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Preface to the second edition

The legislation that abolished provocation as a partial defence to murder has been in force for just under four years. As the legislation applies only to homicides committed after 23 November 2005, the first cases under the new law have only recently started trickling through the Supreme Court.

In its review of defences to homicide, the Victorian Law Reform Commission recommended that, rather than raising a partial defence to murder, provocation should simply be taken into account in the sentencing process along with the other relevant circumstances of an offence. However, the Commission left open the question of what approach sentencing courts should take in assessing provocative conduct that is raised in mitigation of sentence under the new law.

The abolition of provocation as a partial defence was motivated by concerns about its inequitable operation, in light of the very different circumstances in which men and women charged with murder typically raised the defense. If the underlying purposes of the legislation are to be achieved, it is imperative that the problems and flaws of the pre-existing law not be transferred from the substantive criminal law into the law of sentencing. Writing in the early part of the twentieth century of the continuing influence of archaic procedures despite extensive law reform in the late nineteenth century, the eminent historian F.W. Maitland famously observed that: ‘[t]he forms of action we have buried, but they still rule us from their graves’.

In the transformation of the law of provocation, the past should not continue to influence the present in undesirable ways and the partial defence should not re-emerge in a new guise as a particular variety of murder. Many of the old assumptions will need to be discarded and a new normative framework must be developed. To date, provocation as an independent sentencing factor has not loomed large in sentencing law or theory. Outside of provocation manslaughter it has received only passing reference in judgments and sentencing texts, mostly in the context of non-fatal assaults.

For this reason we published the first edition of this research paper in which we analysed how provocation might be considered as a sentencing factor in offences against the person. As demand for the research paper remains high, the Sentencing Advisory Council has decided to republish it.

The research paper has not been updated to reflect developments in the common law since it was first published. However, the new edition has a number of additional features, including a comprehensive legal index and an enlarged fold-out version of the key graph in the paper.

The full impact on sentencing outcomes of the reforms initiated by the Victorian Law Reform Commission for offenders who otherwise might have been convicted of provocation manslaughter is still uncertain and will only become apparent in years to come. Some of these offenders will now face sentencing for murder. Others may be convicted of defensive homicide or other categories of manslaughter. Whatever the context in which provocation is raised in sentencing for homicide as well as other offences against the person, we hope that this paper continues to contribute to the development of a more principled and sophisticated jurisprudence that appropriately reflects changed community standards and expectations.
1. Background

1.1.1 On 5 October 2005, the Attorney-General introduced legislation abolishing provocation as a partial defence to murder in Victoria.\(^1\) The Crimes (Homicide) Act 2005 (Vic) (‘the 2005 Act’) came into force on 23 November 2005. Prior to the 2005 Act the partial defence of provocation had operated to reduce murder to manslaughter if the following criteria were established:

- there was evidence of provocative conduct by the victim;
- the defendant lost self-control as a result of that provocation;
- the provocation was such that it was capable of causing an ordinary person to lose self-control and form an intention to cause serious bodily harm or death; and
- the provocation must have actually deprived the defendant of self-control and the defendant must have acted while so deprived and before his or her passion had cooled.\(^2\)

1.1.2 The 2005 Act implemented the recommendations of the Victorian Law Reform Commission (VLRC) report, Defences to Homicide, Final Report (‘the VLRC Homicide Report’).\(^3\) The report made 56 recommendations, including that the partial defence of provocation be abolished and that the relevant circumstances of an offence, including provocation, instead be taken into account in the sentencing process.\(^4\) Recommendation 50 provides that ‘[i]n sentencing an offender for murder in circumstances where the accused might previously have been convicted of manslaughter on the grounds of provocation, judges should consider the full range of sentencing options’. Recommendation 51 proposes that ‘[w]hen an appropriate case arises, the Court of Appeal should consider indicating the principles which should apply in sentencing an offender who has been subjected to abuse by the deceased and how these should be taken into account in sentencing the offender’.\(^5\) The VLRC’s recommendation that provocation be abolished as a partial defence was motivated by concerns about the inequitable operation of the doctrine as a partial defence to murder, in light of the very different circumstances in which men and women charged with murder typically raise the defence.\(^6\)

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1 Crimes (Homicide) Bill 2005 (Vic). Unlike its original conception, the modern defence of provocation was formulated as a partial excuse, rather than a partial justification (see further [2.1.3]–[2.1.5] for a discussion of the distinction between justification and excuse). Although there is technically a difference between a partial defence and a partial excuse, they are often both described as ‘defences’. For this reason in the remainder of this paper we use the terms ‘partial defence’ and ‘partial excuse’ interchangeably.


4 Ibid 58 (Recommendation 50).

5 Ibid 293 (Recommendations 50 and 51).

1.1.3 This paper is intended as an examination of some of the sentencing policy issues and principles raised by the abolition of the partial defence of provocation in light of the VLRC Homicide Report. Although our main focus is on considering provocation in sentencing offenders convicted of murder as a result of the new law, this discussion is also relevant to provocation as a sentencing factor in relation to offenders convicted of the new offence of defensive homicide or of manslaughter, as well as those found guilty of non-fatal offences against the person. With the abolition of the partial defence, the concept of provocation will play a different role in the trial process. It will be considered along with other sentencing factors (such as remorse, youth, prospects of rehabilitation and future risk) that the court must take into account in arriving at the appropriate and proportionate sentence. However, rather than being partly justified or excused on the uncertain, outdated or unacceptable doctrinal considerations that underpinned substantive provocation, sentencing provocation will need to be justified on its own terms within the broad framework of sentencing theory. The relevant matters to be considered will be found in the Sentencing Act 1991 (Vic), rather than the Crimes Act 1958 (Vic), and in common law sentencing principles rather than the common law of crime.

1.1.4 The changes brought about by the 2005 Act may be profound. If the underlying purposes of the 2005 Act are to be achieved, it is imperative that the problems and flaws of the pre-existing law not be transferred from the substantive criminal law into the law of sentencing. Writing in the early part of the twentieth century of the continuing influence of archaic procedures despite extensive law reform in the late nineteenth century, the eminent historian F.W. Maitland famously observed that: ‘[t]he forms of action we have buried, but they still rule us from their graves’. In the transformation of the law of provocation, the past should not continue to influence the present in undesirable ways and the partial defence should not re-emerge in a new guise as a particular variety of murder. Many of the old assumptions will need to be discarded and a new normative framework must be developed.

1.1.5 To date, provocation as an independent sentencing factor has not loomed large in sentencing law or theory. Outside of ‘provocation manslaughter’ (also referred to as ‘voluntary’ or ‘intentional manslaughter’) it has received only passing reference in judgments and sentencing texts, mostly in the context of non-fatal assaults. The following analysis of how provocation might be considered as a sentencing factor in offences against the person is not intended to create a special set of principles, rules or practices for murderers who have killed on account of some grievance against their victim. What it does intend to do is to reconsider which, if any of the previous substantive elements of provocation might, or, more probably, might not be relevant in the sentencing process and how they could be articulated, incorporated or discarded, as the case may be.

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7 In this paper, the partial defence of provocation will be referred to as ‘substantive provocation’ (as distinct from provocation as a sentencing factor).
8 In the period from 1998–99 to 2006–07, 20 people were convicted of provocation manslaughter; 155 were convicted of ‘other’ categories of manslaughter (including 140 people convicted of unlawful and dangerous act (UDA) manslaughter) and 266 people were convicted of murder. However, for a number of those convicted of murder or other categories of manslaughter, provocation had been raised as a partial defence in their trial. Under the new law it is possible that offenders convicted of murder, defensive homicide and other categories of manslaughter (such as UDA manslaughter) will raise provocation as a mitigating factor in their sentencing hearing.
Part 2 of the Sentencing Act 1991 (Vic) (‘the Sentencing Act’) sets out the principles governing the sentencing of offenders in Victoria. Section 5(1) provides that the only purposes for which a sentence may be imposed are:

(a) to punish the offender to an extent and in a manner which is just in all the circumstances; or
(b) to deter the offender or other persons from committing offences of the same or a similar character; or
(c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or
(d) to manifest the denunciation by the court of the type of conduct in which the offender engaged; or
(e) to protect the community from the offender; or
(f) a combination of two or more of those purposes.10

Section 5(2) sets out the factors that a court must have regard to in sentencing an offender:

(a) the maximum penalty prescribed for the offence; and
(b) current sentencing practices; and
(c) the nature and gravity of the offence; and
(d) the offender’s culpability and degree of responsibility for the offence; and
(daa) the impact of the offence on any victim of the offence; and
(da) the personal circumstances of any victim of the offence; and
(db) any injury, loss or damage resulting directly from the offence; and
(e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so; and
(f) the offender’s previous character; and
(g) the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances.11

Sentencing is a complex and evolving process. While the list of factors (or categories of factors) set out in section 5 appears short, it is expressed broadly enough to include a wide range of considerations, including those relating generally to the offence, the offender and the interests of the criminal justice system more broadly. The shift in focus from substantive provocation to provocation as a sentencing factor changes not only its weight as an issue in the trial and sentencing of the offender, but also the application of the rules of evidence.12 Because the Sentencing Act does not specifically deal with provocation as a matter to be taken into account, its relevance in sentencing must be inferred from the other statutory sentencing factors and from the common law of sentencing.

