, eg, Supreme Court of Western Australia, Practice Note No 5.7 – Status of Published Written Sentencing Remarks – General Division – Criminal.  
70 Bowen, above n 66, 31-32.  
71 Atkinson and Coffey, above n 65.  
1.10 Conclusion

Sentencing is an intuitive synthesis of all of the relevant factors, and other than any legislative requirements placed upon a sentencing judge, there is no requirement for that judge to identify the effect of any one factor on the final sentence imposed. Indeed, while there is a range of factors that can be taken into account by a sentencing judge, the complexity of the sentencing process generally makes it highly improbable that any one factor, taken on its own, is responsible for the ultimate penalty.

As Ashworth points out, sentencing is an important aspect of public policy, and sentencing practice cannot be properly discussed until those practices are made known.73 Consistent with Ashworth’s viewpoint, by undertaking a grounded theory analysis of judges’ sentencing remarks, this research will provide further insight into the ‘why’ and ‘how’ of sentencing conclusions, specifically for males and females sentenced for intimate partner homicide in Australia.

The next chapter, chapter 2, focuses on grounded theory as the methodology adopted to achieve the research aims of the thesis.

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73 Ashworth, above n 33.
Chapter Two

Qualitative Analysis of Sentencing Remarks
2. QUALITATIVE ANALYSIS OF SENTENCING REMARKS

2.1 Introduction

As discussed in Chapter 1, the pursuit of grounded theory as a suggested approach to empirical legal study is rare.\(^1\) Thus, this chapter focuses on the use of grounded theory as the methodology adopted to achieve the research aims.

First, the chapter begins with an overview of grounded theory together with a brief discussion on the particular school of grounded theory chosen to undertake the research. Next this chapter discusses data collection; including the complexities associated with public access to sentencing remarks and the impact this had on the approach to accessing the data. Following on, the chapter outlines the systematic approach taken to analysing the data. Next, the chapter discusses the role of the literature review in a grounded theory research approach, and how this was applied in this research project. Finally, the chapter concludes with a brief discussion on the criticisms surrounding adopting a grounded theory approach to qualitative research.

2.2 Grounded theory – A qualitative research method

As a qualitative research process, grounded theory is a systematic set of methods for collecting, coding and analysing data.\(^2\) Used in a wide variety of research contexts, grounded theory was originally developed as a method to study complex social behaviour.\(^3\)

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\(^1\) See discussion at [1.8].


In contrast to beginning with a theory from which hypotheses are deduced, a grounded theory research project begins with a situation a researcher wishes to understand more about, within a field of study; and whatever is relevant to that project is allowed to come forward during the research process. Indeed the absence of a research question is considered important. In this regard Glaser states that the researcher ‘moves in with the abstract wonderment of what is going on that is an issue and how it is handled’.  

As the original proponents of grounded theory, Glaser and Strauss argue that by placing an emphasis on the verification of existing theories, a researcher is precluded from investigating new areas of research. Hence, when undertaking a grounded theory research project, a qualitative researcher begins with an open mind with the aim of ending up with a theory. That said, in order to provide direction in the research area, the researcher is required to have some knowledge of the subject, although not in the form of an informed opinion. Given my previous study in law generally, and my Honours research specifically, I entered this project with some prior knowledge of the sentencing process. This knowledge facilitated the development of ‘theoretical sensitivity’ in the study. Thus, previous knowledge provided me with the ability to give the data meaning; the capacity to understand the data, as well as the aptitude to separate the relevant from the irrelevant.

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7 Glaser and Strauss, above n 2.
8 Punch, above n 3.
9 Onions, above n 5.
2.2.1 The two schools of grounded theory

As discussed at 2.2, grounded theory was proposed as a research method by researchers Glaser and Strauss, and published in their seminal work in 1967.\textsuperscript{11} However, shortly thereafter a methodological and, some say an ideological split occurred between the proponents.\textsuperscript{12} This divergence between the researchers has resulted in two schools of thought and resulting approaches to grounded theory, termed by Stern as ‘Glaserian’ and ‘Straussian’.\textsuperscript{13} Table 2-1 below presents the key differences between Glaser and Strauss’s diverging approaches to grounded theory. This Table is borrowed from Onions who devised the table contents as a tool to assist researchers in selecting and describing the most suitable approach to undertake their own research.\textsuperscript{14}

\textsuperscript{11} Glaser and Strauss, above n 2.
\textsuperscript{12} Onions, above n 5.
\textsuperscript{14} Onions, above n 5, 5.
### Table 2-1. The key differences between the Glaserian and Straussian approaches to grounded theory

<table>
<thead>
<tr>
<th>‘Glaserian’</th>
<th>‘Straussian’</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beginning with general wonderment (an empty mind)</td>
<td>Having a general idea of where to begin</td>
</tr>
<tr>
<td>Emerging theory, with neutral questions</td>
<td>Forcing the theory, with structured questions</td>
</tr>
<tr>
<td>Development of a conceptual theory</td>
<td>Conceptual description (description of situations)</td>
</tr>
<tr>
<td>Theoretical sensitivity (the ability to perceive variables and relationships) comes from immersion in the data</td>
<td>Theoretical sensitivity comes from methods and tools</td>
</tr>
<tr>
<td>The theory is grounded in the data</td>
<td>The theory is interpreted by an observer</td>
</tr>
<tr>
<td>The credibility of the theory, or verification, is derived from its grounding in the data</td>
<td>The credibility of the theory comes from the rigour of the method</td>
</tr>
<tr>
<td>A basic social process should be identified</td>
<td>Basic social processes need not be identified</td>
</tr>
<tr>
<td>The researcher is passive, exhibiting disciplined restraint</td>
<td>The researcher is active</td>
</tr>
<tr>
<td>Data reveals the theory</td>
<td>Data is structured to reveal the theory</td>
</tr>
<tr>
<td>Coding is less rigorous, a constant comparison of incident to incident, with neutral questions and categories and properties evolving. Take care not to ‘over-conceptualise’, identify key points</td>
<td>Coding is more rigorous and defined by technique. The nature of making comparisons varies with the coding technique. Labels are carefully crafted at the time. Codes are derived from ‘micro-analysis which consists of analysis data word by word’</td>
</tr>
<tr>
<td>Two coding phases or types, simple (fracture the data then conceptually group it) and substantive (open or selective, to produce categories and properties)</td>
<td>Three types of coding, open (identifying, naming, categorising and describing phenomena), axial (the process of relating codes to each other) and selective (choosing a core category and relating other categories to that)</td>
</tr>
<tr>
<td>Regarded by some as the only ‘true’ GTM</td>
<td>Regarded by some as a form of qualitative data analysis (QDA)</td>
</tr>
</tbody>
</table>

In order to analyse judges’ sentencing remarks for this research project, Glaser’s methodology was adopted. This is primarily because the ‘Glaserian’ method allows the data to reveal the theory, as opposed to the ‘Straussian’ method where the use of structured questions forces the theory into being. As such, the ‘Glaserian’ method is
considered more aligned with the pure origins of the theory.\textsuperscript{15} In any case, given that the data already existed, the Straussian approach using structured questions would not be feasible.

2.3 Data collection

2.3.1 Public access to judges’ sentencing remarks

In grounded theory, the first step is the collection of data. Despite sentencing attracting more interest than any other aspect of the criminal justice system,\textsuperscript{16} in practice, public access to sentencing remarks proves challenging. The Australian Legal Information Institute database (‘AustLII’) is a full text electronic database, and is considered Australia’s most popular online free access resource for Australian legal information. Operated jointly by the University of Technology, Sydney and the University of New South Wales, Faculties of Law, AustLII provides free online access via in excess of 270 databases. AustLII considers its public policy agenda is to improve access to justice through enhanced access to legal materials. However, AustLII does state that for each jurisdiction, all decisions are selected and provided by the relevant courts of that particular jurisdiction.\textsuperscript{17}

2.3.2 Access to judges’ sentencing remarks for the purposes of this research

In relation to this study, in order to determine availability of relevant data, it was necessary to conduct preliminary research to ascertain the level of electronic access available on AustLII and other publically available websites for judges’ sentencing remarks across all jurisdictions.

\textsuperscript{15} Michael Jones and Irit Alony ‘Guiding the use of Grounded Theory in Doctoral studies – an example from the Australian film industry’ (2011) 6 International Journal of Doctoral Studies 95, 101.


\textsuperscript{17} The Australian Legal Information Institute database, <http://www.austlii.edu.au>.
Specifically, in order to apply grounded theory methodology, data collection must follow scientific processes, namely: be consistent, be randomly selected; and show no bias. A lack of consistency in accessing sentencing remarks would require exploration of other avenues in order to obtain the necessary data for analysis.

Accordingly, an initial search of AustLII was undertaken for judges’ sentencing remarks in eight jurisdictions: the Australian Capital Territory (‘ACT’); New South Wales (‘NSW’); Northern Territory (‘NT’); Queensland (‘Qld’); South Australia (‘SA’); Tasmania (‘Tas’); Victoria (‘Vic’); and Western Australia (‘WA’). As a result of this search, it was discovered that the jurisdictions of NT, SA and WA provide no public access to sentencing remarks through AustLII, while Qld provides access to selected sentencing remarks only.

Next, a search of the Supreme Court websites for each jurisdiction was undertaken. This search showed that despite seven of the eight jurisdictions providing full text access to sentencing remarks through their court website, three of the eight jurisdictions only allow full access to sentencing remarks for a limited time period. That is to say: for the Northern Territory access is for three months from date of sentence, while for South Australia and Western Australia, access is only for 28 days from date of sentence. In all three jurisdictions, after the allotted time, the sentencing remarks are removed from the court’s website and can only be accessed by writing to the court’s Registrar. In addition, while Queensland allows judges’ sentencing remarks to remain on the court website for three months, the sentencing remarks placed on the website are only those considered by a sentencing judge to be

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18 The exception is the Supreme Court of Victoria where the Court’s website links directly to AustLII.
of particular significance or public interest. Table 2-2 below sets out the variability in access to sentencing remarks across all publically available databases.

Table 2-2. Public access to judges’ sentencing remarks (JSRs)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Supreme Court’s website</th>
<th>AustLII</th>
<th>Other Databases</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACT</td>
<td>Full text of JSRs available from July 2001</td>
<td>Available</td>
<td>Nil</td>
</tr>
<tr>
<td>NSW</td>
<td>Full text of JSRs available</td>
<td>Available</td>
<td>JSRs can also be accessed through ‘NSW Caselaw’</td>
</tr>
<tr>
<td>NT</td>
<td>Retained on the website for three months from date of sentence and then removed</td>
<td>Not available</td>
<td>Only sentencing appeal decisions are available</td>
</tr>
<tr>
<td>QLD</td>
<td>Selected JSRs published only, where a sentencing judge believes those remarks will be of particular significance or public interest. Any remarks placed on the website remain for three months after which time they are removed.</td>
<td>Court selected JSRs only</td>
<td>Nil</td>
</tr>
<tr>
<td>SA</td>
<td>Full text of JSRs only available for four weeks after which time they are removed from the website.</td>
<td>Not available</td>
<td>Nil</td>
</tr>
<tr>
<td>TAS</td>
<td>Full text of JSRs available from 2008. However, the website indicates that JSRs can be removed after one month.</td>
<td>Available</td>
<td>Nil</td>
</tr>
<tr>
<td>VIC</td>
<td>The court’s website links directly to AustLII where full access to JSRs is available</td>
<td>Available</td>
<td>Nil</td>
</tr>
<tr>
<td>WA</td>
<td>JSRs are available on the court’s website within 48 hours of passing sentence. JSRs remain on the website for 28 days after which time they are removed.</td>
<td>Not available</td>
<td>Nil</td>
</tr>
</tbody>
</table>
2.3.3 Requesting the research data

Given the inability to obtain a relevant data sample from publically accessible sources, it was decided that the data should be sourced from the relevant criminal court of each jurisdiction. Following the project’s Human Research Ethics Approval from Murdoch University, a letter of request from Associate Professor Guy Hall to the Chief Justice of the Supreme Court in each jurisdiction was sent in the first instance. (See Appendix A).

In Associate Professor Hall’s correspondence a sample of cases from the District and Supreme Courts of each jurisdiction was requested. The request was for 10 cases from each court in each jurisdiction. For consistency the requested sample was to comprise the 10 most recent judges’ sentencing remarks for each of the intimate partner murder and intimate partner manslaughter cases over the time period July 2009 until June 2014. As discussed in the introduction to this thesis,\(^\text{19}\) this time period was chosen as an extension of the time period covered in the honours thesis which spanned 2001 to 2009.

2.3.4 Obtaining the research data

The Supreme Courts responded to the data request in various ways. Ultimately, the research data was obtained from four different sources: sent directly from the relevant court; the court’s website, AustLII; or NSW Caselaw, which is a public accessible database which publishes decisions for New South Wales Courts and Tribunals. Accordingly, data was collected between February and August 2015. Given the variety of responses to the data request, details of the response from each

\(^{19}\) See discussion on pages 1 and 2.
jurisdiction is outlined below, together with the subsequent steps taken to obtain the sample. The responses are recorded here in order of receipt.

2.3.4.1 Research data response from the Supreme Court (NT)

Ten sets of sentencing remarks were received from the Supreme Court (NT), (see reply Appendix B). Upon receipt, a check was performed to ascertain that each set of remarks met the search parameters. At this stage, one set of remarks was eliminated as the date of sentence was outside the date range requested. Thus nine sets of remarks were included in the sample.

2.3.4.2 Research data response from the Supreme Court (Tas)

Sixteen sets of sentencing remarks were received from the Supreme Court (Tas), (see reply Appendix C). An initial review of these cases showed that 13 sets of remarks did not fit the research parameters. This was because either they did not fall within the relevant date range, or the offender was not an intimate partner of the victim. All three relevant sets of remarks were included in the sample.

2.3.4.3 Research data response from the Supreme Court (ACT)

No sentencing remarks were received from the Court. Instead the Court directed me to their website to obtain the data, (see reply Appendix D).\(^{20}\) Using the research parameters, a search of the sentencing remarks on the Court's website was undertaken. While the data extracted showed 15 murder cases and 3 manslaughter cases, upon further review none of these cases could be categorised as intimate partner homicide. Thus, the search produced a zero result. Given that the ACT has a

low population density,\textsuperscript{21} and given the rarity of homicide and more specifically intimate partner homicide in Australia,\textsuperscript{22} a zero result is not wholly unexpected. Therefore, no data was available for analysis for this jurisdiction.

2.3.4.4 Research data response from the Supreme Court (Vic)

No sentencing remarks were received from the Court. Instead the Court's reply pointed to reviewing the Court's sentencing decisions on AustLII, (see reply Appendix E). While in the AustLII database, and using a variety of search strings, an \textit{AutoSearch} type search was undertaken\textsuperscript{23} for sentencing remarks pertaining to intimate partner murder cases within the relevant date range. AustLII does not provide a separate data base search specifically for sentencing remarks, therefore, the results returned a broad section of court decision-making records, ($n=227$); including for example sentencing decisions for offenders convicted of attempted murder; murder, sentences for murder which were subsequently downgraded to manslaughter; as well as bail applications for alleged murderers and applications for criminal compensations orders following a murder conviction. As a result, each one of the 227 sentencing decision was manually examined in order to exactly match each decision to the research parameters. In the process of this exercise 195 sets of remarks were eliminated, and 32 sets of relevant sentencing remarks were retained. The search process was then extended to intimate partner manslaughter cases. Eighty nine sets of remarks were identified, of which 76 sets were eliminated as not meeting the research parameters. Thirteen sets of relevant remarks were retained.


\textsuperscript{22} AIC Reports, 'Domestic-related homicide: keynote papers from the 2008 International Conference on Homicide' (Research and Public Policy Series No 104, Australian Institute of Criminology, 2008).

\textsuperscript{23} With an \textit{AutoSearch} search AustLII will analyse the words you are searching and attempt to apply the correct search approach for you.
This provided a total pool of 45 sets of sentencing remarks from which 10 sets of remarks were randomly selected.

2.3.4.5 Research data response from the Supreme Court (SA)

Twenty seven sets of sentencing remarks were received from the Supreme Court (SA), (see reply Appendix F). Upon review, 13 sets of remarks were eliminated because they were outside the research parameters. From the 14 remaining sets of remarks, 10 sets of remarks were randomly selected for this jurisdiction’s sample.

2.3.4.6 Research data response from the Supreme Court (WA)

Twelve sets of sentencing remarks were received from the Supreme Court (WA), (see reply Appendix G). Following a preliminary review, two sets of remarks which did not fit the research parameters were eliminated. The remaining 10 sets of remarks were included in the sample.

2.3.4.7 Research data response from the Supreme Court (NSW)

The Court replied with a list of 270 case names, classified by them as sentencing decisions for either murder or manslaughter, (see reply Appendix H). Following the Court’s direction, utilising ‘NSW Caselaw’, which is a publically available decisions database for New South Wales Courts and Tribunals, each of the 270 cases provided were manually extracted and examined. This process gleaned 19 sets of relevant sentencing remarks, from which 10 sets of remarks were randomly selected.
2.3.4.8 Research data response from the Supreme Court (Qld)
No response to the written request for data was received from this jurisdiction.
Follow-up emails and telephone calls to the Court produced no results. As discussed at 2.3.2 public access to sentencing remarks for the Supreme Court of Queensland is extremely limited. As such, no suitable data was available for analysis for this jurisdiction.

2.3.5 Conclusion
Public confidence in Australia’s justice system is maintained, primarily, through the day to day operation of the principles of open justice; and, as an elementary rule of the legal system, this principle also serves as the primary instrument employed to ensure judicial accountability.\(^\text{24}\)

While sentencing attracts more interest than any other aspect of the criminal justice system, public access to sentencing remarks is a complex and convoluted process. Consistent with the principles of open justice, members of the public should have easy access to documents which would allow them to more fully understand court proceedings. Thus judges’ sentencing remarks should be publically available in all jurisdictions, and not be time limited.

Regarding this study, given the lack of consistency in publically accessing sentencing remarks, these were formally requested from eight jurisdictions, by way of letter to the superior courts. Data requests produced a sample of 10 sets of sentencing remarks for the Supreme Courts of Vic; SA; WA; and NSW. Nine sets of

remarks were added for the Supreme Court (NT); and three sets of remarks for the Supreme Court (Tas). Thus, a total of 52 sets of sentencing remarks were available for analysis. Data was not forthcoming for two jurisdictions, namely, ACT and Qld.

Finally, anticipating that the sample size for the supreme courts would be rich in data; and given that murder cases can only be heard in the supreme court, it was decided that rather than source sentencing remarks from the district courts, data analysis would commence using supreme court data only.

2.4 Data analysis

2.4.1 Coding the data

As the starting point for a grounded theory analysis, coding is the action of labelling the data; a process which continues throughout the analysis. By naming and categorising the data, coding aims to develop and correlate the concepts which form the building blocks of the evolving theory. As discussed at 2.2.1, the data analysis uses the ‘Glaserian’ grounded theory method. Glaser espoused three levels of coding; open coding, selective coding and theoretical coding. Given that the coding stages are both consecutive and sequential, the product of each stage guided me to the following stage.

On receipt of the sentencing remarks from the NT data coding was commenced immediately. Backman and Kyngäs state that it is important to collate and code data promptly and concurrently to facilitate the early emergence of themes and possible

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25 Punch, above n 3, 206.
27 Jones and Alony, above n 15, 105.
areas of enquiry. Further, it was considered that analysing the sentencing remarks by jurisdiction in the first instance would facilitate possible theme development on a jurisdictional basis. Taken randomly, and one at a time, each set of NT sentencing remarks were analysed until the saturation point within those remarks was reached. In this instance, saturation describes the point at which no new major ideas could be found within that first set of sentencing remarks, and the task of analysing the data became confirmatory.

2.4.2 Open coding of the data
Beginning with the first set of NT sentencing remarks, each line of narrative was read and then coded. Line-by-line coding compelled the verification and saturation of categories later, as well as minimising the chance of missing important categories. This process results in a rich and dense theory with the sense that nothing has been left out. Therefore, each judicial comment was considered in an effort to find commonalities and differences between concepts within that set of remarks. This process fractured the sentencing remarks into separate and distinct pieces of information. In a qualitative study words under analysis can be assembled, disassembled, clustered and broken up into segments which convey a particular meaning. As such, a qualitative study can organise those words to allow them to be analysed, contrasted or compared as well have patterns conferred upon them. At this stage no filters were applied; and the whole content of the sentencing remarks

28 Kaisa Backman and Helvi A Kyngäs, ‘Challenges of the grounded theory approach to a novice researcher’ (1999) 1(3) Nursing & Health Sciences 147, 149.
31 Matthew B Miles, and A Michael Huberman, Qualitative Data Analysis. (SAGE Publications, 2nd ed, 1994) 6,7.
were accepted. Nothing was excluded. Utilising this process allowed the search for patterns in the data.

2.4.2.1 Development of the codebook

As opposed to themes which emerge from the data, codes are applied to the data. Following the reading of each line of narrative, key points in the judicial comments within each line of the sentencing remarks were marked with a series of codes according to their meaning and relevance to the overall study; each code usually being between one and four words. As this process got underway, at times, more than one code arose from the same piece of text. In order to capture the data from the sentencing remarks a 132 page codebook was developed. Essentially the codebook is comprised of 114 content-driven codes which were applied during the initial analysis of the 52 sets of sentencing remarks. The full list of these codes, in the order in which they were applied to the data, is shown in Appendix I.

Within the codebook each set of sentencing remarks was, in the first instance, allocated a number from one to 52 depending on where in the random selection process that set of remarks was analysed. Then, each set of remarks was allocated a ‘Unique Identifier’ which identified that set of remarks in the following order: first by jurisdiction; then by numerical number ranging between the first and last valid set of remarks obtained for that jurisdiction; next the remarks were allocated a code of either M or F to denote the sex of the offender; next a code of either M or MS was allocated to denote either Murder or Manslaughter, being the offence for which the

32 Guest, Bunce and Johnson, above n 29, 77.
33 Alireza Moghaddam ‘Coding issues in grounded theory’ 2006 16(1) Issues in Educational Research 52, 56.
offender was sentenced; finally, given that violent crimes tend to be intra-racial,\textsuperscript{34} where the race of the offender could be identified as Indigenous, a code was placed at the end of the ‘Unique Identifier’.\textsuperscript{35} For example, a Unique Identifier allocated as SA009FMSA represents the ninth set of sentencing remarks analysed for South Australia, and the offender was an Aboriginal female sentenced for manslaughter.

The code headings in the codebook represent short, descriptive headings which served as memory joggers when reviewing the data. Numbers placed in text boxes within the codebook allowed for direction back to specific lines of text within a particular set of remarks where notations therein would more fully explain that specific code. At times judicial quotations from the data were extracted and also placed in text boxes. These quotations served as a good exemplar of a particular code. An extract of the codebook (Codebook Extract No.1) is located in Appendix J.

\textbf{2.4.2.2 Constant comparison of the data}

Glaser and Strauss explain that the purpose of constantly comparing data, ie: joint coding and analysis, is to ‘generate theory more systematically ... by using explicit coding and analytic procedures’.\textsuperscript{36} Therefore, each code within the first set of remarks was then compared to other codes in the same set of remarks in order to identify commonalities and differences.

Jones and Alony state that the process of constant comparison drives the researcher to reflect on the data obtained, and to form concepts, which are usually recorded in

\textsuperscript{35} The identification of an offender’s Indigenous status in this study is clarified in Chapter 5.
\textsuperscript{36} Glaser and Strauss, above n 2, 107.
memo form. Thus, in this study, the constant comparison allowed for the unearthing and explanation of patterns and variations in the sentencing remarks. Next, the codes were grouped into similar concepts; and hypotheses about the relationships between categories were developed. As more data within each set of sentencing remarks was coded, the concepts were compared and categories produced. This process ultimately formed the basis for the creation and grounding of an emerging theory, which, in this study became a series of ideas, referred to in this thesis as ‘themes’. These themes are used to explain how judges are dealing with the sentencing task for males and females convicted of intimate partner homicide.

When saturation point for all categories within the first set of sentencing remarks was reached, the next set of NT sentencing remarks was randomly chosen. From this point onwards, as primary coder, I went back and forth between each set of sentencing remarks in the sample, coding, comparing data, and constantly modifying and sharpening the developing themes. Associate Professor Guy Hall acted as validating coder during this stage of the process, as well as during the selective and theoretical coding phases of the study.

2.4.2.3 Memoing

In grounded theory a memo is considered as the writing up of ideas about codes and their inter-relationship. These ideas should be developed freely, and are usually recorded as the ideas occur to the researcher while carrying out the coding.

37 Jones and Alony above n 15, 106.
38 Bittel, above n 4, 79.
39 Glaser and Strauss, above n 2, 5.
41 See discussion at [2.4.3] and [2.4.5].
function.\textsuperscript{42} A memo may take the form of a sentence, a paragraph or simply a key word allowing the researcher to make connections between elements of the data, allowing the overarching theories to emerge.\textsuperscript{43}

The codebook also served as the repository for memos concerning the data. Using code headings such as ‘Weapon’, ‘Injury description’ and ‘Cause of death’, it was possible, for example, to later highlight differing judicial commentary on how Aboriginal and non-Aboriginal males killed their intimate partner; and the impact of this commentary on sentencing. These observations are discussed in the articles presented in chapters four and five of this thesis. Examples of memos entered into the codebook can be found in Codebook Extract No.2 (see Appendix K).

\subsection*{2.4.3 Selective coding}

As the propositions in a grounded theory study develop, the researcher begins to decide exactly what data will be pursued next based on that data’s expected contribution to the development of the forming theory.\textsuperscript{44} Thus, once core categories become apparent, selective coding takes place. This form of coding allows a researcher to filter and code data which are considered more relevant to the emerging theory. Therefore only the most relevant lines of a transcript are used and coded.\textsuperscript{45} Thus only relevant data from the sentencing remarks was picked out and added to the core categories where that data were relevant to the study. This proved a timely step in the research process given the lack of uniformity in the length of the sentencing remarks. This is because the shortest judicial narrative in the study extended to 96

\textsuperscript{42} Glaser and Strauss, above \textit{n} 2, 83.
\textsuperscript{43} Punch, above \textit{n} 3, 206.
\textsuperscript{44} Glaser and Strauss, above \textit{n} 2.
\textsuperscript{45} Jones and Alony, above \textit{n} 15, 108.
lines of text, whereas the longest judicial narrative contained 708 lines. Ultimately across 52 sets of sentencing remarks 14,880 lines of text were manually analysed. That said, by using selective coding many of the categories which built up each core category became saturated, producing no new insights. By example, the core category of provocation, whose themes are the subject of the article presented in chapter three, was ‘empirically mature’ following the analysis of 10 sets of sentencing remarks.

2.4.4 Theoretical saturation

The question of when to stop collecting data can raise concerns in a researcher using grounded theory as a research method. The answer is when the researcher no longer needs to continue. For a researcher the sequence of moving between collecting and analysing data continues until new data shows no new theoretical elements, instead confirming the theory that has already emerged. This point is known as ‘theoretical saturation’. Using the example of provocation discussed at 2.4.3, this core category became the focus of selective data collection and coding. Constant comparison between the relevant sets of sentencing remarks continued until the core category provocation was saturated; further coding and constant comparison produced no further insights; and the theory had emerged from the data. Saturation of this core category was reached following the analysis of 10 sets of sentencing remarks (8 males and 2 females). Saturation point for the study as a whole was reached following an analysis of 34 sets of male offender sentencing remarks (21 non-Aboriginal males and 13 Aboriginal males), and 18 sets of female offender

49 Holton, above n 30, 8.
50 Punch, above n 3, 167.
sentencing remarks (10 non-Aboriginal females and 8 Aboriginal females); making a total of 52 sets of sentencing remarks.

2.4.5 Theoretical coding

Theoretical coding is the final coding stage, and occurs once core categories are saturated. Morse points out ‘[I]n qualitative research, there is no published guidelines or tests of adequacy for estimating the sample size required to reach saturation equivalent to those formulas used in quantitative research’. Moreover, Ryan and Bernard declare that how and when saturation occurs depends on a variety of factors, including, but not limited to the number and complexity of the data. Accordingly, in this study, the analysis of 52 sets of sentencing remarks produced sufficient core categories from which themes, and thus a theory grounded in the data, emerged. While further data was likely available from the District Courts, core category saturation derived from the Supreme Courts’ data meant that any analysis of the District Court data would merely have been confirmatory.

While as discussed at 2.4.2, the open coding of the data fractured the sentencing remarks into separate and distinct pieces of information, theoretical coding essentially knits the data back together by examining the saturated categories. Therefore, in this study theoretical coding facilitated the process of theorising what was actually happening during the sentencing process for males and females sentenced for intimate partner homicide. Glaser points out that a grounded theory

51 Jones and Alony, above n 15, 108.
54 Jones and Alony, above n 15, 109.
will appear more plausible, more relevant and more enhanced when integrated and modelled by an emergent TC\textsuperscript{55} (theoretical code).

The resultant themes are discussed in the articles found in chapters 3 to 6 inclusive. Broadly speaking the themes discussed in these chapters cover: provocation; domestic violence; Aboriginal offenders; and alcohol and drugs. Chapter 7 provides a concluding article which presents the key findings of the research as a whole.

2.4.6 Conclusion

Using the 'Glaserian' grounded theory method, the data in this study underwent two coding phases, namely: open coding; and selective coding. This is turn produced categories which culminated in theoretical coding. As a result, key themes emanating from the analysis of 52 sets of sentencing remarks are presented in five articles between chapters 3 and 7 of this thesis.

2.5 The literature review

2.5.1 The role of the literature review in grounded theory

When using a traditional research methodology, the literature review forms the basis of the study, generating a series of hypotheses which are then tested. However, grounded theory requires the researcher to collect and analyse the data first. Then, once themes have come out of that data, the researcher reviews the literature to see if the data results are consistent or inconsistent with previous research in that field.\textsuperscript{56} Guided by a research question or field of study, the researcher wants to be as open-minded as possible when approaching the data. Naturally, reviewing the literature in

\textsuperscript{55} Glaser, The grounded theory perspective III, above n 26, 14.

\textsuperscript{56} Punch, above n 3, 43.
advance of the study is likely to act as a strong influence once the researcher begins working with the data obtained. Therefore, it is important to ensure that categories and concepts found in the literature are not brought to the data ahead of time. However, once concepts and theories become clear within the data then the literature can be reviewed as additional data to be fed into the analysis. By approaching the research study in this way, any theory that develops is considered to be grounded in the data.\textsuperscript{57}

2.5.2 The literature review in this study

The starting point for undertaking a grounded theory study is that a satisfactory theory on a particular subject does not exist, or there is insufficient information on the subject to begin forming a theory.\textsuperscript{58} As discussed in the introduction to this thesis, the genesis for this project arose out of observations made by academics and legal professionals; that males and females appeared to be treated differently when sentenced for killing their partners.\textsuperscript{59} This was a situation that I wished to understand further. Consequently the aim of this research was to undertake a qualitative analysis of judges' sentencing remarks when males kill females and females kill males in the context of intimate partner homicide.

In this study, once saturation of the core categories was reached, an extensive literature review specifically related to those core categories was undertaken, in order to identify if the results of the data were consistent or inconsistent with previous research. This approach is entirely consistent with grounded theory

\textsuperscript{57} Ibid 168.
\textsuperscript{58} Ibid.
\textsuperscript{59} See discussion on page 1.
methodology. As discussed in the preface, given that the traditional thesis structure did not fit with how the actual research in this study developed, the literature review pertinent to any given theme arising from the data is incorporated into the discussion section of the relevant article, as presented in chapter 3 to chapter 7 of this thesis.

2.6 Quality issues in qualitative research

Generally, qualitative research methods are open to the possibility of error in a number of ways, principally that the researcher misinterprets the data, thus threatening the integrity of the emerging theory.

Traditionally, with qualitative research methods the researcher relies on participant validation as a means of verifying how the researcher interprets the participant’s data. Participant validation usually involves a researcher verifying with a participant, the accuracy of their interview transcript, or confirming to the researcher that the researcher’s interpretation of the data is in line with how the participant viewed their experiences.

However, in the context of this study’s data, there was no participant recruitment. Judges approve their recorded and transcribed remarks before they are released into the public domain, therefore those remarks may be considered already validated. In addition, given that a random sample of pre-validated sentencing remarks was used, there was no interaction with individual judges as to the content of their remarks. It

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60 Glaser and Strauss, above n 2, 37.
61 See discussion on page v.
follows, given that there was no control over the data, selectivity bias is removed from the study.

2.7 Criticisms of a grounded theory approach

Usually the aim of qualitative research using a methodology such as grounded theory is to examine something in detail; to understand its complexity within its context.\(^6^4\) However, this approach can raise a number of criticisms: first that this type of behavioural study is too reductionist and loses sight of the whole picture; and second, that viewed in this way social reality becomes oversimplified. However, a grounded theory analysis of judges’ sentencing remarks in the context of intimate partner homicide has the opportunity to provide the wider community with a comprehensive understanding of those remarks in a social context, as well as allowing the community to understand more fully how sentencing principles are applied in court. This is of particular importance as a common criticism by the wider community is that there are disparities in the sentences imposed for similar offences by different courts or different judicial officers.\(^6^5\)

Specifically in relation to the judiciary, the data emanating from this research will provide judges, who often work and undertake the decision making process regarding sentencing, in isolation; with practical information regarding the decision making processes undertaken by their brother and sister judges within this study. It is anticipated that this will facilitate increased transparency and consistency in the sentencing process; and heighten judicial accountability to the public.

