

HOMICIDE LAW REFORM IN NEW SOUTH WALES: EXAMINING THE MERITS OF THE PARTIAL DEFENCE OF ‘EXTREME’ PROVOCATION

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The partial defence of provocation has long attracted controversy and animated law reform in Australia and elsewhere. In June 2012, debate surrounding the provocation defence reignited in New South Wales following the trial and sentencing of Chamanjot Singh for manslaughter (by reason of provocation). In the wake of Singh, the NSW Legislative Council established a Select Committee to undertake a review of the partial defence of provocation. This article builds on the work done by the NSW Select Committee on the Partial Defence of Provocation in 2013. In doing so, it examines the merits of the newly formulated partial defence of ‘extreme’ provocation and argues that NSW would be better placed to repeal provocation as a partial defence and transfer its consideration to sentencing. It is argued that by reforming sentencing guidelines for murder in NSW, the law may be able to move beyond the problems traditionally associated with the provocation defence and more adequately respond to the gendered nature of homicide.

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I INTRODUCTION

The partial defence of provocation has long attracted controversy and animated law reform across Australian state and territory jurisdictions.¹ In June 2012, debate surrounding the provocation defence reignited in New South Wales ('NSW') following the case of *Singh v The Queen* ('*Singh*').² Singh was convicted of the manslaughter (by reason of provocation) of his wife, Manpreet Kaur, in circumstances where the alleged provocative conduct was all too familiar to critics of the defence. In the wake of *Singh*, and in response to mounting community concern surrounding the inadequacy of legal responses to men who kill their female intimate partners, the NSW Legislative Council established a Select Committee to undertake a review of the partial defence of provocation and provide recommendations for its reform.³ The subsequent Parliamentary Inquiry resulted, two years later, in the NSW government's repeal of the provocation defence and the introduction of a new partial defence of extreme provocation.⁴

The 2014 reforms mark NSW as the latest jurisdiction to tackle reform of the law of provocation. Over the past 15 years, review and reform of the provocation defence across Australia has led to its abolition in three jurisdictions⁵ and its restriction in all other state and territory jurisdictions bar South

¹ This includes a body of research and government reports that have been focused on the operation of the partial defence of provocation in New South Wales ('NSW'): see, eg, Kate Fitz-Gibbon, 'Provocation in New South Wales: The Need for Abolition' (2012) 45 *Australian and New Zealand Journal of Criminology* 194; Sam Indyk, Hugh Donnelly and Jason Keane, 'Partial Defences to Murder in New South Wales 1990–2004' (Report, Judicial Commission of New South Wales, 2006); NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997); Lenny Roth, *Provocation and Self-Defence in Intimate Partner and Homophobic Homicides* (NSW Parliamentary Library Research Service, 2007); Stephen Tomsen, 'Hatred, Murder and Male Honour: Anti-Homosexual Homicides in New South Wales, 1980–2000' (Report No 43, Australian Institute of Criminology, 2002); Attorney-General's Department (NSW), *Homosexual Advance Defence: Final Report of the Working Party* (1998).

² [2012] NSWSC 637 (7 June 2012).

³ Legislative Council Select Committee on the Partial Defence of Provocation, Parliament of NSW, *Inquiry into the Partial Defence of Provocation: Terms of Reference* (2012).

⁴ *Crimes Act 1900* (NSW) s 23, as amended by *Crimes Amendment (Provocation) Act 2014* (NSW) sch 1.

⁵ *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas); *Crimes (Homicide) Act 2005* (Vic) s 3; *Criminal Law Amendment (Homicide) Act 2008* (WA) s 8.

Australia, which now stands as the only Australian jurisdiction to retain common law provocation.⁶ As a result of this flurry of national law reform activity, each jurisdiction has introduced reforms that differ from one another, despite these jurisdictions being confronted with similar concerns surrounding the gendered operation of the defence.⁷

This article examines the merits of the newly formulated partial defence of 'extreme' provocation and, in doing so, argues that NSW would be better placed to repeal provocation as a partial defence and transfer its consideration to sentencing. In order to make this argument, this article is structured in five parts. Part II examines the 2012–13 Parliamentary Inquiry, its recommendations for reform and the government's 2014 introduction of a partial defence of extreme provocation. Part III undertakes a critical analysis of the merits of the partial defence of extreme provocation and advances the argument that the defence has been restricted to the point of redundancy. In the second half of the article, an alternative model of reform is proposed: the abolition of provocation as a partial defence to murder and the introduction of six guideline judgments to facilitate the transfer of provocation to sentencing.

To frame this alternative approach, Part IV traces debates surrounding guideline judgments in NSW, proposes six scenarios in which provocation is successfully raised and for which guideline judgments should be formulated, and details why this approach to reform would allow the law to more adequately respond to allegations of provocation in cases of gender-based lethal violence. This proposal for the transfer of provocation to sentencing is supported with reference to the need for wider law reform, including evidentiary and jury directions reform, to counter problems extensively documented in the operation of the partial defence of provocation.

II PROVOCATION LAW REFORM IN NSW

In December 2009, Chamanjot Singh slit his wife's throat with a box cutter in their shared home following a verbal argument during which, he alleged, his wife slapped him several times.⁸ At trial, Singh's defence argued that he had been provoked to kill because of his suspicions of infidelity on the part of his

⁶ Kellie Toole, 'Law Reform: South Australia and the Defence of Provocation' (2013) 38 *Alternative Law Journal* 270, 270.

⁷ See generally 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.

⁸ *Singh* [2012] NSWSC 637 (7 June 2012) [26]–[27], [30] (McClellan CJ at CL).

wife, disparaging comments made by her and her sister's husband about his mother, and his own belief that the marriage was ending.⁹ The defence argued that his belief that the relationship was ending was compounded by the fact that Singh had moved to Australia on a spousal visa and would likely be deported if he and his wife separated.¹⁰ Singh was convicted by jury of manslaughter on the basis of provocation and subsequently sentenced to a non-parole period of six years.¹¹

The *Singh* case reignited concerns surrounding the use of the defence in cases of male-perpetrated intimate homicide and its role in partially legitimating lethal domestic violence. In doing so, the case encouraged a state-wide discussion of the continued viability of provocation as a partial defence to murder. In the week immediately following the sentence in *Singh*, the Hon Helen Westwood raised concerns in the NSW Parliament and called on the Legislative Council to respond to community concerns about the inadequacy of the law's response to the killing of Manpreet Kaur.¹²

In response to the advocacy of parliamentarians and media outrage over the verdict and sentencing in *Singh*,¹³ on 14 June 2012 the Legislative Council established a Select Committee to undertake an inquiry into the operation of the partial defence of provocation.¹⁴ The terms of reference for the Inquiry provided that the Select Committee examine:

- a) the retention of the partial defence of provocation including:
 - i) abolishing the defence,
 - ii) amending the elements of the defence in light of proposals in other jurisdictions,

⁹ Ibid [1]–[2], [34].

¹⁰ Ibid [5], [11].

¹¹ Ibid [48].

¹² New South Wales, *Parliamentary Debates*, Legislative Council, 14 June 2012, 12 790.

¹³ For media coverage of the *Singh* case see, eg, Paul Bibby and Josephine Tovey, 'Six Years for Killing Sparks Call for Law Review', *The Sydney Morning Herald* (Sydney), 8 June 2012, 3; Josephine Tovey, 'Dead Woman's Sister Pleads for a Change in Provocation Law', *The Sydney Morning Herald* (Sydney), 27 August 2012, 5; Josephine Tovey, 'Finding Reason for Taking a Life', *News Review*, *The Sydney Morning Herald* (Sydney), 1–2 September 2012, 2; Dylan Welch, 'Fugitive Husband of Throat-Slashed Wife Arrested in Victoria', *The Sydney Morning Herald* (Sydney), 31 December 2009, 4.

¹⁴ Legislative Council (NSW), 'Parliamentary Inquiry to Examine Partial Defence of Provocation' (Media Release, 21 June 2012).

- b) the adequacy of the defence of self-defence for victims of prolonged domestic and sexual violence, and
- c) any other related matters.¹⁵

In explaining the motivation for these terms of reference, the Committee's chair, Fred Nile, explained:

A recent NSW case has highlighted concerns about the use of the provocation [defence] to reduce a charge of murder to the lesser charge of manslaughter, and in particular, its use in matters where there is a history of domestic violence.

The Committee will inquire into and report on the partial defence of provocation and will consider whether it should be retained, or whether the elements of the partial defence should be amended in light of reforms to the law of provocation in other jurisdictions.¹⁶

Following its formulation, over the course of eight months (from June 2012 to February 2013) the Select Committee took submissions from a range of relevant stakeholders on the operation of provocation in NSW and possibilities for its reform. To supplement these written submissions, the Committee held three days of public hearings where it heard evidence from 36 stakeholders and requested additional submissions from stakeholders in response to its *Consultation on Reform Options* paper.¹⁷

The Inquiry's final report briefly canvassed all contexts within which the partial defence was successfully raised in NSW since 1990,¹⁸ including noting the frequency within which provocation was raised for killings occurring in response to a violent physical confrontation between two males. However, and perhaps unsurprising given the Inquiry's establishment was so heavily influenced by the *Singh* case, one of the key issues raised throughout the stakeholder submissions concerned the successful use of the defence in male-perpetrated intimate homicides motivated by an alleged act of sexual infidelity

¹⁵ Legislative Council Select Committee on the Partial Defence of Provocation, *Inquiry into the Partial Defence of Provocation*, above n 3.

¹⁶ Legislative Council (NSW), above n 14.

¹⁷ Legislative Council Select Committee on the Partial Defence of Provocation, Parliament of NSW, *Consultation on Reform Options* (2012) 1.

¹⁸ Legislative Council Select Committee on the Partial Defence of Provocation, Parliament of NSW, *The Partial Defence of Provocation* (2013) 17–19. In considering the contexts within which the defence was successfully raised, the Inquiry drew heavily on two studies: Indyk, Donnelly and Keane, above n 1; Fitz-Gibbon, 'Provocation in New South Wales', above n 1.

or threat of relationship separation.¹⁹ Advocating for the abolition of the partial defence, these submissions reinvoled the long-held concerns of socio-legal, law and feminist scholars surrounding the legal legitimisation of lethal domestic violence and the role that the defence plays in providing a legal avenue through which the female victim can be put on trial.²⁰ The consequence of the successful use of the provocation defence in this context is previously well captured by Bradfield, who argues that, in practice:

provocation endorses outmoded attitudes that women are the property of their husbands, attitudes that continue to permit men who kill their partners following sexual provocation such as rejection, a partner's unfaithfulness or jealousy to be accommodated within the defence of provocation. The defence of provocation operates as a 'licence' for men to kill their female partners who dare to assert their own autonomy by leaving or choosing a new partner.²¹

Building on this, Crofts and Loughnan have noted the policy implications of the use of provocation in male-perpetrated intimate homicides and the key role that '[t]he tragedy and apparent injustice of such cases' have played in animating advocacy towards abolition of the defence.²² This trend is not unique to NSW, with high profile intimate homicides, including the 2004 case of *R v Ramage*²³ in Victoria and the 2007 case of *R v Sebo; Ex parte Attorney-General (Qld)*²⁴ in Queensland, also propelling debate surrounding the justice

¹⁹ See, eg, *Partial Defence of Provocation Report*, above n 18, 100 [6.61].

²⁰ See, eg, Fitz-Gibbon, 'Provocation in New South Wales', above n 1; Adrian Howe, 'Reforming Provocation (More or Less)' (1999) 12 *Australian Feminist Law Journal* 127; Adrian Howe, 'Provocation in Crisis — Law's Passion at the Crossroads? New Directions for Feminist Strategists' (2004) 21 *Australian Feminist Law Journal* 53; Adrian Howe, 'Provoking Comment: The Question of Gender Bias in the Provocation Defence — A Victorian Case Study' in Norma Grieve and Ailsa Burns (eds), *Australian Women: Contemporary Feminist Thought* (Oxford University Press, 1997) 225; Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (Routledge, 2013); Jenny Morgan, 'Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told about Them' (1997) 21 *Melbourne University Law Review* 237.

²¹ Rebecca Bradfield, 'Domestic Homicide and the Defence of Provocation: A Tasmanian Perspective on the Jealous Husband and the Battered Wife' (2000) 19 *University of Tasmania Law Review* 5, 35.

²² Thomas Crofts and Arlie Loughnan, 'Provocation: The Good, the Bad and the Ugly' (2013) 37 *Criminal Law Journal* 23, 24.

²³ [2004] VSC 508 (9 December 2004) ('*Ramage*').