10 Sentencing Act 1991 (Vic) s 5(1).
11 Sentencing Act 1991 (Vic) s 5(2).
12 See Section 5.3 below.
1.1.9 We argue that there are two fundamental issues that arise from the abolition of the partial defence. First, there is likelihood that, unless the courts radically alter their conception of the offence of murder, the abolition may result in a significant (upward) departure from previous sentencing practices for provoked killers (who would previously have been found guilty of provocation manslaughter), because of the increased maximum penalty (life imprisonment) and the stigma associated with the offence of murder. Related to this is the possibility that the lower end of the sentencing range for murder may experience a downward departure to reflect the incorporation of ‘provoked murderers’. Secondly, we argue that—as provocation in sentencing is directly relevant to an offender’s culpability for an offence (which in turn is relevant to the overall seriousness of the particular offence which has been committed)—rather than being concerned with old, formalistic pre-requisites for the partial defence, theories of culpability should guide the assessment of provocation in sentencing. Although the sentencing range may be wide, we argue that in cases involving homicide, attempted homicide, and serious non-fatal offences against the person, serious provocation should be capable of reducing an offender’s culpability and consequently mitigating his or her sentence. The more grave the offence that has been committed by the offender, the higher the degree of provocation which is likely to be required to justify a reduction in the offender’s culpability.

1.1.10 Under this approach, we argue that the crucial questions for a court will not relate to the defendant’s loss of self-control or whether an offender’s behaviour was consistent with that of an ‘ordinary person’ placed in a similar situation. Instead, to determine whether the provocation warrants a reduction in the offender’s culpability, the court should consider the extent to which the victim’s actions gave the offender a justifiable sense of being wronged and the relationship, or proportionality, between the offence and the provocation. For homicide, attempted homicide and the most serious non-fatal offences against the person, only serious provocation should be found to have given the offender a justifiable sense of having been wronged. For less serious non-fatal offences against the person, a lower degree of provocation may be required to meet this standard. However, trivial conduct by the victim should not be found capable of justifying the offender’s sense of aggrievement.

1.1.11 Adopting the approach of the Victorian Law Reform Commission, we argue that conduct that arises out of the victim exercising his or her right to equality, such as the right to personal autonomy (including the right to form relationships, work and assert his or her independence), should not provide justification for an offender’s sense of having been wronged. Under this approach, the personal circumstances of an offender may be relevant to assessing the gravity of provocation. However, the question of whether an offender has a justifiable sense of being wronged by the provocation should be evaluated in a manner consistent with contemporary societal notions of equality.

1.1.12 The structure of this paper follows closely the approach that the Sentencing Act suggests as an appropriate judicial methodology. Following a brief examination of the partial defence of provocation, we examine first how provocation in homicide relates to the purposes of sentencing and then examine, in turn, the various sentencing factors identified as relevant in the Act.

1.1.13 The views contained in this Research Paper are the views of the authors and do not necessarily reflect the views of the Sentencing Advisory Council or its individual members.

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13 See further [7.3.1]–[7.3.10].
14 As set out in section 5(2)(d) of the Sentencing Act 1991 (Vic).
2. The partial defence of provocation

2.1. A brief history

2.1.1 The doctrine of provocation emerged as a partial defence to murder in sixteenth- and seventeenth-century England when murder attracted a mandatory death penalty and ‘drunken brawls and fights arising from “breaches of honour”’ were commonplace. At that time, honour was an important component of English society. An affront to a man’s honour such as an insult or attack necessitated retaliation; a failure to so retaliate was viewed as cowardly. The precursor to provocation was the concept of ‘chance medley’ killings—killings done ‘on the sudden’ by persons ‘in the time of their rage, drunkenness, hidden displeasure, or other passion of mind’. The Statute of Stabbing of 1604 distinguished such killings from ‘wilful murder’ as they lacked the ‘malice aforethought’ for murder. However under the Act those who killed by stabbing in such circumstances were still liable to suffer death as in case of wilful murder. James Stephen, writing in 1883, infers from this Act that, as the law stood prior to its enactment, ‘it was considered that a person who killed another “on the sudden”, even without provocation or on any slight provocation, was guilty of manslaughter only’. Under the Statute of Stabbing (1604) offenders who killed by stabbing were only spared the death penalty if the victim had first struck the offender or had his or her weapon drawn. James Stephen writes that this ‘produced so harsh a result that the judges would not apply it’.

2.1.2 Through the concept of chance medley killings, the doctrine of provocation emerged and was firmly entrenched as a partial defence to murder by the early eighteenth century, by which time distinct categories of provocation had been identified. The law of provocation, as it stood until recently, stems from R v Mawgridge, in which Lord Holt CJ set out four categories of provocation: (i) a grossly insulting assault; (ii) witnessing a person attacking a friend; (iii) seeing a person being unlawfully deprived of liberty; and (iv) catching a man in the act of adultery with

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17 The Statute of Stabbing (1604) 2 Jas 1, c8, 84. Chance medley killings were described in 1817 as those done ‘by chance (without premeditation) upon a sudden brawle, shuffling or contention’: Edwardo Coke The Third Part of the Institutes of the Laws of England, Concerning High Treason, and other Pes of the CROWN and Criminal Causes (1817), 56.
18 The Statute of Stabbing (1604) 2 Jas 1, c8, II. (Cf. The Law Reform Commission (Ireland), Consultation Paper on Homicide: The Plea of Provocation LRC CP 27–2003 (2003) [1.06]). The Statute of Stabbing (1604) provides:

That every person and persons which … shall stab or thrust any person or persons that hath not then any weapon drawn, or that hath not then first stricken the party which shall so stab or thrust, so as the person or persons so stabbed or thrust shall thereof die within the space of six months then next following, although it cannot be proved that the same was done of malice forethought, yet the party so offending, and being thereof convicted by verdict of twelve men … shall be excluded from the benefit of his or their clergy, and suffer death as in case of wilful murder.

(Emphasis added): at 85.
20 The Statute of Stabbing (1604) 2 Jas 1, c8, II. In 1883 James Fitzjames Stephen construed this as providing that ‘no provocation except drawing a weapon or actual striking could be sufficient provocation to reduce killing by a stab from murder to manslaughter’: Stephen (1883), above n 19, 48.
21 Ibid.
22 R v Mawgridge (1707) 84 ER 1107.
one's wife. Insulting words or gestures were not regarded as sufficiently serious to constitute provocation at law for the purposes of the partial defence. In its original conception, provocation was a partial justification rather than a partial excuse. The focus was on the wrongfulness of the actions of the victim and the defendant's justified response to the invasion of his or her rights. This explains why, historically, the killing of a sexual rival caught in the act of committing adultery with one's wife was seen as a proper basis for the defence, while the killing of one's wife for infidelity was not.

2.1.3 The evolution of the modern law of provocation in the early nineteenth century saw the defendant's loss of self-control gain prominence as a component of provocation. The focus was no longer on the wrongfulness of the victim's act, but rather the loss of self-control of the defendant in the face of such provocation. Consequently, the victim's wrongdoing became subsidiary to the question of whether an ordinary person faced with provocation of that gravity might have similarly lost self-control and formed an intention to kill or to cause really serious injury. This signalled a shift in the rationale for provocation as a partial excuse, rather than a partial justification:

The partial justification rationale is based on the theory that the killing was to some extent warranted by words said or acts done by the provoker to the accused. The idea is that a portion of the responsibility for the killing is transferred to the deceased on the grounds that he or she was partially to blame for his or her own demise. In contrast, the partial excuse rationale is based on the assumption that the accused should not be held fully accountable for his or her actions by reason of loss of control caused by provocation.

2.1.4 The changed rationale to one of partial excuse was illustrated in R v Kirkham. Justice Coleridge emphasised that the main purpose of the doctrine of provocation was to make provision for human frailty, stating that 'there are certain things which so stir up in a man's blood that he can no longer be his own master; the law makes allowances for them … [when] what he did was done in a moment of overpowering passion, which prevented the exercise of reason'. In 1869, in R v Welsh, the concept of the 'reasonable man' was introduced as a benchmark for measuring the defendant's reaction to the provocation. These nineteenth century developments are replicated in the modern test for provocation as a partial defence.