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\(^6^4\) Punch, above n 3, 192.

The next chapter, chapter 3, presents and discusses the theme of provocation; the first of the four key themes arising out of the analysis of the judges' sentencing remarks.
Chapter Three

Theme One: Provocation
3. INTRODUCTION

3.1 Provocation is an extremely important issue; acting both as a defence and/or a mitigating circumstance; and the presence of this theme in the data provided a unique opportunity to review the law in this area. Thus this chapter continues at 3.2 with a literature review pertaining to the doctrine, albeit that the literature review was undertaken after the emergence of all of the themes in the study.

The article presented at 3.3 explores the various ways in which provocation was considered by the sentencing judges in the study. Provocation is a complex doctrine and, over time, the law in this area has undergone many changes across multiple jurisdictions. In this study the judicial commentary regarding the theme of provocation is made up of five key elements. These are: blaming the victim; the flawed nature of the female character; the offender’s loss of self-control; the lowering of the non-parole period; and the complexity of the doctrine of provocation. These elements are discussed within the article. Thus data presented in the article reflect the law as practised in the courts during the study period.

3.2 The doctrine of provocation – An overview

There are several ways in which evidence of provocation may be relevant at trial. At times provocation may be taken into account as a mitigating factor; or may sometimes support a claim that a fault element of an offence was lacking, so, for example at a murder trial the accused may contend that they acted in a ‘blind rage’ with no intention to kill or cause serious harm to the victim; or in the alternative, provocation can provide an exculpatory defence.¹ Arguably, as a criminal law

¹ Eric Colvin, Suzie Linden and John McKechnie, Criminal Law in Queensland and Western Australia (LexisNexis Butterworths, 4th ed, 2005) 300 [15.1].
doctrine, the partial defence of provocation is one of the most contentious, largely
due to its perceived gender bias. Despite generally viewed as operating as the law’s
concession to human frailty, in its practical application, it is considered very much a
concession to male frailty.

In the sixteenth century the formal categories of murder and manslaughter developed
within the law of homicide. In order to distinguish between murders that were
premeditated and unpremeditated, the crime of manslaughter developed whereupon
provocation subsequently arose as a category within manslaughter. During this
period, while claiming provocation, men were considered to be acting in a rational
manner; responding to being wronged. However, despite the origins of provocation
being based on indignation, the focus moved towards a loss of self-control by the
eighteen century. By the nineteenth century the defence of provocation came to
include other categories of conduct including men reacting angrily in matters
concerning their honour, and murder in response to infidelity. The defence has now
also come to include a man’s right to defend his honour when challenged by his
spouse within the intimate bounds of their relationship.

Today, the defence of provocation is available to an accused who, when provoked,
loses self-control and kills their provoker. The proposition being, that when killing

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2 Thomas Crofts and Danielle Tyson, ‘Homicide Law Reform in Australia: Improving Access to
3 Carolyn B Ramsey, ‘Provoking Change: Comparative insights on Feminist Homicide Law Reform’,
4 R v Muy Ky Chhay (1994) 72 A Crim R 1, 11(Gleeson CJ).
5 Rebecca Bradfield, The treatment of women who kill their violent male partners within the
6 Felicity Stewart and Arie Freiberg, ‘Provocation in Sentencing: A Culpability-Based Framework’
7 Bradfield, The treatment of women who kill their violent male partners, above n 5, 63.
8 Ian Leader-Elliott, ‘Passion and Insurrection in the Law of Sexual Provocation’ in Ngaire Naffine
and Rosemary J Owens (eds), Sexing the Subject of Law (Sweet & Maxwell, 1997) 149, 153.
in response to a victim’s provocative conduct, the accused is considered less
culpable than someone who kills their victim deliberately in cold blood. 9

The defence acknowledges that, in certain circumstances, a person may suffer a
temporary loss of self-control, and endeavours to differentiate between cold blooded,
intentional killings, and unpremeditated killings, occurring in a heightened emotional
state. 10 Thus, an accused’s sudden and temporary loss of self-control is viewed as an
altered emotional state, 11 historically known as the ‘heat of passion’. 12 While a large
number of provocation defences are resolved by way of a guilty plea to
manslaughter; in a contested trial, the decision concerning whether or not the
defence is open to the accused is determined by a jury, upon their assessment of the
evidence presented to the court. If a jury accepts that the provocation was sufficient
for an ordinary person to lose control taking the life of the provoker, then for the
accused such provocation reduces the crime of murder to manslaughter. However,
more recently, such a loss of self-control is considered to be at the heart of an
‘excuse based’ defence. 13

The defence of provocation has two limbs; a subjective test, and an objective test.
The subjective test addresses whether the accused actually lost self-control as a result
of the victim’s provocative conduct; and the objective test asks whether or not an
ordinary person when faced with the same provocation could have lost self-control,

9 Kellie Toole et al, Submission to Legislative Review Committee, Inquiry into The Criminal Law
Consolidation (Provocation) Amendment Bill 2013, 30 June 2014, 2.1.
10 Steven Yannoukis, ‘Excusing fleeting mental states: Provocation, involuntariness and normative
11 Judicial College of Victoria, Criminal Charge Book (14 May 2014) 8.10.1
13 Kate Fitz-Gibbon, ‘Provocation in New South Wales: The need for abolition’ (2012) 45(2)
Australian and New Zealand Journal of Criminology 194, 197.
thus forming the intention to kill or do grievous bodily harm. Once the accused raises provocation, it must then be negated beyond reasonable doubt by the prosecution. Usually, the decision regarding whether or not the defence is open to an accused is decided by the jury upon their assessment of the evidence.

As it stands currently, the test for provocation is criticised as being ‘conceptually confused, complex and difficult for juries to understand and apply’;16 with the ordinary person test attracting significant criticism in judicial and academic circles.17 Toole et al point out that jurors can be confused by the objective and subjective elements of the defence, having not only to assess if the accused did in fact lose their self-control, but then assess whether an ordinary person would have lost their self-control in the same circumstances.18

While Tasmania, Victoria and Western Australia have now abolished this partial defence to murder, there are significant differences in how the defence is legislated for in each of the Australian state and territory jurisdictions that retain provocation.19 In each instance the defence has been reviewed, reformed and in some cases restricted to exclude particular contexts of provoked violence.20 South Australia is the only Australian jurisdiction that retains common law provocation.

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15 Jack Hetzel Bone, “'I just snapped, Your Honour': Is the law of provocation still relevant?”, (2016) 38(3) Bulletin (Law Society of South Australia) 8,8.
17 Ibid.
18 Toole et al, above n 9, 5.2.
19 Crimes Act 1900 (NSW) s 23; Crimes Act 1900 (ACT) s 13; Criminal Code 1899 (Qld) s 304; Criminal Code Act 1983 (NT) s 158.
20 Criminal Code Act 1899 (Qld) s 304; Crimes Act 1900 (ACT) s 13(3); Criminal Code (NT) s 158(5).
3.2.1 The demise of provocation?

In 2003 Tasmania became the first Australian jurisdiction to abolish provocation.\(^{21}\) In the following year in Victoria, the case of *R v Ramage* [2004] VSC 508 raised controversy when, upon killing his ex-wife, a violent man was successful in raising the defence. At this time defences to murder were already under review by the Victorian Law Reform Commission. Following extensive research and public consultation, the Victorian Law Reform Commission recommended the repeal of provocation.\(^{22}\) This was subsequently enacted in 2005.\(^{23}\) At the same time, and with renewed concerns for suitable defences for battered women who killed their abusive partners, the Victorian Government re-enacted the defence of excessive self-defence in a new form of crime entitled ‘defensive homicide’.\(^{24}\) This also proved to be contentious, drawing much academic commentary.\(^{25}\) In 2013 the offence of defensive homicide was reviewed by the Department of Justice (‘the Department’) which proposed its abolition. In its research, the Department found that since its inception, for the offence of defensive homicide, men comprised 25 of the 28 convictions. As a result of its consultations, the Department concluded that ‘[t]he price of having defensive homicide for the comparatively small number of women who kill is substantially outweighed by the cost of inappropriately excusing men who kill.’\(^{26}\) To this end, Victoria repealed defensive homicide in 2015.\(^{27}\) Currently, along with Tasmania, Victoria now has no partial defences to murder. In 2008 Western Australia followed Tasmania and Victoria and became the third Australian


\(^{22}\) Victorian Law Reform Commission, above n 16.

\(^{23}\) *Crimes (Homicide) Act 2005* (Vic).

\(^{24}\) Ibd s 6(9AD).


\(^{27}\) *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic).
jurisdiction to abolish provocation, while at the same time introducing the partial defence of self-defence. This partial defence applies in cases where the act was not a reasonable response to the provocation.

Notwithstanding the abolition of provocation in some parts of Australia, provocation still operates as a partial defence in one common law and four code jurisdictions. That said provocation has undergone varying degrees of change. Australian Capital Territory, New South Wales, Northern Territory and Queensland have amended the defence to prevent a claim of provocation based on sexual advance of a non-violent kind. Queensland has also refined legislation to make clear that words can only form the basis of a provocation claim in the most extreme circumstances. Additionally, any changes to, or termination of a domestic relationship can also no longer found a claim of provocation, unless the circumstances are extreme. Moreover, a new partial defence has been introduced whereby if a person kills in response to acts of serious domestic violence by the deceased, in the course of an abusive domestic relationship, and the accused believed that for the preservation of their own life it was necessary to kill the deceased, then such a defence operates to reduce the charge of murder to that of manslaughter. In New South Wales the catalyst for change to the defence arrived in the form of the case Singh v R [2012] NSWSC 637, where the accused successfully argued that he was provoked into killing his wife as she had threatened to end their relationship, likely leading to the

29 Criminal Code Act Compilation Act 1913 (WA) s 248(3).
30 The Queen v R (1981) 28 SASR 321 sets out the elements of the partial defence of provocation for South Australia; Crimes Act 1900 (ACT) s 13; Crimes Act 1900 (NSW) s 23; Criminal Code Act (NT) s 34(2); Criminal Code 1899 (Qld) s 304.
31 Crimes Act 1900 (ACT) s 13(3); Crimes Act 1900 (NSW) s 23; Criminal Code (NT) s 158(5); Criminal Code Act 1899 (Qld) s 304(3A), (6A), (9).
32 Criminal Code Act 1899 (Qld) s 304.
33 Ibid s 304B.
cancellation of his Australian spousal visa. Following extensive public consultation, the New South Wales Select Committee on the Partial Defence of Provocation recommended the retention of the defence, mindful of the often female defendants who were victims of long-term domestic violence and found it difficult to establish a defence of self-defence.\textsuperscript{34} Accordingly, the defence of provocation was replaced by the defence of extreme provocation,\textsuperscript{35} whereby the conduct of the deceased was that of a serious indictable offence.\textsuperscript{36}

3.2.2 The gendered use of the defence

The gendered use of the defence of provocation in certain types of cases remains one of its major problems.\textsuperscript{37} In this regard, the defence is seen to favour the stereotypically violent ways in which men react to domestic conflict.\textsuperscript{38} Kirkwood argues that the availability of provocation in such circumstances may send an unacceptable message ‘that men’s anger and use of violence against women is legitimate and excusable’.\textsuperscript{39} Furthermore, Fitz-Gibbon notes that where ever debate surrounds the abolition of this defence, Government and Law Commissions alike consistently argue that the gender biased nature of provocation no longer reflects community values and beliefs surrounding justice.\textsuperscript{40} Importantly, the existence of provocation is not only seen as a vehicle to promote a culture of blaming the victim; it can send a message that the lives of some victims are less valuable than others.\textsuperscript{41}

\textsuperscript{34} Select Committee on the Partial Defence of Provocation, Legislative Council, \textit{The partial defence of provocation} (2013) xii-xiii.
\textsuperscript{35} \textit{Crimes Act 1900} (NSW) s 23.
\textsuperscript{36} Ibid s 23(2)(b).
\textsuperscript{37} Crofts and Loughman, above n 14, 24.
\textsuperscript{38} Ibid.
\textsuperscript{40} Fitz-Gibbon, above n 13, 194.
\textsuperscript{41} Victorian Law Reform Commission, above n 16, [2.29].
Research indicates that not only do men and women kill with different frequencies, men and women have different motivations to kill their domestic partners. Men kill their female partners in response to female actions such as when the women challenge their authority, leave or threaten to leave the relationship, or form, or are suspected of forming a new relationship. In contrast, for women, possession is rarely a motivating factor in killing their male partners. Women are more likely to commit spousal homicide as a result of self-preservation.

McKenzie et al observe that given the structure of the provocation defence, it is often difficult for female offenders to access it. Males on the other hand appear to access the defence with relative ease when killing in response to provocative female victim conduct such as subjectively perceived nagging, insulting or goading. For females, leaving or threatening to leave the relationship or even flirting or unfaithfulness, suspected or otherwise, can lead to males feeling justifiably provoked into killing females, subsequently relying on the defence to explain their offending. Wells contends that females who are killed by their male partners are frequently stereotyped according to what is considered as ‘undesirable characteristics’. Such commentary highlights the role the provocation defence can play in denigrating a

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44 Ibid.
46 Tyson, above n 25, 208.
47 Ibid.
female victim's character, adding further weight to the argument that the defence is gendered.\(^{49}\)

3.2.3 The role of provocation in reducing an offender's culpability

Shapland, in her study of mitigation, found that offenders often minimised their offending by denying both responsibility and wrongdoing. Shapland states that subsequent to offenders presenting expressions of guilt and remorse, they attempt to deny full responsibility for their offending, claiming for example, provocation, as a factor the offender perceived was beyond their control.\(^{50}\) Indermaur suggests that an offender's belief that they are not in fact responsible for their criminal behaviour may be further accentuated if the judge's sentencing remarks also reflect that the offender's responsibility is moderated.\(^{51}\)

In order to determine if a victim's behaviour towards an offender is indeed provocative, the law says that the gravity of the deceased's conduct must be assessed from the viewpoint of the accused.\(^{52}\) Therefore, amongst other things, account must be taken of the accused's personal characteristics and circumstances; the rationale being that conduct which may not be hurtful or insulting to one individual, may indeed be offensive to another.\(^{53}\) However, Stewart and Freiberg postulate that while provocation ought to be contextualised according to the accused's situation, the

\(^{49}\) See also Kate Fitz-Gibbon and Julie Stubbs, 'Divergent directions in reforming legal responses to lethal violence' (2012) 45 Australian and New Zealand Journal of Criminology 318, 322; Ramsey, above n 3; Bernadette McSherry, 'It's a man's world: Claims of provocation and automatism in 'intimate' homicides' (2005) 29 Melbourne University Law Review 905.


\(^{52}\) Judicial College of Victoria, Criminal Charge Book (14 May 2014) 8.10.2 <http://www.judicialcollege.vic.edu.au/eManuals>.

\(^{53}\) Ibid.
victim’s right to assert their equality, for example by a desire to end the domestic relationship, should also be considered. Accordingly, Stewart and Freiberg propose that the correct approach is to consider if the offender’s actions towards the victim are in fact justified in all of the circumstances.\footnote{Stewart and Freiberg, above n 6, 298.}

While the good character of an accused is a mitigating factor which a sentencing court must take into account,\footnote{See, eg, Sentencing Act 1991 (Vic) ss 5(2)(f), 6.} another approach by the courts which demonstrates how provocation reduces an offender’s culpability, is the application of ‘character theory’. With character theory, the proposition is that when a person loses their self-control their actions can, in part, be excused because those actions are out of character for that person, and therefore unlikely to occur again.\footnote{Stewart and Freiberg, above n 6, 289.} Horder states that through character theory; when an accused argues provocation on the basis that they have lost their self-control, they are arguing that they are not really acting as themselves.\footnote{Jeremy Horder, Excusing Crime (Oxford University Press, 2004) 118.} Furthermore, Tadros states that if a person can show that their character when in a state of extreme anger is dissimilar to their character when they are calm; then actions carried out by that person whilst in a state of extreme anger will not reflect as badly upon them.\footnote{Victor Tadros, “The Characters of Excuse” (2001) 21(3) Oxford Journal of Legal Studies 495, 507.} Stewart and Freiberg point out that by applying this reasoning, should the sentencing court consider the offender is unlikely to repeat the behaviour; then sentencing factors such as specific deterrence may carry less weight.\footnote{Stewart and Freiberg, above n 6, 289.}
Furthermore, Stewart and Freiberg perceive that the application of character theory to an offender who is also a perpetrator of family violence can prove troublesome. They state that when a person acts violently towards one particular person, eventually killing them, while at the same time behaving in a well-mannered and non-violent way towards others; that it is difficult to describe that offender’s behaviour as ‘out of character’ on the basis that other people attest to their non-violent nature. Indeed when the Victorian Law Reform Commission (‘VLRC’) reviewed family violence laws, the VLRC pointed to research noting that ‘[t]he majority of violent or abusive men are just normal people who try to distance themselves from their actions by trying to blame others’. Moreover, the VLRC emphasised the importance both at a legal and a social level to recognise that a perpetrator can appear calm and non-violent all the while perpetrating violence against a family member.

3.2.4 The defence of provocation: Abolish or reform?

Presently the academic debate leans towards the abolition of the defence of provocation as its ‘masculinist history’ arguably hinders its legitimacy in criminal law today, particularly given its tendency to portray male violence as a normal aspect of masculinity. Moreover, commentary suggests that abolition of the

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60 Ibid 289, 290.
defence would convey the message from the legal community that women will no longer be blamed for lethal violence committed against them by men.\textsuperscript{65} Despite the general opinion that provocation operates as the law’s concession to human frailty, and the argument in some quarters that provoked killers are not murderers, in its 2004 review on the defences to homicide in Victoria, the VLRC rejected these viewpoints.\textsuperscript{66} Instead, the VLRC opined that a murder conviction is justified even when killing in response to provocation, given the victim’s loss of life as well as the accused’s intention to kill or seriously harm the victim.\textsuperscript{67}

However, it is frequently argued that the provocation defence still plays an important role for women who kill their abusive partners but are not acting in self-defence.\textsuperscript{68} This was indeed the case for Rajini Narayan (‘Narayan’) who killed her abusive husband after she discovered he was having an affair and intended to leave her. In their final confrontation Narayan snapped, threw petrol on her husband and set him alight.\textsuperscript{69} After successfully raising the defence of provocation, Narayan was found guilty by a jury of manslaughter rather than murder. Furthermore, Narayan’s sentence was wholly suspended and an appeal against sentence refused by the Full Court of the Supreme Court of South Australia. Toole et al point out that if provocation was abolished, Narayan would most likely have received a lengthy prison sentence following a likely conviction for murder.\textsuperscript{70} Toole opines that under no circumstances should a person’s behaviour be excused because they lost control,

\textsuperscript{65} Fitz-Gibbon, above n 13.  
\textsuperscript{66} Victorian Law Reform Commission, above n 16, [2.97].  
\textsuperscript{67} Ibid.  
\textsuperscript{68} See, eg, Crofts and Loughnan, above n 14, 31; Toole et al, above n 9, 4.2  
\textsuperscript{69} R v Rajini Narayan [2011] SASC SCCRM-10-66 (13 April 2011) [18], [21], [22].  
\textsuperscript{70} Toole et al, above n 9, 4.2
killing in a fit of rage; thus avoiding a murder conviction by blaming the provocative actions or words of their victim for their own criminal deeds.\textsuperscript{71}

In proffering its recommendation that the defence should be abolished, the VLRC also recommended that, to the extent that provocation may reduce an offender’s moral culpability, this could be more appropriately taken into account with other mitigating factors during sentencing.\textsuperscript{72} Notably, this reform was implemented in Tasmania and Western Australia following the abolition of the defence in these jurisdictions.\textsuperscript{73} The VLRC considered that such a shift would provide the judiciary with greater flexibility to determine whether or not it was appropriate to take provocation into account in any particular case; as well as the ability to ascertain the appropriate sentence to impose in the circumstances.\textsuperscript{74} However Crofts and Loughnan propose that in cases where a jury is involved in a determination regarding the establishment of provocation, it is also better to leave the determination of an accused’s blameworthiness to that jury.\textsuperscript{75} In the opinion of Crofts and Loughnan shifting such a determination to the judiciary ‘detracts from the transparency of the conviction and denies the jury part of its fact finding role.’\textsuperscript{76}

The VLRC’s recommendation has also been the topic of much legal and academic discourse in relation to cases involving loss of self-control. Commentators argue that accounting for provocation in sentencing may lead to inconsistencies in

\textsuperscript{71} Kellie Toole, ‘Law Reform South Australia and the defence of provocation’ (2013) 38(4) 
\textit{Alternative Law Journal} 270, 271.
\textsuperscript{72} Victorian Law Reform Commission, above n 16, [2.32].
\textsuperscript{73} Kate Fitz-Gibbon and Sharon Pickering, ‘Homicide Law Reform in Victoria, Australia From Provocation to Defence Homicide and Beyond’ (2012) 52 \textit{British Journal of Criminology} 159, 175.
\textsuperscript{74} Victorian Law Reform Commission, above n 16, [2.32].
\textsuperscript{75} Crofts and Loughnan, above n 14, 29.
\textsuperscript{76} Ibid.
sentences for murder.\textsuperscript{77} That said, according to Tombs and Jagger the weight of a sentencing judge’s responsibility to determine the ‘right’ sentence is diminished given the fact that their decision can be checked, validated or overturned by a higher authority in the form of the Appeal Court.\textsuperscript{78} Nonetheless, in the aftermath of the abolition of the defence in Tasmania, Bradfield cautioned that given the gender concerns related to the defence, ‘care needs to be taken to ensure that the abolition of provocation does not worsen the legal position of battered women who kill and that the accounts of men provoked to kill by jealousy or rejection are not merely repeated and given judicial endorsement at the sentencing stage.’\textsuperscript{79} Moreover, some academics have also argued that accounting for provocation at the time of sentencing fails to recognise the significance the stigma a particular label, such as murder or manslaughter, can bring to a criminal conviction, as well as the connotations for the populace.\textsuperscript{80} Notwithstanding the debate surrounding this particular matter, judicial commentary suggests that the issue of provocation will continue to play a significant role at the time of sentencing an offender. As part of a qualitative research study focusing on homicide law reform, a Victorian judge stated that ‘the question of a trigger for actions is always a significant issue in sentencing.’\textsuperscript{81}

In the lead up to the abolition of the defence of provocation in Tasmania, the Attorney-General commented that ‘it is better to abolish the defence than to try to


\textsuperscript{80} Crofts and Tyson, above n 2, 873; Crofts and Loughnan, above n 14, 27.

\textsuperscript{81} VicJudeC quoted in Kate Fitz-Gibbon and Sharon Pickering, ‘Homicide Law Reform in Victoria, Australia From Provocation to Defence Homicide and Beyond’ (2012) 52 British Journal of Criminology 159, 176.
make a fictitious attempt to distort its operation to accommodate gender-behavioural differences. However, as Crofts and Loughnan point out, provocation may be in issue in cases other than cases involving intimate partner violence; cases in which a concession to human frailty is indeed warranted. Given that the gendered use of the defence in certain types of cases continues to be an unresolved and major problem for the criminal justice system, Crofts and Loughnan advocate for the amendment of the defence to exclude any possibility of provocation being pleaded in cases which involve intimate partner violence.

Overall, in recent years provocation has shown itself to be an animate defence. Despite a number of jurisdictions abolishing the defence altogether, some jurisdictions have chosen rather to retain and reform the defence to better reflect modern Australian community values and beliefs concerning justice.

Finally, neither the preceding discussion nor the following journal article is an attempt to analyse the defence of provocation. Rather the aim in this chapter specifically is to describe how judges are dealing with the issue of provocation in the sentencing of cases of intimate partner homicide. The cases in the sample were examined after the defendant’s guilt had been determined. As such this thesis is about sentencing and how judges are dealing with issues such as provocation in the context of sentencing, not in the determination of guilt.

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82 Tasmania, Parliamentary Debates, Assembly, 20 March 2003, Pt2, pp 30-108 (Judy Jackson, Attorney-General, Minister for Justice and Industrial Relations).
83 Crofts and Loughnan, above n 14, 33.
84 Ibid.
3.3 Article: ‘Intimate Partner Homicide: The Theme of Provocation in Judges’ Sentencing Remarks in Australia’

Marion Whittle, Guy Hall and the Hon Michael Murray AM QC

Under review by Feminist Criminology¹

¹ See Appendix L for proof of submission.
Intimate Partner Homicide: The Theme of Provocation in Judges’ Sentencing Remarks in Australia

Marion Whittle, Guy Hall and Michael Murray AM QC

This article discusses a major theme arising out of a grounded theory analysis of judges’ sentencing remarks for males and females sentenced for intimate partner homicide in Australia, between July 2009 and June 2014. The article focuses on the theme of provocation, and presents a current picture regarding the degree to which provocation still plays a role in sentencing. The data reflect that provocation remains gender biased; favouring males as the main beneficiaries. The data also show judges excuse male violence towards women; endorsing the view that female victims are responsible for their own death.

Introduction

This article discusses themes emanating from judges’ sentencing remarks pertaining to the partial defence of provocation in Australia, and represents one aspect of a study undertaken by Whittle and Hall to examine judges’ commentary where offenders are sentenced for intimate partner homicide. For the purposes of the study, intimate partner homicide is defined as murder or manslaughter between current or former, legal or de-facto, heterosexual spouses. Other forms of intimate partner relationships such as dating or homosexual were difficult to identify within the sentencing remarks, and were therefore omitted for research purposes.

Arguably, as a criminal law doctrine, the partial defence of provocation is one of the most contentious (Crofts & Tyson, 2013). It operates as the law’s concession to human frailty; however in its practical application, it is considered very much a concession to male frailty (R v Muy Ky Chhay, 1994, p.11 per Gleeson CJ).
The defence of provocation is available to an accused who, when provoked, loses self-control and kills their provoker. Thus, an accused’s sudden and temporary loss of self-control is viewed as an altered emotional state (Judicial College of Victoria, 2014); historically known as the ‘heat of passion’ (Johnson v R, 1976, p.643 per Barwick CJ). If a jury accepts that the provocation was sufficient for an ordinary person to lose control taking the life of the provoker, then for the accused such provocation reduces the crime of murder to manslaughter. However, more recently, such a loss of self-control is considered to be at the heart of an ‘excuse based’ defence (Fitz-Gibbon, 2012, p.197).

Provocation was originally based on indignation, and the focus moved towards a loss of self-control by the eighteen century. By the nineteenth century the defence of provocation came to include other categories of conduct including men reacting angrily in matters concerning their honour, including infidelity (Bradfield, 2002). The defence has also come to include a man’s right to defend his honour when challenged by his spouse within the intimate bounds of their relationship (Leader-Elliott, 1997).

The defence acknowledges that, in certain circumstances, a person may suffer a temporary loss of self-control, and endeavours to differentiate between cold blooded, intentional killings, and unpremeditated killings, occurring in a heightened emotional state (Yannoulidis, 2005). As a defence, provocation has expanded to take account of killings against a background of infidelity, sexual jealousy and rejection (Bradfield, 2002).
The academic debate now leans towards the abolition of the defence of provocation as its ‘masculinist history’ arguably hinders its legitimacy in criminal law (Bradfield, 2002, p.89), particularly given its tendency to portray male violence as a normal aspect of masculinity (Tyson, 1999; Tomsen & Crofts, 2012; Crofts & Tyson, 2013). Tasmania, Victoria and Western Australia have now abolished this defence (Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas); Crimes (Homicide) Act 2005 (Vic); Criminal Law Amendment (Homicide) Act 2008 (WA)). However, as a partial defence to murder, provocation is still available in five Australian jurisdictions (Crimes Act 1900 (NSW) s 23; Crimes Act 1900 (ACT) s 13; Criminal Code 1899 (QLD) s 304; Criminal Code Act 1983 (NT) s 158; South Australia is governed by the Common Law\(^1\)).

**Current study**

The study covers the period July 2009 to June 2014, and analyses the sentencing remarks for intimate partner homicide offenders sentenced in the supreme court within six Australian jurisdictions; namely New South Wales, Northern Territory, South Australia, Tasmania, Victoria and Western Australia. There were no relevant sentencing remarks available to the researchers for either the Australian Capital Territory or Queensland during the specified time period. The selection of the relevant jurisdictions was determined by the availability of sentencing remarks either through the court directly or alternatively through the Australian Legal Information Institute database (AustLII). The study expands upon Hall, Whittle and Field’s (2015) qualitative analysis of judges’ sentencing remarks for domestic murderers, and as such provides a contemporary picture of intimate partner homicide sentencing in Australia.
A qualitative analysis of statements made by judges’ pertaining to offenders convicted of intimate partner murder and intimate partner manslaughter was undertaken using grounded theory. Saturation was achieved after 52 sets of sentencing remarks (see Method below). Provocation was discussed in 10 of the 52 sets of remarks (8 males and 2 females), and it is these 10 sets of remarks that form the focus of this article. The article contributes to the literature on this complex doctrine by examining how provocation is judicially considered during sentencing.

Method

The methodology for this study is grounded theory, which remains a leading method used by social scientists to analysis qualitative data (Mills, Bonner & Francis, 2006). Grounded theory facilitates the generation of theories which are grounded in the data, thus letting the data speak for itself, and allowing researchers to arrive at a theory which has been systematically developed from the data assembled (Punch, 1998).

Grounded theory encompasses a systematic set of methods which allows for the collation, coding and analysis of textual data (Glaser & Strauss, 1967). The coding and analysis process includes three stages: open coding, selective coding, and theoretical coding. All coding in the current study was undertaken manually. The first named author was the lead coder while the second named author acted as the validating coder. In the current study, the project was a qualitative analysis of sentencing remarks which are a verbatim transcript of judges’ comments at the time of sentencing an offender.
The researchers began the analysis with male offender sentencing remarks as males are more likely to kill than females (Domestic Violence Resource Centre Victoria Advocate, 2015). Each set of male offender sentencing remarks was taken randomly and one at a time until saturation point for that set of sentencing remarks was reached. Saturation point was reached when that set of remarks produced no new major ideas, and the task of analysis became confirmatory (Guest, Bunce & Johnson, 2006). Saturation point for the study as a whole was reached following an analysis of 34 sets of male offender sentencing remarks, and 18 sets of female offender sentencing remarks; making a total of 52 sets of sentencing remarks.

During this process every sentence within each set of remarks was read and coded. Key points within the judicial commentary were compared to other judicial comments within that set of remarks, with respect to commonalities and differences. Following on, similar concepts were grouped leading to the development of hypotheses regarding the relationships between categories. This ultimately formed the basis for the creating and grounding of an emerging theory.

Given that as a methodology grounded theory allows the data to speak for itself, the subsequent literature review was driven by the results emanating from the themes identified during the analysis of the judges' sentencing remarks. The purpose of the literature review was to identify research from a historical, legal and criminological perspective, which was consistent or inconsistent with the results emanating from the themes identified during the analysis of the sentencing remarks. Thus, in this article, following a description of the research, the literature review is presented as a consideration of the results in the context of that literature.
As judges’ sentencing remarks are publically available, there was no interaction with data participants, i.e.: judges; thus, the researchers had no control over the data.

Judicial commentary on provocation

The data show that pertaining to judicial commentary, the theme of provocation was made up of five key elements. These are: blaming the victim; the flawed nature of the female character; the offender’s loss of self-control; the lowering of the non-parole period; and the complexity of the doctrine of provocation. Each of these elements is discussed below. The reader should be aware that this article is not a study of provocation per se; rather the article presents findings which show how judges in Australia are dealing with this issue at the time of sentencing intimate partner homicide offenders.

The following two sections of the article provide examples from the study concerning the types of victim behaviour judges consider as provocative. Judges’ discussed the female victim’s provocative behaviour in 5 of the 8 male offender cases, and did so at length. In the other 3 male offender cases, provocation was raised by the defence, but rejected by the judge in each instance. These 3 cases were in two jurisdictions where the partial defence had already been abolished (Crimes (Homicide) Act 2005 (Vic); Criminal Law Amendment (Homicide) Act 2008 (WA)). As regards the two female offender cases in the sample, while in each case the male victim’s provocative behaviour was accepted by the judge, the judicial narrative in each instance was succinct.
Blaming the victim

In *R v Jermaine Bolt* [2013] the male offender was sentenced for murder. The judge commenced his remarks by commenting on the recurrent domestic violence perpetrated on the female victim by the male offender. That said, his Honour off-set these remarks by commenting on the victim’s behaviour towards the offender in the same paragraph:

During the course of their relationship, the deceased had complained to members of her family, on more than one occasion, that she had been assaulted by Mr Bolt. The deceased had been observed with injuries consistent with her complaints. On the other hand, on a number of occasions, Mr Bolt had called the police to the Ballina address to remove the deceased, who was intoxicated and abusive towards Mr Bolt. (Rothman J, 2013, at [3]).