²⁴ (2007) 179 A Crim R 24.

of provocation as a partial defence to murder.²⁵ Beyond Australia, movements towards reforming provocation in comparable Western jurisdictions such as England and Wales have also been driven by concerns as to the unjust use of the partial defence in cases involving men who kill a female partner in response to sexual infidelity or relationship separation.²⁶

In contrast to calls for the abolition of provocation in light of its abuse in male-perpetrated intimate homicides, the second key issue that emerged throughout the Inquiry concerned the use of provocation by battered women.²⁷ Advocates for retention of the partial defence argued that there was a need to retain the defence as a halfway house between murder and self-defence to protect such defendants. Scholars have long recognised the difficulties that women who kill in response to prolonged family violence encounter in a male-centric criminal justice system.²⁸ For this reason, it has been argued that the defence of provocation is an important alternative to murder for battered defendants who are unable to meet the stringent requirements of the complete defence of self-defence. Some domestic violence advocates and legal scholars argue that, without the defence of provocation, there is an unjustifiable risk that battered women will be convicted of murder and subjected to significantly harsher sentences.²⁹ Reflecting this view, Stubbs

²⁵ Debates surrounding the operation of provocation in Australia stem back far further than *Ramage* to at least 1990, when Murphy J of the Victorian Court of Appeal suggested abolition of the partial defence: *R v Voukelatos* [1990] VR 1, 6.

²⁶ Adrian Howe, “Red Mist” Homicide: Sexual Infidelity and the English Law of Murder (Glossing *Titus Andronicus*) (2013) 33 *Legal Studies* 407, 410–13; Kate Fitz-Gibbon, ‘Replacing Provocation in England and Wales: Examining the Partial Defence of Loss of Control’ (2013) 40 *Journal of Law and Society* 280, 285; Jeremy Horder and Kate Fitz-Gibbon, ‘When Sexual Infidelity Triggers Murder: Examining the Impact of Homicide Law Reform on Judicial Attitudes in Sentencing’ (2015) 74 *Cambridge Law Journal* 307, 307, 310.

²⁷ *Partial Defence of Provocation Report*, above n 18, 74–88 [5.33]–[5.103].

²⁸ See, eg, Rebecca Bradfield, ‘Is Near Enough Good Enough? Why Isn’t Self-Defence Appropriate for the Battered Woman?’ (1998) 5 *Psychiatry, Psychology and Law* 71; Anna Carline and Patricia Eastal, *Shades of Grey — Domestic and Sexual Violence against Women: Law Reform and Society* (Routledge, 2014); Graeme Coss, ‘Killing Violent Men’ (2002) 26 *Criminal Law Journal* 133; Heather Douglas, ‘A Consideration of the Merits of Specialised Homicide Offences and Defences for Battered Women’ (2012) 45 *Australian and New Zealand Journal of Criminology* 367; Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, ‘Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand’ (2012) 34 *Sydney Law Review* 467.

²⁹ See, eg, Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, ‘Battered Women Charged with Homicide in Australia, Canada and New Zealand: How Do They Fare?’ (2012) 45 *Australian and New Zealand Journal of Criminology* 383.

argued during the Inquiry's public hearings that if provocation were to be abolished there would be a real risk that:

people who have a well-founded argument that their resort to homicide should be seen as less culpable than murder — such as some battered women who resort to homicide in desperate circumstances — will be convicted of murder and receive much longer sentences than is currently the case.³⁰

This view was echoed by a NSW defence practitioner who warned of the potential negative consequences of abolition for this vulnerable category of offender.³¹

Beyond these two contexts of lethal violence, historically debate surrounding the provocation defence has also focused on its use by male defendants who kill in response to a non-violent homosexual advance.³² While no homosexual advance defence ('HAD') cases have resulted in a conviction for manslaughter by reason of provocation in the past 10 years in NSW (see below Table 1), the case of *Green v The Queen* ('*Green*')³³ is frequently referred to as a warning of the unjust use of the partial defence in this context. At trial, Malcolm Green was convicted of the 1993 murder of a male friend who got into bed with him and made a sexual advance.³⁴ However, ultimately, on appeal to the High Court the original conviction was overturned (in a 3:2 majority decision)³⁵ and on retrial Green was convicted of manslaughter on

³⁰ Evidence to Legislative Council Select Committee on the Partial Defence of Provocation, Parliament of NSW, Sydney, 28 August 2012, 52 (Julie Stubbs).

³¹ Evidence to Legislative Council Select Committee on the Partial Defence of Provocation, Parliament of NSW, Sydney, 29 August 2012, 37 (Chrissa Loukas).

³² See, eg, Kent Blore, 'The Homosexual Advance Defence and the Campaign to Abolish It in Queensland: The Activist's Dilemma and the Politician's Paradox' (2012) 12 *Queensland University of Technology Law and Justice Journal* 36; Adrian Howe, 'More Folk Provoke Their Own Demise (Homophobic Violence and Sexed Excuses — Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence)' (1997) 19 *Sydney Law Review* 336; Ben Golder, 'The Homosexual Advance Defence and the Law/Body Nexus: Towards a Poetics of Law Reform' (2004) 11(1) *eLaw: Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v11n1/golder111.html>>; Stephen Tomsen and Thomas Crofts, 'Social and Cultural Meanings of Legal Responses to Homicide among Men: Masculine Honour, Sexual Advances and Accidents' (2012) 45 *Australian and New Zealand Journal of Criminology* 423.

³³ (1997) 191 CLR 334.

³⁴ *R v Green* (Unreported, Supreme Court of New South Wales, Abadee J, 7 June 1994).

³⁵ *Green* (1997) 191 CLR 334, 335, rev'd *R v Green* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Priestley JA, Smart and Ireland JJ, 8 November 1995).

the grounds of provocation.³⁶ The case prompted significant outcry in NSW in relation to the applicability of provocation in this context, and motivated the establishment of a working party by the government to examine the use of provocation in homosexual advance cases.

The working party noted that many people found the provocation verdicts in HAD cases ‘profoundly troubling’,³⁷ and recommended that legislative reform be introduced to exclude the availability of provocation as a partial defence to murder where persons have killed in response to a non-violent homosexual advance.³⁸ This recommendation was, however, never implemented; and consequently the use of provocation in cases involving a non-violent homosexual advance arose as an issue for consideration again in 2012–13. Over the course of the Inquiry, several stakeholders argued that, if retained, the provocation defence should be reformed to expressly exclude cases like *Green* from giving rise to a partial defence.³⁹

When considered together, these three contexts of homicide gave rise to the difficult question of how NSW could best reform provocation to exclude unmeritorious cases of male lethal violence while still providing an avenue less than murder for persons who kill an abuser. In attempting to achieve this balance, a range of possible approaches to reform were canvassed in the Inquiry’s *Consultation on Reforms Options* paper, which provided three overarching options: (1) to abolish provocation; (2) to retain provocation without amendment; and (3) to retain provocation with amendments.⁴⁰ Within the last of these options, four potential models for reform were proposed: two based on a conduct-based reform model; one on a test-based reform model; and the final a combination of the conduct and test-based reform models.⁴¹

³⁶ *R v Green* [1999] NSWCCA 97 (18 May 1999).

³⁷ *Homosexual Advance Defence: Final Report*, above n 1, [1.3].

³⁸ *Ibid* [6.59].

³⁹ See, eg. Anti-Discrimination Board of NSW, Submission No 6 to Legislative Council Select Committee on the Partial Defence of Provocation, *Inquiry into the Partial Defence of Provocation*, 31 July 2012; Mr Alastair Lawrie, Submission No 21 to Legislative Council Select Committee on the Partial Defence of Provocation, *Inquiry into the Partial Defence of Provocation*, 10 August 2012, 2; NSW Gay and Lesbian Rights Lobby, Submission No 22 to Legislative Council Select Committee on the Partial Defence of Provocation, *Inquiry into the Partial Defence of Provocation*, 10 August 2012, 4.

⁴⁰ *Consultation on Reform Options*, above n 17, 1.

⁴¹ *Ibid* 1–3.

On 23 April 2013, the Select Committee released its final report, which made 11 recommendations for legislative and policy reform,⁴² including recommendation 4, which proposed that the government amend s 23 of the *Crimes Act 1990* (NSW) to introduce a new ‘partial defence of gross provocation’.⁴³ In response, in October 2013 the O’Farrell Government released a draft exposure Bill for consultation; and on 20 May 2014 that Bill — the Crimes Amendment (Provocation) Bill 2014 (NSW) — gained Royal Assent.⁴⁴ The Act repealed the partial defence of provocation and introduced a new partial defence of ‘extreme’ provocation.

Like its predecessor the new partial defence acts to reduce what would otherwise be murder to manslaughter, a reduction that has a significant impact on sentencing. In NSW, the offence of murder carries a maximum sentence of life imprisonment and a standard non-parole period of 20 years.⁴⁵ In contrast, for the offence of manslaughter there is no standard non-parole period applied and the maximum sentence available is 25 years’ imprisonment.⁴⁶ While the impact of standard non-parole periods are outlined in more detail in the second half of this article, it is important to note here the significant advantage at sentencing, both in terms of the maximum penalty and the non-parole period, of a conviction of manslaughter by reason of extreme provocation as opposed to murder.

The new partial defence of extreme provocation retains several features of the repealed law, including the concept of loss of control and the ordinary person test. However, it also includes provisions that significantly restrict its application. According to s 23(2) of the *Crimes Act 1900* (NSW),⁴⁷ an act is committed in response to extreme provocation if and only if:

- (a) the act of the accused that causes death was in response to conduct of the deceased towards or affecting the accused, and
- (b) the conduct of the deceased was a serious indictable offence, and
- (c) the conduct of the deceased caused the accused to lose self-control, and

⁴² *Partial Defence of Provocation Report*, above n 18, xii–xiii.

⁴³ *Ibid* xii.

⁴⁴ The reforms apply to all homicides committed on or after 13 June 2014: New South Wales, *Commencement Proclamation under the Crimes Amendment (Provocation) Act 2014*, No 354, 11 June 2014.

⁴⁵ *Crimes Act 1900* (NSW) s 19A; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(1).

⁴⁶ *Crimes Act 1900* (NSW) s 24; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(1).

⁴⁷ As inserted by *Crimes Amendment (Provocation) Act 2014* (NSW) sch 1.

- (d) the conduct of the deceased could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased.

That the new partial defence retains the requirement of a 'loss of self-control' is somewhat curious given the considerable criticism that the concept of loss of control has attracted among criminal law and socio-legal scholars. In particular, scholars have highlighted gender bias in the operation of the 'loss of control' test and the consequential difficulty that women defendants face in meeting the requirements of the test, particularly where they have killed in the context of family violence.⁴⁸ Interestingly, the word 'extreme' is only referred to in the body of the new provisions as a descriptor of the 'provocation' (ie, 'extreme provocation'). The term 'extreme' is not defined in the legislation nor does it carry any specific test or requirements.

In addition to the four criteria outlined above, the conduct of the deceased cannot constitute extreme provocation if it was a non-violent homosexual advance or if the accused is found to have incited the conduct in order 'to provide an excuse to use violence against the deceased'.⁴⁹

When introducing this new partial defence, then NSW Attorney-General Greg Smith presented it as striking a balance between restricting the defence while ensuring it was still available in cases of prolonged domestic abuse:

This more limited partial defence of 'extreme provocation' raises the bar on the circumstances when this defence can be used ... This bill ensures that provocation can no longer be used inappropriately to have a murder charge reduced to manslaughter, while ensuring the defence remains available to people who have suffered long standing domestic abuse and violence at the hands of their partners. It does away with a law that was seen by many as being biased against women, and blaming the victim's behaviour for the offender's loss of self-control.⁵⁰

However, by restricting the provocation defence to ensure that it is not applicable to unmeritorious contexts of lethal violence, a concern has emerged that the 2014 reforms restrict the partial defence of provocation to the point

⁴⁸ See, eg, Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective* (Palgrave Macmillan, 2014) ch 3; Jeremy Horder, *Provocation and Responsibility* (Clarendon Press, 1992) ch 9; *Partial Defences to Murder Report*, above n 1, 78 [2.145]; Felicity Stewart and Arie Freiberg, *Provocation in Sentencing: Research Report* (Sentencing Advisory Council, 2nd ed, 2009) 43–4 [8.5.3]–[8.5.8].

⁴⁹ *Crimes Act 1900* (NSW) s 23(3)(b).