23 R v Mawgridge (1707) 84 ER 1107, 1114–1115. Lord Holt CJ described these categories in the following way:

First, if one man upon angry words shall make an assault upon another, either by pulling him by the nose, or filliping upon the forehead, and he that is so assaulted shall draw his sword, and immediately run the other through, that is but manslaughter; for the peace is broken by the person killed, and with an indignity to him that received the assault … Secondly, if a man's friend be assaulted by another, or engaged in a quarrel that comes to blows, and he in the vindication of his friend, shall on a sudden take up a mischievous instrument and kill his friend's adversary, that is but manslaughter … Thirdly, if a man perceives another by force to be injuriously treated, pressed, and restrained of his liberty, though the person abused doth not complain, or call for aid or assistance, and others out of compassion shall come to his rescue, and kill any of those that shall so restrain him, that is manslaughter … Fourthly, when a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of a man, and adultery is the highest invasion of property.

At 1114–1115 (citations omitted). Of the last category, Lord Holt CJ commented that 'a man cannot receive a higher provocation': at 1115.

24 R v Mawgridge (1707) 84 ER 1107, 1112. Lord Holt CJ held that:

First, no words of reproach or infamy, are sufficient to provoke another to such a degree of anger as to strike, or assault the provoking party with a sword, or to throw a bottle at him, or strike him with any other weapon that may kill him; but if the person provoking be thereby killed, it is murder … Secondly, as no words are a provocation, so no affronting gestures are sufficient.

At 1112.

25 The Law Reform Commission (Ireland) (2003), above n 18, [2.02]. See also Victorian Law Reform Commission (VLRC) Defences to Homicide: Options Paper (2003), n 327: 'When provocation is treated as an “excuse”, its foundation is seen to be the abnormal mental condition of the accused which excuses their behaviour to some extent. By contrast, when provocation is treated as “justified”, its foundation is seen to be an appropriate response to the victim’s behaviour."

26 (1837) 8 Car & P 115.
27 R v Kirkham (1837) 8 Car & P 115, 117.
28 (1869) 11 Cox CC 336.
2.1.5 The VLRC Homicide Report describes the modern rationale for the partial defence as follows: provocations are generally justified on the basis that the accused could not properly control his or her behaviour in the circumstances, and an ordinary person might react similarly. Passion or anger is seen to unseat reason, rather than being in accordance with it. This is why provocation is often referred to as a ‘concession to human frailty’. People are seen as suffering from a wave of anger which overcomes their capacity to behave in a normal law-abiding fashion. A person who kills due to a sudden loss of self-control after being provoked is regarded by some as being less morally culpable than someone who kills ‘deliberately and in cold blood’.29

2.1.6 The partial defence of provocation was also related to the operation of the death penalty. One reason for its development was to spare ‘hot blooded’ killers from the severity of a mandatory death sentence.30 In 1975, with the abolition of the death penalty for murder in Victoria, one of the primary rationales for the partial defence of provocation was removed.31

2.1.7 The VLRC Homicide Report recommended the abolition of provocation as a partial defence to murder, concluding that its continued existence as a partial justification for killings committed in anger was no longer morally acceptable.32 The VLRC argued that contemporary community standards require people to control their anger and not to kill, even in circumstances where they may have been provoked. The VLRC rejected arguments that provocation is a necessary concession to human frailty, asserting that a murder conviction is warranted for a person who kills in response to provocation because of the gravity of the loss of a life and the existence of the defendant’s intention to kill or to seriously injure the victim.33

2.1.8 The VLRC found that gender bias existed in the way the partial defence of provocation was interpreted and applied, particularly in relation to homicides in the context of intimate sexual relationships.34 The VLRC noted that when men raise provocation in this context the conduct said to be provocation was often that their partner had been unfaithful or taunted them about their sexual prowess. However such allegations, they argued, usually masked the fact that the man was motivated by jealousy and the need to be in control, and such homicides often occurred when his partner was exercising (or attempting to exercise) her right to leave the relationship.35 In contrast, many women who raised provocation in the context of intimate sexual relationships had been subjected to physical or sexual violence by their partners.36 The need to deal with gender bias was a significant factor in the VLRC’s recommendation to abolish provocation as a partial defence.37

32 VLRC Homicide Report (2004), above n 3, [2.23], [2.95].
33 Ibid [2.97].
34 Ibid xxv, [2.18]–[2.25], [2.28], [7.5]. See also: Morgan (2003), above n 6, 21–29; Morgan (1997), above n 6, 247–250, 255–257.
36 See further Appendix 3 and [8.10.37]–[8.10.53] below.
37 VLRC Homicide Report (2004), above n 3, [7.5]. See further [2.2.3], [8.4.14]–[8.4.17], [8.6.12], [8.10.38], [8.10.54]–[8.10.60].
2.2 The status of provocation in Australia

Victoria and Tasmania

2.2.1 In 2005, Victoria became the second Australian jurisdiction to abolish the partial defence of provocation with the passage of the Crimes (Homicide) Act 2005 (Vic).38 Tasmania had done so in 2003 with the enactment of the Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas).39 As is the case in Victoria, provocation can now be taken into account in Tasmania only as a sentencing factor.

2.2.2 At the launch of the Crimes (Homicide) Bill on 4 October 2005 the Attorney-General said:

the two most significant areas of our reform are the defences of provocation and self-defence. Both these defences evolved in very specific contexts, steeped in misogynist assumptions about what response was acceptable when confronted with an assault on one’s honour, on the one hand, and one’s personal safety on the other …

Provocation will no longer be a partial defence to murder in Victoria. This Government will not support a mechanism that, implicitly, blames the victim for a crime—one that has been relied upon by men who kill partners or ex-partners out of jealousy or anger; by men who kill other men who they believed were making sexual advances towards them; and even by men who kill their own daughters because they believe they have dishonoured them. We cannot retain a defence that condones and perpetuates male aggression. People who kill having lost self-control in this manner will now, if found guilty, be convicted of murder rather than manslaughter; the question of provocation simply taken into account, if relevant, alongside a range of other factors in the sentencing process.40

2.2.3 Two days later, in the second reading speech, the Attorney-General referred to the VLRC Homicide Report and commented:

The Commission found that the law of provocation has failed to evolve sufficiently to keep pace with a changing society. By reducing murder to manslaughter, the partial defence condones male aggression towards women and is often relied upon by men who kill partners or ex-partners out of jealousy or anger. It has no place in a modern, civilised society.41

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38 The 2005 Act introduced a new section 3B into the Crimes Act 1958 (Vic) which provides that “the rule of law that provocation reduces the crime of murder to manslaughter is abolished”.
39 This Act commenced operation on 9 May 2003.
40 The Attorney-General, the Honourable Rob Hulls, Speech at the Crimes (Homicide) Bill launch, Melbourne, 4 October 2005.
41 Victoria, Parliamentary Debates, Legislative Assembly, 6 October 2005, 1349 (Rob Hulls, Attorney-General).
2.2.4 In addition to the abolition of provocation, other amendments made by the Crimes (Homicide) Act 2005 (Vic) included replacing the common law defence to murder of self-defence with a statutory defence of self-defence, creating an alternative offence of defensive homicide, and guiding the approach to homicide cases in circumstances of family violence.

2.2.5 It is not certain what impact these other changes might have on provocation homicide cases. They may combine to change the profile of those offenders who are ultimately convicted of murder and who raise provocation as a sentencing factor. For example, it is not known how the statutory definition of self-defence (in cases other than those involving family violence) will be interpreted by courts. If the definition is found to be stricter than self-defence at common law, it may be that offenders who might previously have been acquitted of murder on the grounds of self-defence may be found guilty of murder or defensive homicide. This might widen the types of murder cases in which provocation is raised as a sentencing factor.

Other Australian jurisdictions and New Zealand

2.2.6 For the time being, provocation remains a partial defence to murder in all other Australian jurisdictions, although it has recently been reviewed in Western Australia, redrafted in the

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42 Section 9AC of the Crimes Act 1958 (Vic) provides that: ‘A person is not guilty of murder if he or she carries out the conduct that would otherwise constitute murder while believing the conduct to be necessary to defend himself or herself or another person from the infliction of death or really serious injury’. Note 1 to section 9AC provides: ‘See section 4 for alternative verdict of defensive homicide where the accused had no reasonable grounds for the belief’. Note 2 provides: ‘This section does not apply where the response is to lawful conduct—see section 9AF’. Note 3 provides: ‘See section 9AH as to belief in circumstances where family violence is alleged’. Section 9AE sets out the defence to manslaughter of self-defence.

43 Section 9AD of the Crimes Act 1958 (Vic) sets out the new offence of defensive homicide: ‘A person who, by his or her conduct, kills another person in circumstances that, but for section 9AC [which sets out the defence of self-defence], would constitute murder, is guilty of an indictable offence (defensive homicide) and liable to level 3 imprisonment (20 years maximum) if he or she did not have reasonable grounds for the belief referred to in that section’. The Note to section 9AD provides: ‘See section 9AH as to reasonable grounds for the belief in circumstances where family violence is alleged’.

44 Section 9AH of the Crimes Act 1958 (Vic) makes provision for cases involving allegations of family violence such as allowing self-defence in circumstances where the harm is not immediate or the response involves the use of excessive force. It also sets out evidence that may be relevant in such cases.