Furthermore, over the next six paragraphs, his Honour extensively discussed the provocative behaviour and display of emotions by the female victim towards the male offender in the lead up to the offence. For example:

The deceased was upset and jealous. ... The deceased became aggressive and started to argue with Mr Bolt. The deceased started pushing Mr Bolt around and pushed him in the face. (Rothman J, 2013, at [5]).

... the deceased started to get wild and argued with Mr Bolt. The deceased pushed Mr Bolt around and, as earlier stated, pushed him in the face... Mr Bolt was defensive and seeking to parry the assault from the deceased. (Rothman J, 2013, at [7]).

Later, the deceased slapped Mr Bolt again, during which time Mr Bolt was trying to cover his face with his hands. (Rothman J, 2013, at [9]).

The deceased was the aggressor in the first and second phase ... (Rothman J, 2013, at [13]).
In summarising his Honour considered that the female victim was as much a contributor to the domestic violence as the male offender. As such, his Honour determined that the victim’s behaviours were indeed provocative:

This is a domestic violence situation in which, throughout the afternoon and evening, violence was perpetrated on each side of the relationship. In some senses, although not of the kind that ameliorates the offence, there was a degree of provocation. (Rothman J, 2013, at [43]).

While his Honour considered that the female victim’s provocative behaviour did not mitigate the offence, his Honour nonetheless proceeded to connect the male offender’s reaction to the female victim’s provocative behaviour with his broken childhood. In discussing the offender’s personal circumstances, his Honour ruminated on the offender’s abusive and dysfunctional childhood over the course of nine paragraphs. His Honour drew attention to the offender’s alcoholic, abusive and neglectful mother, and included judicial narrative regarding the domestic violence perpetrated on the offender’s mother by a series of intimate partners, as well as the domestic violence perpetrated by the offender’s mother on the offender. In the lead up to his concluding remarks concerning the culpability of the offender, his Honour began by validating his viewpoint on the matter, drawing upon a recently decided New South Wales Criminal Court of Appeal case as follows:

Fundamental in assessing the combination of objective and subjective factors is the dysfunctional childhood suffered by Mr Bolt. I agree with Simpson J in R v Millwood [2012] NSWCCA 2 at [69] that a person who has had the start in life that Mr Bolt has does not bear equal responsibility with one who has had a “normal” or “advantaged” upbringing. (Rothman J, 2013, at [47]).
Thus, assessing that the male offender was emotionally ill-equipped to handle the female victim’s perceived unpredictable emotions, his Honour concluded:

I agree with the assessment contained in the submissions made on behalf of Mr Bolt and, in my view, resulting from the limited emotional resources available to him from his background and the degree to which it was affected by constant abuse of women, that Mr Bolt’s actions and the fatal assault “was the result of the inability of the offender to deal with the deceased’s emotionally labile state”. (Rothman J, 2013, at [48]).

Notably this offender received the lowest head sentence (18 years) and non-parole period (12 years) of the 24 offenders sentenced for intimate partner murder in the sample.

The flawed nature of the female character

In this final male offender case example; in Sherna v The Queen [2011] which was a second trial by jury,² the offender had been found not guilty of murder, or of the offence of defensive homicide,³ but guilty of manslaughter by an unlawful and dangerous act; that being the strangulation of his de facto partner, thereby causing her death. The wretchedness of the male offender’s life at the hands of the female victim was affirmed by the judge who began by quoting from the offender’s interview with the police shortly after his arrest:

We had no children, we’ve had no family or friends. We didn’t go to restaurants, we had never had a holiday ... We actually slept in separate bedrooms for between ten and 15 years. ... And the last time we had sex was three years ago. We never kissed open mouthed. It would just be a peck on the cheek ... Her favourite term was ‘low-life’. Used to call me low-life. ... (Beach J, 2011, at [2]).
His Honour continued, again utilising the offender’s police interview to highlight the female victim’s flawed character:

Susie was a mouth – really mouthy, none of the neighbours liked us at all. None of the neighbours would talk to us because she was always mouthing off at them and when we got – Susie never had a license. She never ever got it in her life. So, I used to have to go and do all the shopping and everything and drive her around wherever she wanted to go and, of course, by doing all the driving, I couldn’t do the work at home ... (Beach J, 2011, at [2]).

His Honour continued by emphasising the significance of the offender’s good character:

There are matters which tell in your favour in the exercise of the sentencing discretion ... prior to strangling the deceased, you were a man of good character who had not been in trouble with the law. You had successfully held down responsible jobs and shown nothing to suggest that you were other than a law abiding and self-supporting member of the community. In short, your previous good character tells strongly in your favour. (Beach J, 2011, at [21]).

The context of the male offender’s reaction to the female victim’s provocative behaviour immediately preceding the killing was outlined by the judge as follows:

Close to midnight, you were rocking your Jack Russell cross Maltese Terrier, Hubble, to sleep as was your standard practice each night. Whilst you were rocking Hubble, the deceased (to use your words to the police) “came storming in yelling and screaming” and upsetting the dog. You were upset by this. (Beach J, 2011, at [7]).

...You gave evidence that the deceased then taunted you about the mobile telephone bill, about which she had previously argued with you about ... (Beach J, 2011, at [12]).

His Honour continued:
... In your interview to the police, you said: "I then lost my temper. I lost my temper and I strangled her with the dressing gown cord until she could no longer breathe." (Beach J, 2011, at [7]).

Concurring with the male offender’s view of the victim, his Honour summed up his own assessment of the female victim’s character as follows:

You painted a picture of the deceased as an aggressive, difficult and controlling person who completely dominated you. (Beach J, 2011, at [3]).

... I accept that the deceased was both controlling and domineering of you and that from time to time this involved significant episodes of unpleasantness on her behalf. (Beach J, 2011, at [18]).

In contrast, for female offenders, while judges’ remarked on the provocative behaviour of the victim, the judicial commentary in this regard was limited. In the following example, the male victim’s violent and controlling behaviour was summed up in short, all encompassing sentences. For example:

The relationship, though initially loving, slowly transformed into one beset with problems of her partner’s heavy drinking, engaging in domestic violence, controlling behaviour and infidelity. (Southwood J, 2013, at [12]).

Also of note in this case, the history of the nature and extent of the domestic violence perpetrated on the female offender by the male victim was confined to three lines, as follows:

The offender’s home life deteriorated to such an extent that she was subject to violence by the deceased. The violence occurred in the family home. She was punched in the face and, on occasions, had a full can of beer thrown at her. She did not report this violence. (Southwood J, 2013, at [15]).
The next three sections of the article show how judges in the sample are dealing with provocation in the context of sentencing the offender.

*The offender’s loss of self-control*

In *Singh v R* [2012] the male offender was sentenced for manslaughter. In this instance, the judge viewed the female victim’s behaviour towards the male offender in the following terms:

> I am also satisfied that the actions of the deceased were provocative and were sufficient to have occasioned an ordinary person in the offender’s position to have lost his self-control. (McClellan CJ, 2012, at [36]).

Further, the judge discussed the offender’s loss of self-control over six paragraphs. For example:

> All of the events of that 48 hour period were imposed upon a background of increasing failure in their relationship over the previous months since the offender had arrived in Australia. The offender ultimately responded by entirely losing his self-control. (McClellan CJ, 2012, at [33]).

> Ultimately, being told that his wife never loved him and was going to leave him, accompanied by the offensive remarks of the deceased’s brother-in-law was the trigger for the offender losing his self-control. (McClellan CJ, 2012, at [29]).

More specifically, the judge viewed the offender’s inability to handle the relationship conflict with the victim in the following terms:

> ... as is apparent, he was ultimately overwhelmed by the situation. (McClellan CJ, 2012, at [34]).
I am satisfied that the offender was an immature individual who became caught up in a situation which he was unable to effectively handle. He was far from his family and friends in India and had no resources to draw upon for emotion support. When it became apparent that his marriage had failed, he did not have the personal maturity or capacity to remove himself from the situation and avoid the conflict which ultimately took place. (McClellan CJ, 2012, at [39]).

As events unfolded, his expectation of a continuing and happy relationship was lost and without the necessary personal resources and family support he was vulnerable to the provocation that ultimately caused him to take the life of the deceased. (McClellan CJ, 2012, at [43]).

Despite the extensive narration concerning the offender’s loss of self-control, the domestic violence perpetrated by the male offender on the female victim throughout the marriage was confined to three paragraphs. Nonetheless, his Honour found the level of violence perpetrated by the male offender upon the female victim at the time of the offence to be of a high order:

The acts by which the offender killed his wife were violent. It could only be described as a ferocious attack. The evidence from the autopsy, which I accept, was that he first strangled her (although that may not have been the cause of her death) and then cut her throat at least eight times with a box cutter. At least two of the cuts were deep and would have led to a fatal loss of blood. (McClellan CJ, 2012, at [30]).

In drawing his remarks to a close, his Honour determined that the offender was to receive a prison sentence for a ‘significant period’. (McClellan CJ, 2012, at [47]). Accordingly, his Honour imposed a sentence with a non-parole period of six years with a balance of term of two years on the offender. However, the conviction and sentencing of this male offender subsequently proved controversial in the public arena, stimulating the establishment of a parliamentary inquiry into the viability of
provocation as a partial defence to murder in New South Wales (Fitz-Gibbon & Stubbs, 2012).

In *The Queen v Donathan Williams* [2012] the male offender was sentenced to 17 years, with a non-parole period of 12 years for provocation manslaughter. The judge articulated that this type of manslaughter was considered more culpable than reckless or negligent manslaughter because of the intention to either kill or cause serious harm. Nonetheless, the judge articulated that, in this instance, the female victim’s behaviour was central to the explanation for the male offender’s actions:

> At the time you committed the assault, that led to her death, you intended to cause her serious harm but it is accepted that you lost control as a result of seeing her and RT together, believing at the time that they were engaged in sexual intercourse, so the savagery of the attack, that is, the intention to cause serious harm was not planned, it was a result of that loss of control. (Kelly J, 2012, at [38]).

Additionally, the female victim’s behaviour was viewed as the source of the male offender’s suffering:

> I need to take into account the degree of provocation involved, that is the lack of self control that you suffered at the time. (Kelly J, 2012, at [38]).

*The lowering of the non-parole period*

In *R v Mark Scott Bampton* 2010 the offender was sentenced to mandatory life imprisonment with a non-parole period of 18 years for shooting his female partner. Although the offender did not run a provocation defence, the judge, nonetheless appeared to take the female victim’s behaviour into account at the time of sentencing. The judge determined that because the offender had faced up to the
consequences of his actions rather than running a provocation defence, special reasons existed for lowering the non-parole period. His Honour commented as follows:

It was put to me that in this case you might have run a provocation defence; you might have been able to argue that the gun went off in circumstances where there was no specific intent to kill or do grievous bodily harm, ... It was put that the circumstances surrounding the plea have been that you have been frank with the authorities and have faced up to the consequences of your conduct. Therefore, the discretion to set a non-parole period lower than the mandatory minimum non-parole period has been enlivened and there exits special reasons for fixing a non-parole period that is shorter than 20 years imprisonment. (Sulan J, 2010, at [33]).

Furthermore, his Honour discussed the female victim’s sexual behaviour which led to the offender shooting his partner in the head in the following terms:

You fired on the spur of the moment, having heard your partner, who had recently given birth to your son, arranging to meet another man for sex. Those factors, together with your genuine contrition and your conduct since the shooting satisfy me that special reasons do exist in this case. (Sulan J, 2010, at [35]).

The complexity of the doctrine of provocation

As the following example illustrates, the law surrounding the doctrine of provocation is complex. In *R v Biddle* [2011] the male offender was sentenced for the murder of his wife of 41 years. The offender offered to plead guilty to manslaughter on the grounds of provocation. The plea was not accepted by the Crown, and the accused was committed to stand trial for murder, for which the jury returned a guilty verdict. In sentencing the offender, the judge began by surmising that the offender was not provoked into committing the murder:
At trial Mr Biddle submitted, on the evidence, that the jury would find that he was provoked and therefore guilty of manslaughter. However, consistent with the jury’s verdict, I am satisfied that, provocation having been negatived beyond reasonable doubt by the Crown, Mr Biddle was not provoked into killing his wife. (Garling J, 2011, at [60]).

His Honour continued by saying that based on the facts, the offender was not provoked by the victim at the time of the offending:

In summary I reach the following factual conclusions:
As his counsel told the jury, Mr Biddle fully knew what he was doing to his wife, and fully knew that what he was doing was wrong;
Mr Biddle acted rationally and deliberately. ....

At the time of that attack, Mr Biddle was not provoked. However, the breakdown of his marriage, for which his conduct had been the precipitatary cause, together with his inability to accept that his wife was entitled to an independent life and the fact that he could not reside in the homestead, all combined to bring him to kill his wife;

... Simply put, he was jealous of his wife, and her newly found independence. He could not accept that his previously comfortable life had irretrievably changed. He felt threatened by the loss of his dominant position in the family. (Garling J, 2011, at [80]).

His Honour then turned his attention to specific statutory considerations, in particular section 21A of the *Crimes (Sentencing Procedure) Act* which takes account of aggravating, mitigating and ‘other factors’ in sentencing. In regards to considering provocation as a mitigating factor in the context of the legislation his Honour found that by applying the law to the facts, the offender had indeed been provoked by his wife. His Honour commented as follows:

There are a number of mitigating factors to which I am required to have regard, and to which I do. They are:

...
That the offender was provoked by the victim: s 21A(3)(c). Although the jury has rejected provocation as a partial defence in the proceedings, the conduct upon which Mr Biddle relied may nevertheless be taken into account in mitigation of any penalty which is to be imposed. But the conduct here relied upon, being the interaction between Mr Biddle and his wife about the state of their marriage, and domestic arrangements falls within the description "... relationship tension and general enmity ... leading up to the offence" (emphasis in original) as this phrase is used in Shaw v R [2008] NSWCCA 58 at [26]. Whilst I have regard to it, it carries little weight in terms of mitigation in this case. Mr Biddle's senior counsel accepted in the course of his sentencing submission, that provocation was not available to ameliorate Mr Biddle's conduct ... (Garling J, 2011, at [85]).

Discussion

In the sentencing remarks for male offenders, judges frequently set out a background of jealousy, infidelity and control to explain the offenders' behaviour; specifically male offenders' reactions to perceived threats from their female victims. In this respect, the data is consistent with the historical literature which shows that by the nineteenth century the defence of provocation came to encompass categories of conduct including men reacting angrily in matters concerning their honour, and murder in response to infidelity (Bradfield, 2002). This defence has now expanded to take account of killings against a background of sexual jealousy and rejection. (Bradfield, 2002, p. 88). Kirkwood (2000, p. 209) argues that the availability of provocation in such circumstances may send an unacceptable message 'that men's anger and use of violence against women is legitimate and excusable'. Furthermore, the data is consistent with a study undertaken by the Victorian Law Reform Commission (2004, p. 30) ('VLRC') which concluded that men frequently raise provocation 'in the context of a relationship of sexual intimacy in circumstances involving jealousy or an apparent desire to retain control'.
The data also show that judicial discourse regarding male violent and controlling behaviour; whether the male be an offender or a victim of intimate partner homicide, is often restricted to short, all encompassing sentences, consequently downplaying the nature and extent of male domestic violence towards women. Moreover, judges frequently articulate that the behaviour of the female victim is central to the explanation for the male offender’s violent actions. This finding is consistent with research which demonstrates that when comparing crimes committed between non-intimates, with crimes committed between intimates, intimate partner crimes repeatedly have a measure of victim responsibility (Riedel, 1987; Rapaport, 1991; Dawson, 2012).

Judges also frequently comment on offender remorse. This observation is consistent with judicial discourse generally which highlights that remorse is an important sentencing consideration in all Australian jurisdictions (R v Shannon, 1979, p. 452, per King CJ; R v Thomson & Hulton, 2000, at [118], per Spigelman CJ). As the data show, lack of offender remorse does not appear to be weighed against any mitigation offered by the provocation, moving towards an increase in penalty for the offending.

Judges’ remarks regarding provocation as it pertains to female offenders were only available in two cases. This data mirrors research which indicates that not only do men and women kill with different frequencies, men and women have different motivations to kill their intimate partners (Bradfield, 2001). Men kill their female partners in response to female actions such as when the women challenge their authority, leave or threaten to leave the relationship, or form, or are suspected of
forming a new relationship. In contrast, for women, possession is rarely a motivating factor in killing their male partners. Women are more likely to commit spousal homicide as a result of self-preservation (Polk & Ranson, 1991). This is reflected in the sample where both female offenders killed their partners against a background of prolonged domestic abuse, infidelity and controlling behaviour on the part of the male victim.

The small number of females in this sample is noteworthy as this supports the opinion that, given the structure of the provocation defence, it is often difficult for female offenders to access the defence (McKenzie, Kirkwood, Tyson, & Naylor, 2016). Males on the other hand appear to access the defence with relative ease when killing in response to provocative female victim conduct such as subjectively perceived nagging, insulting or goading (Tyson, 2011, p. 208).

For females, leaving or threatening to leave the relationship or even flirting or unfaithfulness, suspected or otherwise, can lead to males feeling justifiably provoked into killing females, subsequently relying on the defence to explain their offending (Tyson, 2011). Tyson’s (2011) research is consistent with the judges’ sentencing remarks in the sample where female victims as portrayed as ‘mouthy’, ‘aggressive’ and ‘difficult’. Such observations from the data coincide with those of Wells (2000, p. 101) who contends that females who are killed by their male partners are frequently stereotyped according to what is considered as ‘undesirable characteristics’. Such commentary within the current data highlights the role the provocation defence can play in denigrating a female victim’s character, adding further weight to the argument that the defence is gendered (McSherry, 2005;
Ramsey, 2010; Fitz-Gibbon & Stubbs, 2012). In contrast, male offenders in the sample were depicted as being tortured by sexual jealousy, ‘taunted’ or derided.

Judicial commentary for offenders in the sample also reflects that the murderous actions of males belies their beliefs and attitudes regarding women, together with their sense of male entitlement and proprietorship over their female partner, ultimately leading to male justification for the perpetration of lethal violence towards females. This finding is consistent with Shapland’s (1981) observations in her study of mitigation where she found that offenders often minimised their offending by denying both responsibility and wrongdoing. Shapland (1981) stated that subsequent to offenders presenting expressions of guilt and remorse, they attempted to deny full responsibility for their offending, claiming for example, provocation, as a factor the offender perceived was beyond their control. Indermaur (1996, p. 17) suggests that an offender’s belief that they are not in fact responsible for their criminal behaviour may be further accentuated if the judge’s sentencing remarks also reflect that the offender’s responsibility is moderated. In this regard the results of the current study are significant.

Comparing females to males in the sample, males are more likely to be considered ill-equipped to manage conflict within the intimate partner relationship; with females’ emotions perceived by male offenders as unpredictable. At law, in order to determine if a victim’s behaviour towards an offender is indeed provocative, the law says that the gravity of the deceased’s conduct must be assessed from the viewpoint of the accused (Judicial College of Victoria, 2014). Therefore, amongst other things, account must be taken of the accused’s personal characteristics and circumstances;
the rationale being that conduct which may not be hurtful or insulting to one individual, may indeed be offensive to another because of their own characteristics and circumstances (Judicial College of Victoria, 2014). This legal stance is reflected in the data, where for example, in the case of Singh v R [2012] the accused argued successfully that he was provoked into killing his wife as she had threatened to end their relationship, likely leading to the cancellation of his Australian spousal visa. Singh was subsequently sentenced to a head sentence of eight years with a six year non-parole period. The length of Singh’s sentence was articulated by the sentencing judge to represent a ‘significant period’ (McClellan CJ, at [47]).

Arguably, as this example shows, rather than aggravating the crime of intimate partner homicide, partner intimacy serves to mitigate an offender’s actions; a fact Dawson (2008) argues has traditionally reduced an offender’s culpability, despite the fact that the offender’s actions breach the ‘trust and vulnerability’ intrinsic to the intimate relationship. Both the conviction and sentencing of Singh proved controversial in the public arena leading to a New South Wales Parliamentary Inquiry into the feasibility of provocation as a partial defence to murder. In their own analysis of this case, Fitz-Gibbon and Stubbs (2012, p. 321-322) observed that while evidence at trial revealed Singh’s violent history towards his wife, little attention was paid to this at sentencing. Indeed, Fitz-Gibbon (2012, p. 194) notes that where debate surrounds the abolition of this partial defence, Government and Law Commissions alike consistently argue that the gender biased nature of provocation no longer reflects community values and beliefs surrounding justice.

Amongst its 2004 recommendations that the provocation defence be abolished in Victoria, the VLRC (2004, p. 32) argued that considerations concerning provocation
mitigation could be more suitably dealt with during sentencing. Within the data judicial discourse relating to provocation is present in all murder cases in the sample, where, for the most part, the female victim’s behaviour towards the male offender was viewed as provocative by the sentencing judge. These results are significant as they reflect the role provocation plays regardless of whether or not the partial defence is successful in reducing the offender’s criminal liability from murder to manslaughter. Tyson (2011, p. 203) notes that while the partial defence of provocation has been abolished in Victoria, Victorian case law continues to reveal that male violence towards females remains excusable, with the female victim retaining responsibility for her own death. The data also highlights that where a male offender is seen as facing up to the consequences of his actions rather than running a provocation defence, this can, in the case of murder, lead to the shortening of the mandatory minimum non-parole period (Sulan J, 2010, at [33]). This finding supports commentary suggesting that regardless of the abolition of the defence, provocation is likely to continue to play a significant role both at the time of pleading as well as sentencing (Dawson, 2012; Stewart & Frieberg, 2008).

Conclusion

This article forms part of a larger study carried out by Whittle and Hall which analyses judges’ sentencing remarks where offenders are sentenced for intimate partner homicide. Specifically this article focused on themes pertaining to the partial defence of provocation, emanating from those remarks. The data reflect that as a defence, provocation is gender biased; favouring males as the main beneficiaries of the defence. Additionally, while promoting a culture of female victim blaming, the
availability of provocation as a platform for males to normalise and excuse their offending, ultimately fosters male violence against women in a domestic setting.

The continued use of this partial defence accentuates its gendered operation and the part it plays in denigrating the character of a deceased female victim. The data shows that provocation also remains a relevant sentencing consideration when sentencing an offender for murder. Ultimately, even if the partial defence is abolished throughout Australia, as long as provocation remains a sentencing consideration, and commented on without condemnation, male reactions to subjectively perceived provocative behaviour will continue to promote the message to society that male violence against women is a normal part of masculinity, and in this respect, that male violence is justified.

1 For the jurisdiction of South Australia the elements of provocation are set out in *The Queen v R* (1981) 28 SASR 321.
2 The jury at an earlier trial had been unable to agree upon a verdict.
3 Introduced alongside the abolition of provocation, the new offence of defensive homicide is set out in the *Crimes (Homicide) Act 2005* (Vic) s 9AD.
4 This offender was sentenced for two offences which were committed as part of the same course of conduct, and the judge considered it appropriate for the two sentences to be concurrent as to four years and cumulative as to two years.
5 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(c) the offender was provoked by the victim.
Legal Cases Cited


R v Mark Scott Bampton SASC SCCRM-10-59 (4 June 2010).


R v Shannon (1979) 21 SASR 442.


Legislation Cited

Crimes Act 1900 (ACT).

Crimes Act 1900 (NSW).

Crimes (Homicide) Act 2005 (Vic).

Crimes (Sentencing Procedure) Act 1999 (NSW).

Criminal Code 1899 (QLD).


Criminal Law Amendment (Homicide) Act 2008 (WA).
References


End of article
3.4 CONCLUSION

The article presented in this chapter contributes to the debate regarding the abolition of this controversial defence by providing a snapshot of what is occurring in the courts today. Essentially the study encapsulates a period in history where the law in this area is in the process of evolving. Further, not only does the data reflect the complexity of the doctrine, but also its evolution within the criminal law. Thus, this article makes a significant contribution to recording that evolution.

Potentially, when enough time has passed to allow for jurisdictional changes to the defence, further qualitative research of judicial sentencing regarding the interplay between provocation and intimate partner homicide is needed. Specifically, further narrative analysis of sentencing remarks in the wake of changes to this law will aid in understanding, to what extent, the exculpatory narratives of this defence are being removed from the courts.

The next chapter, chapter 4, discusses the second of the key themes emanating from the data; namely domestic violence.
Chapter Four

Theme Two: Domestic violence
4. **Introduction**

4.1 Domestic violence is a matter for global concern,¹ and legal professions, like many others in the community, are influenced by common stereotypes and perceptions about this type of violence.² The article at 4.2 presents and discusses the qualitative data emanating from the sentencing remarks, pertaining to the theme of domestic violence. The sub-themes of offender violence, offender remorse, and general deterrence are also discussed within the article.

In making the observation that gender is a key feature of this thesis, this article focuses on how domestic violence, as perpetrated by males and females, is explained and understood by the judiciary, and provides insight into the impact and significance of this manner of judicial thinking on male and female offenders, and victims, as well as the wider community.

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4.2 Article: ‘Domestic and Homicidal Violence between Intimate Partners: Themes in Judges’ Sentencing Remarks in Australia’

Marion Whittle, Guy Hall and Anahita Movassagh Riegler

Under review by *Law & Policy*³
DOMESTIC AND HOMICIDAL VIOLENCE BETWEEN INTIMATE PARTNERS: THEMES IN JUDGES' SENTENCING REMARKS IN AUSTRALIA

Marion Whittle, Guy Hall and Anahita Movassagh Riegler

This article presents themes arising from a grounded theory analysis of judges’ sentencing remarks for males and females sentenced for intimate partner homicide in Australia between 2009 and 2014.

The data indicate that judges underestimate the significance of domestic violence. Despite the gravity of the violence perpetrated upon women, judges fail to convey a strong sense of responsibility in male offenders for their offending. Rather, judges obscure male offender violence towards women by reformulating those acts as being ‘out of character’. This is despite the fact that women remain in the majority as victims of intimate partner homicide in Australia.

INTRODUCTION

In Australia, preventing lethal violence and homicide continue to be two major priorities for both the criminal justice system and law enforcement agencies. Consequently, in Australia the National Homicide Monitoring Program (NHMP) collates, monitors, analyses and comments on homicide rates, types and trends throughout the country (National Homicide Monitoring Program 2017). The NHMP evolved as a result of a 2003 study by Mouzos and Rushforth which described the characteristics of domestic/family homicides. Mouzos and Rushforth (2003, 5) concluded, amongst other things, that public policy and homicide prevention strategies were required. More recently, Cussen and Bryant (2015) agree that these conclusions continue to have currency.
In updating Mouzos and Rushforth’s (2003) report, Cussen and Bryant (2015) also observe that every homicide is unique. Placed in context each homicide contains a number of variables, including an offender’s motive; the circumstances surrounding the offence; and the individual characteristics of both the offender and the victim (Cussen and Bryant 2015, 5). According to Cussen and Bryant (2015) ‘[u]nderstanding the nuances of these differences requires qualitative incident specific analysis’ (Cussen and Bryant 2015, 5).

Consistent with the need for qualitative studies of this kind, the authors undertook a grounded theory analysis of judges’ sentencing remarks for males and females sentenced for intimate partner homicide in Australia, between July 2009 and June 2014. The primary aim of the study was to ascertain how judges are currently dealing with domestic homicide. As a result of this detailed study a number of key themes emerged from the data.

The aim of the current article is to present and discuss two of the key themes arising out of this qualitative analysis. Those themes are judges’ commentary regarding the violence perpetrated by the offender upon the victim at the time of the offence, as well as judicial discourse on the domestic violence between the parties during the relationship and its connection to the offending. Two related sub-themes arising from the data, namely offender remorse and general deterrence are also discussed in the article.

Domestic violence is now a matter of global concern (Phillips and Vandenbroek 2014, 1). Indeed Australian of the Year for 2015, domestic violence
campaigner Rosie Batty comments that family violence is an ‘epidemic’ (Batty 2016). Thus, in light of the findings of the authors’ current research, this article will conclude with some strong recommendations regarding how judges’ ought to be dealing with the issues of domestic violence and intimate partner homicide at the time of sentencing offenders. In addition to the themes discussed in this article other themes arising out of the study were also identified and will be reported separately.

In concert with Cussen and Bryant’s (2015) recommendation that in order to gain an understanding of the ‘nuances’ of domestic homicide a ‘qualitative incident specific analysis’ (italics added) is required (Cussen and Bryant 2015, 5), this article presents and discusses specific case examples from the current study throughout the article. This approach is also consistent with grounded theory methodology, and best reflects the focus and natural development of the current study (Glaser and Strauss 1967, 37).

Sentencing offenders is considered a difficult and complex task (McKenzie et al. 2016, 118). Yet, how judges go about the task of sentencing is not usually known (Mackenzie 2003, 288). With the focus among lawyers, legally trained academics and the judiciary placed on the ‘black letter’ of the law, the majority of commentary on the remarks judges make during the sentencing process is focused on an analysis of the processes judges use to determine the appropriate sentence in a particular case (Australian Law Reform Commission 2005, 183-185). Nonetheless, how judges approach the sentencing task has been explored in a number of key studies on sentencing both in Australia and overseas, and while the primary mode of research in these instances was either by interview or questionnaire directed to the judiciary,
across a variety of topics of interest, none of these studies have undertaken a qualitative analysis of the verbatim transcript of judges' comments at the time of sentencing an offender for one of the most serious of crimes, namely intimate partner homicide (Indermaur 1990; Bray and Chan 1991; Potas and Spears 1994; Poletti, Spears and Span 1997; Dobb and Marinos 2000; Mackenzie 2001; Gilchrist and Blissett 2002; Searle 2003; Tombs and Jagger 2006; Jacobson and Hough 2007; Bartels 2008).

A previous study undertaken by Hall, Whittle and Field (2015) performed a grounded theory analysis of judges’ sentencing remarks in the context of a domestic relationship. However that study had two limitations: first; the study was limited to offenders sentenced for murder, and second; the study was restricted to two jurisdictions, namely Victoria and New South Wales. Therefore the current article fills a gap in the sentencing literature by reporting on the current study which is a grounded theory analysis which compares judges’ sentencing remarks in Australia when males and females are sentenced for intimate partner homicide. The current study does not repeat data from the previous study.

For the purposes of the current study intimate partner homicide is characterised as murder or manslaughter between current or former, legal or de-facto, heterosexual spouses. Other forms of intimate partner relationships such as dating or homosexual were difficult to identify within the sentencing remarks, and were therefore omitted for research purposes.
DATA COLLECTION

For the current study, a grounded theory analysis of intimate partner homicide sentencing remarks was carried out for six Australian jurisdictions; New South Wales (NSW), Northern Territory (NT), South Australia (SA), Tasmania (Tas), Victoria (Vic) and Western Australia (WA). The selection of these six jurisdictions was based on the availability of sentencing remarks either directly from the Supreme Court or through the Australian Legal Information Institute database (AustLII), which is a full text electronic database. During the study period relevant sentencing remarks were not available for either the Australian Capital Territory or Queensland. Given that judges' sentencing remarks are publically available, the researchers had no interaction with the data participants, ie: judges; thus, the researchers had no control over the data.

In Australia, similar to most other countries, homicide is largely an intra-racial occurrence, and in the sample judges acknowledged an offender's Aboriginality in 40 per cent of the sentencing remarks. However, given that judges tended to focus their remarks on matters directly relevant to the offender, information regarding a victim's racial status was more difficult to determine. Even where it was possible to identify that the victim was Indigenous, it was seldom possible to identify if that victim was of Torres Strait Island or Aboriginal decent. Therefore, in this article, such victims are referred to as Indigenous.¹ No other races were identified in the study.
METHOD

The current study employs a replication of grounded theory methodology used in a previous study by Hall, Whittle and Field (2015) which provided an analysis of judges’ sentencing remarks for domestic murders in two Australian jurisdictions between 2001 and 2009. Grounded theory methodology was also used in this study because it remains the dominant social sciences method used to analyse qualitative data (Mills, Bonner and Francis 2006), and allows for the generation of theories which are grounded in the data itself.

Grounded theory encompasses a systematic set of methods which allows for the collation, coding and analysis of textual data. By letting the data speak for itself, researchers are then able to arrive at theories which have been systematically developed from the collected data (Punch 2008). A literature review does not play a key role in grounded theory, therefore, in this study the literature review was carried out after the complete analysis of the sentencing remarks for both male and female offenders. The purpose of the literature review was to identify previous research which was either consistent or inconsistent with the themes emanating from the study. Thus, in this article, following a description of the research and the results, the literature review is presented as a consideration of the results in the context of that literature.