⁵⁰ Greg Smith, 'New Bill Raises the Bar on Provocation' (Media Release, 5 March 2014).

of redundancy. Specifically, the heavy restriction of the partial defence to apply solely in cases where the provocative conduct was a serious indictable offence, as defined in s 4 of the *Crimes Act 1990* (NSW), ensures that only behaviour amounting to an indictable offence punishable by imprisonment for at least five years will give rise to the partial defence. This approach has been met with concerns from domestic violence advocates and legal professionals that women who kill in response to prolonged family violence will not be able to meet the requirements of extreme provocation. For example, the Women's Legal Services ('WLS') NSW noted:

we fear the requirement that 'the conduct of the deceased was a serious indictable offence' will exclude women who have experienced serious domestic violence and ultimately kill their violent partner from raising the partial defence of extreme provocation. This is because in the experiences of WLS NSW many women do not report violence to the police and hence those women may not be able to establish [that] the deceased's conduct constituted a 'serious indictable offence'.⁵¹

Building on this, the NSW Bar Association raised a concern that, under the new law, threats to commit a very serious indictable offence would not be characterised as 'extreme provocation'⁵² while Crofts and Loughnan have questioned the extent to which an exclusionary model like this will recognise patterns of coercive control, including stalking and intimidating behaviour.⁵³ In response to the latter, it can be anticipated that in its most extreme form, and where proven to the requisite level, stalking and intimidating behaviour could constitute extreme provocative behaviour given that the offence carries a maximum term of five years' imprisonment.⁵⁴ However, given that the maximum term of imprisonment for stalking and harassment is five years it is unlikely that such behaviour or, perhaps, any of the threatening behaviour (as raised by the Bar Association), will often rise to the requisite standards of the heavily restricted partial defence.

⁵¹ Letter from WLS NSW to Barry O'Farrell, 14 March 2014, [6]–[7] <www.wlsnsw.org.au/wp-content/uploads/Ltr-Premier-Provocation-Bill-2014-140314-f.pdf>, cited in New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 May 2014, 28 774 (Paul Lynch).

⁵² New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 May 2014, 28 773–4 (Paul Lynch).

⁵³ Crofts and Loughnan, above n 22, 32–3. See also Thomas Crofts and Danielle Tyson, 'Homicide Law Reform in Australia: Improving Access to Defences for Women Who Kill Their Abusers' (2013) 39 *Monash University Law Review* 864, 872–3, 877.

⁵⁴ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1).

In response to these concerns, former chair of the Inquiry, Fred Nile commented at the time of its introduction that the reforms strike ‘a careful and appropriate balance between restricting the defence and leaving it available for victims of extreme provocation, including victims of long term abuse’.⁵⁵ While this may have been the intended purpose of the reforms, these concerns raised by key stakeholders and experts highlight uncertainties in the new partial defence’s drafting. Equally so, it is unclear from the legislation to what extent defendants in cases which involve a long history of violent acts, each of which may constitute a serious indictable offence, but where the ultimate provoking act did not, will be able to access the new partial defence. This issue of timing raises further questions about the extent to which this approach to reform will offer an effective partial defence for persons who kill following prolonged family violence.

III RESTRICTED TO THE POINT OF REDUNDANCY?

This argument — that the reforms restrict provocation to the point of redundancy — is explored here with reference to NSW provocation case law from the 10 years prior to the reforms. As shown below in Table 1, in the 10-year period immediately prior to the reforms there were 20 convictions finalised in the NSW Supreme Court for manslaughter by reason of provocation.⁵⁶ The following section analyses the contexts within which these homicides occurred and considers which of these cases, post-reform, would likely succeed in raising a partial defence of extreme provocation.

⁵⁵ Liz Foschia, ‘NSW Legislation Will Limit “Defence of Provocation” for Murder Charges’, *ABC News* (online), 5 March 2014 <<http://www.abc.net.au/news/2014-03-05/nsw-legislation-to-limit-27defence-of-provocation27-for-murde/5300490>>.

⁵⁶ This analysis does not include cases where provocation was raised at trial but not accepted by the jury. It is plausible that similar trial narratives of victim-blaming and perpetrator excusing would be present in the trials where provocation is raised but does not succeed.

Table 1: Convictions for Manslaughter by Reason of Provocation in NSW
(1 January 2005 to 31 December 2014)

Defendant name	Year	Verdict /plea	Sex of defendant /victim	Relationship between victim and defendant	Nature of provocative conduct
Armstrong ⁵⁷	2014	Plea	Male/ male	Met and engaged in a sexual encounter on night of death	Non-violent confrontation
Hassan ⁵⁸	2014	Verdict	Male/ female	Married	Non-violent confrontation
Butler ⁵⁹	2012	Plea	Female/ male	Victim was a prostitution client of the offender	Non-violent confrontation
Won ⁶⁰	2012	Verdict	Male/ male	Victim was in a sexual relationship with the offender's estranged wife	Non-violent confrontation
Singh ⁶¹	2012	Verdict	Male/ female	Married	Non-violent confrontation

⁵⁷ *R v Armstrong* [2014] NSWSC 700 (30 May 2014) ('*Armstrong*').

⁵⁸ *R v Hassan* [2014] NSWSC 280 (21 March 2014) ('*Hassan*').

⁵⁹ *R v Butler* [2012] NSWSC 1227 (11 October 2012) ('*Butler*').

⁶⁰ *R v Won* [2012] NSWSC 855 (3 August 2012) ('*Won*').

⁶¹ *Singh* [2012] NSWSC 637 (7 June 2012).

Defendant name	Year	Verdict /plea	Sex of defendant /victim	Relationship between victim and defendant	Nature of provocative conduct
Goundar ⁶²	2010	Verdict	Male/male	Victim was in a sexual relationship with the offender's estranged wife	Planned confrontation ⁶³
Lynch ⁶⁴	2010	Plea	Male/male	Acquaintances	Violent confrontation
Gabriel ⁶⁵	2010	Verdict	Male/female	Married	Violent confrontation
Lovett ⁶⁶	2009	Verdict	Male/male	Victim was in a sexual relationship with the offender's estranged wife	Non-violent confrontation
Chant ⁶⁷	2009	Plea	Female/male	Married	Violent confrontation
Stevens ⁶⁸	2008	Plea	Male/female	De facto relationship	Non-violent confrontation
Mitchell ⁶⁹	2008	Plea	Male/male	Acquaintances	Violent confrontation

⁶² *R v Goundar* [2010] NSWSC 1170 (5 November 2010) ('*Goundar*').

⁶³ In *Goundar*, the defendant organised for his wife to bring the victim, his best friend, to their home. The defendant knew the victim and his wife had been in a sexual relationship prior to this incident. Goundar was sentenced on the basis that he had been provoked upon realising that the victim intended to have sexual intercourse with his wife and that this realisation was heightened by cultural factors: at *ibid* [59].

⁶⁴ *R v Lynch* [2010] NSWSC 952 (15 September 2010) ('*Lynch*').

⁶⁵ *R v Gabriel* [2010] NSWSC 13 (4 February 2010) ('*Gabriel*').

⁶⁶ *R v Lovett* [2009] NSWSC 1427 (18 December 2009) ('*Lovett*').

⁶⁷ *R v Chant* [2009] NSWSC 593 (26 June 2009) ('*Chant*').

⁶⁸ *R v Stevens* [2008] NSWSC 1370 (18 December 2008) ('*Stevens*').

⁶⁹ *R v Mitchell* [2008] NSWSC 320 (18 April 2008) ('*Mitchell*').

Defendant name	Year	Verdict /plea	Sex of defendant /victim	Relationship between victim and defendant	Nature of provocative conduct
Forrest ⁷⁰	2008	Plea	Male/ male	Acquaintances	Violent confrontation
Frost ⁷¹	2008	Plea	Male/ female	Divorced	Non-violent confrontation
Berrier ⁷²	2006	Verdict	Male/ male	Acquaintances	Violent confrontation
Russell ⁷³	2006	Plea	Female/ male	De facto relationship	Violent confrontation
Bullock ⁷⁴	2005	Verdict	Male/ male	Acquaintances	Violent confrontation
Dunn ⁷⁵	2005	Verdict	Male/ female	Close acquaintances	Non-violent confrontation
Mohamad Ali ⁷⁶	2005	Verdict	Male/ male	Acquaintances	Violent confrontation
Hamoui ⁷⁷	2005	Verdict	Male/ female	Estranged girlfriend	Non-violent confrontation

⁷⁰ *R v Forrest* [2008] NSWSC 301 (4 April 2008) ('Forrest').

⁷¹ *R v Frost* [2008] NSWSC 220 (17 March 2008) ('Frost').

⁷² *R v Berrier* [2006] NSWSC 1421 (21 December 2006) ('Berrier').

⁷³ *R v Russell* [2006] NSWSC 722 (21 July 2006) ('Russell').

⁷⁴ *R v Bullock* [2005] NSWSC 1071 (21 October 2005) ('Bullock').

⁷⁵ *R v Dunn* [2005] NSWSC 1231 (13 September 2005) ('Dunn').

⁷⁶ *R v Mohamad Ali* [2005] NSWSC 334 (18 April 2005) ('Mohamad Ali').

⁷⁷ *R v Hamoui [No 4]* [2005] NSWSC 279 (15 April 2005) ('Hamoui').

A Words Alone

Of the 20 convictions for provocation manslaughter between 2005 and 2014, half resulted from a non-violent confrontation between the defendant and victim. A male offender perpetrated all but one of these cases and in six of the 10 cases the victim was female. Following the reforms, cases where the provocative conduct comprised words alone would be at face value highly unlikely to raise a partial defence of extreme provocation given the requirement that the provocative conduct of the victim be a serious indictable offence.⁷⁸ A provision to disallow words alone from giving rise to a partial defence represents a significant restriction of the partial defence and recognises the difficulty of disputing claims of verbal provocative conduct in cases where only the victim and offender were present at the time of the lethal violence.⁷⁹

There were, however, two cases within the period studied involving a non-violent confrontation that present ambiguity and raise the question of how the new partial defence will apply to cases that do not fall neatly into stereotypical scenarios of provoked lethal violence: *Armstrong*⁸⁰ and *Butler*.⁸¹ In May 2014, Paul Armstrong was sentenced for the manslaughter by reason of provocation of Felipe Flores in September 1991.⁸² Armstrong met the victim earlier that night at a licensed venue, following which they 'agreed to have a sexual liaison' and drove to a nearby 'secluded' area to do so.⁸³ At sentencing, Adamson J described the circumstances surrounding the offender's use of lethal violence:

During or after oral sex the deceased told the offender that he was HIV positive. At the time the offender had a fear of contracting HIV. He lost control as a result of what was said and from concern as to the possibility of contracting HIV. He violently assaulted the deceased with such force that Mr Flores suffered fatal injuries ... The Crown accepts that on the evidence the offender's loss of control was induced by Mr Flores' words which were said during or immediately after sexual contact and which affected the offender.⁸⁴

⁷⁸ *Crimes Act 1900* (NSW) s 23(2)(b).

⁷⁹ For further explanation on problems arising from claims of verbal provocative conduct see Morgan, 'Dead Women Tell No Tales', above n 20, 246–7.

⁸⁰ [2014] NSWSC 700 (30 May 2014).

⁸¹ [2012] NSWSC 1227 (11 October 2012).

⁸² *Armstrong* [2014] NSWSC 700 (30 May 2014).

⁸³ *Ibid* [8], [10] (Adamson J).

⁸⁴ *Ibid* [10], [12].

Post-reform, a man in the same circumstances as the offender in *Armstrong* would only be able to raise a partial defence of extreme provocation if it were accepted that the victim's failure to disclose his HIV status constituted reckless grievous bodily harm or wounding.⁸⁵ Without such a ruling, the victim's words alone would not meet the requirements of the heavily restricted partial defence and it would be unlikely that a threat to commit reckless grievous bodily harm or wounding could be borne out of the facts of the case.

In the second example, *Butler*,⁸⁶ similar ambiguities arise in how a case of like-circumstances would be resolved post-reform. Patricia Butler was sentenced for the manslaughter by reason of provocation of Brendon Potter. Butler was a street prostitute and met the victim on the day of the homicide. During their subsequent sexual encounter the victim was alleged to have made several comments about the 'sexual assault of children', and showed Butler a video depicting a young girl performing sexual acts.⁸⁷ Unbeknown to the victim, the offender had been sexually assaulted by her stepfather for several years as a child. She lost self-control and killed Potter following his enunciation of sexual fantasies involving her as a child and her younger sister. Also unbeknown to the victim, the offender had a younger sister of whom she felt very protective. Button J ruled the offender had a 'special sensitivity' to the comments made by the victim immediately prior to his death, making her loss of self-control 'very profound'.⁸⁸

Post-reform, it is unlikely that a person in the same circumstances as Butler would be able to raise a partial defence of extreme provocation. Even though the revised defence provides that the provocative conduct does not need to have occurred 'immediately before the act causing death',⁸⁹ the legislation establishes that the victim must have committed a serious indictable offence.⁹⁰ The Law Society of NSW, in its November 2013 submission, forecast the difficulties that may arise in circumstances where the deceased is not the person who committed the provocative conduct:

⁸⁵ See especially *Crimes Act 1900* (NSW) s 35: reckless grievous bodily harm or wounding is punishable by up to 14 years' imprisonment, making it a serious indictable offence. There is precedent in NSW for transmitting HIV infection to be treated as such: *Kanengele-Yondjo v The Queen* [2006] NSWCCA 354 (16 November 2006).