45 The new statutory test for self-defence has been considered in two Victorian cases to date on the issue of whether or not it is applicable to the offence of attempted murder: R v Pepper (Pepper) [2007] VSC 234 (Unreported, Whelan J, 29 June 2007) and DPP v (MacAllister) [2007] VSC 315 (Unreported, Teague J, 4 September 2007) (MacAllister). In R v Pepper, Justice Whelan commented that ‘Whilst it is true that the new Act did not expressly abolish the common law of self-defence in relation to murder, in the way in which it did the rule of law relating to provocation, it nevertheless seems to me to be clear that it was Parliament’s intention to codify the law of self-defence in relation to homicide and that Parliament did implement that intention in the new Act: R v Pepper [2007] VSC 234 (Unreported, Whelan J, 29 June 2007) [44]. In both cases the court held that the 2005 changes did apply to the offence of attempted murder, effectively creating an offence of attempted defensive homicide: (see further Pepper [47]; MacAllister [7]).

46 Crimes Act 1900 (ACT) s 13; Crimes Act 1900 (NSW) s 23; Criminal Code Act 1983 (NT) s 158; Criminal Code Act 1899 (Qld) s 304; Criminal Code Act Compilation Act 1913 (WA) s 281.

47 The Western Australian Law Reform Commission received a reference on Homicide on 26 April 2005. In September 2007 the Commission released its Final Report reviewing the law of homicide: Law Reform Commission (Western Australia) (2007), above n 31. The Commission’s recommendations included that the partial defence to murder of provocation be repealed, but only if the mandatory penalty of life imprisonment for murder is replaced with a presumptive sentence of life imprisonment: at 222 (Recommendation 29). The Commission also recommended a review of the complete defence of provocation (to offences other than murder with assault as an element) to consider whether it should be retained: at 222–223. The Commission’s provisional view was that the complete defence of provocation should be abolished ‘because the availability of full sentencing discretion for offences other than murder clearly enables any mitigating factors to be taken into account’: at 223.
Provocation in Sentencing

Northern Territory and is currently under review in Queensland. The New Zealand Law Commission has also recently recommended that the partial defence of provocation be abolished, that defendants who would otherwise have relied on the partial defence be convicted of murder and that ‘evidence of alleged provocation in the circumstances of their particular case should be weighed with other aggravating and mitigating factors as part of the sentencing exercise’.

In South Australia, provocation is governed by the common law while in the remaining Australian jurisdictions the governing principles are found in statute. Despite differences in the statutory definitions of provocation there is a large degree of consistency across the Australian jurisdictions that retain the partial defence.

Provocation is also available as a complete defence to some non-fatal offences in a number of Australian jurisdictions. In Queensland and Western Australia, provocation is a complete defence to assault (although the Law Reform Commission of Western Australia has recently recommended a review of the complete defence of provocation to non-fatal assaults). Until recently, provocation was a complete defence to any offence in the Northern Territory, provided the conduct of the defendant did not cause and was not intended and/or likely to cause death or grievous harm. However this provision was repealed in late 2006 and provocation now operates only as a partial defence to murder in the Northern Territory.

Queensland and Western Australia (and the Northern Territory until 3 November 2006) also excuse a defendant who uses ‘such force as is reasonably necessary’ to prevent a person from repeating an act or insult of such a nature as to be provocation to him or her for an assault, provided that the force used is not intended or likely to cause death or grievous bodily harm.

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48 In 2006 the partial defence of provocation under s 34(2) of the Criminal Code Act 1983 (NT) was repealed and a redrafted partial defence of provocation inserted as section 158 of the Criminal Code Act 1983 (NT): Criminal Reform Amendment Act (No 2) 2006 (NT) ss 8, 17.


52 Criminal Code Act 1899 (Qld) s 269 (defence), 268 (definition of provocation).

53 Criminal Code Act Compilation Act 1913 (WA) s 246 (defence), 245 (definition of provocation).

54 See further note 47 in relation to the Law Reform Commission of Western Australia’s review.

55 Criminal Code Act 1983 (NT), s 34(1) (repealed). Section 34 was repealed by section 8 of the Criminal Reform Amendment Act (No 2) 2006 (NT) which came into force on 3 November 2006. This Act also made changes to the partial defence to murder of provocation (see further above n 48).

56 Criminal Reform Amendment Act (No 2) 2006 (NT), s 8.

57 Criminal Code Act (NT) s 34(3) (repealed: see further above n 55); Criminal Code 1899 (Qld) s 270; Criminal Code Act Compilation Act 1913 (WA) s 247.
3. Provocation and the Sentencing Act

3.1.1 The transformation of provocation from a partial defence reducing murder to manslaughter into purely a sentencing consideration raises the question of how provocation is to be understood as a sentencing factor. As provocation is not expressly provided for in the Victorian Sentencing Act, an understanding of its relationship with the purposes of sentencing and factors that a sentencing court must have regard to in sentencing an offender is crucial to understanding the principles that should guide the assessment of provocation.

3.1.2 Section 5(1) of the Sentencing Act provides that the only purposes for which a sentence may be imposed are:

(a) to punish the offender to an extent and in a manner which is just in all of the circumstances; or
(b) to deter the offender or other persons from committing offences of the same or a similar character; or
(c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or
(d) to manifest the denunciation by the court of the type of conduct in which the offender engaged; or
(e) to protect the community from the offender; or
(f) a combination of two or more of those purposes.58

3.1.3 Section 5(2) sets out the factors that a court must have regard to in sentencing an offender, including:

(a) the maximum penalty prescribed for the offence; and
(b) current sentencing practices; and
(c) the nature and gravity of the offence; and
(d) the offender’s culpability and degree of responsibility for the offence; and
(daa) the impact of the offence on any victim of the offence; and
(da) the personal circumstances of any victim of the offence; and
(db) any injury, loss or damage resulting directly from the offence; and
(e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so; and
(f) the offender’s previous character; and
(g) the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances.59

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58 Sentencing Act 1991 (Vic) s 5(1). See further Chapter 4.
3.1.4 The *Victorian Sentencing Manual* explains the link between sentencing factors and purposes:

The sentencer must balance the various purposes for which a sentence may be imposed in light of all the factors which make the instant offence more or less serious and all the factors which indicate that the offender should, if possible, be rehabilitated.60

3.1.5 In Chapter 4 of this paper we look at how provocation may affect the weight to be given to the different purposes of sentencing. In Chapters 5–9 we look at the factors to which a sentencing court must have regard. As provocation is not expressly provided for in the list of sentencing factors in the *Sentencing Act*, these Chapters look at how its relevance in sentencing, and the principles that should govern its consideration, can be inferred from the existing sentencing factors. We argue that, rather than being one of the many considerations covered under the umbrella of ‘mitigating factors’ under the *Sentencing Act*, provocation is directly relevant to an offender’s culpability for an offence, which is in turn significant to the subjective seriousness of the offence which has been committed.

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4. Sentencing purposes

4.1 Introduction

4.1.1 The sentencing guidelines provided by the Sentencing Act 1991 (Vic) set out the various purposes of sentencing that a court must take into account. The justifications for sentencing include just punishment (or retribution), deterrence, both general and specific, rehabilitation, denunciation and community protection. Although these purposes may be subsumed under the general idea of community protection, they will be given different weight in relation to different offences and the varying circumstances in which crimes can be committed. Section 5(1)(f) of the Sentencing Act provides that a sentencer can impose a sentence for a combination of more than one of these purposes. The relegation of provocation from a partial defence to a sentencing consideration may affect the way that sentencing purposes are applied and balanced in a particular case.

4.1.2 The abolition of substantive provocation means that even in cases in which provocation exists, an offender who kills his or her ‘provoker’ is likely to be convicted of murder, rather than the lesser crime of manslaughter. Murder is considered the most serious crime that comes before the courts in acknowledgement of the sanctity of life.61 Consequently, sentencing purposes such as denunciation, punishment, deterrence and the protection of the community are dominant considerations.62 Mitigating provocation by the victim will be only one of the many factors that will influence the relative weight to be given to purposes such as punishment or rehabilitation. For example, although the prospects of rehabilitation of the provoked killer may be better than the prospects of rehabilitation of a contract killer who has killed someone in ‘cold blood’, in all likelihood rehabilitation will remain a secondary consideration, after punishment and deterrence.

4.2 Just punishment

4.2.1 Section 5(1)(a) of the Sentencing Act states that one of the purposes for which a sentence may be imposed is ‘to punish the offender to an extent and in a manner which is just in all of the circumstances’. Fox and Freiberg describe this as:

a more modern form of retribution that is principally concerned with guiding the allocation of punishment, in accordance with the proposition that the severity of the sanction should be commensurate with the seriousness of the wrong-doing.63

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4.2.2 The concept of ‘just punishment’ or ‘just deserts’ is linked to the subjective seriousness of the crime which has been committed: the ‘severity of punishment should be commensurate with the seriousness of the wrong’. The Report of the Victorian Sentencing Committee published in 1988 described the operation of just punishment in modern sentencing practice:

The principle of just deserts operates on the basis that a sentence is imposed on an offender which is proportionate to:

- The seriousness of the offence;
- The culpability of the offender.