The coding and analysis process includes three stages: open coding, selective coding, and theoretical coding. The first named author was the principal coder while the second named author acted as the validating coder. The researchers began the analysis with male offender sentencing remarks as males are more likely to kill than
females. Each set of male offender sentencing remarks was taken randomly and one at a time until saturation point for that set of sentencing remarks was reached. Each sentence within each set of remarks was read and coded. Then, key judicial comments within a set of sentencing remarks were compared to other key judicial comments within the same set of remarks with respect to commonalities and differences. Similar concepts were then grouped which lead to hypotheses about the relationships between categories. This in turn formed the basis for the emerging theory. In the current study, saturation point for a set of remarks was reached when that set of remarks produced no new major ideas, and the task of analysis became confirmatory (Guest, Bunce and Johnson 2006). Saturation point for the study as a whole was reached following an analysis of 34 sets of male offender sentencing remarks (21 non-Aboriginal males and 13 Aboriginal males), and 18 sets of female offender sentencing remarks (10 non-Aboriginal females and 8 Aboriginal females); making a total of 52 sets of sentencing remarks.

FINDINGS

Judicial commentary on violence was comprised of two main themes: offender violence; and domestic violence with two sub-themes: offender remorse and general deterrence. Each of these themes and sub-themes is presented and discussed, in turn, below. In each instance judges’ quotations are provided from case examples in the study in order to illustrate a particular theme or sub-theme, and demonstrate how judges are dealing with that theme at the time of sentencing. This approach is used because the study findings are ‘grounded’ in the data itself and best reflects the focus and natural development of the study (Glaser and Strauss 1967, 37).
Theme one: Offender violence

Judges commented on the fact that men and women in the sample killed their domestic partners for different reasons. Males were usually motivated by jealousy and possessiveness with a strong desire to control their partner. Females, on the other hand primarily killed in response to male violence perpetrated over an extended period of time.

The study also showed that although Aboriginal and non-Aboriginal males killed with the same motivations, they killed their female partners in different ways. More than half of the Aboriginal male offenders in the study used bodily force alone to kill their female victims; the majority of whom were sentenced for manslaughter rather than murder. For these offenders, judges commented extensively on the nature and extent of the violence brought to bear on the female victim.

In the following NT case example the Aboriginal male offender had beaten his Aboriginal wife to death because he was frustrated that given her intoxication, she was incapable of walking back to their home. The following judicial comments provide a graphic example of the lethal effects suffered by a female victim when a male offender killed using bodily force:

The extensive laceration and tearing of the liver would have required a moderate to significant force. The damage to the mesentery was caused by trauma deep within the abdomen and would have required a lot of force, a shearing sliding force necessary to tear the mesentery and rupture the artery passing through it. The degree of force required would have been consistent with kicking or stomping, alternatively flopping by dropping knees
first onto your wife’s body with your full body weight. *(The Queen v Esau Hodgson 2012 at 3).*

His Honour continued:

Additional injuries to your wife, although not fatal injuries, included a significant impact injury to the back of her head causing contrecoup injuries internally at the front of the skull. There was also a shearing injury to the chin sufficient to detach the skin and soft tissues underlying the chin from the jaw underneath. This injury would have required considerable force and the expert evidence is that it was caused as the result of a kick by someone wearing footwear which gripped the surface skin and soft tissues, creating a tearing force sufficient to cause the shearing away of the superficial soft tissues from the jaw underneath. *(The Queen v Esau Hodgson 2012 at 4).*

Despite detailing the nature of the violence perpetrated by the offender, the judge considered that the intoxicated victim may have, to an extent, been responsible for at least some of her injuries:

It is reasonably possible that some of your wife’s injuries were caused accidentally, possibly as she fell to the ground as a result of tripping or possibly as a result of some unintended actions on your part. *(The Queen v Esau Hodgson 2012 at 4).*

In discussing the lead up to the offending, the judge frequently discussed the mutual intoxication of the offender and the victim. For example:

You and your wife were not everyday drinkers but once a week, ... you would binge drink together, consuming significant amounts of alcohol. *(The Queen v Esau Hodgson 2012 at 2).*
On 26 February 2010 you and your wife woke up and started the day by drinking rum at breakfast time. You and she had been drinking heavily the previous day as well. *(The Queen v Esau Hodgson 2012 at 2).*

The judge continued by explaining the offender’s actions leading up to the offending, subsequently reiterating the offender’s frustration at his wife’s intoxicated state:

... your wife was intoxicated to the extent that she was incapable of walking back to your home at the Binjarri Community. She fell over on several occasions. You unsuccessfully tried to carry her but you fell over. At a certain stage, with your wife asleep and laying on your lap, you became frustrated that you could not get the both of you home. ... you then beat your wife. *(The Queen v Esau Hodgson 2012 at 4).*

Furthermore his Honour surmised that given the offender’s state of intoxication, he was prevented from having the necessary insight to determine that his conduct would result in his wife’s death:

Your conduct involved a very high risk of causing the death of your wife although you may not have realised it. *(The Queen v Esau Hodgson 2012 at 5).*

In concluding his sentencing remarks regarding the offender, the judge provided extensive positive descriptions of the offender’s employment history, community contributions and family commitments, thereby highlighting the offender’s ordinariness in the context of his offending. For example:

... You worked for Kalano Community under its CDEP scheme. When that finished you worked in your own community doing building work, working for the health clinic, doing
gardening and maintenance, and also as a transport driver to drive people into town for hospital appointments. (*The Queen v Esau Hodgson* 2012 at 6).

You have had a good work history. ... You were a respected man in your community. You were in an established long term relationship with your deceased partner and you lived in a family unit which included your wife, your daughter, your adopted son and your grandson. (*The Queen v Esau Hodgson* 2012 at 7).

Finally, in sentencing the offender to a head sentence of 11 years with a non-parole period of five years and nine months the judge commented that the sentence imposed should reflect community condemnation for the offender’s ‘cruel and violent conduct’.{2} His Honour commented as follows:

The maximum penalty specified in the Criminal Code for the crime of manslaughter is imprisonment for life. ... The protection of human life and personal safety is a primary objective of the system of criminal justice. The sentence of this Court must provide a real demonstration that society cannot tolerate criminal offending resulting in the taking of a human life. The fact that a life has been lost must be the starting point in the consideration of the sentence to be imposed. ... Because of the degree of violence, with fatal consequences, the factor of general deterrence is of great importance. Your sentence must provide a serious disincentive to other would be offenders. (*The Queen v Esau Hodgson* 2012 at 6).

In contrast to Aboriginal male offenders, non-Aboriginal male offenders in the study rarely used bodily force to kill their victims. For non-Aboriginal male offenders the weapon used to kill their female victim was predominately a knife, a gun or strangulation device such as a cord or scarf placed around the victim’s neck. Also, in contrast to the lengthy judicial descriptions of Aboriginal male offender
violence, commentary regarding non-Aboriginal male offender violence towards their partner was for the most part unremarkable. However, as observed with Aboriginal male offenders; rather than resting responsibility for male offender violence squarely with the offender, judges frequently considered that while feeling the stresses of the family relationship, males became overwhelmed by emotion; often lacking the emotional resources to deal with relationship problems.

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

raised in an unstable home life, marred by domestic violence towards his mother, as well as his mother’s alcoholism. He recalled her [his mother’s] behaviour as vacillating between neglect and abuse; her behaviour could alternate from kicking Mr. Bolt and his younger step sister out of the home to standing over them with a knife in an alcohol induced rage. For Mr. Bolt, this resulted in his belief that he had to protect the women in his life, both his sister as well as his mother, not only to protect her from herself, but from the violent men in her life. Mr. Bolt identified that he came from an environment where violence towards women was not only common, but extreme; he stated his biological father was serving a gaol sentence for attempted murder of his partner, and his stepfather murdered his mother. Domestic violence was present in each of Mr. Bolt’s relationships. ... (emphasis in original). (R v Jermaine Bolt 2013 at 6).
His Honour commented further as follows:

I agree with the assessment of the psychologist. There can be little doubt that Mr Bolt had a dysfunctional childhood and upbringing. (*R v Jermaine Bolt* 2013 at 6).

In concluding his remarks, his Honour considered that due to the lack of emotional resources available to the offender, he was unable to deal with the situation he found himself in at the time of the offence. Therefore while the maximum sentence for murder at the time of the offender's offending was life imprisonment, with a standard non-parole period of 20 years; Rothman J sentenced the male offender to a head sentence of 18 years with a non-parole period of 12 years. This represented the lowest head sentence and non-parole period imposed on all murderers in the sample.

As with Aboriginal male offender remarks, blaming the female victim for the male offender's violent actions was apparent in a number of non-Aboriginal offender cases. For example:

Your acts of violence centred around your drug abuse and your relationship with Ms Petropoulos. (*R v Mark Scott Bampton* 2010 at 9). ... It occurred in circumstances in which both you and the deceased were heavily affected by drugs. ... You were both irrational. You both acted in a drug induced way... (*R v Mark Scott Bampton* 2010 at 12).

I do not think that personal deterrence is an important issue in the sentence process for you ... I doubt that you will be in a similar position again where your emotions are aroused to the same extent. (*The State of Western Australia v Silva* 2013 at 13).
Finally, judges at times considered male offender violence towards their female victim as being ‘out of character’. For example:

I accept that the defendant was in a very distressed state and had been for a time, and that violence was out of character for him. (R v Patrick Daley 2014 at 2).

Compared to male offenders in the study, females primary killed in response to male violence perpetrated upon them over an extended period of time. The study also showed that females used different weapons to kill their partner. All but two of the females in the study were sentenced for manslaughter. In the majority of cases some form of domestic knife was the weapon. However, for the two female offenders in the sample who were sentenced for murder, one female had hired an assassin to kill her husband, and in the second instance the female offender was convicted entirely on circumstantial evidence as the body of the male victim was never found. In both instances, the female offenders were motivated by the financial gain they would receive on the death of their partner. No male offenders in the sample killed their domestic partner for financial benefit. Where females were found to have killed their partner for financial gain, judges considered that this motive carried a significantly higher level of criminality. By example, in the following Tasmanian case example the judge commented:

It was a deliberate killing for the purpose of some sort of personal gain. It warrants a heavier sentence than most murders. (R v Susan Neill-Fraser 2010 at 4).
Also in the same case, the female offender who was sentenced for murder was convicted entirely on circumstantial evidence. The judge took the opportunity to express his views on the offender’s character based upon his observations. The following paragraph denotes the only comments made about the female offender within the sentencing remarks:

I have had the opportunity to observe Ms Neill-Fraser during two very long police interviews. ... She seems to me to be clever, very cool-headed, and well able to control her emotions. ... It was an intentional and purposeful killing. (R v Susan Neill-Fraser 2010 at 3).

**Theme two: Domestic violence**

Despite a significant number of the sentencing remarks showing a history of domestic violence between the offender and the victim, remarkably, the length of the judicial commentary in this regard was sparse. Male offenders convicted of either murder or manslaughter were for the most part also the perpetrators of long term domestic violence upon their female victim. Only one male offender in the sample was himself considered a victim of domestic violence at the hands of his de-facto partner (DPP v Sherna (No.2) 2009). On the other hand, female offenders were in all but one case, victims as opposed to perpetrators, of long term domestic violence at the hands of their victim. In all instances in the sample where a violence restraining order was in place at the time of the offending, the order had been issued against the male in the relationship.

For female offenders, judges at times neutralised the violence perpetrated by the male victim by commenting on the female offender’s behaviour towards the
victim. For example, in the following South Australian case the judge commented as follows:

There were occasions of physical violence towards each other. You suffered physical injuries after you and the deceased had quarrelled. ... (R v Catherine Therese Collyer 2012 at 1). ... There were other occasions when you were extremely aggressive towards the deceased. There were times when you physically assaulted him. (R v Catherine Therese Collyer 2012 at 2)

Also, in R v Cassandra Lee Dodd 2011 his Honour said:

... on occasions you would physically assault Mr Brabham in the course of one of your arguments and on other occasions he would assault you, sometimes simultaneously. ... In the past you have been, as your counsel put it, perfectly capable of giving as good as you get in the course of the many arguments which you have had with Mr Brabham. (R v Cassandra Lee Dodd 2011 at 2).

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

This is a domestic violence situation ... violence was perpetrated on each side of the relationship. (R v Jermaine Bolt 2013 at 8).

In addition, judges acknowledge a lack of understanding regarding the difficulties experienced by female victims of domestic violence. One judge summed up the dilemma as follows:
I doubt that it is possible for persons who have not experienced it to truly comprehend the impact of being the victim of a violent abusive relationship. (R v Debra Patricia Charles 2013 at 4):

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

There is simply no need for this cycle of abuse and violence to continue in your life. (R v Cassandra Lee Dodd 2011 at 3).

... the order was for Ms Kupsch’s protection it appears that she did not want that protection so far as all contact with him was concerned, ... (R v Mathew Tunks 2012 at 1).

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

... domestic violence in their home and in the broader community in Kalgoorlie has desensitised you to the seriousness and unacceptability of domestic violence. (R v Sherridan Rose Hodder 2013 at 5).

... when he was released from prison, you voluntarily recommenced your relationship with him. (R v Sherridan Rose Hodder 2013 at 6).
The admissibility of evidence of domestic violence

In Australia the procedural law of evidence covers a wide diversity of rules, and the duty to apply those rules in a court proceeding is a fundamental characteristic of the judicial process. At trial, for victims of domestic violence, the admissibility of their evidence must be relevant to a fact in issue. The matter becomes more complex when the domestic violence victim is also the victim of an intimate partner homicide, and therefore unable to give their evidence of domestic abuse at the trial of their murderer.

In this next case the judge expressed his view on the threshold for the admissibility of evidence by an abused individual at the hands of a violent partner. Specifically, T. Forrest J called for judicial caution in the court’s acceptance of allegations of domestic violence:

In my view, courts should exercise caution before accepting allegations of this sort that are either made from the Bar table or in histories given to a forensic psychologist engaged for the purposes of a court hearing. If there is contemporaneous objective support for the allegations or a sufficient body of evidence to demonstrate the abusive flavour of the relationship, then it may be that the allegations can be more readily accepted. (R v Debra Patricia Charles 2013 at 4).

In the following case example the male offender was being sentenced for the second time, having previously been convicted of his wife’s murder by a previous jury. The offender’s first conviction was set aside by the Court of Appeal (Azizi v R 2012). In its decision, the Court of Appeal ruled that some evidence, admitted at the offender’s previous trial, was in fact inadmissible. That evidence concerned features
of the relationship between the offender and the victim, and consisted of a number of statements by the victim regarding the offender’s conduct towards her. In the set of sentencing remarks within the sample, the judge re-iterated that evidence of domestic violence perpetrated on the female victim by the male offender was, in some respects, inadmissible. That said, the judge ascertained that the evidence, viewed in another way, retained some relevance in the sentencing process. Kaye J commented as follows:

Approximately one month before she died, Marzieh spoke on the telephone to her sister Shookria. She told Shookria that you had been hitting her. As I have stated, that evidence is inadmissible as proof that you had in fact assaulted your wife. However, it is relevant as to the nature of the relationship which you had with Marzieh, and as to her feelings concerning you. (DPP v Azizi (Sentence) 2013 at 3).

There was no admissible evidence as to why she was scared of you. It would be impermissible of me to speculate in that regard. (DPP v Azizi (Sentence) 2013 at 4).

However his Honour’s remarks also demonstrated the boundaries in which a sentencing court must operate; within the confines of the rules of evidence as regards victims of domestic violence. Nonetheless, in this instance, the perpetration of domestic violence upon the female victim resonated clearly in the remarks. His Honour said:

First, as indicated at the outset of these sentencing remarks, the evidence, which was adduced on your trial before me, was significantly different to the evidence which was adduced in your first trial. In particular, I am satisfied that King J sentenced you on the basis of evidence before her which indicated that the offence of murder, for which you were convicted, occurred in the background of a relationship between you and your wife, in
which you had been abusive and violent to her on a number of occasions. That evidence was excluded by the order of the Court of Appeal, and by the ruling which I made at the commencement of your trial. Thus, the sentence, which I shall impose on you, will be on the basis that although Marzieh and you had a troubled relationship, in which Marzieh was wishing to divorce you, there is no admissible evidence that you were physically or otherwise abusive or violent towards her, before the incident which caused her death. 

(DPP v Azzai (Sentence) 2013 at 16).

In contrast, in the following case heard in NSW, the female offender's 13 year old daughter tendered a victim impact statement to the court which, amongst other things outlined her knowledge of the domestic violence suffered by her mother at the hands of the male victim. The evidence in this regard was not accepted by the judge, who commented as follows:

The victim's daughter, CR, provided a “victim impact statement” through her mother’s legal representatives. ... The entirety of the letter reads as an apology for her mother’s conduct and a damning indictment of the victim. To the extent that the statement purports to support Helen Ryan’s account of physical and emotional abuse at the hands of the victim, it is an unsworn and untested statement that has no weight for the purposes of sentencing. (R v Helen Ryan 2011 at 7).

**Sub-theme one: Offender remorse**

In cases where there was a history of domestic violence in the relationship, the male offender’s remorse was discussed by the judge in almost all cases, and was viewed for the most part by the sentencing judges as genuine. For example:

I accept that you have good prospects for rehabilitation, considering your remorseful contrition... (The Queen v Damien Hughes 2010 at 5).
... your genuine contrition and your conduct since the shooting occurred, satisfy me that special reasons do exist in this case (R v Mark Scott Bampton 2010 at 12).

In a number of cases judges opined that the male offender had demonstrated a high level of remorse. In each instance the judge linked this level of remorse, among other things, to the offender’s immediate actions following the offence. For example:

... you are plainly remorseful for what has occurred. You demonstrated that sense of remorse when you first spoke to the police at the scene of your offence ... (The State of Western Australia v Attwood 2013 at 10).

Mr Bolt offered to assist. Some of those words are significant. He said: “Just bring her back; I know I’ve done the wrong thing. I flogged her but I love her. I’m going away for a long time; just save her.” ... (R v Jermaine Bolt 2013 at 4). Mr Bolt displays high levels of remorse ... (R v Jermaine Bolt 2013 at 7).

On the other hand, in some cases male offender remorse is considered either disingenuous or incomplete. In the following case example, at the time of the offence, the offender was the subject of an interim violence restraining order taken out by the female victim. Jenkins J sentenced the offender to mandatory life imprisonment with a minimum non-parole period of 25 years. In considering the offender’s claimed remorse, her Honour commented as follows:

The difficulty is that I am sure that on previous occasions, after you had committed acts of violence, that you were sorry for what you had done. In the past, that regret over your acts of violence has not stopped you from repeating your violent behaviour. (The State of Western Australia v Payet 2014 at 17).
In this final example regarding male offender remorse, while the judge acknowledged the offender’s remorse, his Honour also pointed to the offender’s denial of culpability; at the same time noting defence counsel’s rebuttal of such claims:

It seems that the remorse is genuine and intense and that the offender himself feels very keenly the loss of his partner, the victim, but it was he that killed her. There is a detailed analysis of the offending which leads to a conclusion by the psychologist that Rosewood has a tendency to minimise the severity of the violence that he perpetrated and that he has a tendency to transfer the responsibility for his conduct, at least in part, to others. That is a matter which was quite assiduously rebutted in the submissions by counsel for Rosewood on the basis that impressions to that effect were mistaken and due to his submissive personally [sic] and sense of grief and responsibility for what had happened. I accept that may be so but there does seem to be an air of unreality and a lack of full recognition of the consequences and of his role and culpability in this offence (The State of Western Australia v Rosewood 2013 at 6).

Within the sample, a history of domestic violence between the female offender and the male victim was present in all manslaughter cases, as well as in one murder case. The female offender’s remorse at killing their partner was accepted by the judge in almost all instances. Of particular note, judges often used adverbs to emphasise the depth and extent of the female offender’s remorse. For example:

... you are incredibly remorseful for what you have done. (R v Hudson 2013 at 12).

There is no doubt that Ms Duncan is deeply remorseful for her crime. (R v Judith May Duncan 2010 at 6).
... you were instantly remorseful and tried to save Mr Brabham. (*R v Cassandra Lee Dodd* 2011 at 6).

At times judges also commented on the female offender’s continued pain, regret and suffering post offence. In the following two South Australian Supreme Court examples, each female offender received a wholly suspended sentence:

I also have had regard to your plea of guilty and your obvious contrition and remorse. You continue to punish yourself for what occurred. You will probably do so for the rest of your life. (*R v Noreen Jessamine Weetra* 2009 at 11).

I accept that you are truly remorseful and have suffered personally since your husband’s death. You punish yourself by fasting regularly and sleeping on the floor at home. You live a simple life of looking after your family and spending time with your church and doing community work. ... As to punishment, it seems that you have suffered a great deal already and to send you to gaol might have a greater effect on punishing others than you. (*R v Rajini Narayan* 2011 at 17).

However, in this final case example, the female offender was found guilty of murder by a jury for hiring a ‘hitman’ to gun down her estranged husband on his property. Regarding the offender’s lack of remorse, Latham J commented as follows:

It is clear that the offender refuses to take responsibility for the murder of her husband and must therefore be sentenced on the basis that she demonstrates no remorse or contrition. (*R v Helen Ryan* 2011 at 9).
For this offender, at the time of sentencing, the offence of murder carried a maximum (non-mandatory) sentence of life imprisonment and a standard non-parole period of 20 years. While no male or female offenders in the sample were sentenced to non-mandatory life imprisonment, this female offender received a head sentence of 36 years with a non-parole period of 27 years. This sentence represented the second highest head sentence (non-mandatory life) and highest non-parole period for all domestic murderers in the sample. By considering the offender 'deliberately chose to exact revenge upon her husband' for instigating divorce proceedings against her, his Honour commented as follows:

... the offence is worthy of the description "wicked" and "gravely reprehensible". To contemplate and carry out such a plan for purely selfish and largely financial motives demonstrates heinousness to a significant degree. (R v Helen Ryan 2011 at 5).

Also, in the course of sentencing Latham J remarked upon the domestic violence experienced by this offender as follows:

The evidence in the trial established that Mr Ryan had complained to family members and friends of minor assaults upon him by Helen Ryan. There was evidence of minor bruising to Mr Ryan's upper arm, consistent with such assaults. Similar claims were made by Helen Ryan against her husband, although the extent and severity of the assaults said to have been committed upon her were a matter of some contention. (R v Helen Ryan 2011 at 2).

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

124
I am satisfied beyond reasonable doubt that Helen Ryan’s claims in respect of the assaults upon her by her husband, and his general behaviour towards her and towards their daughter, were grossly exaggerated ... it was these asserted episodes of violence or threats of violence that were said to justify Helen Ryan’s actions. (*R v Helen Ryan 2011* at 3).

His Honour continued:

I accept that there were episodes of pushing and shoving between Helen Ryan and the victim, and that on occasions, the victim’s greater strength resulted in the offender sustaining bruising. On one occasion, the victim pushed Helen Ryan against the wall, resulting in a break in the gyprock. (*R v Helen Ryan 2011* at 3).

Furthermore, Latham J’s opinion of the female offender may be summed up as follows:

Far from the cowering, oppressed and terrorised wife that she attempted to portray, Helen Ryan embarked on a cold-blooded plan to get rid of her husband ... (*R v Helen Ryan 2011* at 4).

*Sub-theme two: General deterrence*

Judges frequently discussed the requirement for an offender’s sentence to reflect an ongoing need to protect the community. In the following NT case, the Aboriginal male offender pleaded guilty to reckless manslaughter in relation to the death of his wife. While the judge reminded the Court that the maximum penalty for the offence was imprisonment for life; based on the offender’s plea of guilty, the judge applied a sentencing discount of twenty five percent to a starting point of twelve years, and handed down a head sentence of nine years with a non-parole period of six years. At
the time of the offence the offender was considered to be ‘heavily intoxicated’ with ‘no real recollection of the attack’. The judge considered the viciousness of the offender’s attack upon his wife, and comments as follows:

By any measure, this was a brutal assault committed upon a woman who was not able to defend herself. She was pleading with you to desist, but you continued on. Others called on you to stop but you did not do so. The violence was unrelenting and brutal. It only came to an end when you were informed that the police had been called. As a consequence of the vicious attack, your victim died. (The Queen v Corelius Mollinjin 2009 at 3).

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

There is little that can be done by the Courts to deal with this issue other than to impose sentences designed to reflect the abhorrence of the community and hopefully provide some deterrence to others who may be inclined to offend in this way. (The Queen v Corelius Mollinjin 2009 at 4).

In the present case, the sentence I impose is one which must reflect a strong element of general deterrence and retribution. Men like you who may be inclined to offend in this way must know that significant sentences of imprisonment will follow. (The Queen v Corelius Mollinjin 2009 at 4).

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

Significant weight must be given to punishment, denunciation and deterring others from committing the same or similar offences in the future. (R v Kirsty Smiler 2013 at 6).

DISCUSSION

What follows is a consideration of the themes and sub-themes found in the current study pertaining to violence; in the context of the literature review specifically pertaining to these themes. In this regard, the purpose of the thematic literature review was to identify and comment upon previous research which was either consistent or inconsistent with the themes emanating from the study. This approach is consistent with grounded theory methodology.

Theme one: Offender violence

A review of previous homicide studies shows that men who kill their intimate partners are, for the most part, driven to do so out of jealousy as well as a desire to control their partner. Women, on the other hand are repeatedly shown as being driven to kill as a retaliatory action to their partner's violence towards them, or as a means of self-protection (Polk 1994; McKenzie et al. 2016). The results of the current study are consistent with previous studies, that is, men primarily killed as a result of their jealousy and possessiveness with a strong need to control their female partner. On the other hand, females in the sample primarily killed their male partner in response to extended periods of domestic violence at the hands of their victim.
Studies continue to show that women remain in the majority as victims of domestic homicide. The most recent data from the NHMP shows that in Australia, during the period 1 July 2010 to 30 June 2012, one woman a week was the victim of a domestic homicide incident with more than half of those incidents classified as intimate partner homicides (where the victim and offender share a current or former intimate relationship, including homosexual and extramarital relationships). In spite of these figures, within the sample, male offender violence was, at times, judicially considered to be ‘out of character’, occurring in circumstances where the offender was emotionally distressed, or in all other respects of good character. This particular observation accords with McKenzie et al. (2016) who found that within many of the sentencing remarks in their study legal professionals also described male homicidal violence as being ‘out of character’. Further, Mckenzie et al. (2016) postulate that such an opinion infers that the offender is less likely to be violent in the future. As in the current study, the authors’ previous study highlighted the fact that judges frequently present positive character evaluations for male offenders (Hall, Whittle and Field 2015, 4), and rely upon various psychological states such as depression and severe psychological distress in order to explain a male offender’s behaviour (Hall, Whittle and Field 2015, 9). Thus, it is evident from the current study and the authors’ previous study that regardless of being sentenced for murder or manslaughter in a domestic context, judges continue to excuse male violence.

For male offenders in particular, the data also shows that judges frequently look towards the female victim to take some responsibility for the offending and the violence perpetrated upon them. For Aboriginals in particular, behaviours such as intoxication and violence in the lead up to the offence were judicially perceived as
being mutual to both the offender and the victim. Coates and Wade (2004) point out that while violent behaviour is a social interaction, it is also one-sided because it is effectively the actions of one person against ‘the will and well-being of another’. As such, Coates and Wade (2004) argue that judicial language which ‘mutualises’ the violent behaviour between an offender and a victim suggests partial victim liability for the offending, and obscures the fact that the offender is entirely responsible for their own violent behaviour. Indeed Coates (2000) found that by shifting the focus away from the offender and towards the victim, perpetrator responsibility was reduced. Blaming the female victim was also apparent in Hall, Whittle and Field’s (2015) study where the victim’s actions were, more often than not, considered the primary cause for the violence perpetrated upon them by the male offender (Hall, Whittle and Field 2015, 12). As with the above observation regarding judges excusing male violence, it is also evident in the current study that regardless of sentencing for murder or manslaughter, judges in Australia continue to distance male offenders from their offending.

While national homicide data shows that the largest single cause of death is stabbing (Bryant and Cussen 2016); as this sample demonstrates, for Aboriginal male offenders the predominant method used to kill their partner was the use of bodily force alone. Regarding these offenders, judges discuss at length the extensive nature of this type of violence, and particularise graphic details of victims’ injuries. Specifically, Willis (2011) reports that as victims; Indigenous women will experience more serious violence than non-Indigenous women.
Theme two: Domestic violence

Generally, intimate partner homicide occurs in the context of a man’s violence towards his female partner, and this is regardless of whether the perpetrator of the homicide is male or female (McKenzie et al. 2016). The study findings are consistent with this observation. Indeed the study also revealed the woman to predominately be the victim of domestic violence at the hands of the male in the relationship. This is further demonstrated in the current study which shows that in every case where a violence restraining order was in place at the time of the offending, the order had been issued against the male in the relationship.

Despite a significant number of judges in the study acknowledging a history of domestic violence between the offender and the victim, the length of judicial commentary in this regard was sparse. Furthermore, in almost all cases, the domestic violence was conveyed as being mutual. This particular finding is consistent with Hunter’s (2006) observations. In an examination of judicial knowledge concerning domestic violence within Victoria’s Magistrates’ Courts Hunter (2006) found that magistrates’ perceived violence as ‘a product of spousal conflict arising from the stresses of a marriage or de facto relationship’; that both parties were likely responsible for the violence; and that the violence would cease upon separation of the parties (Hunter 2006). As the current study shows judges often appear unable to explain why a woman would or could not reach out for assistance, or indeed leave the relationship in order to avoid further domestic violence. Such a perspective strengthens Mitchell’s (2011) argument that not only do few people understand why women stay in violent relationships; people fail to
understand that some women's vulnerability to family violence victimisation, such as Indigenous status or location, affect their 'help-seeking' behaviour.

Some studies suggest that men normally trivialise their violence within a domestic relationship, and seek to minimise their personal responsibility in this regard (Dobash et al. 1998; Hearn 1998; Stubbs 2007). Specifically, Hunter (2006) found that through their reactions to women's stories of domestic violence, magistrates also contributed to the minimisation and denial of male violence, and in some instances to the redistribution of offender blame. McKenzie et al. (2016) put forward that a community outlook where violence is trivialised, or the victim is blamed can play a role in the acceptance of domestic violence.

Hunter (2006, 767) also observed that, at times, when women spoke up about being a victim of domestic violence they were construed as either 'bad mothers' or 'vindictive ex-wives'. In the current study, the case of R v Ryan 2011 NSWSC 1249 is instructive. Despite the female offender's reports and visible signs of domestic violence at the hands of the victim; as well as the apprehended violence order in place against the victim at the time of the offending, Helen Ryan's claims in this regard were largely disbelieved and her offending considered 'wicked' and 'gravely reprehensible' (R v Ryan 2011 at 5). Vilifying adjectives such as 'wicked' were also present for female offenders in Hall, Whittle and Fields (2015) study of domestic murderers (Hall, Whittle and Field 2015, 6). Historical literature shows that when it comes to killing a spouse, women have always been considered Machiavellian, and their crimes more heinous than when committed by men (Gavigan 1989; Knelman 1998). In the current study, the judicial perception that Helen Ryan was selfish and
cold-blooded as opposed to passive and helpless, arguably contributed to her receiving the second highest head sentence of 36 years, and the highest non-parole period of 27 years of all murderers in the sample. In the context of Battered Wife Syndrome, some academics have commented that women who are neither passive nor helpless, or do not conform to accepted stereotypical roles, may be judged more severely (Stubbs and Tolmie 2008; Bradfield 2001).

The admissibility of evidence of domestic violence

As discussed previously, where there was a history of domestic violence between the offender and the victim, detailed judicial commentary in this regard is sparse. In Australia, for a domestic violence victim’s evidence to be admissible at trial, it must be relevant to a fact in issue. McKenzie et al. (2016, 107) suggest that any consideration of prior domestic violence by a sentencing judge is limited to ‘the extent to which the evidence available meets the relevant standard of proof in relation to aggravating and mitigating factors’. Judicial commentary in the study reflects the boundaries within which a sentencing judge must operate, in particular the confines of the rules of evidence regarding victims of domestic violence.

Arguably, such constraints on legal rules and processes can lead to diminishing the impact of domestic violence in the community, as they tend to minimise or even deny the domestic abuse. This in turn allows misconceptions concerning domestic violence to be perpetuated and condoned (McKenzie et al. 2016).
Sub-theme one: Offender remorse

Remorse is an important sentencing consideration in Australia, and as a discretionary variable, remorse can act to significantly reduce the severity of an offender’s punishment. Judges discuss offender remorse in almost all cases in the study where there was a history of domestic violence between the offender and the victim. Additionally, judges frequently link a high level of remorse to, among other things, an offender’s immediate actions following the offence. This is particularly evident in male offender cases within the sample. According to Stubbs (2007) research suggests that an apology can be used in gendered ways. Empirical evidence shows that women apologise in order to restore relationships and express positive emotions towards others. On the other hand, men may offer an apology in order to control a situation (Petrucci 2002). Furthermore, in discussing her original research project, ‘Walker Cycle Theory of Violence’, Walker (2009) restates that men often use an apology strategically in order to win back their partner in the third phase of the cycle of violence.