⁸⁶ [2012] NSWSC 1227 (11 October 2012).

⁸⁷ *Ibid* [4]–[5] (Button J).

⁸⁸ *Ibid* [11]–[12].

⁸⁹ *Crimes Act 1900* (NSW) s 23(4).

⁹⁰ *Ibid* s 23(2)(b).

the Committees take the view that this may inappropriately exclude some cases where the conduct does not constitute a serious indictable offence. For example, a vulnerable victim by virtue of a history of sexual or other abuse may lose self-control in response to conduct that may be a taunt but does not amount to intimidation (and is therefore not a serious indictable offence) because the defendant was not aware of the abuse history; (and is not the long term abuser).⁹¹

On a face-value reading, it appears unlikely that a partial defence of extreme provocation could be successfully raised post-2014 in circumstances mirroring *Butler* and possibly *Armstrong*. While the reforms sought to limit the defence's applicability in cases where the provocative conduct was words alone, these cases highlight potential ambiguities in how the courts will discern whether a serious indictable offence has been committed (as in *Armstrong*) and whether that offence needs to have been committed by the eventual victim or can extend to third-party actions (as in *Butler*). For this reason there will be a definite need, post-reform, to monitor emerging case law to evaluate how the extreme provocation defence is interpreted in practice and what cases of 'words alone' provocation are excluded from its remit.

B Male-Perpetrated Intimate Partner Homicide

Given that the establishment of the Inquiry was heavily motivated by perceived injustice in the law's response in *Singh*,⁹² it is unsurprising that one of the main aims of restricting the provocation defence was to exclude the successful use of the partial defence in cases of intimate partner homicide motivated by relationship separation or infidelity. However, despite this guiding motivation and the fact that these cases make up the majority of those where provocation has in the past succeeded in reducing murder to manslaughter (as shown above in Table 1), homicides provoked by a person's desire to change the nature of a relationship (through separation or infidelity) were not included in the list of specific exclusions under s 23 of the new extreme provocation defence.⁹³ It can only be inferred that to do so was deemed unnecessary given the requirement that the provocative conduct be a serious indictable offence.

⁹¹ Letter from the Law Society of NSW to the Department of Attorney-General and Justice (NSW), 18 November 2013, 2.

⁹² [2012] NSWSC 637 (7 June 2012).

⁹³ *Crimes Act 1900* (NSW) s 23.

That such cases would now fail to raise a partial defence of extreme provocation appears likely when the circumstances common to such cases are considered against the requirements of the new defence. An examination of the last male-perpetrated intimate homicide to raise a partial defence of provocation in NSW pre-reform, the 2014 *Hassan* case, demonstrates this point.⁹⁴ Hassan, aged 56 years at the time of sentencing, killed his 24-year-old wife in a ‘frenzied’ knife attack following over two years of ‘marital disharmony’.⁹⁵ While the specific cause of the marriage deterioration was ‘not entirely clear’ and only the victim and offender were present at the time of the homicide, at sentencing Garling J identified multiple contributing factors including their significant age difference, cultural differences and disagreements over parental discipline style.⁹⁶ Garling J accepted that the offender stabbed his wife at least 14 times in a ‘brutal and vicious assault’⁹⁷ following a series of verbal disagreements in which she questioned his masculinity:

[Hassan] said that his wife said to him words to the effect that he was not a man, the children were not his but were another man’s and he should take a look in the mirror, and further that these words were accompanied by swearing on her part.⁹⁸

It was this verbal confrontation that the jury accepted caused the offender to lose his self-control and form the intention to kill. Hassan was subsequently sentenced to a term of 12 years’ imprisonment, with a non-parole period of nine years.⁹⁹

This case shares many of the features common to scenarios of ‘jealous man’ provocation — namely, that the provocative conduct of the victim was words alone and reflected a desire to change the nature of the relationship, as opposed to any physically threatening behaviour. And given that Garling J at sentencing stated that the degree of provocation enacted by the victim was at the lower end of the scale and that the provocative conduct was words alone, it seems highly unlikely that a man in Hassan’s position could now raise the partial defence of extreme provocation. This is a welcomed exclusion in a law

⁹⁴ [2014] NSWSC 280 (21 March 2014).

⁹⁵ *Ibid* [50]–[52] (Garling J).

⁹⁶ *Ibid* [27].

⁹⁷ *Ibid* [47], [49].

⁹⁸ *Ibid* [45].

⁹⁹ *Ibid* [95].

that for too long has privileged the use of lethal male violence against women in response to threats to male honour and masculinity.¹⁰⁰

C *Persons Who Kill in Response to Prolonged Family Violence*

The need to demonstrate that the provocative conduct amounted to a serious indictable offence may exclude the very category of defendant — namely, battered women unable to raise a complete defence — for whom the Select Committee had recommended retaining provocation. Two cases within the 10-year period under study involved a female defendant who killed an abusive male partner.¹⁰¹ In both cases the female offender used lethal violence following an allegedly violent confrontation with her male partner during which she was subjected to verbal abuse and threats to kill. In both *Chant* and *Russell* there was a witnessed history of violence in the relationship. Specifically, in *Russell*, the offender killed her de facto husband in response to years of ‘alcohol abuse and violence’.¹⁰² While at home drinking, the victim and offender became involved in an argument during which the victim ‘swore at and struck the offender’, following which she stabbed him once fatally in the chest.¹⁰³ In *Chant*, Howie J described the events surrounding the use of lethal violence:

The deceased had ‘been bashing’ and verbally assaulting the offender regularly for many years. ... He had never before the night of the killing threatened her with a firearm. On the night of the deceased’s death he was drunk. There was an argument between the offender and him. The deceased produced a rifle, which caused the offender to become very frightened. There was a struggle in the third bedroom during which the offender pushed the gun towards the floor and a bullet was discharged. The firing of the rifle caused the offender to panic and become more fearful. ... The offender believed that the deceased was going to kill her. She was ‘out of her mind with fear and lost her self-control’. The offender picked up the rifle and shot him in the head.¹⁰⁴

¹⁰⁰ See Horder, above n 48, 192–3.

¹⁰¹ *Chant* [2009] NSWSC 593 (26 June 2009); *Russell* [2006] NSWSC 722 (21 July 2006).

¹⁰² [2006] NSWSC 722 (21 July 2006) [5] (Newman AJ).

¹⁰³ *Ibid.*

¹⁰⁴ [2009] NSWSC 593 (26 June 2009) [12]–[15]. It is worth noting that, while tendered as agreed facts between the Crown and defence, the offender’s version of events was queried by the sentencing judge, who stated, ‘I would not have been prepared to act upon anything that the offender said about the circumstances surrounding the killing’: at [20].

Two questions arise when these cases are considered with reference to the new partial defence of extreme provocation. First, what additional barriers will women face in proving that the precipitating incidents and threats of violence made by the deceased constituted a serious indictable offence. It is unclear to what extent prior incidents of assault, not associated with the circumstances surrounding the use of lethal violence, will be relevant to determining whether the defendant was responding to conduct that amounted to a serious indictable offence. While the Act provides that the conduct of the deceased does not have to occur 'immediately before' the use of lethal violence,¹⁰⁵ this is unlikely to be of solace to battered defendants unless they can substantiate their claim that the victim committed a serious indictable offence in the period leading up to and/or prior to their loss of control. If they are able to do this, the second question then arises, relating to why women in the position of Chant and Russell — who were responding to an immediately harmful situation against a backdrop of a violent relationship — are not better catered for under the complete defence of self-defence. Both questions highlight that the government's reforms do little to improve the law's ability to respond to the contexts within which women kill in response to prolonged family violence. Indeed, the reforms are likely to increase the difficulty that such women will face in accessing a partial defence of provocation, while simultaneously failing to address previously recognised limitations in the law of self-defence.

Furthermore, in both *Chant* and *Russell*, the female offenders pleaded guilty to manslaughter on the basis of provocation prior to trial. Post-reform, in NSW, there is a concern that battered women will continue to display an unwillingness to test their cases of self-defence at trial by offering to plead to manslaughter on the basis of extreme provocation. The desire to do so may be particularly heightened now that the law requires defendants to prove that the provocative conduct they were responding to was a serious indictable offence. As Tolmie has previously argued in her analysis of battered women and provocation in New Zealand, in cases involving a battered woman a conviction for provocation manslaughter may be more representative of 'an instance where the defence of provocation did some of the work that should have been accomplished by the complete defence of self-defence'.¹⁰⁶ The same is likely to be true of extreme provocation in NSW.

¹⁰⁵ *Crimes Act 1900* (NSW) s 23(4).

¹⁰⁶ Julia Tolmie, 'Is the Partial Defence an Endangered Defence? Recent Proposal to Abolish Provocation' [2005] *New Zealand Law Review* 25, 38.

When these concerns are considered together, it is arguable that the reformed partial defence of extreme provocation, while claiming to cater for women who kill in response to prolonged family violence, further reduces women's access to the defence, an outcome that risks amplifying the difficulties that such defendants face in their interactions with the criminal justice system. Several of the concerns raised here mirror those advanced recently in the Victorian context, where the 2005 abolition of the partial defence of provocation was accompanied by the introduction of an alternate offence of defensive homicide.¹⁰⁷ Designed largely to provide a 'half-way' alternative offence for persons who kill in the context of family violence, the offence was heavily criticised throughout its nine-year operation and was abolished in November 2014.¹⁰⁸

IV AN ALTERNATIVE MODEL OF REFORM: TRANSFERRING PROVOCATION TO SENTENCING

In light of the difficulties that are likely to arise from the operation of the partial defence of extreme provocation, it is this article's contention that, while not without its risks, transferring provocation to sentencing would have been a preferable model of reform to the now implemented partial defence of extreme provocation. The possibility of abolishing provocation altogether was considered as part of the Select Committee's inquiry, which included consideration of how provocation could be transferred to sentencing if it were abolished as a partial defence to murder.¹⁰⁹ Building on that work, the remainder of this article outlines how the proposed transfer of provocation to sentencing for murder could be achieved through the development of a series of guideline judgments for what have historically been the common scenarios of provoked lethal violence in NSW. In the period post-abolition, members of the NSW Supreme Court judiciary would be able to rely on these judgments for standard guidance on how the issue of provocation and claims of provocative conduct should be accounted for in sentencing for murder.

¹⁰⁷ *Crimes (Homicide) Act 2005* (Vic) s 6, inserting *Crimes Act 1958* (Vic) s 9AD.

¹⁰⁸ *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) s 3; Victoria, *Victorian Government Gazette*, No S 350, 7 October 2014, 1. For further discussion of the offence of defensive homicide and its abolition, see Kate Fitz-Gibbon, 'The Offence of Defensive Homicide: Lessons Learnt from Failed Law Reform' in Kate Fitz-Gibbon and Arie Freiberg (eds), *Homicide Law Reform in Victoria: Retrospect and Prospects* (Federation Press, 2015) 128; Kellie Toole, 'Defensive Homicide on Trial in Victoria' (2013) 39 *Monash University Law Review* 473.

¹⁰⁹ *Partial Defence of Provocation Report*, above n 18, 67–73 [5.3]–[5.32].

Provocation has been transferred to sentencing in three Australian jurisdictions: Tasmania, Victoria and Western Australia ('WA').¹¹⁰ Internationally, provocation is also considered at sentencing in New Zealand and France.¹¹¹ Given the recency of reforms to abolish provocation as a partial defence, the intended and unintended effects of its transfer to sentencing are still emerging through initial evaluations of the reforms. Yet concerns have emerged relating to the lack of a theory of gendered sentencing for provoked lethal violence or a workable framework that can be applied in practice.¹¹² Indeed, with the exception of the extensive work undertaken by Stewart and Freiberg in Victoria,¹¹³ in the jurisdictions that have abolished provocation there has been an absence of consideration of how provocative conduct should be considered in sentencing in favour of a general assumption that, given that judges have previously considered it in sentencing for murder (in cases where the partial defence was not successful), they are well-equipped to continue to do so. Building on the work of Stewart and Freiberg, this article recognises that if the gendered aims of reform are to be achieved, a clear framework for the consideration of provocation at sentencing for murder must accompany its abolition as a partial defence. It is argued that a series of guideline judgments could provide that model for NSW.