4.2.3 As we explore in Section 8.2 below, provocation is relevant to an offender’s culpability for an offence, which in turn is relevant to the subjective seriousness of the offence which has been committed. Therefore provocation which is of a sufficient degree to justify a reduction in an offender’s culpability is directly relevant to the amount of punishment which will be ‘just’ in a particular case.

4.2.4 The difficulty in balancing sentencing purposes in provocation manslaughter cases where there was both a loss of self-control and an intention to kill or cause really serious injury was discussed by Street CJ in the New South Wales case of R v Hill:

The circumstances leading to the felonious taking of human life being regarded as manslaughter rather than murder can vary infinitely, and it is not always easy to determine in any given case what should be done in the matter of sentence. At the start it should be recognised that the felonious taking of a human life is recognised both in the Crimes Act 1900 and in the community at large as one of the most dreadful crimes in the criminal calendar. The courts have, however … gradually manifested a willingness to recognise factual contexts which provide some basis for understanding the human tragedies that can lead to the taking of a life. The manifestation of this humanitarian tendency is necessarily attended by the utmost caution. It can be seen to be constantly written in the decisions of the courts and in the enactments of the legislature that the taking of a human life is a grave action calling for a correspondingly grave measure of criminal justice being meted out to the guilty party. In a case such as the present, where there is material justifying a degree of understanding and of sympathy towards the appellant, the task of sentencing is particularly difficult. It is necessary to evaluate the demands of the criminal justice system, the expectations of the community at large, the subjective circumstances of the person coming forward for criminal judgment and the interest of society in protecting itself and its members from criminal activity amounting, as in the present case, to the taking of a life.

4.2.5 Broadening the scope of murder to include situations that may previously have been classed as manslaughter may possibly require a recalibration of the notions of what may be regarded as proportionate or commensurate sentences for murder, but much will depend upon how the court views the culpability of an offender who has killed the victim under such circumstances. The future scope of murder and the classes of behaviour that it incorporates may be very much dependant on the application of the new definition of self-defence and the offence of defensive homicide, which should capture some of the cases that might otherwise be uplifted from provocation manslaughter into the category of murder.

66 Loss of self-control is not necessarily an element of provocation in sentencing; see further Section 8.5.
68 Ibid 402.
69 See further Chapter 8 (Culpability).
70 See further [2.2.4]–[2.2.5].
4.3 General deterrence

4.3.1 One of the purposes of sentencing is to use the threat of legal punishment to discourage persons who might find themselves in similar situations to the offender from committing similar crimes (general deterrence).

4.3.2 Although general deterrence is frequently emphasised in homicide cases, in some provocation manslaughter cases under the previous law, sentencers had expressed the view that because the offender had been ‘provoked’, general deterrence may be of less relevance, depending on the circumstances. For example, in R v Okutgen,71 Justice Starke said ‘the impact of general deterrence in a case where a man has acted in the heat of the moment is not as relevant as it may be in the case of a premeditated violent crime’.72 Similarly, in R v Farfalla, Justice Vincent said ‘I consider that whilst the principle of general deterrence should be regarded as possessing less significance in your case, where the jury has not excluded the possibility that you acted under provocation, it should nevertheless be taken into account in the determination of an appropriate sentence’.73

4.3.3 However, in other provocation manslaughter cases under the previous law, general deterrence was given great weight. For example, general deterrence was identified as a highly significant factor in sentencing violent, abusive or controlling offenders who ultimately had killed their partner or former partner, even in cases where the jury had determined that they had killed in response to provocation.74 In R v Ramage,75 (in which the offender was convicted of provocation manslaughter), the sentencing judge emphasised general deterrence on the basis that:

Domestic killings involve the cruel and brutal subjugation of one party to a relationship to the emotional inadequacy and violence of the other. The deliberate taking of another’s life is an act of the utmost gravity and in the domestic context often carries with it not only the tragic and untimely loss of life of the victim but also severe consequential emotional trauma to all those who knew and loved that victim.76

4.3.4 Similarly, under the previous law, where an offender with a history of violent, abusive or controlling conduct towards a partner (or former partner) used a weapon to kill that partner, general deterrence was to be weighed ‘as strongly as possible’.77

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72 Ibid 266 (Starke J). See also: R v Sergeant (1974) 60 Cr App R 74.
73 [2001] VSC 99, [21].
75 [2004] VSC 508 (Unreported, Osborn J, 9 December 2004). See further [8.6.21], [8.10.71], [8.10.76]-[8.10.78].
76 Ibid [49].
4.3.5 There are also examples of sentences for non-fatal offences in which great weight has been given to
general deterrence despite the fact that an offender was provoked. For example, in cases
where an offender is motivated by revenge, general deterrence is likely to retain significant weight
in sentencing the offender, despite the existence of provocation. In DPP v Doncon, the offender
had pleaded guilty to one count of intentionally causing serious injury. He was sentenced to
3½ years’ imprisonment with a non-parole period of 18 months. On a Crown appeal against
sentence, Callaway JA stated:

it may be accepted on the balance of probabilities that the altercation and blow in the dairy … were
the last act in a long history. Although the respondent went home, loaded a weapon, considered
an alternative course of action and returned to the dairy and committed the offence, there was a
sense in which the attack was a sudden reaction to events. So much may be accepted and taken into
account in mitigation, but that is all. It did not mean, as counsel submitted, that this offence was at
the bottom of the scale. Even in cases of homicide where the offence is reduced to manslaughter
by provocation, the killing is usually regarded as being in the worst category of manslaughter. In the
case of assaults falling short of homicide, sight must not be lost of the fact that one of the purposes
of general deterrence in the sentencing process is to deter revenge.

4.3.6 Similarly, where a non-fatal offence against the person is a grossly disproportionate response to
the provocation, there may be considerable emphasis on punishment and general deterrence
in sentencing the offender. In R v Gudgeon, the offender pleaded guilty to recklessly causing
serious injury after ‘glassing’ the victim. The sentencing judge took into account that the incident
was caused by the victim’s provocation but balanced this against the severe assault, stating that:
‘no provocation warrants an attack such as this’ and ‘[t]here is much to be denounced about this
offence and which calls for a sentence which effects deterrence and appropriate punishment’.
The use of a weapon by an offender in other contexts (such as pub fights) is also relevant to an
assessment of the degree to which that offender is an appropriate vehicle for general deterrence,
despite allegations of provocation.

4.3.7 In R v Craddock, it was alleged that the victim had sexually abused the offender when the offender
was a child. Justice Smith said:

General deterrence must not be overlooked and is a weighty consideration in determining the
appropriate sentence. People cannot be allowed to take the law into their own hands as the prisoner
did and exact a revenge for wrongs done to them. The prisoner took it upon himself to impose a
death sentence on Mr Denham, a sentence far in excess of that available under the law.

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79 Ibid [9].
80 R v Aboujaber (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Tadgell, Ormiston and Kenny JJ A, 9 October
1997), 12 (Tadgell JA); R v Manna El-Rahi (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Winneke P,
Brooking and Tadgell JJ A, 19 August 1997).
81 (Unreported, County Court of Victoria, 27 February 2003).
82 Ibid 8.
83 Ibid 10.
84 See further [9.2.2]–[9.2.17] for a discussion of balancing weapon use and provocation.
86 Ibid [23].
4.4 Specific deterrence

4.4.1 Specific deterrence has been defined as the ‘application of a criminal sanction in order to dissuade the offender from repeating his or her offence’. The existence of provocation as an explanation of offending may reduce the weight to be given to specific deterrence. For example in R v Randall, the sentencing judge said:

In terms of specific deterrence, I am satisfied that the death of your mother occurred in circumstances where there was no premeditation on your behalf but rather a sudden loss of self control … I am satisfied that the issue of specific deterrence is of little if any significance in relation to the task I have of sentencing you. I do not consider, on the material before me, that you are a danger to the public, nor does it seem to me that there is a likelihood that you will re-offend after your eventual release from prison.

4.4.2 Conversely, there may be circumstances where the offender’s response to the provocation calls for this sentencing purpose to be ‘emphasised rather than limited’ for example, where an offender responds unreasonably to a minor or imagined provocation or where the response of the offender is disproportionate.

4.4.3 Specific deterrence was emphasised in R v Winter, in which the offender had stabbed his victim once with a large knife that he was carrying in his car during a ‘road rage’ confrontation. In sentencing the offender to seven years’ imprisonment with four years’ non-parole for manslaughter, Justice Osborn emphasised specific deterrence, stating ‘although your lapse in self-control was of short duration, it is apparent that you were not able to exercise appropriate self-control as a driver. It must be brought home to you that presence on the road brings with it a commensurate need for self-control and responsibility’.