Additionally, for Australian courts, remorse as a mitigating factor, is often difficult to distinguish from expediency and self-pity (R v Whyte 2004 at 403), and in any case is always inferred since it cannot be directly observed. There is little evidence that feigned remorse is any different than genuine remorse (Proeve et al. 1999). However, in the current study, some judges appeared to believe that they were able to discern this issue, remarking that offender remorse is sometimes either disingenuous or incomplete, despite occasional submissions by defence counsel to the contrary.
Indeed Bagaric and Amarasekara (2001, 365) argue that remorse is perhaps the easiest mitigating factor to claim, requiring no obvious behavioural change on the part of the offender, and ‘being purely subjective it is almost impossible to rebut’. Following on from their analysis of theories of punishment, Bagaric and Amarasekara (2001) conclude that there is no doctrinal basis for treating a remorseful offender more leniently than any other offender, and as such, remorse should be discarded in the sentencing matrix.

As the data show, with judges frequently linking a high level of remorse to a male offender’s actions immediately following their offending, such reasoning is clearly gender biased.

**Sub-theme two: General deterrence**

General deterrence is a fundamental principle of sentencing. By demonstrating the consequences of offending, general deterrence aims to deter others from following a similar course of conduct (Edney and Bagaric 2007). Moreover, for the judiciary, general deterrence is considered particularly important when an offence is prevalent. As the data show, judges frequently discussed the requirement for an offender’s sentence to reflect an ongoing need to protect the community.

In the current study, the sentencing judge in the case of The Queen v Corelius Mollinjin 2009 considered the Aboriginal male offender’s assault on his Aboriginal wife as ‘brutal’ with ‘unrelenting’ violence; and articulates that ‘men like you who may be inclined to offend in this way must know that significant sentences of imprisonment will follow’. Nonetheless, his Honour proceeds to impose a head
sentence of nine years with a non-parole period of six years. Judges in the study also comment on the requirement for general deterrence in respect of female offenders. This is remarkable given that in Australia females make up only 15% of homicide offenders (Domestic Violence Resource Centre Victoria Advocate 2015, 47). Furthermore, studies continue to show that in the context of intimate partner homicide, males are predominately driven to kill out of jealousy and a desire to control their partner, while females primarily kill as a retaliatory action or as a means of self protection. Given that 85% of homicide perpetrators are male, and in the context of intimate partner homicide 76% of victims are female (Domestic Violence Resource Centre Victoria Advocate 2015, 47), it is arguable that males should be sentenced more punitively.

Given the small number of cases in the sample, a statistical analysis of the range of sentences imposed was limited, nonetheless as the data show, despite condemning Aboriginal male offender conduct as violent and cruel, judges appear to be handing down sentences which in reality place little weight on deterrence and the protection of the community. In a discussion concerning the sentencing of Indigenous male offenders in the NT, Hemming (2011, 315) opines that ‘the value placed on the life of a female Aboriginal by the Supreme Court of the Northern Territory is five years’. Furthermore, Hemming (2011) argues that given Indigenous females as a group are the most vulnerable to homicide, they should be afforded particular protection.
LIMITATIONS

Given that homicide is a rare event in almost all western, industrial countries (Australian Institute of Criminology Reports 2008), undertaking research generally on this type of crime presents numerous challenges. First, regarding quantitative and qualitative analysis of sentencing remarks, it can be problematic accumulating sufficient data to recognise trends associated with the complex dynamics relating to the circumstances surrounding the offence, and the interaction of events and life circumstances between a victim and an offender. Second, sentencing regimes operate within an arena of ever changing criminal law within multiple Australian jurisdictions. Finally, there is a persistent argument amongst many Aboriginal people that issues surrounding violence and homicide in their societies should not be discussed in public forums (Martin 1992, 168). Thus, the availability of statistics and research examining the extent and nature of family and more specifically, intimate partner violence in Indigenous communities is limited (Mitchell 2011, 12).

CONCLUSION

The results of the current study add to the literature on sentencing in Australia by demonstrating that judges continue to underestimate the significance of domestic violence against women, especially women who are victims of intimate partner homicide.

The results of the current study further indicate that not only is judicial commentary on domestic violence sparse, judges frequently convey this type of violence as being mutual; and fail to demonstrate an understanding of women’s vulnerability to domestic violence victimisation.
Action must be taken by the judiciary in order to demonstrate to the community that judges understand the issues pertaining to domestic violence. This should be reflected in judicial sentencing practices.

If there is a history of domestic violence from the offender to the victim judges can scarcely reason that a sentencing discount based on offender remorse is valid. Such reasoning should be removed from the sentencing matrix. Rather, judges must effectively convey to the offender that they and they alone are the source of their own behaviour; and sentence them accordingly.

Judges' commentary is an opportunity for the legal system to communicate messages which promote gender equality and address attitudes towards women which facilitate the prevention of domestic violence as well as intimate partner homicide. Judicial language which mutualises violent behaviour diminishes the fact that the offender is entirely responsible for their own violent behaviour which ultimately led to the death of their victim.

A lack of judicial understanding concerning some women's vulnerability to domestic violence victimisation requires further examination and research. More specifically, further steps are needed to improve the judiciary's understanding of domestic violence.

In the current study, despite the gravity of the homicidal violence perpetrated upon women, judges failed to clearly convey a strong sense of responsibility in the male offender for their offending. Rather, judges obscured male offender
responsibility and deliberate acts of violence towards women by reformulating those acts as being ‘out of character’, and as such, inferring that the male offender is less likely to be violent in the future. This is despite the fact that women remain in the majority as victims of intimate partner homicide.

Problems associated with the admissibility of evidence of domestic violence coupled with a lack of denunciation of prior abuse at the sentencing stage, may lead not only to the minimisation of the prevalence of domestic violence in Australia; but also portray the intimate partner homicide as an isolated incident.

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

Presenting the results of this study not only make judicial commentary on sentencing decisions for intimate partner homicide more visible, but can potentially hold the judiciary, as decision makers, more accountable for their actions.
NOTES

1 The term ‘Indigenous Australian’ includes individuals of Aboriginal or Torres Strait Islander descent who identify themselves as such, and are recognised as an Indigenous person by other Aboriginal or Torres Strait Islanders: Commonwealth v Tasmania (1983) 158 CLR 1, 274 (Deane J).

2 The head sentence is the total sentence given to an offender including the minimum term and parole period. The non-parole period is defined as the period of time during which a person serving a sentence of imprisonment may not be released on parole.

3 An individual who accepts the law’s authority can remove its restrictions by justifying their actions. Sykes and Matza (1957) call this process neutralisation.

4 A mandatory sentence is a compulsory, fixed penalty prescribed by legislation with no discretion granted to the court to individualise punishment.
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143
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End of article
4.3 Conclusion

The analysis of the data pertaining to judicial commentary on violence, in the context of intimate partner homicide, makes an important and original contribution to the existing literature because it reflects both the courts’ current understanding of this long standing social issue,\(^1\) as well as the courts’ response to that violence at the time of sentence. More specifically, the data provides vital information regarding judicial perceptions of the characteristics of the offender and the victim, as well as the circumstances in which the homicide occurred.

As the data demonstrate, further steps are needed to improve the judiciary's understanding of domestic violence. However, given that the law of homicide focuses on individual offenders, it’s feasible to think that this law is not designed to address the sizeable social problem that domestic violence has become.\(^2\) Regardless, the importance of judicial training in this area was also emphasised in the Supreme Court of Victoria’s 2015 submission to the Royal Commission into Family Violence as follows:

The Supreme Court recognises the importance of judges having an understanding of social issues in general, and family violence in particular, in order to carry out their duties. A knowledgeable, skilled and experienced judiciary is critical to the administration of justice, the experience of individuals interacting with the courts and general community confidence in the courts.

Judges bring with them extensive legal and practical experience when appointed to the Court, and for many the nature and consequences of family violence will be well known. There remains a need however for specialist programs to allow all judges to be fully

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informed about the relevant law and the broader issues of family violence, as well as developing “court craft” skills in dealing with family violence cases.³

The next chapter, chapter 5, presents data on the third key theme, namely, the sentencing of Aboriginal offenders.

³ Supreme Court of Victoria, Submission to the Royal Commission into Family Violence, 2015, 9.
Chapter Five

Theme Three: The Sentencing of Aboriginal Offenders
5. **Introduction**

5.1 In the course of undertaking a quantitative analysis of sentence length for all offenders in the study, a statistically significant difference was found between Aboriginal males and non-Aboriginal males. This is discussed at 5.2.

For the most part, the article presented at 5.3 focuses on the themes emanating from the data pertaining to Aboriginal offenders in the study, including the difficulty of sentencing for manslaughter and the length of judicial commentary. A number of sub-themes are explored within the article, including offender violence, alcohol intake at the time of the offence and deterrence. Given that gender is a key focus of this thesis, the article compares and contrasts judicial commentary when judges sentence Aboriginal males and females for intimate partner homicide.

Indigenous people suffer violence, including domestic and family violence, at substantially higher rates than other Australians.¹ Hence, the article presented in this chapter, amongst other things, provides an insight into how judges are currently dealing with issues such as domestic violence when sentencing Aboriginal males and females in Australia's superior courts.

Given the journal's restriction on word count, the majority of the statistical data, by necessity, was omitted from the submitted article. An overview of this data is discussed at 5.2 and presented in Appendix N.

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5.2 Quantitative results

Aboriginal males were convicted of manslaughter rather than murder at a statistically significant proportion than non-Aboriginal males.² (See Appendix N).³

Although Aboriginal males received higher head sentences than non-Aboriginal males, when comparing the non-parole period for all offenders for both murder and manslaughter, Aboriginal males received a significantly lower sentence than non-Aboriginal males.⁴ On average the minimum term for Aboriginal males is 64.6 months or 5 years 3 months lower than non-Aboriginal males. (See Appendix N).⁵

In order to understand why these differences occurred, a more detailed examination of the sentencing remarks was undertaken through a qualitative analysis of the data. These results are presented and discussed in the article at 5.3.

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² Chi-square result for males is ($\chi^2$ (df=1) = 6.35, p < 0.02). Follow-up Z-proportion tests demonstrate a significantly greater number of Aboriginal males were convicted for manslaughter relative to non-Aboriginal males ($Z = 2.66, p < 0.01$). The test for female offender sentences by Aboriginal status was not significant ($\chi^2$ (df=1) = 1.80, $p > 0.17$).
³ Appendix N – Table 5-1.
⁴ Independent sample t-test, $t = 2.19$, $p < 0.05$.
⁵ Appendix N – Table 5-2 and Table 5-3.
5.3 Article: ‘Intimate Partner Homicide: Themes in Judges’ Sentencing Remarks for Australian Aboriginal Offenders’

Marion Whittle and Guy Hall

Under review by *Justice Quarterly* "See Appendix O for proof of submission."
INTIMATE PARTNER HOMICIDE: THEMES IN JUDGES’ SENTENCING REMARKS FOR AUSTRALIAN ABORIGINAL OFFENDERS

Abstract

This article focuses on how judges are dealing with Australian Aboriginal offenders at the time of sentencing, in the context of intimate partner homicide. The findings arise out of a grounded theory analysis of judges’ sentencing remarks for males and females sentenced for intimate partner homicide in Australia between July 2009 and June 2014.

A qualitative analysis of judges’ remarks found that while judges identify that the killing of Indigenous women by intoxicated Aboriginal men needs to be tackled head-on, judges continually view the male offender’s use of alcohol as modifying the seriousness of the offending. At the same time, the vulnerability of an intoxicated female victim is the context of the gravity of the offence is rarely recognised. A quantitative analysis of these remarks in the context of the larger study found that although judges comment that drunken Aboriginal male violence against women will not be tolerated, judges are sanctioning Aboriginal males less harshly than non-Aboriginal males.

Introduction

This article presents research findings which show how judges are dealing with Australian Aboriginal offenders at the time of sentencing, in the context of intimate partner homicide. The key themes discussed in this article emerge from a grounded theory analysis of judges’ sentencing remarks, for males and females sentenced for intimate partner homicide in Australian supreme courts between July 2009 and June 2014. In the current study intimate partner homicide is defined as murder or manslaughter between heterosexual spouses – legal or de facto, current or former. Other forms of intimate partner relationships such as dating or homosexual were difficult to identify within the sentencing remarks, and were therefore omitted for research purposes.
When using a traditional research methodology, the literature review forms the basis of the study, generating a series of hypotheses which are then tested. However, the starting point for undertaking a grounded theory study is that a satisfactory theory on a particular subject does not exist, or there is insufficient information on the subject to begin forming a theory (Punch, 1998). In Australia empirical work on the relationship between offenders’ Indigenous status and sentencing is scarce (Jeffries & Bond, 2009, p.50), consequently, the current study provides the most comprehensive picture of judges’ sentencing remarks for Aboriginal offenders in the context of intimate partner homicide currently available in Australia; and contributes to a greater understanding of the relationship between Aboriginality and sentencing in Australian courts.

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

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

The Data

Data was collected from six Australian jurisdictions, namely: New South Wales, Northern Territory, South Australia, Tasmania, Victoria and Western Australia.
There were no relevant sentencing remarks available to the researchers for either the Australian Capital Territory or Queensland during the specified time period. The selection of the relevant jurisdictions was determined by the availability of sentencing remarks either through the court directly or alternatively through the Australian Legal Information Institute database (AustLII), which is a full text electronic database.

All murder and manslaughter sentencing remarks were examined manually to identify the offender/victim relationship. A total of 52 cases met the selection criteria. Judges acknowledged an offender's Aboriginality in 40 per cent of the remarks (n=21).\(^1\) Seventy six per cent of victims killed by Aboriginal offenders were indigenous (n=16). However, the reader must note that when analysing the sentencing remarks, information concerning victims was more difficult to determine as judges tended to focus their remarks on matters directly relevant to the offender and their sentencing. In particular, even where it was possible to identify that the victim was Indigenous, it was seldom possible to identify if that victim was of Torres Strait Island or Aboriginal decent. For this reason, victims in this study are referred to as Indigenous throughout this article.

**Method**

Grounded theory methodology was used in this study because it remains the dominant social sciences method used to analyse qualitative data (Mills, Bonner, & Francis, 2006), and allows for the generation of theories which are grounded in the data itself. Grounded theory encompasses a systematic set of methods which allows for the collation, coding and analysis of textual data (Glaser & Strauss, 1967). By
letting the data speak for itself, researchers are then able to arrive at theories which have been systematically developed from the collected data (Punch, 1998). A literature review does not play a key role in grounded theory, therefore, in this study the literature review was carried out after the complete analysis of the sentencing remarks for both male and female offenders. The purpose of the literature review was to identify previous research which was either consistent or inconsistent with the themes emanating from the study. Thus, in this article, following a description of the research and the results, the literature review is presented as a consideration of the results in the context of that literature.

In grounded theory, the coding and analysis process includes three stages: open coding, selective coding, and theoretical coding. All coding in the current study was undertaken manually. The first named author was the lead coder while the second named author acted as the validating coder. In the current study, the project was a qualitative analysis of sentencing remarks which are a verbatim transcript of judges’ comments at the time of sentencing an offender. The researchers began the analysis with male offender sentencing remarks as males are more likely to kill than females. Each set of male offender sentencing remarks was taken randomly and one at a time until saturation point for that set of sentencing remarks was reached. Each sentence within each set of remarks was read and coded. Then, key judicial comments within a set of sentencing remarks were compared to other key judicial comments within the same set of remarks with respect to commonalities and differences. Similar concepts were then grouped which lead to hypotheses about the relationships between categories. This in turn formed the basis for the emerging theory. In the current study, saturation point for a set of sentencing remarks was
reached when that set of remarks produced no new major ideas, and the task of analysis became confirmatory (Guest, Bunce & Johnson, 2006). Saturation point for the study as a whole was reached following an analysis of 34 sets of male offender sentencing remarks (21 non-Aboriginal males and 13 Aboriginal males), and 18 sets of female offender sentencing remarks (10 non-Aboriginal females and 8 Aboriginal females); making a total of 52 sets of sentencing remarks.

Limitations

In Western society homicide is a rare event (Australian Institute of Criminology Reports, 2008); accordingly research on this type of crime is challenging in terms of accumulating sufficient data to recognise trends. Additionally, sentencing regimes in Australia operate in an arena of every changing criminal law within multiple jurisdictions. Finally, there is a persistent argument amongst many Aboriginal people that issues surrounding violence and homicide in their societies should not be discussed in public forums (Martin, 1992: 168). Therefore, the availability of statistics and research examining the extent and nature of family and more specifically, intimate partner violence in Indigenous communities is limited (Mitchell, 2011: 12). Thus, whilst the study offers some quantitative data which is discussed herein, the aim of this article is to discuss the qualitative analysis of judges’ sentencing remarks for Australian Aboriginal offenders.

Quantitative Results

Theme – Sentence Length

As a whole the data illustrate that Aboriginal males were convicted of manslaughter rather than murder at a greater proportion than non-Aboriginal males. This
difference was statistically tested for significance. In particular there is a statistically significant Chi-square result for males ($\chi^2 (df=1) = 6.35, p < 0.02$). Follow-up Z-proportion tests demonstrate a significantly greater number of Aboriginal males were convicted for manslaughter relative to non-Aboriginal males ($Z = 2.66, p < 0.01$). The test for female offender sentences by Aboriginal/non-Aboriginal status was non-significant ($\chi^2(df=1) = 1.80, p > 0.17$).

Although Aboriginal males received higher head sentences than non-Aboriginal males; when comparing the non-parole period for all offenders for both murder and manslaughter, the data reflect that Aboriginal males received a significantly lower sentence than non-Aboriginal males (independent sample t-test, $t = 2.19, p < 0.05$). On average the minimum term is 64.6 months or 5 years 3 months lower than non-Aboriginal males.

In order to understand why these differences occurred, the researchers undertook a more detailed examination of the sentencing remarks through a qualitative analysis of the data.

**Qualitative Results**

*Theme One – Offender Violence*

Regarding Aboriginal male offenders sentenced for murder, the majority of female victims were Indigenous, and a history of domestic violence perpetrated by the male offender on the female victim was discussed by judges in each case. While judges did not mention that the killing of a female partner was aggravated by the presence of domestic violence, neither was it considered mitigating. For example:
That the killing has arisen from domestic violence is not a mitigating factor \((R \text{ v } Kane Rodney Jonathon Allen, [2010] at [12])\).

For Aboriginal male offenders sentenced for manslaughter, again, the majority of victims were Indigenous. A history of male offender violence against the female victim was also remarked upon by judges.

An analysis of all male Aboriginal offenders showed that while some offenders used a knife to kill their victim, and others used a blunt instrument such as a nearby rock, more than half of these offenders used bodily force alone. The majority of offenders killing with bodily force were sentenced for manslaughter. The extent of the homicidal violence was remarked upon by judges in every case. For example:

You punched and kicked Ms Payne in the face, head, chest, back arms and legs. As a result, Ms Payne became unconscious after a period of time (The State of WA \text{ v } Haworth [2014] at [9]).

You repeatedly punched her in the head, chest and torso area while she tried to shield her head with her arms and her hands. You had clenched fists and you were bringing your arms behind your head and slamming down so hard into the victim that the witnesses could hear the blows from a distance away. This went on for a number of minutes. The victim could be heard pleading with you to stop and then she fell silent. The beating continued after she fell silent (The Queen \text{ v } Corelius Mollinjin, [2009] at [2]).

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

You became angry and assaulted RT and then your wife ... then you kicked your wife hard to her face, four times with the heel and toe of your boot, and that made her unconscious. You also kicked her hard two or three times in the ribs. She was lying down at the time you kicked her. You later told police that you were wearing steel-capped working boots at the time (The Queen v Jonathan Williams [2012] at [10]).

Her Honour continued to depict the violence inflicted on the victim over a further three paragraphs; completing her narrative by repeating the offender’s own words, as recounted to another Aboriginal male, with whom the offender had been drinking the previous evening:

Yeah I bashed her and her boyfriend RT up. I punched RT and kicked A with steel-capped boots to her face. I think I broke her arm (The Queen v Jonathan Williams [2012] at [13]).

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

The victim had been severely beaten and suffered severe head injuries, including both sub-dural and sub-arachnoid haemorrhages over the surface of the brain, as well as abdominal injuries involving severe soft tissue damage of the posterior wall of the abdominal cavity. As I said before, approximately 500 millilitres of blood present in the cavity itself. These injuries were consistent with being struck extremely hard a number of times (The Queen v Damien Hughes [2016] at [14].
However, while deciding the offender’s actions typified a serious example of negligent manslaughter, his Honour viewed the offending as less serious given the absence of a weapon:

This is a serious example of negligent manslaughter. ... On the other hand, this is not a case where a weapon was used, such as a knife, or a blunt instrument (The Queen v Damien Hughes [2010] at [14], [15].

In a Northern Territory case, while discussing the offender’s violent past, the judge considered that related convictions from 17 years ago had reached their expiry date:

Of significance for present purposes are two matters from the early 1990’s. In 1992 you were convicted of aggravated assault and sentenced to imprisonment for six months. In 1993 you were again convicted of aggravated assault, this time causing bodily harm, and sentenced to imprisonment for nine months. Those offences were obviously serious cases of violence. You have not been convicted of an offence of violence since that time and I bear in mind that the convictions are now somewhat old ((The Queen v Corellus Molinjin, [2009] at [9]).

In this final example, the judge discussed the violence inflicted on the female victim over eight paragraphs. This equated to 20 per cent of the sentencing remarks. Consider the following extract:

The force required to cause the injuries to her ribs at the front and the side was moderate force. The force required to fracture the ribs at the rear causing them to shear away from where they joined the spine would have required a lot of force on your part, for example a hard kick. Alternatively it would have required the force of a reasonably heavy person, such as yourself, flopping onto your wife with your full
body weight directed through your knees. Considerable force would have been required to fracture the sternum. ... Those injuries or combination of injuries were sufficient to cause your wife’s death within approximately 30 minutes of their being inflicted (The Queen v Esau Hodgson [2012] at [12]).

His Honour continued:

Your wife also sustained fatal injuries to her abdominal area. These injuries included extensive lacerations and tearing of the liver and spleen, and tearing of the mesentery and the mesenteric arterial cascade with bruising around the kidneys (The Queen v Esau Hodgson [2012] at [14]).

... your deceased wife lost clumps of hair from her head caused by the hair being pulled out, or possibly the force exerted by her being dragged by her hair. I should also mention that your wife lost three teeth as a result of the trauma. Two of the teeth were taken out completely and the third still had part of its root system in place (The Queen v Esau Hodgson [2012] at [17]).

Concluding his remarks on the violent offending his Honour said:

Your violent conduct represented a great falling short of the standard of care that a reasonable person would have exercised in the circumstances (The Queen v Esau Hodgson [2012] at [24]).

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

You first offended in 1986 when you were 20 years old. You were convicted of assault causing bodily harm. ... In December 1986 you were convicted of rape in the Supreme Court ... I note that you were next convicted in January 1990 of a relatively
minor matter, fighting in a public place ... On February 2009 you committed three
offences: driving at a speed and in a manner dangerous, driving with a high range
blood alcohol content, and being armed with an offensive weapon (*The Queen v
Esau Hodgson* [2012] at [27], [29]).

Nonetheless his Honour concluded:

> Although you have committed a very violent and cruel offence you have not
> otherwise been a violent offender and your prospects for rehabilitation are good ...
> (*The Queen v Esau Hodgson* [2012] at [41]).

The above offender was then sentenced for manslaughter, receiving a head
sentence of 11 years with a non-parole period of 5 years and 9 months.

For Aboriginal females, all but one offender used a knife to kill their male
victim. The remaining offender used a shard of glass. Sometimes judges thought
the use of a knife by a female offender lacked premeditation. For example:

Any crime which involves the taking of a life is serious and in your case you
introduced a knife into a volatile situation. Nevertheless, the circumstances in
which that occurred, in my view, place your offence at the lower end of the scale of
offences of this type (*R v Noreen Jessamine Weetra* [2009] at [36]).

The killing was not premeditated, you did not seek to kill the deceased, it was – as
was the situation in Lovett – one stab wound (*R v Melissa Anne Kulla Kulla* [2010]
VSC 60 at [65]).
Theme Two – Alcohol

The majority of Aboriginal male offenders were affected by alcohol at the time of the offence. While judges discussed the offender’s state of intoxication, no explicit expression of the offender’s alcoholic state being either mitigating or aggravating was made; however, it is apparent from the remarks that judges were taking intoxication into account. Although judges linked the male offender and the female victim through their joint consumption of alcohol leading up to the offence, the vulnerability of the intoxicated victim contributing to the gravity of the offence was discussed in only one case (The Queen v Damien Hughes [2010] at [14]). For Aboriginal males, the offender’s intoxicated state was clearly articulated as an aggravating factor in only one instance:

The sentence to be imposed on you must reflect the need to deter other Aboriginal men from committing acts of violence to Aboriginal women. The various matters to which I have referred were accepted by your counsel, Ms Fedele, as factors that aggravated the seriousness of your offending (The State of WA v Attwood [2013] at [24]).

Despite the prevalence of Aboriginal male offenders affected by alcohol at the time of the offending, judges remarked on the need for general and specific deterrence to specifically punish violent, alcohol fuelled femicide in only a few cases. For example:

Sentences imposed for drunken violence against Aboriginal women within Aboriginal communities, especially sentences for drunken violence which results in death must properly reflect sentencing factors relevant to protecting vulnerable women; personal deterrence and general deterrence...
on you must reflect the need to deter other Aboriginal men from committing acts of violence to Aboriginal women (The State of WA v Attwood [2013] at [23], [24]).

In a further case, the victim was pregnant with the offender’s child at the time of the offence. Despite the judge commenting on the need for general deterrence, the requirement for specific deterrence appears to have been judicially moderated by the male offender’s use of alcohol during the course of previous offending:

There must be a significant sentence of imprisonment to punish you for what you did and for the purposes of general deterrence. There must also be an element of special deterrence in your case because of your prior convictions of assault. However, I am told, all appear to be alcohol-related (The Queen v Damien Hughes [2010] at [27]).

In another set of sentencing remarks, while aggravating and mitigating circumstances were not explicitly expressed, the judge explained that the male offender’s extreme intoxication moderated the serious offending:

It is an extremely serious offence. It is moderated to a degree by your background and your extreme intoxication at the time ... (The State of WA v Brooking [2014] at [6].

In the Northern Territory judges appeared to hold opposing views as to the connection between the male offender’s state of intoxication and that offender’s insight into his victim’s death. In this first example, the judge opined that the offender’s lack of foresight due to his intoxication did not excuse the offending:
This is a serious example of negligent manslaughter. Some of the relevant features which need to be taken into account in assessing the gravity of the offending are the following: ... She was heavily intoxicated at the time. It is likely that you, too, were also intoxicated, given the amount of alcohol you consumed during the day ... (*The Queen v Damien Hughes [2010] at [14]).

His Honour continued:

As a general rule, negligent manslaughter is not as serious as reckless manslaughter because of the lack of foresight. This is not always the case because lack of foresight may be the result of over-indulgence in alcohol (*The Queen v Damien Hughes [2010] at [26]).

However, in a second Northern Territory case, while the judge also found the male offender was negligent in causing the victim's death, his Honour determined that the offender's intoxication affected the offender's insight into his offending:

In my assessment your state of intoxication prevented you from having insight that death could result from your conduct (*The Queen v Esau Hodgson [2012] at [24]).

As the following two Northern Territory case examples show, where the male offender was found guilty of reckless manslaughter, judges viewed the offender's intoxication more seriously:

The sentence I impose must send a message that such drunken violence is totally unacceptable. It must give emphasis to the need for general deterrence, community protection, punishment and to reflect the abhorrence the community feels for such violence (*The Queen v Sebastian Kunoth [2014] at [19]).
Unfortunately, offending of this kind is not uncommon in the Northern Territory. Violent attacks by drunken Aboriginal men upon vulnerable and often drunken Aboriginal women, are regrettably, commonplace... Courts will continue to impose sentences upon people such as yourself that fulfil the need for punishment and contribute to specific and general deterrence insofar as it be possible (The Queen v Corelius Mollinjin [2009] at [16]).

As the next three examples demonstrate, judges appeared to be at a loss as to how to resolve the issue of intoxicated Aboriginal males killing their partners; and acknowledged the limitations of the court’s role in effecting social change:

I do not know what can be done to stop people drinking and then killing those closes to them, as you have done (The State of WA v Brooking [2014] at [3]).

There is little that can be done by the Courts to deal with this issue other than to impose sentences designed to reflect the abhorrence of the community and hopefully provide some deterrence to others who may be inclined to offend in this way (The Queen v Corelius Mollinjin [2009] at [17]).

Whatever may be the futility of sentences in trying to effect social change, the High Court in Munda made it clear that sentences imposed in cases where an unlawful killing occurs must provide recognition to the human dignity of the victim and the legitimate interests of the wider community in denouncing and punishing offenders, for brutal, alcohol fuelled destruction of female partners (The State of WA v Narrier [2014] at [35]).

In one instance, the judge articulated that the social problems arising from intoxicated Aboriginal males killing their partners needed to be tackled head-on; and required the co-operation of the whole community:
There are significant underlying problems which need to be addressed. One aspect of the senseless violence is the almost inevitable presence of an excessive, sometimes unbelievable, consumption of alcohol on the part of one or both parties to the violence. Whilst the underlying problems need to be addressed over the long term, the issue of the abuse of alcohol may be addressed in a shorter timeframe. This is a problem for the whole of our community. We need to confront it as soon as possible (The Queen v Corellus Moolinjfin [2009] at [18]).

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

In one case where the offender picked up a knife laying on the kitchen table in order to kill her victim, the judge considered that the offender’s actions should be moderated in view of her intoxication:

I consider you took it as something at hand without particularly, in your alcohol induced state, appreciating how lethal it could be (R v Doolan [2010] at [10]).

There was no case example where the female offender’s alcohol intake was considered aggravating to the offence; and a female offender’s alcohol intake was clearly expressed as a mitigating factor in only one instance:

Lastly, I take into account that whilst drunkenness is not normally a mitigating factor, where, as in your case, the abuse of alcohol by an offender reflects the social circumstances and the environment in which you have grown up in, that can and

As the above commentary shows, her Honour applied one of the principles articulated in *R v Fernando* (1992) 76 A Crim R 58 ("Fernando"). In *Fernando*, Justice Wood of the New South Wales Supreme Court identified the common law principles, applicable in New South Wales, relating to Indigenous offender sentencing, in order to provide a framework to consider the disadvantages surrounding the personal circumstances of an Indigenous offender (Manuell, 2009, p. 4-5, 10). One of the eight principles distilled by Wood J included the consideration of drunkenness as a mitigating circumstance in relevant cases:

While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects (*R v Fernando* (1992) at 62]-[63]).

An analysis of all cases where an Aboriginal offender was affected by alcohol at the time of the offence reveals that the *Fernando* principle pertaining to alcohol abuse was applied in only two cases.³ The first instance, as detailed above was for a female offender. The second instance as detailed below was for a male
offender. The male offender received a mandatory head sentence of life imprisonment. The non-parole period imposed was 12 years. This was the second lowest recorded non-parole period for all males sentenced for murder. In applying the *Fernando* principle to this offender’s offending, his Honour said:

I have taken into account what Mr Johnston has said and in the light of what he has told me I have also taken into account what was said by Wood J in *R v Fernando* (1992) 76 A Crim R 58 and in the [sic] *The State of Western Australia v Munda* (emphasis in original) (*The State of WA v Attwood* [2013] at [42]).

Further analysis of the data showed that the *Fernando* principle pertaining to alcohol abuse was, in one case, not followed: 4

The evidence establishes that Mr Bugmy has had a life of great deprivation of the kind often seen in rural indigenous communities. ... Ms Manuell submitted that in those circumstances the principles stated in *R v Fernando* [2002] NSWCCA 28 are relevant to the sentencing of Mr Bugmy. When close regard is had to the content of the eight propositions articulated by Wood CJ at CL in that case, that is an unexceptionable proposition (emphasis in original) (*R v Damien Charles Bugmy* [2011] at [43]).

The *Fernando* principle was not mentioned for the remaining Aboriginal cases in the sample.

*Theme Three – Deterrence*

Despite victimisation from domestic violence; for Aboriginal female offenders, judges in certain cases acknowledged that general deterrence must assume some
weight in the sentencing process. For Aboriginal male offenders, judges used their remarks to send a message to the community that drunken violence, particularly against Indigenous women would not be tolerated, and that the sentence imposed must reflect this. The following Aboriginal male was sentenced for reckless manslaughter in the Northern Territory in 2014. At the time of sentence the maximum penalty in this jurisdiction was life imprisonment.\textsuperscript{5} At the time of the offence the Indigenous victim was the ‘protected person’ in a Domestic Violence Order taken out against the offender. In this instance the offender received a head sentence of 9 years and 6 months with a non-parole period of 7 years. In relation to determining the sentence length the judge commented as follows:

The sentence I impose must send a message that such drunken violence is totally unacceptable. It must give emphasis to the need for general deterrence, community protection, punishment and to reflect the abhorrence the community feels for such violence (\textit{The Queen v Sebastian Kunoth} [2014] at [19]).