A Guideline Judgments in NSW

In NSW, guideline judgments are legislated under ss 36–42A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). A guideline judgment can be produced under two circumstances: (1) if the Attorney-General applies for one; or (2) if the NSW Court of Criminal Appeal issues one on its own

¹¹⁰ *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas); *Crimes (Homicide) Act 2005* (Vic) s 3; *Criminal Law Amendment (Homicide) Act 2008* (WA) s 8.

¹¹¹ For recent research on the impact of provocation in sentencing in New Zealand and France see Julia Tolmie, 'Defending Battered Defendants on Homicide Charges in New Zealand: The Impact of Abolishing the Partial Defences to Murder' [2015] *New Zealand Law Review* 649; New Zealand Law Commission, *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide*, Report No 139 (2016); J R Spencer, 'Intentional Killings in French Law' in Jeremy Horder (ed), *Homicide Law in Comparative Perspective* (Hart Publishing, 2007) 39.

¹¹² For recent discussion of this in the United Kingdom context, see Horder and Fitz-Gibbon, above n 26.

¹¹³ Felicity Stewart and Arie Freiberg, 'Provocation in Sentencing: A Culpability-Based Framework' (2008) 19 *Current Issues in Criminal Justice* 283; Stewart and Freiberg, *Provocation in Sentencing: Research Report*, above n 48.

motion.¹¹⁴ Section 36 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) defines a guideline judgment as ‘a judgment that is expressed to contain guidelines to be taken into account by courts sentencing offenders’. The legislation sets out that guideline judgments can be applied to a particular court, offence or class of offender.¹¹⁵ Former NSW Director of Public Prosecutions Nicholas Cowdery sets out three main types of guideline judgments: (1) those that suggest an appropriate sentencing range for the offence; (2) those that set an appropriate starting point; and (3) those that do not set out an appropriate sentence but rather list the relevant sentencing factors for the offence while providing an indication of what weight should be attached to each.¹¹⁶ Sentencing guidelines for the six key scenarios of provoked murder would follow the last of these approaches, referred to as the ‘sentencing considerations approach’.¹¹⁷

The first guideline judgment in any Australian jurisdiction was delivered in *R v Jurisic* (*‘Jurisic’*) in October 1998.¹¹⁸ It followed the second of the ‘main types’ set out by Cowdery by providing guidance on the appropriate sentence starting point for the offence of dangerous driving causing death or grievous bodily harm. In *Jurisic*, Spigelman CJ set out the scope and purpose of such judgments:

guidelines are intended to be indicative only. They are not intended to be applied to every case as if they were rules binding on sentencing judges. ... [S]uch judgments will provide a useful statement of principle to assist trial judges to ensure consistency of sentencing with respect to particular kinds of offences.¹¹⁹

The broad purpose of guideline judgments was further clarified by Gleeson CJ, who in *Wong v The Queen* (*‘Wong’*)¹²⁰ stated that:

¹¹⁴ The NSW Sentencing Council is not permitted to issue guideline judgments: see John Anderson, ‘Standard Minimum Sentencing and Guideline Judgments: An Uneasy Alliance in the Way of the Future’ (2006) 30 *Criminal Law Journal* 203, 221.

¹¹⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 36 (definition of ‘guideline judgment’ para (b)).

¹¹⁶ Nicholas Cowdery, ‘Guideline Sentencing: A Prosecution Perspective’ (1999) 11 *Judicial Officers’ Bulletin* 57, 58, 60; Nicholas Cowdery, ‘Guideline Judgments: It Seemed Like a Good Idea at the Time’ (Paper presented at the 20th International Conference for the International Society for the Reform of Criminal Law, Brisbane, 2–6 July 2006) 1, 16.

¹¹⁷ Cowdery, ‘Guideline Judgments’, above n 116. This approach was adopted in *Re A-G’s (NSW) Application [No 1]*; *R v Ponfield* (1999) 48 NSWLR 327 (*‘Ponfield’*).

¹¹⁸ (1998) 45 NSWLR 209.

¹¹⁹ *Ibid* 220.

¹²⁰ (2001) 207 CLR 584.

They cover a variety of methods adopted by appellate courts for the purpose of giving guidance to primary judges charged with the exercise of judicial discretion. Those methods range from statements of general principle, to more specific indications of particular factors to be taken into account or given particular weight, and sometimes to indications of the kind of outcome that might be expected in a certain kind of case, other than in exceptional circumstances.¹²¹

Under this model, in cases where the court does not sentence in line with the guideline, there is an expectation that a reason be provided in the resulting judgment.¹²² To date, there are six applicable guideline judgments in NSW including for armed robbery,¹²³ dangerous driving,¹²⁴ and break, enter and steal.¹²⁵ The low number of guideline judgments issued to date has been linked in research to the High Court's undermining of the use of guideline judgments for federal offences in *Wong*,¹²⁶ and to the introduction in 2003 of standard non-parole periods.¹²⁷ Neither of these reasons however closes off the possibility of a guideline judgment approach to the sentencing of manslaughter cases where provocation is raised.

Guideline judgments aim to ensure consistency in sentencing while still allowing justice to be attained on a case-by-case basis. Consistency is achieved in terms of both the outcome of the sentencing process, and perhaps more importantly, the approach taken to reaching that outcome.¹²⁸ Guideline judgments are not intended to 'straightjacket' or 'control judicial discretion'; rather, they are considered a form of judicial assistance and 'structuring'.¹²⁹ As emphasised by Spigelman CJ in *R v Whyte*,¹³⁰ guidelines should be taken into account as a 'check' or 'sounding board', and not read by the courts as a 'rule'

¹²¹ *Ibid* 590–1 [5].

¹²² *R v Whyte* (2002) 55 NSWLR 252, 269 [114] (Spigelman CJ) ('*Whyte*').

¹²³ *R v Henry* (1999) 46 NSWLR 346.

¹²⁴ *Whyte* (2002) 55 NSWLR 252.

¹²⁵ *Ponfield* (1999) 48 NSWLR 327.

¹²⁶ (2001) 207 CLR 584.

¹²⁷ Sarah Krasnostein and Arie Freiberg, 'Sentencing Guideline Schemes across the United States and Beyond' (2014) *Oxford Handbooks Online*, 18–19 <<http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935383.001.0001/oxfordhb-9780199935383-e-001?rskey=vbFyma&result=1>>.

¹²⁸ John Anderson, "Leading Steps Aright": Judicial Guideline Judgments in New South Wales' (2004) 16 *Current Issues in Criminal Justice* 140, 142.

¹²⁹ Anderson, 'Standard Minimum Sentencing', above n 114; Cowdery, 'Guideline Judgments', above n 116.

¹³⁰ (2002) 55 NSWLR 252.

or ‘presumption’.¹³¹ In an area of the law as controversial as provocation, this model would be utilised to ensure consistency in the approach taken to the sentencing of provoked murders following the abolition of the partial defence. It would also play an important role in reducing the likelihood that outdated concepts from the partial defence will re-emerge at the sentencing stage post-abolition.

By enhancing consistency in sentencing, proponents of guideline judgments propose that they serve to maintain, and in some cases increase, public confidence in the justice system.¹³² Enhancing public confidence in sentencing through transparency and consistency of approach is an important outcome in this context given that debate surrounding the provocation defence has been heavily driven by community concerns and media campaigns over perceived inadequacies in the law’s response to homicides where the partial defence is successfully raised. In this respect, guideline judgments can also serve a political ‘law and order’ purpose in that they can be viewed as a response to community concerns surrounding lenient sentencing. However, in allowing for instinctive synthesis they do not go as far as mandatory sentencing schemes in restricting judicial discretion and undermining the importance of individualised justice.¹³³ Indeed, at the time of their introduction in NSW, guideline judgments were viewed as a preferable alternative to mandatory minimum or grid sentencing schemes.¹³⁴

In highlighting the potential benefits of guideline judgments for both the prosecution and the defence, Cowdery argues:

There are significant benefits for the prosecution from effective guidelines — more consistent and appropriate sentences moulded by reference to known criteria, fewer Crown appeals and less pressure on the executive to respond to media hype. The defence also benefits, being able to predict more accurately

¹³¹ Ibid 269 [113].

¹³² Cowdery, ‘Guideline Judgments’, above n 116; Beth Crilly, ‘Guideline Judgments in Victoria: An Examination of the Issues’ (2005) 31 *Monash University Law Review* 37, 48–50; Chief Justice J J Spigelman, ‘Sentencing Guideline Judgments’ (1999) 11 *Current Issues in Criminal Justice* 5, 8, 10; Kate Warner, ‘The Role of Guideline Judgments in the Law and Order Debate in Australia’ (2003) 27 *Criminal Law Journal* 8, 22. For an overview of evaluations of guideline judgments see Sarah Krasnostein and Arie Freiberg, ‘Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You’re Going, How Do You Know When You’ve Got There?’ (2013) 76(1) *Law and Contemporary Problems* 265, 284–6.

¹³³ Crilly, above n 132, 54–6; Warner, above n 132, 22.

¹³⁴ Cowdery, ‘Guideline Judgments’, above n 116; Spigelman, above n 132, 6.

just what the offender will receive and how best to take advantage of the guideline considerations.¹³⁵

Alongside these recognised benefits, some criticisms have also been made of guideline judgments — particularly by members of the Australian High Court, and based on the experiences of other Australian jurisdictions, such as WA.¹³⁶ In particular, the High Court in *Wong* criticised the use of numerical guidelines ‘as being incompatible with the proper application of sentencing principles’.¹³⁷ While the proposed guideline framework for considering provocation in sentencing does not take a quantitative approach, the view of the High Court illustrates why adopting a qualitative approach to guidelines allows the model to align with existing sentencing principles. Beyond the High Court’s comments, scholarly concerns have focused on the potentially prescriptive nature of guideline judgments as well as the practical risk that they serve to unduly increase the length of sentences imposed for targeted offences.¹³⁸ Crilly argues that the latter is particularly the case in NSW, ‘where guidelines are heavily prison oriented and sentences have risen’ for the relevant offences.¹³⁹ As the proposed guideline judgment framework does not follow a numerical approach, the latter of these concerns is unlikely to be as relevant in this context.

B *Guideline Judgments for Scenarios of Provoked Lethal Violence*

In proposing a guideline judgment model for the transfer of provocation to sentencing for murder, this article recognises the value of the framework for considering provocation in sentencing proposed by Stewart and Freiberg in the wake of the Victorian reforms.¹⁴⁰ Stewart and Freiberg pose that provocation should only be considered at sentencing where ‘serious provocation should be found to have given the offender a justifiable sense of having been

¹³⁵ Cowdery, ‘Guideline Judgments’, above n 116, 14.

¹³⁶ Austin Lovegrove, ‘Intuition, Structure and Sentencing: An Evaluation of Guideline Judgments’ (2002) 14 *Current Issues in Criminal Justice* 182, 183–6; Arie Freiberg, ‘Australia: Exercising Discretion in Sentencing Policy and Practice’ (2010) 22 *Federal Sentencing Reporter* 204, 206–7.

¹³⁷ Anderson, ‘Leading Steps Aright’, above n 128, 144, citing *Wong* (2001) 207 CLR 584, 608 [65] (Gaudron, Gummow and Hayne JJ).

¹³⁸ See, eg, Crilly, above n 132; Lovegrove, above n 136.

¹³⁹ Crilly, above n 132, 58.

¹⁴⁰ See Stewart and Freiberg, *Provocation in Sentencing: Research Report*, above n 48, ch 8; Stewart and Freiberg, ‘A Culpability-Based Framework’, above n 113.

wronged' and where the degree of provocation is proportionate to the severity of the offender's response.¹⁴¹ Specifically, they assert that:

Where the offender reacted particularly violently or intentionally caused serious harm or death, only the most serious examples of provocation are likely to reduce the offender's culpability. Where the harm caused by the offender is less serious, a lower degree of provocation may warrant a reduction in the offender's culpability ...¹⁴²

Importantly, Stewart and Freiberg argue that this judgment should be made with consideration to society's common understandings and expectations of human behaviour and personal autonomy.¹⁴³ Specific features of this framework are further drawn on below to inform the development of guideline judgments for considering provocation in sentencing for murder.