87 Fox and Freiberg (1999), above n 63, [3.405].
89 Ibid [44]–[45].
90 Judicial College of Victoria (2005), above n 60, [9.10.3].
91 [2004] VSC 329 (Unreported, Osborn J, 3 March 2004), [31]–[33].
92 Ibid [34]. See further Section 8.5 (Loss of self-control).
4.5 Rehabilitation

4.5.1 Section 5(1)(c) of the Sentencing Act allows a sentencer to impose a sentence to ‘establish conditions within which … the rehabilitation of the offender may be facilitated’. The Victorian Sentencing Manual notes the importance of rehabilitation:

Rehabilitation is an important aspect of punishment and is, if effective, as much in the public interest as deterrence by punishment. The courts must always consider whether the public interest will be best served by a sentence which focuses upon rehabilitation rather than deterrence.93

4.5.2 The community interest served by effective rehabilitation was noted in R v Williscroft,94 in which Justice Starke said:

It is often taken for granted that if leniency for the purpose of rehabilitation is extended to a prisoner when the judge is passing sentence, that this leniency bestows a benefit on the individual alone. Nothing, in my opinion, is further from the truth. Reformation should be the primary objective of the criminal law. The greater the success that can be achieved in this direction, the greater the benefit to the community.95

4.5.3 For offences like murder and serious assaults, rehabilitation is likely to be subsumed by other sentencing purposes such as deterrence and punishment. This was noted by Justice Batt in DPP v Lawrence:96

with an offence as serious as intentionally causing serious injury and particularly with an instance of it as grave as this one, the offender’s youthfulness and rehabilitation, achieved and prospective, whilst not irrelevant in the instinctive synthesis which the sentencing judge must make, were of much less significance than they would have been with a less serious offence. As has been said, youth and rehabilitation must be subjugated to other considerations. They must … take a ‘back seat’ to specific and general deterrence where crimes of wanton and unprovoked viciousness (of which the present is an example) are involved … This is because the offending is of such a nature and so prevalent that general deterrence, specific deterrence and denunciation of the conduct must be emphasised.97

4.5.4 The weight to be given to rehabilitation as a sentencing purpose in a particular case ‘depends upon a consideration of the circumstances of the offence and the circumstances of the offender’:98

in other words on an analysis of the sentencing factors which are relevant in a particular case. Therefore although purposes such as deterrence and punishment are more likely to be emphasised for homicide and other serious offences against the person, there may be cases in which it is appropriate to emphasise the rehabilitation of the offender to reflect the fact that his or her actions were motivated by provocation. This may be particularly so in cases in which an offender of prior good character was subjected to severe provocation by the victim prior to committing the offence. However, provocation by the victim will be only one of the many factors that will influence the relative weight to be given to sentencing purposes such as rehabilitation, and in cases involving death or serious injury, rehabilitation remains more likely to be regarded as a secondary consideration.

93 Judicial College of Victoria (2005), above n 60, [7.7.1].
95 Ibid 303.
97 Ibid 132.
98 Judicial College of Victoria (2005), above n 60, [7.7.2].
4.6 Denunciation

4.6.1 Sentencing also serves a symbolic function. Section 5(1)(d) of the Sentencing Act requires a sentencer to 'manifest the denunciation by the court of the type of conduct in which the offender engaged'. Denunciation has been described in the following terms:

The purpose of denunciation is a symbolic one, often linked with retributivism, by which the court conveys a message from the community to the offender that the conduct is unacceptable. Denunciation, as an expression of public condemnation, has an important role in public confidence in the criminal justice system: justice being seen to be done.99

4.6.2 The denunciatory function of the law may play a more significant role in the sentencing of murderers where the law becomes more normative (that is, expects changes of behaviour) than reflective or accepting of existing behaviours or attitudes (a concession to human frailty). Judicial pronouncements can contribute to the creation of new values where the law changes. The historical rationalisation of the partial defence of manslaughter as a concession to human frailty may carry little or no weight in circumstances where public policy, as articulated in the Attorney-General’s second reading speech, and in the VLRC Homicide Report which preceded it, suggests that particular forms of homicidal conduct are not accepted or tolerated. Where, for example, a court considers that the prevalence of homicides by jealous men calls for the imposition of deterrent and denunciatory sentences in order to maintain strong social barriers against resorting to violence in response to non-violent threats or non-violent harms, it will do so despite the fact that a particular offender’s culpability may be lessened by other factors.100

4.6.3 As with punishment and deterrence, the effect of provocation in a particular case may result in denunciation being viewed as a less important consideration than it might have been had the offender’s actions been unprovoked. However, in homicide cases and other cases involving serious injury caused to a victim, even where there has been serious provocation which greatly reduces an offender’s culpability, it is likely that denunciation will remain a highly relevant purpose to reflect the level of harm caused by the offender. Even in sentencing for less serious non-fatal offences against the person, denunciation of the offender’s violence towards the victim is likely to remain a relevant sentencing purpose, even where the offender was subject to provocation. This may particularly be so in cases where the offender’s conduct is found to have been grossly disproportionate to the level of provocation by the victim.101

100 See further Chapter 8 (Culpability).
101 See further [8.7.1]–[8.7.6] (Proportionality).
4.7 Conclusion

4.7.1 As we have explored in this chapter, where a reduction in an offender’s culpability is justified by provocation in a particular case,¹⁰² this may affect the weight to be given to the various sentencing purposes. For example, it may mitigate the sentence by reducing the weight to be given to deterrence and denunciation and/or increasing the emphasis placed on the offender’s rehabilitation.

4.7.2 However, in the case of serious offences against the person, punishment, deterrence and denunciation are likely to remain significant, even where it is established that the offender’s culpability is reduced by provocation. Where public policy requires normative changes in behaviour, some ‘traditional’ categories of provocation may not lessen an offender’s culpability and consequently may have little or no impact on the weight to be given to sentencing purposes such as punishment, general deterrence and denunciation. For example, men who kill their partners out of jealousy or the desire to control them are likely to face sentences that emphasise punishment, general deterrence and denunciation, despite the fact that the killings may have occurred in circumstances that used to provide scope for provocation to be found to have reduced the offender’s culpability.¹⁰³

¹⁰² See further Chapter 8 (Culpability).
¹⁰³ See further [8.10.54]–[8.10.91].
5. Sentencing factors: an overview

5.1 Sentencing factors under the Sentencing Act

5.1.1 The Victorian Sentencing Act 1991 requires a sentencer to have regard to numerous factors, or categories of factors, in sentencing offenders. Although no particular weight can be accorded to each factor, changes to the maximum penalty and to the notions of culpability may weigh heavily on sentencers’ minds.

5.1.2 The remainder of Chapter 5 looks at the traditional approach to provocation as a sentencing factor and the changes to the onus and standard of proving provocation brought about by the 2005 changes. Chapters 6 and 7 look at the maximum penalty and sentencing practices for murder and manslaughter and analyse the possible implications of the 2005 changes. In Chapter 8 we examine the relevance of individual sentencing factors to assessing the seriousness of a particular offence and the implications of adding provocation to this equation. We argue that, rather than being one of the myriad mitigating factors in the catch-all provision in section 5(2)(g) of the Sentencing Act 1991 (Vic), provocation has particular relevance to the degree of an offender’s culpability for an offence. For this reason, the assessment of provocation should be guided by the same principles that guide the assessment of an offender’s culpability in other circumstances.

5.2 The approach to provocation in sentencing

5.2.1 Traditionally, the consideration of provocation as a sentencing factor has been free of the constraints which were part of substantive provocation. At sentencing, courts have taken a broader, more flexible approach to determining whether there is sufficient provocation in a particular case to justify a reduction in the offender’s sentence.

5.2.2 There are many instances in cases of non-fatal assaults in which provocation, in its non-technical sense, has been taken into account in sentencing. Reflecting this broader understanding of provocation, in R v Okutgen, Justice Starke observed:

I think it is clear enough that the applicant was subjected to considerable provocation. I am using the word ‘provocation’ in the general meaning of that word as it is understood in the English language and not with the special and technical meaning given to it in the law of homicide. Of course, it is well established now that provocation is not a defence to this particular charge.