In this second example the offender was sentenced for negligent manslaughter in the Northern Territory in 2010. At the time of sentence the maximum penalty in this jurisdiction was life imprisonment.\textsuperscript{6} In this instance the judge imposed a head sentence of 7 years and 2 months on the offender, with a non-parole period of 3 years and 7 months. This was the second lowest Aboriginal male manslaughter sentence in the sample, as well as the third lowest male manslaughter sentence overall. Regarding the sentence length imposed, Mildren J said:

\textbf{There must be a significant sentence of imprisonment to punish you for what you did and for the purposes of general deterrence. There must also be an element of special deterrence in your case because of your prior convictions of assault.}
However, I am told, all appear to be alcohol-related (The Queen v Damien Hughes [2010] at [27]).

**Theme Four - The Difficulty of Sentencing for Manslaughter**

As a crime, manslaughter can be committed in many ways. When sentencing offenders for manslaughter, the study data show that in 25 per cent of Aboriginal cases, and in 25 per cent of non-Aboriginal cases, judges across multiple jurisdictions expressed the difficulty they experience generally in finding a starting point for sentencing; given the wide variety of circumstances in which the offending can occur. In this study, the majority of judicial discourse occurs in the Northern Territory, where, for Aboriginal males, judges explain the difficulties involved in manslaughter sentencing. For example:

I now propose to say something about the offence of manslaughter. The maximum penalty specified in the Criminal Code for the crime of manslaughter is imprisonment for life. However sentencing for the crime of manslaughter is a most difficult task. The crime is committed in a very wide variety of circumstances from negligent stupidity to conduct falling just short of murder. The maximum sentence is in many cases of very limited guidance since by definition every case of manslaughter involves the death of a victim. Sentencing principles require a judge to assess where on the imprecise scale of criminal culpability a particular offence lies (The Queen v Esau Hodgson [2012] at [31]).

Nonetheless, despite the offence involving a wide range of criminality, judges agreed in all male offender cases that manslaughter was serious. For example:
The Parliament, which binds us all, has passed a law which increases the penalty for the crime of manslaughter ... Courts must give effect to that in sentencing so that sentences now for this sort of criminal behaviour within relationships is likely to be more seriously treated than may have been in the past ... (The State of WA v Brooking [2014] at [4]).

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

The protection of human life and personal safety is a primary objective of the system of criminal justice. The sentence of this Court must provide a real demonstration that society cannot tolerate criminal offending resulting in the taking of a human life (The Queen v Esau Hodgson [2012] at [32]).

There is not an established tariff; an established length of sentence for the crime of manslaughter, because circumstances in the various crimes of manslaughter are different, they can vary almost infinitely, but the starting point is always what has been described by another Judge as ‘The unlawful taking of a human life, one of the gravest offences against ordered society (The Queen v Donathan Williams [2012] at [24]).

Notwithstanding the above commentary, the average head sentence for an Aboriginal male killing his partner is 9 years and 6 months; with an average non-parole period of 6 years and 4 months.

Theme Five - The Length of Judicial Commentary
Judges proffered more commentary on the seriousness of the offending for Aboriginal males, as compared to Aboriginal females. However, Aboriginal females
received more sentencing commentary than Aboriginal males generally. The shortest judicial narrative was dispensed to an Aboriginal male sentenced in South Australia in 2010. The offender received a mandatory head sentence of life imprisonment. The mandatory minimum non-parole period for the offence of murder in South Australia at that time was 20 years, for an offence at the lower end of the range of objective seriousness. In this case, the judge imposed a non-parole period of 22 years and 6 months. The judge’s remarks on sentence were contained in a mere 96 lines of text; and the judge’s reasons for increasing the non-parole period appeared particularly sparse.

Although judges provided more narrative for Aboriginal female offenders than Aboriginal male offenders; reviewing judicial commentary for the whole study showed that judges provided less narrative for Aboriginal offenders as compared to non-Aboriginal offenders.

Literature Review in the Context of the Results

Introduction

Following analysis of the data, this literature review and discussion considers the key themes for Aboriginal offenders. The purpose of the literature review was to identify previous research which was either consistent or inconsistent with the themes. This approach is compatible with grounded theory methodology.

Indigenous Overrepresentation

Aboriginal offenders represented 40 per cent of the sample. Regarding the victims of Aboriginal offenders, 76 per cent were identified as Indigenous. For the
remaining 24 per cent of Aboriginal offender victims, their ethnicity could not be
determined from the remarks. This data is consistent with the widely acknowledged
over-representation of Indigenous Australians in the Australian criminal justice
system. Statistics show that despite comprising only three per cent of the Australian
population, Indigenous people constitute 11 per cent of homicide offenders and 13
per cent of homicide victims (Australian Bureau of Statistics, 2012); where the
majority of intimate partner homicides involving an Indigenous offender also
involved an Indigenous victim (Bryant & Cussen, 2016, p.24).

Quantitative Results

Theme - Sentence Length

In the current study Aboriginal males received higher head sentences than non-
Aboriginal males. This finding corresponds with Jeffries and Bond’s (2009, p. 50)
study regarding the sentencing of Indigenous offenders in South Australian higher
courts. In their study, Jeffries and Bond (2009, p. 64) found that when Indigenous
and non-Indigenous offenders faced a court in similar circumstances, Indigeneity
appeared to mitigate a judge’s decision to imprison. However, their results also
showed that once imprisonment was decided, Indigenous offenders were punished
more severely than their non-Indigenous counterparts. According to Jeffries and
Bond (2009, p. 67), Indigenous offenders were sentenced to longer periods of
imprisonment.

The current study diverges from Jeffries and Bond’s (2009) findings when
non-parole periods are considered. In the current study the researchers found that
when compared to non-Aboriginal males, Aboriginal males received statistically
lower non-parole periods. It was also found that Aboriginal males received a lesser sentence prior to parole eligibility than non-Aboriginal males. In sum, Aboriginal males served shorter sentences than their non-Aboriginal male counterparts, when sentenced for manslaughter.

While no Aboriginal females were convicted of murder, 50 per cent of females sentenced for manslaughter were Aboriginal. This highlights the disproportionate representation of Indigenous females in the Australian criminal justice system. Despite accounting for only two per cent of the total female Australian population, Indigenous females make up one third of Australia’s female prison population generally (Australian Bureau of Statistics, 2015).

Observing sentencing practices in Western Australian higher courts, Jeffries and Bond (2013, p. 37) found that Indigenous females, as compared to non-Indigenous females, were more likely to receive lenient sentences when they appeared before the court in like circumstances. In a previous study, Bond and Jeffries (2010) considered the possibility that the extension of leniency to Indigenous women may arise as a result of the judiciary’s sensitivity to Indigenous women’s unique circumstances when compared to non-Indigenous society generally. Bond and Jeffries (2010, p. 75) argue that as such, the judiciary, in Western Australia at least, may recognise Indigenous women as less culpable than their non-Indigenous counterparts. In the current study, despite some variations in sentencing between Aboriginal and non-Aboriginal females, the sample size was too small for statistical analysis, and no trend could be identified.
Qualitative Results

Theme One - Offender Violence

For Aboriginal males sentenced for murder, a history of domestic violence perpetrated by the male against the female was discussed in all but one case. Repeated violence towards the victim of Aboriginal male manslaughter offenders was also the subject of extensive judicial discourse. Bagshaw, Chung, Couch, Lilburn & Wadham (2000, p. 123) assert there is extensive evidence to suggest that Indigenous women are far more likely to be victims of domestic violence than non-Indigenous women, and are more likely to sustain fatal injuries.

Cussen & Bryant (2015, p. 4) found that regarding intimate partner homicide, for the 10 year period to 2011-12, the highest apparent cause of death was a stab wound. In the current study, while non-Aboriginal males used a variety of weapons to kill their partner, only Aboriginal males used bodily force alone. This occurred in half of all Aboriginal male cases, and the data reflect that judges view this type of force as less serious when compared, for example, to the use of a knife.

Judges frequently set out the background of domestic violence experienced by female victims, providing extensive and graphic detail of victims’ injuries, particularly to a victim’s face, head, chest and torso. This data is consistent with Lloyd’s (2014) study of intimate partner violence within Indigenous communities in Central Australia. Lloyd (2014) found that in the majority of cases of male violence the weapons used were the offender’s body or heavy blunt objects such as rocks, with knives used on only three occasions. Lloyd (2014, p.103) postulates that the nature, extent and intent of male offender violence is evident in the use of the ‘upper
end of moderate to severe force’, to purposefully cause injuries to the female victim’s head, face and torso. Lloyd (2014) argues that the use of such weaponry has been misinterpreted as signifying this type of violence is opportunistic; and as such, not only normalises and diminishes both the nature and the extent of this form of domestic violence; but has played a part in ‘similar fact’ homicides being treated as manslaughter, which in real terms, according to Lloyd (2014, p. 103), attract a much lighter sentence. Consistent with Lloyd’s (2014) argument, in the current study, the quantitative findings show that Aboriginal males are significantly more likely to be found guilty of manslaughter rather than murder. When comparing non-parole periods for all offenders, the data also show that, in contrast to non-Aboriginal males, Aboriginal males receive significantly lower sentences.

Anthropological literature indicates that the difference in injuries sustained by male and female Aborigines, in violent intra-racial conflicts is significant. Brady (1990, pp. 135-140) points out that, for example, arm-breaking in women is one area of the body subjected to a customary blow of punishment. Brady (1990) says that the fact that, at least in some cases, given that an intoxicated offender is able to direct a blow to a specific part of the victim’s body is suggestive of powerful cultural factors at work. Brady (1990, pp. 135-140) argues that such actions intimate that despite intoxication, an offender may be adept enough to maintain a degree of control over their actions. In the current study, the data show one offender recounting to an Aboriginal male drinking partner how he believed he had broken his wife’s arm during his drunken and violent attack, which subsequently killed her.
When Aboriginal males were sentenced for either murder or manslaughter, no judge remarked that the killing of the female partner was aggravated by domestic violence perpetrated by the offender. In the context of public policy change in Canada over three decades, Dawson (2008) comments that intimacy often tends to reduce an offender’s culpability, and serves to mitigate rather than aggravate the offence. Dawson’s (2008) view is that the more intimate the link between the offender and the victim, the more ‘society’s collective gut reaction seems to be less intense, less strong, less indignant and somehow, more accepting’ of the violence. Dawson (2008) believes that this is the case because intimate partner violence is, in general, viewed as ‘normal’, ‘expected’, ‘spontaneous’, ‘unpredictable’ and as such, cannot be prevented.

However, in Australia, despite the ‘traditionally incident-focused nature of criminal law’, family violence is now recognised in varying degrees, in some criminal offences in a number of jurisdictions (Australian Law Reform Commission, 2010, p. 565). For example, in Western Australia, if the offender is in a ‘family and domestic relationship with the victim’ an offence against the person is treated as aggravated. South Australia has a similar provision. That said, for the six Australian jurisdictions examined in this study, not all legislation pertaining to the sentencing of homicide offenders sets out aggravating or mitigating factors. Also, the interplay between aggravating and mitigating factors appears more problematic given that the opposite of a mitigating factor is not necessarily an aggravating factor, and vice versa (Australian Law Reform Commission, 2010, p. 600). This is reflected in the data:
That the killing has arisen from domestic violence is not a mitigating factor (\textit{R v Kane Rodney Jonathon Allen}, [2010] at [12]).

Judges also frequently excused male violence due to an offender's intoxication at the time of the offence; or the fact that any previous violent criminal history, (often against women), may have been too far in the past to be considered in the current sentencing matrix. From an Aboriginal female victim's perspective, Randal (1995) argues that such judicial narratives serve to marginalise Aboriginal women by perpetuating racist and sexist stereotypes. Randal (1995, p.3) also comments that with the courts' preparedness to consider alcohol abuse by the male offender as 'mitigating', such commentary fails to acknowledge the effect such remarks have on Aboriginal women generally.

\textit{Theme Two - Alcohol}

Indigenous homicide is frequently connected with high incidences of spousal or family violence as well as high rates of alcohol consumption (Martin, 1992, p. 170).

While judges frequently discussed an Aboriginal male offender's high level of intoxication at the time of the offence, it was difficult to tell from judges' comments whether the alcoholism was considered aggravating or mitigating in the context of the sentencing matrix. Such intoxication was considered as an aggravating factor in only one instance.

In one example the judge decided that the Aboriginal male offender's intoxicated state had in fact affected his insight into his offending. Warner (1996, p. 115) considers that treating intoxication as a mitigating factor allows offenders to
avoid taking responsibility for their violence. Newton (2002, p. 33) asserts that a
court's preparedness to view a male offender's alcohol abuse as mitigating only
serves to proliferate the victimisation of Aboriginal women. Arguably, this
victimisation is evident in the data because, in almost all Aboriginal male offender
cases, judges linked the offender with the victim through their joint consumption of
alcohol leading up to the offence; frequently discussing their mutually intoxicated
state.

Although judges did not generally appear to excuse a male offender's
intoxicated behaviour at the time of the offence, the data does reflect that judges
frequently sought to explain offenders' intoxication. Warner (1996, p. 115) argues
that such judicial explanation does not give clear direction as to how offender
intoxication is being judicially considered. Warner (1996, p. 115) further comments
that sufficiently clear guidance is also lacking in sentencing principles regarding the
significance of intoxication, in the context of the offence.

In a six year study on alcohol related homicide, Dearden and Payne (2009,
p.5) found that in the context of intimate partner homicide, Indigenous on
Indigenous homicide incidents were more than 13 times as likely to be classified as
alcohol related than other intimate partner homicides. In the current study, despite
the prevalence of Aboriginal male offenders affected by alcohol at the time of
offending, judges seldom remarked on the need for general and specific deterrence.
Nonetheless, as a fundamental principle of sentencing, general deterrence is
considered to be particularly important where an offence is prevalent. 12
For Aboriginal female offenders, modest narration occurred concerning their intoxication at the time of the offence. Instead, judges focused their remarks on the male victims’ alcohol intake. Also for female offenders, alcohol consumption was not considered as aggravating the offence. Nonetheless, alcohol abuse by an Indigenous offender can be a relevant sentencing factor where that abuse reflects the offender’s socioeconomic circumstances, and/or deprivation within their community (Flynn, 2005, p. 15). In the current study, alcohol abuse was expressed as a mitigating factor for one female offender. The Fernando principle relating to alcohol abuse was only applied in two cases (one female and one male).

On the one hand, this data supports Baldry and Cunneen’s (2014, p. 288) comments that there are in fact very few cases where the Fernando principles have been considered or applied to Indigenous women, with no clear judicial explanation as to how these principles may in fact relate to such women. However, Jackson (2015, p. 172) argues that Fernando concerns itself with socio-economic disadvantage generally, and not specifically Aboriginality. The High Court of Australia has had few opportunities to consider the principles of sentencing exclusively in relation to Indigenous offenders. In a discussion concerning the practical implications of the most recent of these High Court decisions in the wake of Fernando, Justice Rothman (2014, p. 22) of the Supreme Court of New South Wales opined that a sentencing court must have material before it in order to determine if the Fernando principles are relevant to that particular offender; and that such factors have actually affected the offender’s moral culpability. For the Aboriginal manslaughter cases in this study, it was not possible to identify if the above factors were present, if they were not mentioned by judges.
Perhaps the most telling judicial viewpoint, as put forward by Justice Rothman (2014, p. 22) is that only after an ample number of case have had sufficient material before a court pertaining to the application of the *Fernando* principles, for a particular offender, will a court perhaps consider taking judicial notice\(^4\) of that fact:

... it is only after that has occurred on a sufficient number of occasions that judicial officers *may eventually* (emphasis added) be able to take judicial notice of such effects.

The judges in this study rarely referred to broader social and political contexts concerning the treatment of Aboriginal offenders, or Aboriginal people in general. This observation arguably supports Justice Rothman’s (2014, p.22) viewpoint, reasserting the principle of individualised justice:

Each individual must be treated as such. There can never be a “group discount” on sentence just because of a person’s membership of a particular race, religion, or ethnic group.

*Theme Three - The Difficulty of Sentencing for Manslaughter*

During the study period the maximum penalty for manslaughter varied considerably between jurisdictions; from 20 years to life imprisonment. Brown et al. (2011, p.37) note differences in homicide laws between Australian states result, in part from ‘parliamentary activism’ as well as being a consequence of political campaigns and ‘localised histories’. While judges remained cognisant of Parliament’s increased penalties for manslaughter, and the judiciary’s duty to remain bound by legislative directives; judges remarked on the limited guidance a maximum penalty can offer.
Snowball and Weatherburn (2007, p.277) comment that while the maximum penalty for an offence should indicate the seriousness of that offence, it often acts as a poor guide to the realities of actual sentencing practices. This is reflected in the data where, for example, head sentences for Aboriginal male offenders who have killed their partners in extremely violent circumstances, average less than half of the lowest maximum penalty in any one jurisdiction. This is despite judges in all Aboriginal male cases expressing the seriousness of manslaughter. Hemming (2011, p.316) comments that manslaughter sentences have previously been too lenient in the Northern Territory. Western Australian parliamentary debates leading to the increased life imprisonment penalty for manslaughter discussed West Australians’ opinion that sentencing in this area had been ‘too soft’.\textsuperscript{13} Hemming (2011) holds the view that regardless of circumstances, considering the maximum penalty for manslaughter in the Northern Territory is life imprisonment; the commencement point for serious manslaughter cases should be 20 years.

Certainly for Aboriginal offenders, judges repeatedly remarked on the complexity of the sentencing process, and their commentary belies the fact that they are dealing with the symptoms of a complex social problem. Behrendt and Watson (2008, p.46) contend that it is the politicians, and not the judiciary who hold the most power in addressing the root cause of this issue.

\textit{Theme Four - The Length of Judicial Commentary}

For Aboriginal offenders, judges’ remarks were extensive for females as opposed to males. Yet judges provided less narrative overall for Aboriginal offenders when compared to non-Aboriginal offenders. The remarks are silent as to why this may be
the case. Nonetheless, sentencing is an extremely subjective process (Hemming, 2011, p.313). Heumann (1990, p.200) observes that judges are attuned to conceal features of their decision making processes that may be of particular interest to social scientists’ analyses. That said, in Wong v The Queen (2001) 207 CLR 584 at 622, Kirby J urged the judiciary to provide greater transparency and honesty in the sentencing process.

Conclusion

Regarding the sentencing of Aboriginal males, the data show that judges are saying one thing and doing another. While on the one hand, judges comment that drunken male violence against Indigenous women will not be tolerated, and that sentences must reflect this; on the other hand, judges are sanctioning Aboriginal males less harshly than non-Aboriginal males.

While you would expect that the prevalence of male violence against women calls for a need for greater deterrence, the data tell us that judges are handing down significantly lower sentences to Aboriginal males as compared to non-Aboriginal males. Judges are viewing Aboriginal males as less culpable than their non-Aboriginal counterparts, and are being sentenced accordingly.

Notwithstanding the serious nature of homicide, the need for general and specific deterrence for alcohol fuelled femicide is seldom discussed in the sentencing remarks. The authors find it difficult to reconcile the fact that the savage beating to death of a woman is considered less serious than if she had been stabbed or shot to death.
While judges identify that the killing of Indigenous women by intoxicated Aboriginal men needs to be tackled head-on; the data show that judges continually view a male offender’s use of alcohol as modifying the seriousness of the offending. At the same time, the vulnerability of an intoxicated female victim in the context of the gravity of the offence is rarely recognised.

The use of bodily force to kill a woman is judicially portrayed as opportunistic, with the nature and extent of the violence perpetrated normalised, and diminished in nature. A point that Lloyd (2014, p.103) argues, in real terms, leads to lighter sentences.

1 According to the Aboriginal and Torres Strait Islander Commission Act 1989 s 4 ‘Aboriginal person’ means ‘a person of the Aboriginal race of Australia’.
2 In the current study, domestic violence may be emotional; verbal, social, economic, psychological or spiritual abuse.
3 A principle of law articulated in Fernando is applied to a new set of facts by the court in these cases.
4 The court in this case has declined to apply the principles of law articulated in Fernando.
5 Criminal Code Act 1983 (NT) s 160.
7 Criminal Law Consolidation Act 1935 (SA) s 11.
8 Criminal Law (Sentencing) Act 1988 (SA) s 32(5)(ab).
9 Although an aggravating factor increases the culpability of an offender, and acts to increase the sentence imposed, the sentence should not go beyond the maximum penalty for the offence.
10 Criminal Code Act Compilation Act 1913 (WA) s 221.
11 Criminal Law Consolidation Act 1935 (SA) s 5AA(1)(g).
14 Wherever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it, the court ‘notices’ it: Holland v Jones (1917) 23 CLR 149.
References


**Case Law**

*Bugmy v The Queen* (2013) 87 ALJR 1022.

*DPP v Lovett* [2008] VSCA 262.

*Holland v Jones* (1917) 23 CLR 149.

*Munda v Western Australia* (2013) 87 ALJR 1035.


*R v Sherridan Rose Hodder* [2013] WASCSR 211.

*R v Melissa Anne Kulla Kulla* [2010] VSC 60.


The Queen v Esau Hodgson [2012] NTSC SCC 21007364.

The Queen v Damien Hughes [2010] NTSC SCC 20916792.


The Queen v Sebastian Knooth [2014] NTSC SC21249438.


Wong v The Queen (2001) 207 CLR 584.

Legislation

Aboriginal and Torres Strait Islander Commission Act 1989.


Criminal Law Consolidation Act 1935 (SA).

End of Article
5.4 Conclusion

Ultimately, sentencing is a social policy issue, and governments seek to legislate for penalties that reflect community expectations, particularly for crimes against the person. The imposition of a sentence on an Aboriginal offender not only reflects government policy and legislation but reveals, to an extent the judicial decision-making process. This study shows that while judges say that male violence against women will not be tolerated, judges are sanctioning Aboriginal males less harshly than non-Aboriginal males. While you would expect that the prevalence of male violence against women demonstrates a need for greater deterrence, current sentencing practices disclose that Aboriginal males are judicially considered less culpable than their non-Aboriginal counterparts.

In Australia, empirical work on the relationship between offenders' Indigenous status and sentencing is scarce.\(^1\) Therefore, arguably, for the advancement of both the law and its legal framework, empirical legal research is a necessity.\(^2\) As such, further large-scale studies across all Australian jurisdictions are needed in order to explore the differences between Indigenous and non-Indigenous offender sentence lengths. Additionally, further studies on how judges interpret the principle of equality before the law in the context of an offender's Indigeneity will provide a more thorough understanding of how Indigeneity is actually influencing sentencing.

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The next chapter, chapter 6, discusses the fourth and final key theme, namely the use of alcohol and/or drugs in the context of the offending.
Chapter Six

Theme Four: The use of alcohol and/or drugs as a contributing factor to the offence
6. Introduction

6.1 The article at 6.2 focuses on the theme of the use of alcohol and/or drugs as a contributing factor to the offending, as presented in the data. In doing so, the article sheds light on how judges’ are dealing with this issue at the point of sentencing males and females for intimate partner homicide.

Observing that gender in a focus in this thesis, the article concentrates on two key points. First, despite the seriousness of the offence, sentencing judges often fail to attribute a sufficient degree of responsibility to male offenders for their voluntary consumption of alcohol and drugs, and their subsequent violent behaviour; and second, that judges attribute more blameworthiness to non-Aboriginal female offenders than to their Aboriginal counter-parts.
6.2 Article: 'The Use of Alcohol and/or Drugs in Intimate Partner Homicide: Themes in Judges' Sentencing Remarks'

Marion Whittle and Guy Hall

Under review by Psychiatry, Psychology and Law¹

¹ See Appendix P for proof of submission.
THE USE OF ALCOHOL AND/OR DRUGS IN INTIMATE PARTNER HOMICIDE: THEMES IN JUDGES’ SENTENCING REMARKS

Marion Whittle and Guy Hall

This article presents the results of a major theme arising out of a grounded theory analysis of judges’ sentencing remarks for males and females sentenced for intimate partner homicide in Australia between July 2009 and June 2014. Specifically, this paper focuses on judges’ commentary regarding the use of alcohol and/or drugs as a contributing factor to the offending. Overall the qualitative data indicate that despite the seriousness of the offence, sentencing judges often fail to clearly attribute a sufficient degree of responsibility to male offenders for their voluntary consumption of alcohol and drugs; and their subsequent violent behaviour. Additionally, within the data judges attributed more blameworthiness to non-Aboriginal female offenders whom they believed were; in an alcohol or drug induced state, unable to take control of their dysfunctional lives.

INTRODUCTION

This article presents the results of one of several major themes arising out of a grounded theory analysis of judges’ sentencing remarks for males and females sentenced for intimate partner homicide in Australia between July 2009 and June 2014. Specifically this article examines judges’ commentary on the use of alcohol and/or drugs as a contributory factor in the offending. In doing so this article draws on all cases in the study, (n=52). This study broadens Hall, Whittle and Field’s prior qualitative analyses of judges’ sentencing remarks in cases of domestic murderers sentenced in New South Wales and Victoria between 2002 and 2009.1 For the purposes of the current study, intimate partner homicide is defined as murder or manslaughter between current or former, legal or de-facto, heterosexual spouses.
Using a grounded theory approach allows the data to speak for themselves. The researcher then reviews the literature to ascertain if the study results are consistent or inconsistent with previous research. Thus, this article presents a description of the research and the results, followed by a consideration of the results in the context of the literature.

Alcohol and/or drug use by the offender and/or victim was remarked upon as a contributing factor to the intimate partner homicide in 38 of the 52 cases in the sample. While the offender and/or victim’s use of drugs alone was remarked upon in only six of the 52 cases; judges repeatedly discussed the alcohol use or abuse by the offender and/or the victim in 32 cases. Given the small number of cases involving drugs, this article will predominantly discuss judges’ commentary pertaining to the use of alcohol, although there is also some reporting on the use of drugs.

Figure 1 depicts the total number of offenders in the sample categorised by offender race, (n=52). The sample consists of 21 non-Aboriginal males and 13 Aboriginal males, (n=34); together with 10 non-Aboriginal females and eight Aboriginal females, (n=18). Alcohol was considered a contributing factor to the offence in 32 cases. This comprises seven non-Aboriginal male cases, and 11 Aboriginal male cases; as well as six non-Aboriginal female cases, and eight Aboriginal female cases. Comparing offender types by race, alcohol was viewed as a contributing factor to the offence in 13 non-Aboriginal cases compared to 19 Aboriginal cases.
Figure 1 – Intimate Partner Homicide – By Offender Race: alcohol considered as a contributing factor to the offence.

![Intimate Partner Homicide - By Offender Type](image)

Figure 2 depicts, in a percentage format, the sample data reported in Figure 1. Alcohol was considered a contributing factor to the offence in 61 percent of all cases. For male offender cases this comprises 33 percent of non-Aboriginals and 85 percent of Aboriginals. For female offender cases this comprises 60 percent of non-Aboriginals and 100 percent of Aboriginals. Comparing offender types by race, alcohol was viewed as a contributing factor to the offence in 42 percent of non-Aboriginal cases compared to 90 percent of Aboriginal cases.
Figure 2 – Intimate Partner Homicide – By Offender Race: alcohol considered as a contributing factor to the offence (percentages)

Overall, judicial discourse concerning the contribution of alcohol to the offence was most common in Aboriginal offender cases. Specifically, an offender and/or victim’s alcohol intake leading up to the offence was discussed in four of the five Aboriginal male offender murder cases and in seven of the eight Aboriginal male offender manslaughter cases. Both alcohol intake and the effects of alcohol on the offender and/or victim were discussed in all eight Aboriginal female manslaughter cases. No Aboriginal females in the study were sentenced for murder. The reader must note that, when analysing the data, information concerning victims was more difficult to determine, given that judges tended to focus their remarks on matters directly relevant to the offender and their sentencing. In particular, even where it was possible to identify that the victim was Indigenous, it was seldom possible to identify if that victim was of Torres Strait Island or Aboriginal decent. For this reason, such victims in the study are referred to as Indigenous throughout this article.
Furthermore, some Indigenous victims may have been recorded as being of unknown race if there was no information in the sentencing remarks to indicate otherwise. Indigenous victims may therefore be under-reported in this study.

**THE RESEARCH METHODOLOGY**

Grounded theory is recognised as the leading method to analyse qualitative data in the social sciences, and was adopted as the research methodology for this study. As opposed to beginning with a theory from which hypotheses are deduced, a grounded theory study commences with either a research question or field of study, and arrives at a theory systematically developed from the collated data. Grounded theory uses a systematic, detailed and rigorous set of methods which collates, codes and analyses textual data, and allows the data to speak for itself. Researchers are then able to arrive at theories which are grounded in that data. In the current study, the task was a qualitative analysis of judges’ sentencing remarks in order to uncover and compare themes present when males kill females and females kill males in the context of a domestic relationship; current or previous.

When using grounded theory as the method the initial step is to collate the data. For this study sentencing remarks were collated from six Australian jurisdictions. Selection was based on the availability of sentencing remarks either directly from the Supreme Court or through the Australian Legal Information Institute database (AustLII). As judges’ sentencing remarks are available publically, the researchers had no interaction with the participants, and therefore, no control over the data. The researchers began the analysis with male offender remarks as males are more likely to kill than females. Each set of male offender remarks was examined, randomly
and one at a time, until saturation point for that set of remarks was reached. The saturation point being when no new major ideas are forthcoming and analysis becomes merely confirmatory.  

Each sentence within each set of remarks was read and coded. Then, key judicial comments within a set of remarks were compared to other key judicial comments within the same set of remarks with respect to commonalities and differences. Similar concepts were then grouped which lead to hypotheses about the relationships between categories. This in turn formed the basis for the emerging theory. Once saturation point was reached for the first set of sentencing remarks then the next set of male offender remarks was chosen at random. The researchers then went back and forth between sets of sentencing remarks, comparing data, modifying and sharpening the developing theory. Saturation point for male offender remarks was reached following an analysis of 34 sets of remarks (21 non-Aboriginal males and 13 Aboriginal males). This then allowed for a comparison with female offenders. Accordingly 18 sets of female offender remarks (10 non-Aboriginal females and 8 Aboriginal females) were also analysed. Saturation point for the whole study was reached following an analysis of a total of 52 sets of sentencing remarks.

On the basis that critical thinking and discovery can be clouded by preconceptions, the grounded theory method does not consider a literature review prior to analysis as playing a key role in the research. Therefore, in this study, the literature review was commenced only after a complete analysis of both the male and female offenders’ sentencing remarks was complete. In the course of the literature review the researchers observed that the terms Aboriginal and Indigenous were used.
interchangeably by academic authors. For the purposes of this article, where academic findings are discussed, the term used in those findings is retained.

JUDICIAL COMMENTARY

For Aboriginal offenders, judges remarked upon officially recorded blood alcohol readings in a number of cases in the sample, across each jurisdiction where Aboriginal offenders were recorded. However, for Aboriginal male offenders, judicial discourse concerning the offender’s blood alcohol reading at the time of the offence was largely absent; rather, judges used their remarks to draw attention to two factors they considered an integral part of the sentencing matrix; first, the connection between the male offender and the female victim through their mutual intoxication at the time of the offence; and second, the history of alcohol addiction suffered by the male offender.

In the following three case examples the judge remarked upon the mutual intoxication of the Aboriginal male offender and the Indigenous female victim in the following terms:

At the time of the attack, you and your victim were both heavily intoxicated. Her blood alcohol reading was 0.273%.\textsuperscript{8}

You both became highly intoxicated.\textsuperscript{9}

... you and the victim were in Katherine township consuming alcohol at the Last Chance Saloon Bar, an appropriate name. ... you, the victim and another male purchased two two-litre casks of white wine.\textsuperscript{10}

In this next case example, despite an absence of judicial discourse pertaining to the Aboriginal male offender’s blood alcohol reading at the time of the offence; in the
course of discussing the offender's previous criminal history, the judge concluded that the offender had a long-standing problem with alcohol:

He has a criminal record for a variety of offences commencing in 1999 for various traffic offences, but as the years proceed there are convictions for disorderly conduct, driving under the influence and other alcohol-related offences, including driving with an excess alcohol level beyond 0.8% [sic]. This indicates, which I consider to be well established by other materials, a long-standing problem with alcohol and repeated excessive intoxication.12

In the following case example, while the judge discussed the offender's previous criminal history in the context of his excessive alcohol consumption, Barr J reinforced defence counsel’s argument that the offender’s wife’s alcohol addiction contributed to the breakdown of the offender’s marriage in the lead up to the offence:

On 14 February 2009 you committed three offences: driving at a speed and in a manner dangerous, driving with a high range blood alcohol content, and being armed with an offensive weapon. Your blood alcohol concentration was 0.2 percent. I can easily infer from your offending in February 2009 that you were by that time drinking very significant amounts of alcohol. Your counsel explained in sentencing submissions that your long standing relationship with your wife deteriorated over the years as both you and your wife became progressively addicted to alcohol.12

Despite the considerable absence of judicial discourse on the blood alcohol reading of Aboriginal male offenders at the time of the offence, in contrast, judicial commentary on an Aboriginal female offender’s blood alcohol reading at the time of the offence was present in half of all cases in the sample. Also, where the Aboriginal female offender’s blood alcohol reading did not appear to have been taken immediately following the offence, the judge, nonetheless, in each instance proceeded to draw conclusions as to what that reading may have been. Consider the following case examples:
His blood alcohol level was 0.28. I am unaware of your blood alcohol content, as no one thought to take it, but I presume that you would have had a similar level to that of Mr Mumin.13

His post mortem blood alcohol level was .215 grams per 100 millilitres, ... Your blood was not sampled until after 2am ... it was clear of alcohol ... Professor Stramer’s evidence is not challenged and, having regard to it, I find that it is probable that at 5 pm on 6 March your blood alcohol level was something over .139 grams per 100 millilitres.14

Where judges did remark upon an Aboriginal male offender’s intoxicated state at the time of the offence, for the most part, those remarks were unclear as to whether the intoxication was considered as mitigating or aggravating to the offence.15 Indeed, an Aboriginal male offender’s intoxication was judicially expressed as an aggravating factor in only one instance.16 Remarkably, the vulnerability of the intoxicated female victim as a contributing factor to the gravity of the offence was discussed in only one case.17 However, the judicial commentary in this regard was limited to describing the victim as ‘heavily intoxicated’ with no further discourse on the diminished capacity of the offender’s wife to anticipate the fatal assault.