In examining the extent to which provocation should influence the length of sentence imposed, Stewart and Freiberg identified two potential impacts of transferring provocation to sentencing for murder: that abolishing the defence of provocation may 'result in a significant (upward) departure from previous sentencing practices for provoked killers'; or, conversely, that the prior average sentencing range for the offence of murder 'may experience a downward departure to reflect the incorporation of "provoked murderers"'.¹⁴⁴ The Law Reform Commission of WA similarly predicted that transferring consideration of provocation to sentencing would have disparate effects on the lengths of murder sentences:

in some cases an offender will receive a higher sentence than would have been imposed if the offender was convicted of manslaughter, but in some cases the offender will be sentenced leniently for murder. ... Not all cases of provocation deserve leniency. A person who kills his wife after discovering she is having an affair is entitled to less mitigation than a person who kills his friend after discovering him sexually abusing his child.¹⁴⁵

The lack of clear understanding on how provocation's transfer to sentencing should impact the length of sentences imposed reinforces the need for a guideline judgments model in NSW, which will assist members of the

¹⁴¹ Stewart and Freiberg, *Provocation in Sentencing: Research Report*, above n 48, 4 [1.1.10].

¹⁴² Stewart and Freiberg, 'A Culpability-Based Framework', above n 113, 294.

¹⁴³ Ibid.

¹⁴⁴ Ibid 286.

¹⁴⁵ Law Reform Commission of WA, *Review of the Law of Homicide: Final Report*, Project No 97 (2007) 221.

judiciary to consistently differentiate between the cases that do and do not warrant a degree of mitigation in sentencing for murder. This is particularly important given that since 2003 NSW has legislated a standard non-parole period ('SNPP') of 20 years for the offence of murder.¹⁴⁶ The SNPP applies to the sentencing of all offenders over the age of 18 who are convicted following trial of an offence committed since 1 February 2003,¹⁴⁷ and must be implemented, except in circumstances where the judge can justify setting a minimum term above or below the SNPP by reference to the established mitigating and aggravating factors included in the Act.¹⁴⁸ In cases where an offender has pleaded guilty prior to trial, it has been accepted that the SNPP should still be used as a 'guidepost'.¹⁴⁹ The SNPP scheme seeks to promote consistency in the sentencing of div 1A offences.¹⁵⁰ As there is no SNPP prescribed for the offence of manslaughter this scheme does not at present apply to sentencing practices for the new partial defence of extreme provocation.

In the context of proposing a guideline judgment approach to the consideration of provocation in sentencing for murder it is useful to note that while initially research suggested that guidelines were unlikely to be applied to SNPP offences and would likely assume a 'minor or subsidiary' role post-SNPP legislation,¹⁵¹ the 2004 guideline judgment for high-range prescribed concentration of alcohol can be seen as an 'indication' that guidelines do still play a role in NSW sentencing.¹⁵² Furthermore, the 2011 decision of the High Court in *Muldrock v The Queen* ('*Muldrock*')¹⁵³ reduced the significance of SNPPs and the legislation now requires that SNPPs be 'taken into account ... without limiting the matters that are otherwise required or permitted to be taken into account'.¹⁵⁴ Following the view established in *Muldrock*, this article seeks to provide a workable approach that would protect against the potential-

¹⁴⁶ *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A.

¹⁴⁷ NSW Sentencing Council, *Standard Non-Parole Periods: A Background Report by the NSW Sentencing Council* (2011) 10 [2.14]–[2.15] ('*Sentencing Council Report*').

¹⁴⁸ See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.

¹⁴⁹ *Sentencing Council Report*, above n 147, 10 [2.16].

¹⁵⁰ *Muldrock v The Queen* (2011) 244 CLR 120, 132 [30]. For further information on SNPPs see generally NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-Parole Periods*, Report No 134 (2012); *Sentencing Council Report*, above n 147.

¹⁵¹ Anderson, 'Leading Steps Aright', above n 128, 150. See also Anderson, 'Standard Minimum Sentencing', above n 114, 205.

¹⁵² Anderson, 'Leading Steps Aright', above n 128, 157.

¹⁵³ (2011) 244 CLR 120.

¹⁵⁴ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(2).

ly unjust impact of a 20-year non-parole period in some cases of provoked lethal violence.

Drawing on the previously discussed 10-year case analysis of NSW provocation cases from the period immediately prior to the introduction of extreme provocation (as detailed above in Table 1), it is proposed that there are six key scenarios in which provocation has been successfully raised in NSW, and for which guideline judgments would need to be formulated. These scenarios are listed below in Table 2, which includes footnote references to the cases that would have been likely to fall into each of the scenarios for the period studied. Importantly, of the 20 successful defences of provocation raised in the 10 years prior to the NSW reforms, all are accounted for within these six scenarios of provoked lethal violence.

Table 2: Scenarios of Provoked Lethal Violence in NSW

Scenario	Guideline judgment should be formulated on the directive that —
<p>Scenario One</p> <p>Intimate partner homicide perpetrated in response to actual (or alleged) sexual infidelity, relationship separation, threat of a change in the nature of the relationship, or verbal taunt.¹⁵⁵</p>	<p>The provocative conduct should not be considered mitigating at sentencing for murder.</p>
<p>Scenario Two</p> <p>Lethal violence committed in response to the victim's sexual involvement with the offender's intimate partner (current or estranged).¹⁵⁶</p>	<p>The provocative conduct should not be considered mitigating at sentencing for murder.</p>
<p>Scenario Three</p> <p>Lethal violence committed in response to prolonged family violence or to an act constituting serious criminal conduct.¹⁵⁷</p>	<p>The provocative conduct does not need to have occurred in the period immediately prior to the lethal violence for the judge to consider it at sentencing, but in some cases it may have. In cases where the provocative family violence or criminal conduct is particularly grave and/or prolonged, the judge should depart significantly from the SNPP for murder and impose an exceptionally mitigated sentence that falls outside the usual range of sentences for murder, and more closely aligns with the lower range of sentences imposed for manslaughter.</p>

¹⁵⁵ In the period studied, the cases of *Hassan* [2014] NSWSC 280 (21 March 2014); *Singh* [2012] NSWSC 637 (7 June 2012); *Stevens* [2008] NSWSC 1370 (18 December 2008); *Hamoui* [2005] NSWSC 279 (15 April 2005) would likely fall into this category.

¹⁵⁶ In the period studied, the cases of *Won* [2012] NSWSC 855 (3 August 2012); *Goundar* [2010] NSWSC 1170 (5 November 2010); *Lovett* [2009] NSWSC 1427 (18 December 2009) would likely fall into this category.

¹⁵⁷ In the period studied, the cases of *Armstrong* [2014] NSWSC 700 (30 May 2014); *Chant* [2009] NSWSC 593 (26 June 2009); *Russell* [2006] NSWSC 722 (21 July 2006); *Gabriel* [2010] NSWSC 13 (4 February 2010); *Mitchell* [2008] NSWSC 320 (18 April 2008); *Mohamad Ali* [2005] NSWSC 334 (18 April 2005) would likely fall into this category.

Scenario	Guideline judgment should be formulated on the directive that —
<p>Scenario Four</p> <p>Lethal violence committed in response to an alcohol-fuelled confrontation between the deceased and the offender.¹⁵⁸</p>	<p>The degree to which provocation should be considered mitigating should be taken into account in determining the appropriate sentence as outlined in the <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) s 21A(3)(c).</p> <p>This scenario should include a directive that, where a person is intoxicated at the time of the act or omission causing death, and the intoxication is self-induced, loss of control caused by that intoxication or resulting from a mistaken belief occasioned by that intoxication is to be disregarded.</p>
<p>Scenario Five</p> <p>Lethal violence committed in response to a non-violent confrontation between the victim and the offender.¹⁵⁹</p>	<p>The provocative conduct should not be considered mitigating at sentencing for murder. This includes provocation that amounts to words alone and non-violent sexual advances.</p>
<p>Scenario Six</p> <p>Lethal violence committed in response to a violent confrontation between the victim and the offender.¹⁶⁰</p>	<p>Consideration in sentencing should be given to whether the offender intended to kill the deceased or to cause the deceased grievous bodily harm. The degree to which provocation should be considered mitigating should be taken into account in determining the appropriate sentence, as outlined in the <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) s 21A(3)(c).</p>

¹⁵⁸ In the period studied, the cases of *Lynch* [2010] NSWSC 952 (15 September 2010); *Dunn* [2005] NSWSC 1231 (13 September 2005) would likely fall into this category.

¹⁵⁹ In the period studied, the cases of *Butler* [2012] NSWSC 1227 (11 October 2012); *Frost* [2008] NSWSC 220 (17 March 2008) would likely fall into this category, as well as several of the cases listed under the first scenario involving a male-perpetrated intimate homicide.

¹⁶⁰ In the period studied, the cases of *Forrest* [2008] NSWSC 301 (4 April 2008); *Berrier* [2006] NSWSC 1421 (21 December 2006); *Bullock* [2005] NSWSC 1071 (21 October 2005) would likely fall into this category, as well as several of the cases listed under the second scenario.

Scenarios One and Two, as presented in Table 2, most closely capture the cases of intimate partner homicide (typically but not exclusively male-perpetrated) that have incited calls for the abolition of the partial defence of provocation. The guideline judgments in these two scenarios would establish that provocative conduct that relates to a person exercising their right to end a relationship or to engage in sexual conduct with another person should not be perceived as mitigating factors in sentencing for murder. This would ensure that the law of homicide in NSW can distance itself from the ‘jealous man’ and ‘heat of passion’ narratives that have been heavily criticised in the operation of the defence across Australia and have given rise to significant concern surrounding the law’s production of victim-blaming discourses at trial and sentencing.

The directive proposed in Scenarios One and Two also aligns with the ‘equality framework’ advanced by Stewart and Freiberg, who argue that provocation relating to a victim exercising their equality rights should not serve to reduce an offender’s culpability at sentencing.¹⁶¹ As argued by Freiberg and Stewart:

An equality analysis of potentially mitigating provocation would disqualify behaviour that arose out of the victim exercising his or her equality rights, such as the right to personal autonomy (including conduct associated with leaving an intimate relationship, forming new social or intimate relationships, choosing to work or gain an education, or other assertions of independence).¹⁶²

In Scenario Two, this equality framework is extended beyond the context of intimate relationships to cover lethal violence perpetrated upon a third party that has or is engaged in a relationship with the offender’s intimate partner (current or estranged). While such heat of passion homicides could reasonably be perceived as belonging to earlier centuries when the law provided that women were the property of their husbands,¹⁶³ in the 10 years prior to the 2014 reforms there were three cases where a male perpetrator was convicted of manslaughter by reason of provocation, having killed a male ‘sexual rival’.¹⁶⁴ The directive in Scenario Two would provide a much-needed update to ensure that such killings no longer receive mitigation, bringing the law into line with current community expectations.

¹⁶¹ Stewart and Freiberg, ‘A Culpability-Based Framework’, above n 113, 295.

¹⁶² *Ibid* 296.

¹⁶³ See, eg, *R v Mawgridge* (1707) Kel J 119, 137; 84 ER 1107, 1115 (Lord Holt CJ).

¹⁶⁴ *Won* [2012] NSWSC 855 (3 August 2012); *Goundar* [2010] NSWSC 1170 (5 November 2010); *Lovett* [2009] NSWSC 1427 (18 December 2009).

Scenario Three adopts a markedly different approach from that of Scenarios One and Two. It provides that provocative conduct be taken into consideration to the extent that it may reduce a sentence imposed for murder, to what would be imposed at the lower end of the sentencing range for manslaughter, in cases where lethal violence is committed in response to prolonged family violence or serious criminal conduct. This is intended to provide an unequivocal message to members of the judiciary that, where a person who kills in response to prolonged family violence is unable to alleviate themselves of a murder conviction through the various avenues of manslaughter or the complete defence of self-defence, their actions should be significantly mitigated at sentencing for murder. This directive would allow members of the NSW judiciary to move well below the prescribed SNPP of 20 years for murder. By taking this focus, Scenario Three addresses concerns that the transfer of provocation may result in the imposition of substantially longer sentences on women who kill a prolonged abuser and are unable to raise a complete defence of self-defence.¹⁶⁵

Moving away from intimate homicides specifically, Scenario Four draws from the provision included in the partial defence of extreme provocation as well as the model of reform proposed by the Hon James Wood during the NSW Parliamentary Inquiry.¹⁶⁶ Under the new provisions, s 23(5) of the *Crimes Act 1900* (NSW) states:

For the purpose of determining whether an act causing death was in response to extreme provocation, evidence of self-induced intoxication of the accused (within the meaning of Part 11A) cannot be taken into account.