5.2.3 This broader approach to assessing provocation in sentencing was also discussed in R v Kelly, in which Justice Chernov of the Victorian Court of Criminal Appeal said that:

It is true that the courts have recognised that, in certain circumstances, provocation, in the non-technical sense of the word - that is to say, not in the sense in which it is used in the law of homicide - may constitute

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104 Sentencing Act 1991 (Vic) s 5(2). See further [3.1.3].
105 (1982) 8 A Crim R 262 (CCA Vic) (the offender had been convicted of unlawful wounding).
106 Ibid 264.
a mitigating factor in sentencing considerations … Depending on circumstances, the mere fact that the conduct of the complainant cannot be properly characterised as ‘provocative’ does not necessarily mean that it has less force as a mitigating factor than conduct that can be properly described as ‘provocative’.108

5.2.4 Similarly, in *R v Aboujaber*109 Justice Ormiston commented ‘[h]ere the element of provocation is not to be measured in any prescribed way, as it would be in answer to a charge of murder … It may be conceded that even where a response to provocation exceeds that which may fairly be expected, the sentencing discretion may be tempered by an understanding of the reasons which led to the committing of serious criminal behaviour’.110

5.2.5 The more flexible approach to provocation evident in sentencing for non-fatal assaults was adopted in the first Tasmanian case to consider provocation as a sentencing factor in murder cases under the new law: *Tyne v Tasmania*.111 Justice Blow outlined the approach to be taken in sentencing an offender for murder where provocation is raised as a mitigating factor:

The circumstances that a sentencing judge should take into account in relation to provocation in a murder case include the nature of the provocation, its severity, its duration, its timing in relation to the killing, any relevant personal characteristics of the offender (e.g., in cases of racial abuse), and the extent of the impact of the provocative conduct on the offender. When provocation is taken into account as a mitigating factor for sentencing purposes in relation to a crime other than murder, it is not common for anything to be put to the sentencing judge as to whether an ordinary person would have been deprived of the power of self control, nor as to whether or not there was time for the offender’s passion to cool. Those matters are of course relevant, but the weight to be attached to the provocation can be readily assessed by reference to the factors I have listed. I see no reason why provocation should be dealt with as a mitigating factor any differently in murder cases from the way it is dealt with in other cases.112

5.2.6 It appears that both the VLRC and the Attorney-General intended the abolition of the partial defence of provocation to enable a reformulation and reconsideration of the range of factors that will be taken into account by a judge when offenders are sentenced for murder in circumstances where the partial defence of provocation might once have exposed them to a lower maximum penalty by virtue of reducing murder to manslaughter.113

5.2.7 We argue that in sentencing offenders for murder who previously might have been convicted of provocation manslaughter it should be general theories of culpability, rather than the principles that guided the application of substantive provocation, that should primarily inform the development of a framework against which to assess what types of provocative conduct should, and should not be given weight as mitigating factors in a sentencing context. Determining principles about the examples of provocation that should justify reducing an offender’s culpability will be critical to establishing the relative seriousness of homicide cases in which provocation has been raised in mitigation of sentence. Provocation should only mitigate an offender’s sentence if a reduction in the offender’s culpability for the offence is justified by the nature and degree of the provocation, regardless of whether the same conduct would have afforded the offender a partial defence under the previous law.114

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109 (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Tadgell, Ormiston and Kenny JJA, 9 October 1997).
110 Ibid 9–10 (citations omitted).
111 (2005) 15 Tas R 221. See further [7.2.2]–[7.2.5] for a discussion of the facts of this case.
112 Ibid 229.
113 VLRC Homicide Report (2004), above n 3, [2.94]–[2.100]; The Attorney-General, the Honourable Rob Hulls, Speech at the Crimes (Homicide) Bill launch, Melbourne, 4 October 2005; Victoria, Parliamentary Debates, Legislative Assembly, 6 October 2005, 1349 (Rob Hulls, Attorney-General).
114 See further Chapter 8 (Culpability).
5.3 Onus and standard of proof

5.3.1 The relevance of provocation solely as a sentencing factor has particular implications for the application of the rules of evidence.

5.3.2 With provocation now having uniform application as a sentencing factor for all offences against the person, a threshold question is: Who has the onus of proving that an offender was provoked and to what standard must this be proved? 5

5.3.3 Prior to the 2005 Act, during a trial for murder the issue of provocation had to be left to the jury if, on the version of events most favourable to the defendant which was suggested by the available evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the killing was unprovoked in the relevant sense. 15

5.3.4 The effect of this was that in circumstances in which there was evidence of some specific act or words of provocation resulting in a loss of self-control, from whatever source it emerged, and whether or not the defendant sought to rely upon it, the issue of provocation had to be left to the jury. 16 This meant that provocation could arise even if the defence did not raise it as an issue or did not want it before the jury. 17

5.3.5 Where provocation arose as an issue in the context of a murder trial, the Crown had the legal onus of proof. The defence did not have to prove that the defendant had been provoked in the relevant sense; instead it was a matter that the Crown had to negate beyond reasonable doubt once evidence of provocative conduct had been raised. Thus, the prosecution had to prove beyond reasonable doubt that the victim did not act provocatively towards the defendant, or that the defendant did not lose self-control as a result of that provocation, or that an ordinary person, faced with provocation of that gravity, could not have lost self-control and acted as the defendant did (forming an intention to kill or to seriously injure the victim). 18

5.3.6 In provocation cases under the previous law, a jury reached a verdict as to whether the offender was guilty of provocation manslaughter or murder depending on their conclusion as to whether the offender had been ‘provoked’ in the technical sense required. Consequently, the jury was responsible for determining whether the victim had engaged in the alleged conduct and—applying the test for provocation—whether this conduct was sufficient to reduce the offender’s culpability to the extent necessary to find him or her guilty of the lesser crime of manslaughter. Although a conviction for provocation manslaughter reflected the defendant’s reduced culpability because of the loss of self-control as a result of the provocation, 19 it did not alter the fact that the defendant had intended to kill or cause really serious injury to the victim, intention being only one aspect of culpability. 20 The extent to which provocation was perceived to decrease the level of an offender’s culpability, and

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115 Stingel v The Queen (1990) 171 CLR 312, 334.

116 ‘Now it is well-established by a line of authority … that if the defence of provocation to a charge of murder is open on the evidence, the trial judge should leave it to the jury, no matter what course is followed by the accused’s counsel or whether the defence was actually raised during the trial’: R v Thorpe [1999] 1 VR 326, 333.


118 Masciantonio v The Queen (1995) 183 CLR 58; Moffo v The Queen (1977) 138 CLR 601; R v Thorpe (No 2) [1999] 2 VR 719.


consequently the seriousness of the offence, was broadly reflected in the maximum penalties available for manslaughter and murder, being respectively 20 years’ imprisonment and life imprisonment.

5.3.7 In contrast, when it comes to sentencing, the sentencing judge is required to determine the facts that will form the basis of sentence. There is no general requirement that the sentencing judge must sentence an offender on a view of the facts most favourable to the offender. Provocation is likely to be raised by the defence as a factor in mitigation of the offender’s sentence, in which case the defence will have the onus of proving, on the balance of probabilities, that the offender was provoked.

5.3.8 The law governing aggravating and mitigating factors in sentencing in Victoria is set out in \( R \text{ v Storey} \). A specially convened Full Bench of the Victorian Court of Appeal held that while aggravating factors (factors adverse to the offender) must be established by the prosecution beyond reasonable doubt, mitigating factors must be established by an offender only on the balance of probabilities. Where aggravating factors are not established beyond reasonable doubt the sentencing judge must determine an outcome on the basis that those aggravating factors are not present.

5.3.9 Whether a particular fact is mitigating or aggravating ultimately depends on the use to be made of that fact by the sentencing judge:

The test is not what tag can or should be applied to any particular fact but what use the judge proposes to make of the fact in relation to the offender. If it is a use adverse to the interests of the offender then proof beyond reasonable doubt is required; if it is a use in favour of the offender then proof on the balance of probabilities will suffice.

5.3.10 In \( T \text{yne v Tasmania} \), Justice Blow described the implications of abolishing the partial defence of provocation on the onus of proving provocation in murder cases, stating that:

the onus of proof in relation to provocation in murder cases shifted with the 2003 amendment. Before then, when provocation was an issue on a trial, the Crown bore the onus of proving beyond reasonable doubt that the killing was not one to which s 160 applied. Since the amendment, provocation has been no more than a mitigating circumstance, as to which the offender bears the onus of proof for sentencing purposes if there is a dispute as to the facts.

5.3.11 The different onus of proof that applies to provocation in sentencing may decrease some of the criticisms of substantive provocation, one of which was that it ‘defamed the dead’. It was argued that because courts were required to assess alleged provocation on the view of the facts most favourable to the accused person, the accused could make untrue allegations about the victim’s conduct leaving the Crown with the difficult task of disproving the allegations beyond reasonable doubt. A requirement that an offender has to prove that he or she was subjected to provocation by the victim partly addresses this problem. Furthermore, even if it is established that an offender was provoked, the judge will have discretion over how much mitigating weight (if any) the provocation warrants.

121 \( R \text{ v De Simoni} \) (1981) 147 CLR 383, 392; \( R \text{ v Mokbel} \) [2006] VSC 119 (Unreported, Gillard J, 31 March 2006), [24].


123 Ibid 371.

124 \( R \text{ v Anderson} \) (1993) 177 CLR 520, 536 (Deane, Toohey and Gaudron JJ). See further Richard Fox and Arie Freiberg (1999), above n 63, [2.304].

125 \( R \text{ v Storey} \) [1998] 1 VR 359, 371.

126 (2005) 15 Tas R 221. See further [7.2.2]–[7.2.5] for a discussion of the facts of this case.