In addition, rather than viewing the Aboriginal male offender as choosing to be violent, the sentencing judge frequently explained that the offender’s homicidal actions were as a direct consequence of a force outside of his control. As the following case examples demonstrate, this external force could take a number of forms; such as the female victim’s behaviour, the effects of the male offender’s alcohol use and/or alcohol addiction, or indeed the male offender’s upbringing:

... your wife was intoxicated to the extent that she was incapable of walking back to your home at the Binjarri Community. She fell over on several occasions. You unsuccessfully tried to carry her but you fell over. At a certain stage, with your wife asleep and lying on
your lap, you became frustrated that you could not get the both of you home. ... you then beat your wife ... 18

... although it would appear that you did not fully appreciate the seriousness of what had occurred due to your intoxication. 19

I am persuaded you have an alcohol addiction, and that was very much part of the inevitability of this offence. 20

You were raised in an environment where eventually you were a part of a culture of violence and alcohol consumption. This was the type of environment you were living in at the time you killed the deceased. 21

Even where Aboriginal female offenders were affected by alcohol, in each instance, judges focused the extent of their remarks on the male victim’s alcohol intake. Additionally, while no Aboriginal female offender’s alcohol intake was considered aggravating to the offence, 22 there was only one case in which the female offender’s alcoholic state was clearly considered as mitigating. 23 In that case Jenkins J applied one of the principles articulated by Wood J in R v Fernando (1992) 76 A Crim R 58 (‘Fernando’). Jenkins J commented as follows:

Lastly, I take into account that whilst drunkenness is not normally a mitigating factor, where, as in your case, the abuse of alcohol by an offender reflects the social circumstances and the environment in which you have grown up in, that can and should be taken into account to some extent as a mitigating factor: R v Fernando (1992) 76 A Crim R 58, R v Churchill [2000] WASCA 230, and State of Western Australia v Munda [2012] WASCA 164. 24

Overall, the Fernando principle pertaining to alcohol abuse was applied in only two cases in the study. 25 In the second instance, the principle was applied in an Aboriginal male offender case. 26
Regarding non-Aboriginal female offenders affected by alcohol and/or drugs, judges frequently painted a picture of a woman who was dysfunctional, with an inability to form positive personal relationships. Consider the following two case examples:

As an adult, you have had a succession of unsatisfactory relationships with a series of violent men and, as your counsel pointed out during submissions, it seems to have been all downhill from there.\(^{27}\)

There were other relationships, it would seem all of them disastrous, and ultimately you formed a relationship with a man named Caine who also has substance abuse problems, who apparently still visits you in prison. You have a history of exceedingly poor choices in male companions.\(^{28}\)

Nonetheless, judicial narratives did, at times, indicate that a non-Aboriginal female offender had the potential to perform to society’s expectations of being a good mother with the ability to lead a productive life. For example:

You are an intelligent woman and the affect of the shock of what you have done to Mr Dick and to your children may well have got through to you and got through the fog of alcohol and drugs in which you had surrounded yourself. I cannot be positive but I have a degree of hope that you may be able to reclaim your life and ultimately be the parent that these children so desperately need.\(^{29}\)

... the most powerful sign of real contrition will be if in the months and years ahead you do make the decision to break that cycle of violence and abuse in your own life and decide to become the person you are undoubtedly capable of being and the mother your children need you to be.\(^{30}\)

... you are obviously a woman of some ability and could, if you ever become motivated, choose to lead a more productive and undoubtedly happier life. The choice is yours, no-one can make that choice for you.\(^{31}\)

Notably, judicial commentary on the parenting skills of both male and female Aboriginal offenders was non-existent; and rare for non-Aboriginal male offenders.
When comparing judges’ comments on non-Aboriginal males and non-Aboriginal females; judges at times appeared to hold different views on offenders’ alcoholic background, its effect on their homicidal actions and the subsequent sentence which should be imposed. In this first example, the non-Aboriginal male offender was sentenced in Victoria to five years imprisonment with a non-parole period of three years, following his conviction for the manslaughter of his domestic partner by criminal negligence and recklessly causing injury.

You were raised in a loving and caring family, though both of your parents were heavy drinkers. You adopted that habit at an early age. ... In 1991 you were placed on a disability pension when, as your counsel explained, ‘alcohol got the better’ of you. ... According to Dr Stuart, testing revealed a marked impairment in your executive skills (which he says is the ability to sum up a situation and take appropriate action) and severe impairment of memory for verbal information. These deficits are a product of your alcohol abuse. Mr Cummins assessed you as being severely depressed. Both reports note that you have suffered from chronic alcoholism for many years. I accept that imprisonment will be a greater burden on you than on others by reason of your state of health. I take that into account.

By comparison, in the following example, for the purposes of sentencing, the judge took a different view of the offender’s alcoholic background. In this case the non-Aboriginal female offender, who was also sentenced in Victoria, received a sentence of six years with a non-parole period of four years following her conviction for the manslaughter of her ex-husband who at the time of his death was under police investigation following a report of sexual abuse towards a child of both the offender and the victim. The female offender had also suffered domestic violence at the hands of the male victim throughout their relationship. King J commented as follows:
You informed Dr Sullivan that you commenced using alcohol from the age of 12 and more heavily from the age of 15. After you lost custody of your children you became a serious binge drinker, drinking anything you could lay your hands on, and, when drunk, you became nasty and aggressive. You have a relatively recent history of psychiatric issues. You have overdosed on heroin. You had previous episodes of depression, you have had derogatory auditory hallucinations, together with associated symptoms of poor concentration, and poor sleep. You are also a person who becomes angry and violent with unstable moods and low impulsivity. ... Your inability to think clearly or make calm or rational choices due to the disinhibition of alcohol and your difficulties in handling anger, he found can be causally associated with the offences. I do not find that that is in any way ameliorating of the appropriate penalty that should be imposed.

Furthermore, in the context of this non-Aboriginal female offender's extensive drug abuse King J proceeded to discuss the offender’s parenting skills:

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

Nonetheless, while condemning the offender’s actions leading to the death of her ex-husband, King J took the opportunity to praise the male victim's parenting skills.

Her Honour remarked as follows:

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

LITERATURE OVERVIEW AND DISCUSSION IN THE CONTEXT OF THE RESULTS

The following literature overview and discussion considers one of the major themes pertaining to the current study, namely judicial commentary concerning the use of alcohol and/or drugs as a contributing factor in intimate partner homicide. In this
instance, the purpose of the literature review was to identify previous research which was either consistent or inconsistent with this theme which emanated from the study. Such an approach is consistent with grounded theory.

Although homicide remains a rare event in almost all western, industrial countries, research continues to highlight the compelling relationship between homicidal violence and alcohol. Indeed, many intimate partner homicides are alcohol related with studies citing that in the majority of Indigenous intimate partner homicides, alcohol played an integral part. By example, Dearden and Payne’s study found that overall, between 2000 and 2006, 44 percent of intimate partner homicides were alcohol related; with alcohol being a specific factor in 87 percent of Indigenous intimate partner homicides. These findings are consistent with the current study where, alcohol as a contributing factor to the offence, was judicially discussed in over 60 percent of all cases, and more specifically in 90 percent of Aboriginal offender cases.

Within this study, a common narrative for judges sentencing Aboriginal male offenders was to point out that the homicide was preceded by the mutual intoxication of both the offender and their Indigenous female victim. At times judges also reiterated defence counsels’ arguments which fostered the notion that a female victim’s intoxication was, in some way, to blame for the offending. These findings are consistent with those of Coates, who, when researching the connections between language, violence and responsibility (in the context of judges sentencing individuals convicted of sexualised violence), identified that certain judicial ‘linguistic
representations of violence' allowed perpetrator responsibility to be reduced by shifting the focus away from the offender and onto to the victim. \(^{42}\)

Furthermore, regarding Aboriginal male and non-Aboriginal male offenders alike, the current study also identified that while the offender's alcohol abuse was rarely explicitly accepted as a mitigating factor in sentencing, judges frequently accepted that the offender's alcohol abuse or addiction was a force outside of the offender's control. Coates also found that judges obscured alcohol fuelled offending by constructing external factors to explain an offender's violent behaviour. \(^{43}\) In the current study, rather than viewing the offender as choosing to be violent, judges continuously explained away homicidal actions. Commentary such as 'alcohol got the better of you', \(^{44}\) and 'you did not fully appreciate the seriousness of what had occurred due to your intoxication' \(^{45}\) are indicative of judges accepting a male offender's argument that his intoxication was a cause of the homicidal violence. Warner states that treating intoxication as a mitigating factor allows offenders to avoid taking responsibility for their violence. \(^{46}\) Furthermore, regarding Aboriginal victims, Newton asserts that a court's preparedness to view a male offender's alcohol abuse as mitigating only serves to proliferate the victimisation of Aboriginal women. \(^{47}\) While judges did not overtly excuse a male offender’s intoxicated behaviour at the time of the offence, the data does reflect that judges frequently sought to explain offenders’ intoxication. Warner argues that such judicial explanation does not give clear direction as to how offender intoxication is being judicially considered. \(^{48}\)
Ultimately, in the current study, for the purposes of sentencing, the male offender’s alcohol consumption was considered the principal cause of the killing. McKenzie et al point out that while legal rules and the criminal justice system’s adversarial nature endorse such narratives, the end result is that misconceptions concerning violence are propagated and condoned.\textsuperscript{49} This opinion is reflected in studies which show that male offenders continue to blame their female victim after killing them. By example, Dobash and Dobash’s study found that once imprisoned, men continued to express a lack of remorse for the killing or empathy for their victim. Instead, men ‘blamed alcohol, claimed it was an accident and/or blamed the victim in particular or women in general’. In these instances men considered that they were the victim and considered that their anger and related violence were justified in the circumstances.\textsuperscript{50}

Seventy five percent of Aboriginal female offenders in the study were also affected by alcohol at the time of the offence. This data contrasts with Brady’s findings that when compared to Aboriginal men, Aboriginal women appear to consume less alcohol, often abstain and are considered ‘vanguards of initiatives’ controlling access to alcohol by Aboriginals.\textsuperscript{51}

For the most part judges again failed to provide clear direction as to whether the Aboriginal female offender’s intoxication was considered aggravating or mitigating, with the application of the \textit{Fernando} principles in only one instance.\textsuperscript{52} The \textit{Fernando} principles were first articulated in \textit{R v Fernando} (1992) 76 A Crim R 58 (‘\textit{Fernando}’) by Justice Wood of the New South Wales Supreme Court in 1992. In that case Wood J expressed eight common law principles, applicable in New South Wales, relating to Indigenous offender sentencing, in order to provide a framework
to consider the disadvantages surrounding the personal circumstances of an 
Indigenous offender.53 One of the principles distilled by Wood J included the 
consideration that drunkenness may be a mitigating circumstance in relevant cases.54 
However, the Fernando principle pertaining to alcohol abuse was seldom applied by 
judges in the study.55

Stubbs and Tolmie postulate that Indigenous women may be judged unfavourably 
against the standards of ‘white, often middle-class stereotypes of women’s 
behaviour’; and as a result, be denied mitigation of sentence.56 This viewpoint was 
not evident in the current study. That said, non-Aboriginal female offenders who 
were intoxicated at the time of their offending were frequently viewed judicially as 
domestically dysfunctional. The ability of non-Aboriginal female offenders to be 
good and caring mothers, loyal and supportive wives or form lasting personal 
relationships in the wake of their alcohol or drug use was frequently questioned. The 
negative descriptors pertaining to domestic incompetence attributed to non-
Aboriginal female offenders are consistent with Chan’s findings which state that 
women’s treatment in the criminal justice system is determined by long standing 
myths and stereotypical views of women, rather than the circumstances surrounding 
their offence.57 Moreover, recent research literature has identified that strategies 
critical to both the prevention of domestic violence and intimate partner homicide 
involve addressing attitudes towards women, as well as the promotion of gender 
equality.58
CONCLUSION

This article reports on part of a larger study undertaken by Whittle and Hall to analyse judges’ sentencing remarks for males and females convicted of intimate partner homicide. Specifically, this article examined the part of the larger study as it relates to judges’ commentary on the use of alcohol and/or drugs as a contributing factor to the offending.

A qualitative analysis of the sentencing remarks shows that despite the seriousness of the offence, there is often a failure by sentencing judges to clearly attribute a sufficient degree of responsibility to the male offender for their voluntary consumption of alcohol or drugs; and their subsequent violent behaviour. Judicial explanations regarding the effect of intoxication on the offender are unproductive as they do not provide clear direction as to whether the court views the intoxication as mitigating or aggravating to the offence. In particular, blaming external forces should not be allowed to enable male offenders to avoid taking responsibility for their homicidal violence. Judges play a pivotal role in the criminal justice system and must seize the opportunity to instil in offenders a sense of responsibility for their actions; and reflect this in sentencing practices. In this way the criminal justice system is upholding its responsibility to act as a deterrent, preventing others from acting in a similar way.

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

1 Guy Hall, Marion Whittle and Courtney Field, ‘Themes in Judges’ Sentencing Remarks for Male
3 Keith F Puch, Introduction to Social Research - Quantitative and Qualitative Approaches (SAGE
4 Barney G Glaser and Anselm L Strauss, The discovery of grounded theory: Strategies for qualitative
research (Aldine de Gruyter, 1967).
5 New South Wales, Northern Territory, South Australia, Tasmania, Victoria and Western Australia.
No data was available for the Australian Capital Territory or Queensland during the study period.
47, 47.
7 G Guest, A Bunce and L Johnson, “How Many Interviews are Enough? An Experiment with Data
Saturation and Variability” (2006) 18 (1) Field Methods 59, 82.
11 The State of Western Australia v Rosewood [2013] WASCSR 77 (2 May 2013) [15] (EM Heenan
15 The Queen v Joachim Golder [2010] NTSC SC20921764 (2 September 2010); The State of Western
Australia v Narrier [2014] WASCSR 105 (18 June 2014); The Queen v Corelius Molinijn [2009]
NTSC SCC 20907622 (7 October 2009); The Queen v Sebastian Kunoth [2014] NTSC SCC21249438
(11 April 2014); The Queen v Damien Hughes [2010] NTSC SCC 20916792 (30 November 2010); The
State of Western Australia v Rosewood [2013] WASCSR 77 (2 May 2013); The Queen v Esau
19 The State of Western Australia v Atwood [2013] WASCSR 157 (9 August 2013) [26] (Corboy J).
21 The State of Western Australia v Narrier [2014] WASCSR 105 (18 June 2014) [24] (Commissioner
Sleigh).
22 R v Doolan [2010] NSWSC 615 (7 June 2010); R v Hudson [2013] VSC 184 (26 April 2013); R v
Melissa Anne Kulla Kulla [2010] VSC 60 (9 April 2010); R v Hudson [2013] VSC 184 (26 April
2013).
24 Ibid.
25 A principle of law articulated in Fernando is applied to a new set of facts by the court in these
cases.
26 The State of Western Australia v Atwood [2013] WASCSR 157 (9 August 2013) [42] (Corboy J).
28 R v Downie [2012] VSC 27 (2 February 2012) [31] (King J).
29 Ibid [37].
33 Ibid [31]-[34].
34 R v Downie [2012] VSC 27 (2 February 2012) [27] (King J).
35 Ibid [32]-[33].
36 Ibid [28].
37 Ibid [18].
41 Dearden and Payne, above n 39.
45 The State of Western Australia v Atwood [2013] WASCSR 157 (9 August 2013) [26] (Corboy J).
48 Warner, above n 46.
55 A principle of law articulated in Fernando is applied to a new set of facts by the court in these cases.
57 Wendy Chan, Women, Murder and Justice (Palgrave, 2001) 22.
58 Our Watch, Australia’s National Research Organisation for Women’s Safety (ANROWS) and VicHealth, ‘Change the story: A shared framework for the primary prevention of violence against women and their children in Australia’ (Our Watch, 2015) 9.
End of article
6.3 Conclusion

As the article at 6.2 shows, the blaming of external forces such as alcohol and/or drugs for the offending can enable male offenders in particular, to avoid taking responsibility for their homicidal violence. Further consideration should be given to the ways in which blameworthiness is reduced for some offenders.

The next chapter, chapter 7, presents a concluding article which draws the key points of the four major themes of the study together.
Chapter Seven

Conclusion
7. Introduction

7.1 The focus of the concluding article presented at 7.2 is on drawing the main themes of the study together in order to report on the study as a whole. This means that the key aspects of each of the themes discussed in the preceding articles are presented here once more, and a degree of overlap and repetition is unavoidable.

In particular, some of the judicial commentary within the article presented at 6.2 is repeated here in the article at 7.2. Both of these articles are currently under review with the same academic journal, and this issue was brought to the attention of the journal's editor at the time of submission. By necessity, details of the study such as data collection and method are also reproduced in a similar format to the other articles presented in this thesis.
7.2 Article: ‘Intimate Partner Homicide: Themes in Judges’ Sentencing Remarks’

Marion Whittle and Guy Hall

Under review by Psychiatry, Psychology and Law¹

¹ See Appendix Q for proof of submission.
INTIMATE PARTNER HOMICIDE: THEMES IN JUDGES’ SENTENCING REMARKS

Marion Whittle and Guy Hall

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

Introduction

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

This article presents and discusses the quantitative theme of sentence length, together with the four key qualitative themes emanating from the study data. These themes are: the sentencing of Aboriginal offenders; offender violence; the use of alcohol
and/or drugs at the time of the offending; and provocation. The reader should be aware that this is not a study of these themes per se; rather this article presents research findings which show how judges are dealing with these issues at the time of sentencing, in the context of intimate partner homicide.

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

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

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

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

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

During this process every sentence within each set of remarks was read and coded. Key points within the commentary were compared to other judicial comments within that set of remarks, with respect to commonalities and differences. Following on, similar concepts were grouped, leading to the development of hypotheses regarding the relationships between categories. This ultimately formed the basis for the creation and grounding of an emerging theory.

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

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

Quantitative Results

Theme - Sentence Length

The data illustrate that Aboriginal males were convicted of manslaughter rather than murder at a greater proportion than non-Aboriginal males. This difference was statistically tested for significance. In particular there is a statistically significant Chi-square result for males (\(\chi^2(\text{df}=1) = 6.35, \ p < 0.02\)). Follow-up Z-proportion tests demonstrate a significantly greater number of Aboriginal males were convicted
for manslaughter relative to non-Aboriginal males ($Z = 2.66, p < 0.01$). The test for female offender sentences by Aboriginal/non-Aboriginal status was non-significant ($\chi^2(df=1) = 1.80, p > 0.17$).

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

**Qualitative Results**

**Theme One – The Sentencing of Aboriginal Offenders**

**Homicidal Violence**

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

> You repeatedly punched her in the head, chest and torso area while she tried to shield her head with her arms and her hands. You had clenched fists and you were bringing your arms behind your head and slamming down so hard into the victim that the witnesses could hear the blows from a distance away. This went on for a number of minutes. The victim could be heard pleading with you to stop and then she fell silent. The beating continued after she fell silent. ⁶
In the following case, the Aboriginal male offender had been drinking heavily for a number of hours prior to the offending. He attacked his wife in the belief that he saw her engaging in sexual intercourse with his brother-in-law. Her Honour said:

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

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

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

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

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

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

Of significance for present purposes are two matters from the early 1990’s. In 1992 you were convicted of aggravated assault and sentenced to imprisonment for six months. In
You were again convicted of aggravated assault, this time causing bodily harm, and sentenced to imprisonment for nine months. Those offences were obviously serious cases of violence. You have not been convicted of an offence of violence since that time and I bear in mind that the convictions are now somewhat old.\textsuperscript{10}

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

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

His Honour continued:

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

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

Concluding his remarks on the violent offending his Honour said:

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

Turning to the offender’s previous criminal history, his Honour remarked as follows:
You first offended in 1986 when you were 20 years old. You were convicted of assault causing bodily harm. ... In December 1986 you were convicted of rape in the Supreme Court ... I note that you were next convicted in January 1990 of a relatively minor matter, fighting in a public place ... On February 2009 you committed three offences: driving at a speed and in a manner dangerous, driving with a high range blood alcohol content, and being armed with an offensive weapon.\textsuperscript{15}

His Honour concluded:

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

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

\textit{Alcohol}

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

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

\begin{quote}
I consider you took it as something at hand without particularly, in your alcohol induced state, appreciating how lethal it could be.\textsuperscript{17}
\end{quote}
There was no case example where the female offender's alcohol intake was considered aggravating to the offence; however, a female's alcohol intake was explicitly articulated as a mitigating factor in one instance:

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

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

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

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

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

Further, judges linked the male offender and the female victim through their joint consumption of alcohol leading up to the offence, however, the vulnerability of the
intoxicated victim contributing to the gravity of the offence was discussed in only one case.\textsuperscript{21}

\textit{The Difficulty of Sentencing for Manslaughter}

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

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

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

The Parliament, which binds us all, has passed a law which increases the penalty for the crime of manslaughter ... Courts must give effect to that in sentencing so that sentences now for this sort of criminal behaviour within relationships is likely to be more seriously treated than may have been in the past ...\textsuperscript{33}

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

The protection of human life and personal safety is a primary objective of the system of criminal justice. The sentence of this Court must provide a real demonstration that society cannot tolerate criminal offending resulting in the taking of a human life.\textsuperscript{24}
**Deterrence**

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

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

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

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

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

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

Notwithstanding such commentary, the average head sentence for an Aboriginal male killing his partner is 9 years and 6 months; with an average non-parole period of 6 years and 4 months.
Theme Two - Offender Violence

Male Offenders

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

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

I am satisfied that the offender was an immature individual who became caught up in a situation which he was unable to effectively handle. He was far from his family and friends in India and had no resources to draw upon for emotion support. When it became apparent that his marriage had failed, he did not have the personal maturity or capacity to remove himself from the situation and avoid the conflict which ultimately took place. 38

... as is apparent, he was ultimately overwhelmed by the situation. 39
In the following example, while the judge commented on the non-Aboriginal male offender violence over a number of paragraphs, more than twice as much commentary was attributed to the dysfunctional childhood suffered by the offender, specifically the offender’s childhood experiences of violence. Consequently, the judge proceeded to discuss the offender’s childhood trauma over eight consecutive paragraphs. For example:

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

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

Aboriginal Male Offender

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

In the community you were seen as a hardworking, empathetic person who helped new migrants. You are well respected in the community. You have had the support of your family and members of the community. In determining the non-parole period I have had regard to those matters and the support you have.  

Female Offenders

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

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

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

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

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

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

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

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

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

This is a domestic violence situation ... violence was perpetrated on each side of the relationship.
In addition, judges acknowledge a lack of understanding regarding the difficulties experienced by female victims of domestic violence. For example:

I doubt that it is possible for persons who have not experienced it to truly comprehend the impact of being the victim of a violent abusive relationship.\textsuperscript{42}

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

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

... the order was for Ms Kupsch's protection it appears that she did not want that protection so far as all contact with him was concerned, ... \textsuperscript{44}

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

... domestic violence in their home and in the broader community in Kalgoorlie has desensitised you to the seriousness and unacceptability of domestic violence.\textsuperscript{45} ... [w]hen he was released from prison, you voluntarily recommenced your relationship with him.\textsuperscript{46}

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

I accept that you have good prospects for rehabilitation, considering your remorseful contrition ... \textsuperscript{47}
... your genuine contrition and your conduct since the shooting occurred, satisfy me that special reasons do exist in this case.\textsuperscript{46}

In a number of cases judges opine that the male offender had demonstrated a high level of remorse. In each instance the judge link this remorse, among other things, to the offender’s immediate actions following the offence. For example:

... you are plainly remorseful for what has occurred. You demonstrated that sense of remorse when you first spoke to the police at the scene of your offence ... \textsuperscript{49}

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

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

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

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

I accept that you are truly remorseful and have suffered personally since your husband’s death. You punish yourself by fasting regularly and sleeping on the floor at home. You live a simple life of looking after your family and spending time with your church and

237
doing community work. ... As to punishment, it seems that you have suffered a great deal already and to send you to gaol might have a greater effect on punishing others than you.\textsuperscript{54}

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

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

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

\begin{quote}
... the offence is worthy of the description “wicked” and “gravely reprehensible”. To contemplate and carry out such a plan for purely selfish and largely financial motives demonstrates heinousness to a significant degree.\textsuperscript{57}
\end{quote}

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

\begin{quote}
The evidence in the trial established that Mr Ryan had complained to family members and friends of minor assaults upon him by Helen Ryan. There was evidence of minor bruising to Mr Ryan’s upper arm, consistent with such assaults. Similar claims were made by Helen
\end{quote}
Ryan against her husband, although the extent and severity of the assaults said to have been committed upon her were a matter of some contention. 58

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

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

His Honour continued:

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

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

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

General deterrence

Judges frequently discuss the requirement for an offender’s sentence to reflect an ongoing need to protect the community. In the following case the Aboriginal male offender had pleaded guilty to reckless manslaughter in relation to the death of his wife. While the judge reminded the Court that the maximum penalty for the offence was imprisonment for life; based on the offender’s plea of guilty, the judge applied a sentencing discount of twenty five percent to a starting point of twelve years, and
handed down a head sentence of nine years with a non-parole period of six years. At the time of the offence the offender was considered to be ‘heavily intoxicated’ with ‘no real recollection of the attack’. The judge considered the viciousness of the offender’s attack upon his wife, and commented as follows:

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

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

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

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

The need for general deterrence was also expressed by judges for female offenders. In the following case the judge qualified his statements regarding general deterrence by pointing out that the Aboriginal female offender had acted on the spur of the moment. Nonetheless, the judge commented as follows:
Significant weight must be given to punishment, denunciation and deterring others from committing the same or similar offences in the future.69

Theme Three – Alcohol and Drugs

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

Aboriginal Male Offenders

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

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

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

... although it would appear that you did not fully appreciate the seriousness of what had occurred due to your intoxication.71
*Aboriginal Female Offenders*

Judicial commentary on the alcohol intake of females was unremarkable. In each instance where females were affected by alcohol, judges focused the extent of their remarks on the male victim’s alcohol intake.

*Non-Aboriginal Male Offenders*

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

> You were raised in a loving and caring family, though both of your parents were heavy drinkers. You adopted that habit at an early age. ... In 1991 you were placed on a disability pension when, as your counsel explained, ‘alcohol got the better’ of you.\(^2\) ... I accept that imprisonment will be a greater burden on you than on others by reason of your state of health. I take that into account.\(^3\)

*Non-Aboriginal Female Offenders*

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

> There were other relationships, it would seem all of them disastrous, and ultimately you formed a relationship with a man named Caine who also has substance abuse problems, who apparently still visits you in prison. You have a history of exceedingly poor choices in male companions.\(^4\)
Nonetheless, judicial narratives did, at times, indicate that females had the potential to perform to society’s expectations of being a good mother with the ability to lead a productive life. For example:

...the most powerful sign of real contrition will be if in the months and years ahead you do make the decision to break that cycle of violence and abuse in your own life and decide to become the person you are undoubtedly capable of being and the mother your children need you to be.\textsuperscript{73}

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

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

In the context of this offender’s drug abuse the judge proceeded to discuss the offender’s parenting skills:
You reported to Dr. Sullivan that you enjoyed being stoned but agreed that it made you paranoid and was partly to blame for the loss of custody of the children because you were classified as an ineffectual and non-productive parent.78

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

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

**Theme Four – Provocation**

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

For male offender cases containing judicial commentary on provocation, there is an absence of remarks regarding cold-bloodedness or premeditation. Rather, judges painted a picture of males being tortured by sexual jealousy, taunted or derided by their female victims. For example:
Ultimately, being told that his wife never loved him and was going to leave him, accompanied by the offensive remarks of the deceased's brother-in-law was the trigger for the offender losing his self-control.\textsuperscript{80}

At the time you committed the assault, that led to her death, you intended to cause her serious harm but it is accepted that you lost control as a result of seeing her and RT together, believing at the time that they were engaged in sexual intercourse, so the savagery of the attack, that is, the intention to cause serious harm was not planned, it was a result of that loss of control.\textsuperscript{81}

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

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

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

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

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

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

I accept that the defendant was in a very distressed state and had been for a time, and that violence was out of character for him.\textsuperscript{86}
In contrast, for females sentenced for murder, judges focus on the cold blooded nature of the offenders' behaviour. For example:

... the offence is worthy of the description "wicked" and "gravely reprehensible". To contemplate and carry out such a plan for purely selfish and largely financial motives demonstrates heinousness to a significant degree. 67

Also, when comparing males offenders to female offenders in the sample, males are more likely to be considered ill-equipped to manage conflict within the domestic relationship; with females' emotions perceived by male offenders as unpredictable.

I agree with the assessment contained in the submissions made on behalf of Mr Bolt and, in my view, resulting from the limited emotional resources available to him from his background and the degree to which it was affected by constant abuse of women, that Mr Bolt's actions and the fatal assault "was the result of the inability of the offender to deal with the deceased's emotionally labile state". 68

As events unfolded, his expectation of a continuing and happy relationship was lost and without the necessary personal resources and family support he was vulnerable to the provocation that ultimately caused him to take the life of the deceased. 69

Literature Overview in the Context of the Results

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

Sentence Length

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

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

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

The Sentencing of Aboriginal Offenders

Homicidal Violence

The majority of Aboriginal male offenders sentenced for manslaughter used bodily force alone to kill their victim. While judges provided extensive and graphic details of victims’ injuries, the data reflect that judges view this type of force as less serious when compared, for example, to the use of a knife. In Lloyd’s study of intimate partner violence within Indigenous communities in Central Australia,\textsuperscript{94} she found that in the majority of cases of male violence, the weapons used were the offender’s body or heavy blunt objects such as rocks, with knives used on only three occasions. Lloyd argues that the use of such weaponry has been misinterpreted as signifying this type of violence is opportunistic; and as such, not only normalises and diminishes both the nature and the extent of this form of domestic violence; but has played a part in ‘similar fact’ homicides being treated as manslaughter, which in real terms, according to Lloyd, attract a much lighter sentence.\textsuperscript{95} Consistent with Lloyd’s argument, in the current study, the quantitative data show that Aboriginal males are significantly more likely to be found guilty of manslaughter rather than murder. When comparing non-parole periods for all offenders, the data also show that, in contrast to non-Aboriginal males, Aboriginal males receive significantly lower sentences.

Alcohol

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

In one example in the sample, the judge determined that the Aboriginal male offender’s intoxicated state had in fact affected his insight into his offending. 100 Warner considers that treating intoxication as a mitigating factor allows offenders to avoid taking responsibility for their violence. 101 Newton asserts that a court’s preparedness to view a male offender’s alcohol abuse as mitigating only proliferates the victimisation of Aboriginal women. 102 This victimisation is evident in the data, as in almost all Aboriginal male offender cases, judges linked the offender with the victim through their joint consumption of alcohol leading up to the offence; frequently discussing their mutually intoxicated state.

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

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

Deterrence

In an alcohol related homicide study, Dearden and Payne found that in the context of intimate partner homicide, Indigenous on Indigenous homicide incidents were more than 13 times as likely to be classified as alcohol related than other intimate partner homicides. In the current study, despite the prevalence of violent alcohol fuelled Aboriginal male offenders, judges seldom remarked on the need for general and specific deterrence. As a fundamental principle of sentencing, general deterrence is considered to be particularly important where an offence is prevalent.
Offender Violence

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

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

Domestic Violence

In almost all cases in this study, judges remark upon the mutuality of the domestic violence between the offender and the victim. This finding is consistent with Hunter’s examination of judicial knowledge concerning domestic violence within Victoria’s Magistrates’ Courts. Hunter found that magistrates’ perceived violence as ‘a product of spousal conflict’ arising out of the stresses of the relationship; and that both parties were likely responsible for the violence.
Hunter also observed that, at times, when women spoke up about being a victim of domestic violence they were construed as either 'bad mothers' or 'vindictive ex-wives'. In the current study, the case of Ryan is instructive. Despite reports and visible signs of domestic violence at the hands of the victim; as well as the apprehended violence order in place against the victim at the time of the offending, Helen Ryan's claims of abuse were largely disbelieved and her conduct considered 'wicked' and 'gravely reprehensible'. In the context of Battered Wife Syndrome, some academics have commented that women who are neither passive nor helpless, or do not conform to accepted stereotypical roles, may be judged more severely.