The extent to which intoxication, and in particular self-induced intoxication, should mitigate culpability has been the centre point in recent policy debates surrounding the perpetration of lethal violence in and around Sydney's night-time economy,¹⁶⁷ and was also considered to a lesser extent during the NSW Provocation Inquiry.¹⁶⁸ During the 10-year period prior to the reforms, there were two homicides categorised as provocation manslaughter where the lethal violence occurred in the context of an alcohol-fuelled confrontation between

¹⁶⁵ See Crofts and Tyson, above n 53, 874.

¹⁶⁶ This model is detailed in Appendix B of the *Consultation on Reform Options*, above n 17, 5–6.

¹⁶⁷ Julia Quilter, 'One-Punch Laws, Mandatory Minimums and "Alcohol Fuelled" as an Aggravating Factor: Implications for NSW Criminal Law' (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 81, 97.

¹⁶⁸ *Partial Defence of Provocation Report*, above n 18, 119–20 [6.146]–[6.147].

the offender and victim.¹⁶⁹ Post-2014, it is unlikely that such defendants would be able to raise a partial defence of extreme provocation and Scenario Four upholds this view.

Scenario Five excludes non-violent provocative conduct from receiving mitigation in sentencing. This includes conduct that amounts to words alone and non-violent sexual advances. The directive to exclude provocative conduct that is a non-violent homosexual advance from operating as a mitigating factor at sentencing aligns with the requirements of the extreme provocation defence.¹⁷⁰ While there were no NSW cases in the 10 years prior to the reforms mirroring this context, recent debate following the 2015 High Court decision in *Lindsay v The Queen*¹⁷¹ highlights why the law in NSW must affirm that lethal violence committed in response to a non-violent homosexual advance cannot be mitigated on the basis of provocation. This would ensure that discourses of victim-blaming and the legal legitimisation of homophobia are not transferred to the sentencing process for murder.

Finally, Scenario Six provides perhaps the most open direction on the extent to which provocative conduct should be considered relevant to culpability in sentencing. This recognises that it is not possible to predict and provide for all scenarios of provoked lethal violence. In establishing this new guideline judgment approach, reconsideration should be given to whether the three relevant factors established by Hunt CJ at CL in *R v Alexander* ('*Alexander*')¹⁷² should continue to be relied upon at sentencing. In *Alexander*, the court established that in determining an offender's level of culpability in provocation cases, the following is relevant:

- (1) the degree of provocation offered (or, alternatively, the extent of the loss of self-control suffered), which when great has the tendency of reducing the objective gravity of the offence; (2) the time between the provocation (whether isolated or cumulative in its effect) and the loss of self-control, which when short also has the tendency of reducing the objective gravity of the offence; and (3) the degree of violence or aggression displayed by the prisoner, which when excessive has the tendency of increasing the objective gravity of the offence.¹⁷³

¹⁶⁹ *Lynch* [2010] NSWSC 952 (15 September 2010); *Dunn* [2005] NSWSC 1231 (13 September 2005).

¹⁷⁰ *Crimes Act 1900* (NSW) s 23(3)(a).

¹⁷¹ (2015) 255 CLR 272.

¹⁷² (1994) 78 A Crim R 141, 144.

¹⁷³ *Ibid.*

These factors have been widely cited throughout NSW provocation case law and used to assist sentencing judges in determining the extent to which the sentence imposed for murder should be mitigated below the SNPP.¹⁷⁴ While often referred to in case law, criticisms of the provocation defence have equally been focused on several of the elements affirmed in *Alexander*, such as the notion of a loss of self-control. For this reason the reform exercise provides an opportunity to rethink the philosophical framework that should justify a reduction in culpability, including the extent to which the elements set out in *Alexander* should continue to be relied upon in sentencing post-reform.

C Accounting for Gender-Based Violence in Sentencing

The proposed framework arguably provides an approach through which gender-based violence can be more adequately accounted for in sentencing without reproducing the victim-blaming narratives that have traditionally been associated with the law of provocation. Given that the use of provocation as a partial defence to murder has been most controversial in intimate partner homicide trials, this section considers the viability of the proposed guideline sentencing framework in light of the work of Thérèse McCarthy in examining the need for sentencing to adequately reflect the seriousness of gender-based violence.¹⁷⁵ McCarthy's research considers 'that potential gains are possible through open engagement between gender-based violence advocates, the judiciary and the community ... [and] the potential role of sentencing policy in the prevention of gender-based violence'.¹⁷⁶ The application of McCarthy's work is particularly relevant here given that a key goal of the 2014 NSW reforms was to implement laws that would overcome gender bias in the operation of the law of homicide.

¹⁷⁴ See, eg, *Goundar* [2010] NSWSC 1170 (5 November 2010) [58] (Kirby J); *Won* [2012] NSWSC 855 (3 August 2012) [11] (Fullerton J); *Lynch* [2010] NSWSC 952 (15 September 2010) [9] (Studdert AJ); *Chant* [2009] NSWSC 593 (26 June 2009) [21] (Howie J).

¹⁷⁵ Thérèse McCarthy, 'A Perspective on the Work of the Victorian Sentencing Advisory Council and Its Potential to Promote Respect and Equality for Women' in Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (Federation Press, 2008) 165, 171. While McCarthy's research focused on the role of the Victorian Sentencing Advisory Council, this article extends that work to consider how gender-based violence can be adequately accounted for at sentencing for murder in cases where claims of provocation are raised.

¹⁷⁶ *Ibid* 166.

McCarthy argues that providing ‘clear and unequivocal messages at the point of sentencing’ is equally as important as the numerical length of sentence imposed,¹⁷⁷ and that it is imperative that sentencing remarks ‘reflect an intolerance of [gender-based] violence’.¹⁷⁸ In reflecting McCarthy’s argument in the proposed framework, it is essential that, post-abolition, members of the NSW judiciary be proactive in ensuring that provoked lethal violence that occurs in unmeritorious cases (such as those detailed in Scenarios One, Two and Five in Table 2) receive a clear condemnatory response from the legal system and are framed at sentencing in a way that adequately reflects the nature and aetiology of gender-based violence. The proposed model of guideline judgments provides a framework for this to be achieved in cases of provoked lethal violence while also ensuring consistency in judicial responses to such cases.

Beyond sentencing remarks, by recognising the intent present in the offence committed with a murder rather than manslaughter conviction, the proposed framework allows for a more accurate retelling of the event which places responsibility for the lethal violence perpetrated in the first instance with the offender, rather than the victim. Law reform commissions have previously noted the presence of an intention to kill in provocation killings.¹⁷⁹ For example, in 2002 the Victorian Law Reform Commission (‘VLRC’) questioned why provocation killings should be mitigated to manslaughter given the presence of an intention to kill:

it can be argued that those who rely on provocation as a defence have generally formed an intention to kill. Why should the emotion of anger reduce moral culpability more than other emotions such as envy, lust or greed? ... Why should it make a difference to the level of criminal responsibility that a person who intends to kill does so as a result of a loss of self control?¹⁸⁰

The proposed guideline judgment framework provides a direct response to such arguments by offering a model through which the intent to kill in a provocation killing will be recognised with a conviction for murder while also providing a legitimate framework for the consistent application of mitigation

¹⁷⁷ Ibid 172.

¹⁷⁸ Ibid 170.

¹⁷⁹ See, eg, New Zealand Law Commission, *The Partial Defence of Provocation*, Report No 98 (2007) 6–7; Victorian Law Reform Commission, *Defences to Homicide*, Issues Paper (2002) 67 [6.17]–[6.18].

¹⁸⁰ VLRC, *Defences to Homicide*, Issues Paper (2002) 67 [6.17]. See also Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003, 59–60 (Judy Jackson).

at sentencing in cases of genuine provoked violence (such as those listed in Scenarios Two, Four and Six in Table 2).

Recognising the intent present in cases where provocation is raised also represents an important step away from the victim-blaming and gender-biased narratives that have been problematically associated with successful provocation defences in NSW, as well as in other Australian and international jurisdictions. Writing in relation to rape trials, McCarthy suggests ways in which the eradication of gender bias in the law can be achieved, noting that in sentencing:

a court that challenges attitudes that trivialise violence and its impacts would not tolerate violence-supportive attitudes in legal argument or in mitigation. Attributing blame to the victim in a plea might not be allowed (for example, remarks about dress or consent on an earlier occasion), just as justifying rape or providing excuses that diminish men's responsibility would be frowned upon.¹⁸¹

These approaches can and should be adopted within the proposed model for sentencing provocation cases as murder rather than manslaughter. The adoption of the proposed model would be preferable when dealing with scenarios of male-perpetrated intimate partner homicide (as covered in Scenario One in Table 2), as it would provide a clear structure for responsibility to be located with the offender and a model through which the harms inflicted upon the victim can be more fully recognised.

D Broader Reform to Support the Sentencing Process

In implementing the proposed framework of guideline judgments, NSW would be wise to also consider broader reforms implemented in Victoria, which go beyond reforming legal categories to ensure a wider framework is in place to support the eradication of problems previously associated with the operation of the provocation defence.¹⁸² Here, three additional reforms are canvassed: reform to restrict evidence which demeans the victim; reform to introduce social framework evidence; and enhancements to jury directions given in homicide cases occurring in the context of family violence. It is argued that these reforms, implemented alongside the transfer of provocation to sentencing, would further enhance the law's ability to respond to the often-

¹⁸¹ McCarthy, above n 175, 171.

¹⁸² See Jenny Morgan, *Who Kills Whom and Why: Looking Beyond Legal Categories* (VLRC, 2002).

gendered nature of homicide and would enable the law to better accommodate the contexts within which both men and women commit lethal violence.

While reforms to evidentiary provisions to counter victim-blaming were considered outside the scope of the NSW report,¹⁸³ this is an unattended concern in the law's operation that could be better addressed through a combination of the proposed sentencing reform alongside reform of evidence law. Victims being 'put on trial' is a key problem with the foundations of the defence, which arguably cannot be overcome through reform that retains and restricts the defence. In raising provocation, the offender seeks to put the words or actions of the victim on trial in order to illustrate how their use of lethal violence was provoked. In the majority of cases, this occurs in situations where no third party is able to contest the defendant's version of what occurred in the period immediately prior to the homicide. Consequently, the acts and conduct of the victim become a central focus in trials where provocation is raised. The 2014 NSW reforms fail to address this problem in the law's operation, raising a key concern post-reform that, where the partial defence of extreme provocation is raised at trial — whether successfully or unsuccessfully — it is likely to act as a vehicle for the continued mobilisation of victim-blaming narratives. Under this proposed model, however, by transferring provocation to sentencing, 'provocative conduct' on the part of victim would no longer be a key consideration in determining culpability in contested trials. This would arguably substantially decrease the incentive for the victim's conduct to be a defence focus. Furthermore, a guided approach such as that provided in Table 2, would ensure that such narratives are not merely transferred to the sentencing stage of the justice process.

To date, Victoria is the only Australian jurisdiction that has introduced evidentiary law reform that addresses victim-blaming in homicide cases. The Victorian reform, introduced in 2014 as part of the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic):

gives the court the discretion under the *Evidence Act* to exclude evidence if its probative value is substantially outweighed by the danger that the evidence might 'unnecessarily demean the deceased in a criminal proceeding for a homicide offence', while including a note that this 'does not limit evidence of family

¹⁸³ *Partial Defence of Provocation Report*, above n 18, 188–9 [8.147]–[8.148].

violence that may be adduced' under the new self-defence, duress and sudden emergency provisions.¹⁸⁴

Introduced as part of a wider package of reforms to the law of homicide and jury directions, the Victorian evidence reforms responded to over 10 years of concerns that emerged following the trial of James Ramage surrounding the proliferation of victim-blaming narratives in the Victorian criminal courts.¹⁸⁵ In commending this aspect of the reforms to Parliament in 2014, then Attorney-General Robert Clark explained:

This reform is designed to reduce unjustifiable attacks on the character and reputation of the deceased during homicide proceedings. 'Victim blaming' has been a significant problem in the past, and can cause significant distress and trauma for the victim's family and friends.¹⁸⁶

Such reform rightly recognises that reforming legal categories alone is not sufficient to overcome entrenched victim-blaming narratives. While monitoring and evaluating the Victorian reforms will be important in terms of understanding their effect in practice, in the meantime the viability of introducing such reform in NSW should be considered to ensure that victim-blaming does not continue to plague the law's response to lethal violence.