Remorse

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

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

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

Alcohol and Drugs

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

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

*Provocation*

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

For male offenders, judges frequently set out a background of jealousy, infidelity and control to explain the offenders’ behaviour; specifically male offenders’ reactions to perceived threats from their female victims. The data is consistent with a study undertaken by the Victorian Law Reform Commission (‘VLRC’) whereupon the VLRC concluded that men frequently raise provocation ‘in the context of a relationship of sexual intimacy in circumstances involving jealousy or an apparent desire to retain control’.
Within the sample, judges frequently articulate that the behaviour of the female victim is central to the explanation for the male offender’s violent actions. This finding is consistent with research which demonstrates that when comparing crimes committed between non-intimates, with crimes committed between intimates, intimate partner crimes repeatedly have a greater measure of victim responsibility. As one male offender case in the sample highlights, judges can at times consider an offence is ‘out of character’ for an individual. As commentators argue, the use of character theory to explain that a person is not themself at the moment they lose their self-control, can lead not only to the offender being excused for their actions, but the possible reduction in weight of sentencing factors such as specific deterrence. Judicial commentary for offenders also reflects that the actions of males belies their beliefs and attitudes regarding women, together with their sense of male entitlement and proprietorship over their female partner, ultimately leading to male justification for the perpetration of lethal violence towards females. This finding is consistent with Shapland’s observations that by claiming factors such as provocation as being beyond their control, an offender is in fact minimising their offending and denying full responsibility for their actions. Indermaur points out that an offender’s belief in this regard is emphasised even more if the judge’s sentencing remarks also reflect that the offender’s responsibility is moderated.

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

Conclusion

The Sentencing of Aboriginal Offenders

The data show that when sentencing Aboriginal male offenders, judges are saying one thing and doing another. Judges comment that drunken Aboriginal male violence against women will not be tolerated, and that sentences must reflect this; and yet Aboriginal males are sanctioned less harshly than non-Aboriginal males. Judges often excuse the problematic use of alcohol by Aboriginal males, thereby modifying the seriousness of the offending. At the same time, the vulnerability of an intoxicated victim in the context of the gravity of the offence is rarely recognised.

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

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

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

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

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

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

Provocation

The data reflect that as a defence, provocation continues to be gender biased; favouring males as the main beneficiaries of the defence. While promoting a culture of female victim blaming, the availability of provocation as a platform for males to normalise and excuse their offending fosters brutal domestic violence perpetrated by men against women. As the data show judges continue to excuse male violence towards women; endorsing the view that the female victim is responsible for her own death. As such, the authors add their voices to the many authorities advocating for the abolitionment of this flawed defence which has no place among modern community values and beliefs concerning justice.
As Hemming points out, despite jurisdictional review of the defence, a lack of consistency remains; as does the defence in five Australian jurisdictions.\textsuperscript{132} This commentary is consistent with the data in this study. Bradfield cautions that given the gender concerns related to the defence, ‘care needs to be taken to ensure that the abolition of provocation does not worsen the legal position of battered women who kill and that the accounts of men provoked to kill by jealousy or rejection are not merely repeated and given judicial endorsement at the sentencing stage.’\textsuperscript{133} Such concern is valid, as the data also show that provocation continues to be a relevant sentencing consideration when sentencing an offender for murder.

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

\textsuperscript{5} According to the Aboriginal and Torres Strait Islander Commission Act 1989 s 4 ‘Aboriginal person’ means ‘a person of the Aboriginal race of Australia’.
\textsuperscript{6} The Queen v Corellius Molljinj [2009] NTSC SCC 20907622 (7 October 2009) [2].
\textsuperscript{7} The Queen v Donalathan Williams [2012] NTSC SC 21131552 (12 December 2012) [10].
\textsuperscript{8} The Queen v Damien Hughes [2010] NTSC SCC 20916792 (30 November 2010) [14].
\textsuperscript{9} Ibid [14], [15].
\textsuperscript{10} The Queen v Corellius Molljinj [2009] NTSC SCC 20907622 (7 October 2009) [9].
\textsuperscript{11} The Queen v Esau Hodgson [2012] NTSC SCC 21007364 (12 April 2012) [12].
\textsuperscript{12} Ibid [14].
\textsuperscript{13} Ibid [17].
\textsuperscript{14} Ibid [24].
\textsuperscript{15} Ibid [27], [29].
\textsuperscript{16} Ibid [41].
\textsuperscript{17} R v Doolan [2010] NSWSC 615 (7 June 2010) [10].
\textsuperscript{18} R v Sherridan Rose Hodder [2013] WASCSR 211 (5 December 2013) [25].


R v Cassandra Lee Dodd [2011] SASCCRN-11-183 (9 September 2011) [5].

R v Jermaine Bolt [2013] NSWSC 895 (5 July 2013) [43].

R v clawed Patricia Charlie [2013] VSC 470 (1 August 2013) [14].


R v Jermaine Bolt [2013] NSWSC 895 (5 July 2013) [7].

R v Mark Scott Bamton SASCCRM-10-59 (4 June 2010) [36].

R v Rajini Narayan [2011] SASCCRM-10-66 (13 April 2011) [46], [48].

R v Helen Ryan [2011] NSWSC 1249 (21 October 2011) [35].

R v Kirsty Smiler [2013] NTSC SCC 21333003 (23 December 2013) [40].

R v Downie [2012] VSC 27 (2 February 2012) [31].
R v Downie [2012] VSC 27 (2 February 2012) [27].
Ibid [32]-[33].
Ibid [28].
Ibid [18].
Singh v R [2012] NSWSC 637 (7 June 2012) [29].
The Queen v Donald Williams [2012] NTSC SC 21131552 (12 December 2012) [38].
R v Mark Scott Bampton SASC SCCRM-10-59 (4 June 2010) [35].
Sherma v The Queen [2011] VSCA 242 [18].
Singh v R [2012] NSWSC 637 (7 June 2012) [36].
The State of Western Australia v Silva [2013] WASCSR 98 (4 June 2013) [42].
R v Patrick Daley [2014] TASSC COPS Report (19 August 2014) [7].
R v Helen Ryan [2011] NSWSC 1249 (21 October 2011) [16].
R v Jermaine Bolt [2013] NSWSC 895 (5 July 2013) [48].
Singh v R [2012] NSWSC 637 (7 June 2012) [43].
Ibid 67.
Ibid 103.

Criminal Code Act Compilation Act 1913 (WA) s 221.
Criminal Law Consolidation Act 1935 (SA) s 5AA(1)(g).
The Queen v Esau Hodgson [2012] NTSC SCC 21007364 (12 April 2012) [24].
Warner, above n 101, 111.
Dearden and Payne, above n 96.
‘Figuring Violence’ above n 4.
Ibid 767.
117 Ibid 375.
119 ‘Figuring Violence’ above n 4.
120 Ibid.
122 Wendy Chan, Women, Murder and Justice (Palgrave, 2001) 22.
123 Our Watch, Australia’s National Research Organisation for Women’s Safety (ANROWS) and VicHealth, ‘Change the story: A shared framework for the primary prevention of violence against women and their children in Australia’ (Our Watch, 2015) 9.
129 Judicial College of Victoria, Criminal Charge Book (14 May 2014) 8.10.2 http://www.judicialcollege.vic.edu.au/eManuals>
130 Ibid.
131 Lloyd, above n 94, 103.
End of article
7.3 CONCLUSION

This thesis presents the results of a grounded theory analysis of judges’ sentencing remarks for males and females sentenced for intimate partner homicide in Australia between July 2009 and June 2014. The purpose of the analysis was to compare themes present when males were sentenced with themes present when females were sentenced. Four key themes emerged from the data; provocation; domestic violence; the sentencing of Aboriginal offenders; and the use of alcohol and/or drugs as a contributing factor to the offence.

The analysis of the cases in this study provides a valuable insight into how judges are currently dealing with these issues at sentencing. In particular chapter 3 highlights that as a partial defence, provocation continues to favour men as the main beneficiaries. Chapter 4 shows that judges continue to underestimate the significance of domestic violence, obscuring deliberate acts of violence by males towards females. The quantitative results discussed in chapter 5 show that in terms of sentencing penalties, Aboriginal males are, in some ways, sanctioned less harshly than non-Aboriginal males. Finally, regarding an offender’s consumption of alcohol and/or drugs, chapter 6 illustrates that more blameworthiness is attributed to non-Aboriginal female offenders, whereas judicial narratives for male offenders generally, fail to clearly attribute a sufficient degree of responsibility for violent offender behaviour which is alcohol and/or drug induced.

The sentencing of an offender is a central task of the administration of justice. At this pivotal moment judges have the opportunity to create a platform from which an
offender can take full responsibility for their offending, by judicially exposing the violence perpetrated on the victim and challenging victim blaming.

Considering the public nature of sentencing, judges’ sentencing remarks are highly symbolic, sending a message to both the offender and the community, ultimately shaping how society regards and reacts to crime. Given that intimate partner homicide epitomises family violence at its most extreme, judges’ sentencing remarks can play an important role in shaping and informing public understandings and attitudes towards one of the most serious of crimes.
Appendices
APPENDIX A
Example of letter to judges

The Honourable T Carmody
Chief Justice of Queensland
Queensland Supreme Court
Level 12, Queen Elizabeth II Courts of Law
415 George Street
Brisbane QLD 4000

Dear Chief Justice,

Murdoch University Doctor of Philosophy Candidate research request

I am currently supervising Marion Whittle for her Law PhD in conjunction with the Hon. Michael Murray AM QC, in his capacity as adjunct professor at Murdoch University and Dr Joe Clare, former Manager, Statistical Analysis of the Sentencing Advisory Council of Victoria. Marion completed her LLB (Hons) under my supervision at Murdoch.

The aim of her research is to compare judges’ sentencing remarks when males kill females and females kill males in the context of domestic homicide. By undertaking both a quantitative and a qualitative analysis of these statements, a comparison of themes present when males kill females and females kill males will be obtained for analysis.

Using grounded theory methodology, this analysis will be undertaken for all Australian jurisdictions. Grounded theory is a qualitative procedure which identifies, and allows for analysis, themes from the subject matter, in this case judges’ sentencing remarks.

Marion’s thesis proposal has approval from our Human Research Ethics Committee. In addition, Marion has presented her proposal to a group comprising academics from the School of Law and Justice Murray and Judge Cock. To progress her research Marion needs a sample of cases from the District and Supreme Courts of each Australian jurisdiction. Ideally she needs 10 cases from each court in each jurisdiction. For consistency across all jurisdictions the sample should comprise the 10 most recent judges’ sentencing remarks for each of the domestic murder and domestic manslaughter cases over the time period July 2009 until June 2014.

Could you please advise how we might be able to obtain such a sample from your Court?

I can be contacted on 08 9360 6033 or by email to G.Hall@murdoch.edu.au.

Yours sincerely,

Associate Professor Guy Hall
11th February, 2015
APPENDIX B
Email from the Supreme Court (NT)

marion.whittle@bigpond.com

From: "Guy Hall" <G.Hall@murdoch.edu.au>
Date: Tuesday, 17 February 2015 4:14 PM
To: <marion.whittle@bigpond.com>
Attach: Robinson_26022010_20831429.pdf; Golder_02092010_20921764.pdf;
Williams_12122012_21131552.pdf; Ashley_03072014_21218788.pdf
Subject: FW: Sentencing research - Marion Whittle

Received this during the call yesterday

Associate Professor Guy Hall
Academic Chair Criminology and Legal Studies
School of Law
Murdoch University
08 93606033

From: Frieda Evans [mailto:Frieda.Evans@nt.gov.au]
Sent: Monday, 16 February 2015 12:44 PM
To: Guy Hall
Subject: Sentencing research - Marion Whittle

Good afternoon Associate Professor Hall

Your letter of 11 February 2015 to His Honour Chief Justice Riley of the Northern Territory Supreme Court has been passed to me for response.

I have interrogated our Sentencing Database for instances of domestic homicide. I have located 9 such cases between 2009 and 2014.

Please find 5 transcripts attached to this email; I'll send the other 4 in a separate email. I'll also see if I am able to locate another one so you have your full complement of 10 for the NT.

Frieda

Frieda Evans
Library Manager, Courts Library
Department of the Attorney-General and Justice
GPO Box 3946, Darwin NT 0801

Supreme Court of the NT Centenary 1911 - 2011
Wisdom is the reward you get for a lifetime of listening when you would have preferred to talk – Doug Larsen

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APPENDIX C
Email from the Supreme Court (Tas)

for any other purpose.

-----Original Message-----
From: Parker, Christine (SCT)
Sent: Monday, 16 February 2015 3:48 PM
To: 'G.Hall@murdoch.edu.au'
Subject: Murdoch University Doctor of Philosophy Candidate Research Request

Good afternoon Associate Professor Hall

Chief Justice Blow asked me to reply to your request. Attached are comments on passing sentence for the crimes of murder and manslaughter which fall within the context of domestic homicide, although, at the suggestion of the Chief Justice, I have included 4 comments relating to members of families other than husbands or wives: Kibbey, Johnson, Killingback and Harper. Also most of the sentences are outside the requested date range. I hope these are helpful. Please do not hesitate to contact me if I can be of further assistance.

Christine Parker
Executive Assistant to Chief Justice A M Blow OAM Judges' Chambers Supreme Court of Tasmania

Ph: (03) 61657429
Fax: (03) 62311918

Please note that all email accounts managed by the Supreme Court now have a new email address formula. Please update your records with my new email address christine.parker@supremecourt.tas.gov.au

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APPENDIX D
Email from the Supreme Court (ACT)

marion.whittle@bigpond.com

From: "Guy Hall" <G.Hall@murdoch.edu.au>
Date: Tuesday, 17 February 2015 4:16 PM
To: <marion.whittle@bigpond.com>
Subject: FW: Murdoch University Doctor of Philosophy Candidate Research Request

And this

Associate Professor Guy Hall
Academic Chair Criminology and Legal Studies
School of Law
Murdoch University
08 93606033

From: Erickson, Robyn [mailto:Robyn.Erickson@act.gov.au]
Sent: Tuesday, 17 February 2015 7:48 AM
To: Guy Hall
Subject: Murdoch University Doctor of Philosophy Candidate Research Request

Dear Associate Professor Hall

Chief Justice Murrell has received your letter dated 11 February 2015 requesting assistance in obtaining sentencing remarks. Her Honour has asked me to reply to you.

All of our sentences are put up onto our website (see link below). They are clearly marked. It has only been over the last 12 months that the sentences have been given a citation number. Before that time sentencing transcripts were entered onto the website.


Hopefully, this information will be helpful.

Kind regards,

Robyn Erickson
Personal Assistant to the Chief Justice Murrell
Supreme Court of the ACT
Ph: (02) 62071568
Fax: (02) 62071530
robyn.erickson@act.gov.au

This email, and any attachments, may be confidential and also privileged. If you are not the intended recipient, please notify the sender and delete all copies of this transmission along with any attachments immediately. You should not copy or use it for any purpose, nor disclose its contents to any other person.

270
19/11/2017
18 February 2015

Associate Professor Guy Hall  
Murdoch University – School of Law  
90 South Street  
Murdoch WA 6150

Dear Associate Professor Hall

re: Murdoch University of philosophy candidate research request

Thank you for your letter of 11 February 2015 regarding Ms Whittle's PhD research. The Chief Justice has asked me to respond on her behalf.

The sentencing remarks of matters heard at the Supreme Court of Victoria are available on the Austlii website- www.austlii.edu.au. A search of that website should provide the necessary sample of cases for Ms Whittle's research.

Yours sincerely

Maria Vasilopoulos  
Chamber’s Manager to the Chief Justice of Victoria
Just received from SA – can I ask you reply and thank them?

Guy

Associate Professor Guy Hall
Academic Chair Criminology
School of Law
Murdoch University
08 93606033

From: Gleeson, Kevin (CA) [mailto:Kevin.Gleeson@courts.sa.gov.au]
Sent: Thursday, 19 March 2015 6:38 AM
To: Guy Hall
Subject: Murder by wife and husband

Dear Prof Hall,

Your request to the Chief Justice for collation of sentencing by persons killing spouses or ex-spouses has been referred to me.

Attached are sentencing remarks of murder and manslaughter sentences where partners are involved.

I was not able to locate and women sentence for murder in the period 2009 to 2014, so for interest I found some earlier that that period. Of course there were probably some cases where women charged with murder in the period were acquitted or had a nille prosequi entered, or might have been found mentally unfit to stand trial or not guilty by reason of mental incompetence but I have not taken that step.

Attached are the remarks that I have located.

Kevin Gleeson
Criminal Appeals Co-ordinator
Supreme Court
Phone: (08) 8204 0200
Fax: (08) 8204 0543
E-Mail: kevin.gleeson@courts.sa.gov.au
APPENDIX G
Email from the Supreme Court (WA)

marion.whittle@bigpond.com

From: <Christopher.Mofflin@justice.wa.gov.au>
Date: Tuesday, 31 March 2015 3:34 PM
To: <marion.whittle@bigpond.com>
Subject: Re: Assistance with research by PhD student Ms Marion Whittle of Murdoch University

Dear Ms Whittle,

I attach pdf copies of the sentencing remarks for the 12 most recent murder or manslaughter sentencings prior to July 2014 where the victim was in a domestic relationship with the accused. I realise that you only asked for 10, but in a number of these I was uncertain as to whether they fit your criteria for domestic relationships so I included an extra two out of an abundance of caution. If you need more sentencing remarks, please let me know and I will provide you with them.

As per your instructions, I have excluded unlawful assault causing death.

Please contact me if you have any questions or require further assistance.

Kind regards,

Chris Mofflin

Principal Associate to the Hon. Chief Justice Wayne Martin AC
Supreme Court of Western Australia
Phone: (08) 9421 5395
Fax: (08) 9221 3833
Email: christopher.mofflin@justice.wa.gov.au

<marion.whittle@bigpond.com>

24/03/2015 07:13 PM
To
<Christopher.Mofflin@justice.wa.gov.au>
cc

Subject
Re: Assistance with research by PhD student Ms Marion Whittle of Murdoch University
APPENDIX H
Email from the Supreme Court (NSW)

marion.whittle@bigpond.com

From: <Linda_Murphy@agd.nsw.gov.au>
Date: Thursday, 14 May 2015 2:28 PM
To: <marion.whittle@bigpond.com>
Cc: "Guy Hall" <G.Hall@murdoch.edu.au>
Attach: Finalised cases with sentence for homicide charge July 2011-17 Feb 2015.xlsx
Subject: Re: Fw: Murdoch University Doctor of Philosophy Candidate Research Request

Dear Ms Whittle,

Please accept my sincere apologies for the delay in providing you with case information to assist with your PhD research project.

We have data for finalised cases meeting your criteria since July 2011. Unfortunately, we cannot easily extract date for cases back to 2009.

We have isolated the case numbers and accused name for the cases that fit your criteria, and that were finalised by sentence. We have listed them in reverse order of finalisation (most recent first).

You could look up these cases on CaseLaw, read the remarks on sentence and take the first 10 cases that can be classed as domestic murder/manslaughter.

I attach the list of cases (270 of them).

I hope this is of assistance and once again, my sincere apologies for the delay in providing this information.

Regards

Linda Murphy | CEO and Principal Registrar | Supreme Court of New South Wales
Law Courts Building, Queens Square, 184 Phillip Street, Sydney NSW 2000
GPO Box 3 Sydney NSW 2001 | DX 829 Sydney
Tel: +61 2 9230 8097 | Email: Linda_Murphy@agd.nsw.gov.au

From: <marion.whittle@bigpond.com>
To: <Linda_Murphy@agd.nsw.gov.au>,
Cc: "Guy Hall" <G.Hall@murdoch.edu.au>
Date: 20/04/2016 10:04 AM
Subject: Fw: Murdoch University Doctor of Philosophy Candidate Research Request

Dear Ms Murphy,

I am writing in relation to your email and associated correspondence to Professor Guy Hall dated 23 February 2015, as attached.

Professor Hall and I appear to have no record of the 10 sentencing decisions discussed in your letter. The sentencing decisions were required to assist with my PhD research as
APPENDIX I
List of content-driven codes

1. Relationship/history between offender/victim
2. Family background of offender
3. Family background of victim
4. Injury description
5. Weapon
6. Circumstances leading to the offence
7. Circumstances surrounding the offence
8. Circumstances at exact time of offence
9. Cause of death
10. Motive
11. Mental/physical behaviours of offender pre-offence
12. Mental/physical behaviours of offender at time of offence
13. Mental/physical behaviours of offender post-offence
14. Mental/physical behaviours of victim
15. Offender did/did not intend to kill the victim
16. How offender viewed victim
17. How victim viewed offender
18. How judge viewed offender
19. How judge viewed victim
20. How others viewed the offender
21. How others viewed the victim
22. Words used to describe the offender pre-offence
23. Words used to describe offender post-offence
24. Words used to describe the victim
APPENDIX I
List of content-driven codes

25. Forensics
26. Mitigating factors expressed as such
27. Aggravating factors expressed as such
28. Provocation - reasons raised for provocation in defence
29. Provocation – accepted by judge
30. Provocation – declined by judge
31. Sentencing rationale
32. Words used to describe offender at time of offence
33. Offender characteristics
34. Marital/relationship discord
35. Alcohol
36. Infidelity
37. Domestic violence
38. Remorse
39. Children issues/involvement
40. Loss of self control
41. Ethnicity of offender
42. Ethnicity of victim
43. Jealousy on part of offender
44. Police Intervention/involvement
45. Distancing offender from the offence
46. Partner reconciliation
47. Offender anger
48. Previous threats to victim
49. Weight given to expert evidence
APPENDIX I
List of content-driven codes

50. Victim fear
51. Offender self-harm
52. Threats by victim
53. Family discord (in offender’s family)
54. Parental influence on offender
55. Trust issues between offender and victim
56. Religion
57. Offender’s drug use
58. Offender depression
59. Murder location
60. Offender’s education
61. Victim’s education
62. Offender’s employment (history/prospects)
63. Offence occurs in presence of children
64. Motive/means/opportunity
65. Comparison to other offenders
66. Offender self worth
67. Other offences committed at same time
68. Weight given to offender’s previous convictions
69. Witness credibility
70. Empathy for/consoling victim’s family
71. Police appreciation
72. Victim Impact Statement
73. General deterrence
74. Personal/specific deterrence
APPENDIX I
List of content-driven codes

75. Empathy for offender’s family
76. Prosecution appreciation/views expressed
77. Defence counsel appreciation
78. Impact of victim and/or offender’s culture on the offending
79. Offender suffering
80. Special circumstances considered to increase/decrease HS and/or NPP
81. Manslaughter is difficult to characterise
82. Judicial validation in favour of offender “I am entitled to ...”
83. Judicial validation against offender “I am entitled to ...”
84. Use of CCA cases to validate judge’s conclusions/decisions
85. Judge commentary on changes needed in society
86. Female offender – not good at choosing men
87. Use of offender quotes written/verbal to explain offending
88. Effect of offender’s memory loss on sentence passed
89. Effect of offender’s age on sentence passed
90. Judge considers there is a limit to their role in the sentencing process
91. Setting the minimum term is not an easy decision
92. Victim employment
93. Offender control over victim
94. Judge - ‘I am satisfied beyond reasonable doubt/balance of probabilities’
95. Judge - ‘I am not satisfied beyond reasonable doubt/balance of probabilities’
96. Offender credibility
97. Judge expresses personal viewpoint on VIS content
98. Remarks - a vehicle for judge to speak to family of offender/victim

1 HS = Head sentence; NPP = Non-parole period
2 CCA = Criminal Court of Appeal
3 VIS = Victim impact statement
APPENDIX I
List of content-driven codes

99. Use of case law to determine sentence length
100. Offender to also undergo traditional punishment
101. Alcohol – impact on traditional Aboriginal society
102. Offender – hope for the future
103. Offender - rehabilitation
104. Recent changes to the law/penalties discussed
105. Offender/victim blood alcohol readings discussed
106. Offender’s health
107. Offender/victim height and/or build discussed
108. Victim’s jealousy
109. Victims of Crime Compensation Levy
110. Admissibility of evidence
111. Victim’s health
112. Validation of the judiciary
113. Domestic violence – impact on the Indigenous community
114. Offender fear
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<td>65-72</td>
<td>37-38 Offender's hands and feet</td>
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<td>24-26 Large knife</td>
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<td>24-25</td>
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<td>35-37, 47-48 Stabbing to chest</td>
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<td>52-55, 56-61, 73-75, 94-96 97-104</td>
<td>37-40, 45-50, 186-188</td>
<td>75-77 Pneumonia in association with severe head injuries</td>
<td>35-37 Victim was under the influence of drugs</td>
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<td>14-15 Offender did not want victim to go into town</td>
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<td>35-37</td>
<td>33-35 Offender wanted to continue socialising and drinking alcohol</td>
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<td>79-81</td>
<td>52-58, 87-90</td>
<td>57-66 Knife wound into the aorta</td>
<td>40-58 Domestic argument</td>
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<td>33-34 Shotgun wound to chest</td>
<td>9-11, 77-84 Offender denied access to his child by victim</td>
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Feminist Criminology

Intimate Partner Homicide: The Theme of Provocation in Judges' Sentencing Remarks in Australia

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Manuscripts

http://mc.manuscriptcent5al.com/fc
DOMESTIC AND HOMICIDAL VIOLENCE BETWEEN INTIMATE PARTNERS: THEMES IN JUDGES’ SENTENCING REMARKS IN AUSTRALIA

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Manuscripts
APPENDIX N
Quantitative data

Table 5-1  All offenders sentenced for murder and manslaughter by jurisdiction, sex and ethnicity

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<td>M'slaughter</td>
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284
## APPENDIX N
Quantitative data

Table 5.2  All offenders sentenced for murder by head sentence, non parole period, ethnicity, sex and jurisdiction

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<td>NT</td>
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<tr>
<td>Life</td>
<td>25 years(^3)</td>
<td>Non-Aboriginal</td>
<td>Male</td>
<td>WA</td>
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<tr>
<td>Life</td>
<td>24 years(^4)</td>
<td>Non-Aboriginal</td>
<td>Male</td>
<td>SA</td>
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<tr>
<td>Life</td>
<td>22 years 6 months(^5)</td>
<td>Aboriginal</td>
<td>Male</td>
<td>SA</td>
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<td>Life</td>
<td>22 years(^6)</td>
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<td>NT</td>
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<tr>
<td>Life</td>
<td>22 years(^7)</td>
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<td>Male</td>
<td>WA</td>
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<td>Life</td>
<td>20 years(^8)</td>
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<td>WA</td>
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<td>WA</td>
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<td>Life</td>
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<td>17 years(^13)</td>
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<td>36 years</td>
<td>27 years(^16)</td>
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<td>NSW</td>
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<tr>
<td>27 years</td>
<td>18 years(^17)</td>
<td>Non-Aboriginal</td>
<td>Male</td>
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<tr>
<td>26 years</td>
<td>18 years(^18)</td>
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<td>NSW</td>
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<tr>
<td>26 years</td>
<td>18 years(^19)</td>
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<td>Female</td>
<td>Tas</td>
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<tr>
<td>23 years 6 months</td>
<td>13 years(^20)</td>
<td>Non-Aboriginal</td>
<td>Male</td>
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<tr>
<td>21 years</td>
<td>15 years 9 months(^21)</td>
<td>Non-Aboriginal</td>
<td>Male</td>
<td>NSW</td>
</tr>
<tr>
<td>20 years</td>
<td>16 years(^22)</td>
<td>Non-Aboriginal</td>
<td>Male</td>
<td>Vic</td>
</tr>
<tr>
<td>19 years</td>
<td>16 years(^23)</td>
<td>Non-Aboriginal</td>
<td>Male</td>
<td>Vic</td>
</tr>
<tr>
<td>18 years</td>
<td>12 years(^24)</td>
<td>Non-Aboriginal</td>
<td>Male</td>
<td>NSW</td>
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\(^2\) The Queen v Joachim Golder [2010] NTSC SC20921764 (2 September 2010).
\(^3\) The State of Western Australia v Payet [2014] WASCSR 88 (16 May 2014).
\(^6\) The Queen v Darren Ashley [2014] NTSC SC21218788 (3 July 2014).
\(^8\) The Queen v Jason Robinson [2010] NTSC 20831429 (26 February 2010).
\(^9\) The State of Western Australia v Wood [2014] WASCSR 90 (21 May 2014).
\(^10\) R v Mark Scott Bampton SASC SCCRM-10-59 (4 June 2010).
\(^12\) The State of Western Australia v Rosewood [2013] WASCSR 77 (2 May 2013).
\(^13\) The State of Western Australia v Silva [2013] WASCSR 98 (4 June 2013).
\(^14\) The State of Western Australia v Atwood [2013] WASCSR 157 (9 August 2013).
\(^18\) R v Gittany (No 5) [2014] NSWSC 49 (11 February 2014).
\(^21\) R v Bretherton [2013] NSWSC 1339 (19 September 2013).
\(^22\) DPP v Aitai [2013] VSC 16 (8 February 2013).
## APPENDIX N
### Quantitative data

Table 5-3  All offenders sentenced for manslaughter by head sentence, non-parole period, ethnicity, sex and jurisdiction

<table>
<thead>
<tr>
<th>Head sentence</th>
<th>Non-parole period</th>
<th>Offender's ethnicity</th>
<th>Offender sex</th>
<th>Jurisdiction</th>
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<td>17 years</td>
<td>12 years</td>
<td>Aboriginal</td>
<td>Male</td>
<td>NT</td>
</tr>
<tr>
<td>14 years</td>
<td>10 years</td>
<td>Non-Aboriginal</td>
<td>Male</td>
<td>Vic</td>
</tr>
<tr>
<td>11 years</td>
<td>7 years</td>
<td>Non-Aboriginal</td>
<td>Male</td>
<td>Vic</td>
</tr>
<tr>
<td>11 years</td>
<td>5 years 9 months</td>
<td>Aboriginal</td>
<td>Male</td>
<td>NT</td>
</tr>
<tr>
<td>10 years</td>
<td>8 years</td>
<td>Aboriginal</td>
<td>Male</td>
<td>WA</td>
</tr>
<tr>
<td>9 years 6 months</td>
<td>7 years</td>
<td>Aboriginal</td>
<td>Male</td>
<td>NT</td>
</tr>
<tr>
<td>9 years</td>
<td>6 years</td>
<td>Aboriginal</td>
<td>Male</td>
<td>NT</td>
</tr>
<tr>
<td>8 years 3 months</td>
<td>5 years 6 months</td>
<td>Aboriginal</td>
<td>Male</td>
<td>NSW</td>
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<td>8 years</td>
<td>6 years</td>
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<td>3 years 7 months</td>
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<td>Male</td>
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<td>Vic</td>
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<tr>
<td>6 years 9 months</td>
<td>3 years 9 months</td>
<td>Non-Aboriginal</td>
<td>Female</td>
<td>NSW</td>
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<tr>
<td>6 years</td>
<td>4 years</td>
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<td>3 years 9 months</td>
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<td>3 years</td>
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<td>Female</td>
<td>Vic</td>
</tr>
<tr>
<td>6 years suspended</td>
<td>3 years suspended</td>
<td>Non-Aboriginal</td>
<td>Female</td>
<td>SA</td>
</tr>
<tr>
<td>5 years 9 months</td>
<td>2 years 3 months</td>
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<td>Female</td>
<td>SA</td>
</tr>
<tr>
<td>5 years 3 months</td>
<td>2 years 7.5 months</td>
<td>Aboriginal</td>
<td>Male</td>
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<td>3 years</td>
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<tr>
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<td>Female</td>
<td>SA</td>
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<tr>
<td>5 years</td>
<td>1 year 11 months</td>
<td>Non-Aboriginal</td>
<td>Female</td>
<td>SA</td>
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<tr>
<td>4 years 9 months</td>
<td>2 years 4.5 months</td>
<td>Aboriginal</td>
<td>Female</td>
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<tr>
<td>4 years 9 months</td>
<td>2 years 4.5 months</td>
<td>Aboriginal</td>
<td>Female</td>
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<tr>
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<td>Female</td>
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<td>Vic</td>
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<tr>
<td>3 years</td>
<td>1 year 4 months</td>
<td>Aboriginal</td>
<td>Female</td>
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APPENDIX O
Article submission details – *Justice Quarterly*

Intimate Partner Homicide: Themes in Judges’ Sentencing
Remarks for Australian Aboriginal Offenders

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APPENDIX P
Article submission details – Psychiatry, Psychology and Law
Psychiatry, Psychology and Law

THE USE OF ALCOHOL AND/OR DRUGS IN INTIMATE PARTNER HOMICIDE: THEMES IN JUDGES’ SENTENCING REMARKS

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APPENDIX Q
Article submission details — Psychiatry, Psychology and Law
Psychiatry, Psychology and Law

INTIMATE PARTNER HOMICIDE: THEMES IN JUDGES’ SENTENCING REMARKS

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