In addition to evidence reform to counter victim-blaming discourses in law, the transfer of provocation to sentencing would be greatly supported if accompanied by the introduction of a 'social framework evidence' provision. Social framework evidence was introduced in 2005 in Victoria through the *Crimes (Homicide) Act 2005* (Vic),¹⁸⁷ which established the relevance of family violence evidence in cases where a person committed homicide after experi-

¹⁸⁴ Paige Darby, Alice Jonas and Catriona Ross, 'Crimes Amendment (Abolition of Defensive Homicide) Bill 2014' (Research Brief No 8, Parliamentary Library, Parliament of Victoria, 2014) 7.

¹⁸⁵ *Ramage* [2004] VSC 508 (9 December 2004). For research that has critiqued victim-blaming in the *Ramage* case, see generally Graeme Coss, 'Provocation's Victorian Nadir: The Obscenity of *Ramage*' (2005) 29 *Criminal Law Journal* 133; Fitz-Gibbon, *Gender and the Provocation Defence*, above n 48, 1–6; Howe, 'Provocation in Crisis', above n 20; JaneMaree Maher et al, 'Honouring White Masculinity: Culture, Terror, Provocation and the Law' (2005) 23 *Australian Feminist Law Journal* 147.

¹⁸⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 20 August 2014, 2836.

¹⁸⁷ *Crimes (Homicide) Act 2005* (Vic) s 6, inserting *Crimes Act 1958* (Vic) s 9AH. Following the introduction of further reforms to the Victorian law of homicide in 2014, this aspect of the 2005 reform is now reflected in s 322J of the *Crimes Act 1958* (Vic), as inserted by *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) s 4.

encing abuse by the deceased. The VLRC explained that such evidence could include:

- ‘the general dynamics of abusive relationships;
- the cycle of violence;
- the complex reasons women stay in abusive relationships;
- why some women do not report violence; and
- why a woman may have to plan to kill in order to protect herself.¹⁸⁸

The introduction of these provisions in Victoria was intended to ensure that persons who kill in response to family violence are able to introduce evidence related to the history of violence and their prior circumstances. As stated by the Victorian Department of Justice, this evidence framework helps to ‘ensure that during homicide proceedings, the jury hears evidence of family violence and the impact of that violence.’¹⁸⁹ While research conducted in 2013 found that the provisions were not being used widely by those within the legal profession,¹⁹⁰ the potential benefits of such provisions have been captured by Douglas, who notes that they ‘help to ensure that the contexts of the lives of abused women who kill are better understood and heard throughout the criminal justice process’.¹⁹¹

In its final report, the Select Committee recognised the need for social framework evidence provisions as a ‘major issue’,¹⁹² and recommended ‘[t]hat the NSW Government introduce an amendment similar to section 9AH of the Victorian *Crimes Act 1958*, to explicitly provide that evidence of family violence may be adduced in homicide matters.’¹⁹³ This recommendation reflected the views of several submissions provided to the Inquiry, which highlighted the importance of such evidence and supported its introduction. Despite this, the 2014 reforms did not introduce this provision, noting that it was not necessary given existing evidence laws under the *Evidence Act 2008* (NSW). While family violence evidence is relevant to trials beyond those that

¹⁸⁸ VLRC, *Defences to Homicide*, Options Paper (2003) xix–xx.

¹⁸⁹ Criminal Law — Justice Statement, Department of Justice (Vic), ‘Defensive Homicide: Review of the Offence of Defensive Homicide’ (Discussion Paper, Department of Justice (Vic), August 2010) 27 [81].

¹⁹⁰ Debbie Kirkwood, Mandy McKenzie and Danielle Tyson, ‘Justice or Judgment? The Impact of Victorian Homicide Law Reforms on Responses to Women Who Kill Intimate Partners’ (Discussion Paper No 9, Domestic Violence Resource Centre Victoria, 2013) 51.

¹⁹¹ Douglas, above n 28, 378.

¹⁹² *Partial Defence of Provocation*, above n 18, 178 [8.102].

¹⁹³ *Ibid* 186 (recommendation 2).

raise the partial defence of extreme provocation, the need for a family violence evidence provision in NSW will be particularly important if provocation is abolished. Such reform would ensure that evidence pertaining to family violence is accessible in the trials of persons who kill in response to prolonged abuse and will no longer have the halfway partial defence to rely upon and where self-defence proves too restrictive.

If the current approach to extreme provocation is maintained, there is arguably an equal need for NSW to consider the introduction of social framework evidence reform given that the law requires that persons who kill in response to prolonged family violence show that the conduct of the deceased amounted to a serious indictable offence. Without bolstering evidence laws, defendants who kill in response to prolonged abuse will undoubtedly face significant barriers in conveying their experiences of family violence to the courts so that their use of lethal violence may be understood within the bounds of the heavily restricted defence.

Related to the need to introduce social framework evidence reforms to ensure that a clearer picture of the nature of family violence can emerge in the criminal court setting is the equal need to consider how jury directions on family violence could be enhanced in NSW to allow the nature and dynamics of family violence to be contextualised for lay members of the jury. Research has consistently observed the spread of myths and misconceptions surrounding the nature of family violence and the behaviour of family violence victims in the Australian community.¹⁹⁴ Carline and Eastale refer to these as ‘invisible biases’,¹⁹⁵ which become particularly problematic in the realm of law, where the actions of persons who kill in response to prolonged family violence often fail to fall neatly within legal defences, such as provocation and self-defence, or to be adequately understood by lay members of the jury. As recognised by Carline and Eastale:

women frequently assert [their] agency in various ways in response to violence. Indeed, it is important to emphasise the diverse and unexpected ways in

¹⁹⁴ Silke Meyer, ‘Why Women Stay: A Theoretical Examination of Rational Choice and Moral Reasoning in the Context of Intimate Partner Violence’ (2012) 45 *Australian and New Zealand Journal of Criminology* 179, 180; Natalie Taylor and Jenny Mouzos, ‘Community Attitudes to Violence against Women Survey 2006: A Full Technical Report’ (Report, Australian Institute of Criminology, November 2006) xi; VicHealth, ‘Australians’ Attitudes to Violence against Women: Findings from the 2013 National Community Attitudes towards Violence against Women Survey’ (Report, Victorian Health Promotion Foundation, 2014).

¹⁹⁵ Carline and Eastale, above n 28, 6.

which women perform their gender, as this often causes difficulties in the legal sphere.¹⁹⁶

A contested homicide trial involving a person who kills in response to prolonged family violence requires jurors to evaluate the offender's actions to determine reasonableness and intent among other factors. For this reason, it is essential that the system actively ensures that an accurate depiction of family violence is conveyed to lay members of the jury.

NSW could look to recent reforms introduced in Victoria in 2014 in considering how jury directions could be enhanced to ensure that victim responses to family violence are better understood and represented in the legal process.¹⁹⁷ Reform of the *Jury Directions Act 2015* (Vic) requires trial judges in self-defence and duress cases to provide directions to the jury on family violence. The amendment also provides that a trial judge must, if requested, provide a direction:

- (a) that family violence —
 - (i) is not limited to physical abuse and may include sexual abuse and psychological abuse;
 - (ii) may involve intimidation, harassment and threats of abuse;
 - (iii) may consist of a single act;
 - (iv) may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial;
- (b) if relevant, that experience shows that —
 - (i) people may react differently to family violence and there is no typical, proper or normal response to family violence;
 - (ii) it is not uncommon for a person who has been subjected to family violence —
 - (A) to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;
 - (B) not to report family violence to police or seek assistance to stop family violence ...¹⁹⁸

¹⁹⁶ Ibid 8.

¹⁹⁷ These reforms were introduced alongside the aforementioned reforms to evidence laws: see above n 187 and accompanying text.

¹⁹⁸ *Jury Directions Act 2015* (Vic) s 60.

These reformed directions are intended to contextualise family violence and overcome long-held misconceptions about the nature of family violence and assumptions about how a person *should* react to family violence.¹⁹⁹

Given that the NSW reforms increase the requirements to raise a partial defence of provocation, and do not reform self-defence, ensuring that jurors adequately understand the actions of persons who kill in the context of family violence will be paramount in the operation of the law post-reform if injustices are to be avoided. Combined with the aforementioned social framework evidence reforms, reform of jury directions is intended to open up the complete defence of self-defence to those who have previously struggled to access it while also ensuring that accurate understandings of family violence permeate all trials involving a homicide offence. When considered either separately or together, these proposed reforms would assist in ensuring that in the event of the abolition of provocation, and its transfer to sentencing, persons who kill in response to prolonged family violence are better supported throughout the trial process.

V CONCLUSION

Of course, the criminal law is in a constant state of change and so it should be. As society develops and changes the rules by which we live need to be adapted. It will usually be the case that the law changes a little behind the pace of social change and that is not a bad thing. ... It is to be hoped, of course, that all change equals improvement — but regrettably that is not always so.²⁰⁰

These comments made by former NSW Director of Public Prosecutions Nicholas Cowdery are particularly relevant to the arguments advanced in this article. While the abolition of provocation as a partial defence to murder and its transfer to sentencing through a guideline judgment model may be perceived as ‘risky’ reform, it is necessary to adapt the criminal law to better reflect current community values and expectations of justice. It is only through a wholesale approach to reform — one that reconsiders offence categorisation, sentencing practice, evidence laws and the understanding of the jury — that can effectively address long-held concerns surrounding the

¹⁹⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 20 August 2014, 2835–6 (Robert Clark, Attorney-General).

²⁰⁰ Nicholas Cowdery, ‘The Times They Are A-Changing: Where to for the Criminal Law in NSW?’ (Speech delivered at the John Marsden Memorial Lecture 2012, Sydney, 15 November 2012).

law's inability to adequately reflect the gendered nature of lethal violence. It is argued that the 2014 NSW reforms, while heavily restricting the provocation defence, do not go far enough in countering concerns surrounding the operation of the provocation defence specifically and the failure of the law to adequately understand and respond to lethal violence committed in response to family violence more broadly.

As the case analysis contained in this article demonstrates, the new partial defence of extreme provocation is unlikely to apply to the majority of cases that gave rise to a conviction for provocation in the 10 years prior to the reforms. While in many cases this is a welcomed development, it does raise the question of why the government did not go one step further and abolish the partial defence of provocation altogether. It is argued that, by abolishing provocation and introducing a sentencing guideline framework to support its consideration at sentencing, the NSW courts could better attend to the myriad of contexts within which provoked lethal violence occurs. This approach to reform would also establish NSW as the first Australian jurisdiction in which the abolition of provocation were accompanied by a guiding framework for how provocative conduct should be treated in sentencing for murder.

There will be a definite need, post-reform, to monitor and evaluate whether the proposed sentencing guideline framework is applied in practice as intended, and if so, to what effect. As Bradfield noted in response to the 2003 abolition of provocation in Tasmania, caution and evaluation are important to ensure that no undue sympathy is illegitimately afforded to male intimate partner homicide offenders during the sentencing stage of the court process and that a clear rejection of their claim of provocation is given by members of the judiciary.²⁰¹ Post-reform evaluation is also important, given concerns raised in Victoria that the production of problematic narratives continued into the sentencing stage of the court process following the abolition of provocation, most notably through the operation of the former offence of defensive homicide, rather than in sentencing for murder.²⁰²

²⁰¹ Rebecca Bradfield, 'The Demise of Provocation in Tasmania' (2003) 27 *Criminal Law Journal* 322, 324.

²⁰² Sarah Capper and Mary Crooks, 'New Homicide Laws Have Proved Indefensible', *The Sunday Age* (Melbourne), 23 May 2010, 21; Fitz-Gibbon, *Gender and the Provocation Defence*, above n 48, 181–8; Kate Fitz-Gibbon, 'The Victorian Operation of Defensive Homicide: Examining the Delegitimisation of Victims in the Criminal Court System' (2012) 21 *Griffith Law Review* 555, 563–71.

If NSW is to effectively adopt a model that relocates provocation to sentencing and overcomes the gender bias historically associated with this partial defence, members of the judiciary will be required to take an active role in ensuring that the victim-blaming and gendered narratives associated with the operation of provocation are not merely reproduced in sentencing. As McCarthy argues, it is important that members of the justice system involved in sentencing are proactive in ‘challeng[ing] attitudes that trivialise violence and its impacts’.²⁰³ However, beyond sentencing, it is argued that the accompanying reforms recommended in this article — namely, enhanced jury directions and evidence reforms — will equip the criminal justice system to ensure that the transfer of provocation to sentencing for murder in NSW is a step forward in the law’s response to the gendered nature of homicide.

²⁰³ McCarthy, above n 175, 171.