127 Ibid 229.


129 This criticism frequently arose in the context of ‘sexual jealousy’ provocation cases (see further [8.10.54]–[8.10.91]) and ‘unwanted sexual advance’ provocation cases (see further [8.10.13]–[8.10.23]).
6. The maximum penalty for the offence

6.1.1 A significant determinant of an offender’s sentence is the comparative seriousness of the offence for which he or she has been convicted. The maximum penalty provides legislative guidance as to the relative seriousness of an offence as compared with other offences. It is a relevant sentencing consideration to which a court must have regard under section 5(2)(a) of the Sentencing Act 1991 (Vic), and the sentencing judge, applying this provision, ‘steers by the maximum’. Whereas manslaughter is punishable by a maximum penalty of 20 years’ imprisonment, murder carries a maximum life sentence and the stigma of being convicted of murder rather than of manslaughter.

6.1.2 Although the statutory maximum penalty is but one of the many factors to which the sentencer must have regard, the particular significance of the statutory maximum penalty has been emphasised by the Victorian Court of Appeal:

It is because the maximum penalty is important that … the Sentencing Act lists it first among the matters to which a court sentencing an offender must have regard and, if the judge mistakes the maximum, that re-opens the discretion unless the Court of Appeal is satisfied that the mistake could not have materially affected the sentence.

6.1.3 The significance of the maximum penalty was discussed in the recent provocation manslaughter case of R v Ibrahim (expected to be one of the last cases sentenced under the previous law). The sentencing judge, in sentencing the offender to 15 years’ imprisonment with a non-parole period of 13 years, said:

Before the maximum sentence for manslaughter was increased in 1997 from 15 years to 20 years’ imprisonment, sentences of imprisonment imposed in cases of manslaughter by reason of provocation tended not to exceed ten years and were frequently less, although there were cases in which they ranged as high as 13 years. Following the increase in the maximum to 20 years’ imprisonment, it was to be expected that there would be a corresponding increase in the sentences actually imposed. Yet sentencing statistics suggest that actual sentences have by and large remained the same. For my own part, the increase in the maximum does imply that there should be some increase in the sentence actually to be imposed and I propose to follow that course in your case. Despite the general utility of current sentencing trends, I am not prepared to follow them down to a level below the sentence which a maximum of 20 years implies it is necessary to impose. Since the maximum sentence is now 20 years’ imprisonment, and since in the case of manslaughter by provocation that maximum takes into account the ameliorating effect of provocation, I consider that the gravest offences of manslaughter are liable to attract sentences of 17 years or more.

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131 Ibid [12] (Callaway JA).
132 Suicide-pact manslaughter has a maximum penalty of 10 years’ imprisonment: Crimes Act 1958 (Vic) s 6B(1A).
133 Crimes Act 1958 (Vic) s 3.
137 Ibid [58]–[59].
6.1.4 The following Chapter considers the implications on murder sentencing practices of ‘provoked killers’ facing a higher maximum penalty as a result of the abolition of the partial defence of provocation.
7. The impact on sentencing practices

7.1 Introduction

7.1.1 As a result of the abolition of the partial defence, it would be expected that offenders found guilty of murder under the new law would generally receive more severe sentences than those previously found guilty of provocation manslaughter. However, not all people who might previously have been found guilty of provocation manslaughter will necessarily be convicted of murder under the new law. Some may instead be acquitted after successfully raising self-defence; others may be found guilty of defensive homicide or unlawful and dangerous act manslaughter. This may be particularly so in homicide cases involving allegations of past family violence by the victim towards the offender.

7.1.2 It appears from the VLRC Homicide Report and the Attorney-General’s comments that the abolition of the partial defence of provocation was intended to enable a reformulation and reconsideration of the range of factors that will be taken into account by judges when offenders are sentenced for murder in circumstances where the defence of provocation might once have saved them from that fate. The intention appears to be to enlarge the range of penalties that can be imposed upon such offenders. Another possible interpretation is that the reclassification of provocation manslaughter was intended to result in a general and uniform increase of sentences for this group of offenders. The next section of the paper looks at sentencing practices, including the likely impact that the new law will have on the sentencing ranges for the group of offenders convicted of murder who might previously have been convicted of provocation manslaughter; bearing in mind that sentencing judges will steer by a higher maximum in setting sentences for this group of offenders.

7.1.3 As Tasmania was the first jurisdiction to abolish provocation, we will first look at the approach to sentencing provocation that has been taken by Tasmanian courts under the new regime.

7.2 The approach in Tasmania

7.2.1 In 2003, Tasmania became the first Australian jurisdiction to abolish provocation as a partial defence to murder. To date, two murder cases in Tasmania have considered the issue of provocation during sentencing under the new law.

7.2.2 In R v Tyne, the offender pleaded guilty to the murder of his wife on the basis that he had intended to kill her and raised provocation as a mitigating factor. The provocation by the victim (the offender’s wife) included her deliberately harming her children and attempting to conceal this behaviour (she...
had suffered from Munchausen by Proxy syndrome). The offender had believed his wife’s denials until shortly before the killing. In sentencing the offender for murder, the sentencing judge took into account the provocative conduct by the victim over the preceding years. The offender was sentenced to 16 years’ imprisonment with a non-parole period of eight years. The judge commented:

Provocation is no longer a defence to murder and the accused is to be sentenced for murder and not for manslaughter. I have not had specific regard to sentencing levels for manslaughter. However, that he was provoked is a matter I take into account in sentencing.143

7.2.3 The defence appealed the sentence on the ground that it was manifestly excessive because, but for the abolition of the partial defence of provocation, the appellant would have been sentenced for manslaughter by reason of provocation. It was contended that despite the repeal of the partial defence, the offender should have been sentenced as if provocation had reduced his crime to manslaughter. In his reasons for judgment dismissing the appeal, Chief Justice Underwood (with whom Justices Slicer and Blow agreed) said:

It is difficult to put the matter more succinctly than did the learned sentencing judge when he said that provocation is no longer a defence to murder and the accused is to be sentenced for murder, not manslaughter. There is no longer any need to enquire into whether the insult would have deprived an ordinary person with the attributes of the accused (whatever that entails in each case) of the power of self-control. There is no longer any reason to impose a sentence for manslaughter instead of murder because of provocation. Provocation is taken into account in the exercise of the sentencing discretion for murder. The degree of provocation is just an aspect of the sentencing discretion. In a suitable case, no doubt it could be urged that greater mitigatory weight than usual should be given to the provocation because not only did the insult cause the accused to lose the power of self-control, but it was so grave it would also have caused a reasonable person to lose that power.

However, it is not contended on this appeal that the learned sentencing judge failed to give sufficient weight to the issue of provocation, nor is it contended that the sentence is manifestly excessive for any reason other than it is well outside the range of sentences imposed for the crime of murder reduced to manslaughter by reason of the partial defence of provocation.144

7.2.4 Justice Slicer was of the view that ‘[t]he subjective characteristics of the offender … and the quality of the initiating provocation … remain significant matters in the determination of sentence’.145 He held that the sentencing judge ‘properly and adequately took into account the effect of conduct of the victim, the interrelationship between the victim and offender, and the subjective characteristics of the appellant’.146

7.2.5 Justice Blow noted that the previous disparity between sentences for intentional killings (murder and provocation manslaughter) would be reduced with the abolition of the partial defence:

Between the abolition of mandatory sentences of life imprisonment for murder in 1994 and … [the abolition of substantive provocation] in 2003, sentences for manslaughter in provocation cases were substantially less than those for murder. The only reason for the great disparity between murder sentences and manslaughter sentences in provocation cases was the existence of [the partial defence of provocation] … Now … there is no reason for such a great disparity. When a murder has been brought about or contributed to by provocation, that is now simply a mitigating factor whose weight will depend on the circumstances.147

143 Ibid 3.
144 Tyne v Tasmania (2005) 15 Tas R 221, 227.
145 Ibid 228 (citations omitted).
146 Ibid. See [8.6.21]–[8.6.25] for a discussion of the relevance of the offender’s personal characteristics.
147 Ibid 228–229.
7.3 The approach in Victoria

Introduction

7.3.1 Under section 5(2)(b) of the Sentencing Act a court must have regard to current sentencing practices in sentencing an offender. The impact that the abolition of substantive provocation will have on sentencing practices and ranges in Victoria for murder is uncertain.

7.3.2 Our analysis of the sentencing ranges for murder and manslaughter may provide an understanding of the consequences that abolishing the partial defence may have on future sentencing practices. It also explores the impact that the new law may have on the sentencing ranges for the group of offenders convicted of murder who might previously have been convicted of provocation manslaughter.

7.3.3 Appendix 4 compares sentencing outcomes and ranges for persons convicted of provocation manslaughter, other types of manslaughter and murder over the eight-year period 1998–99 to 2006–07. Figure 1 (page 30) illustrates the imprisonment sentencing ranges (total effective sentence and non-parole period) for provocation manslaughter, other categories of manslaughter and murder for each individual person. This figure is explained in Appendix 4 (page 120) and is enlarged in the back page fold-out so that it can be referred to alongside the text of this paper.

7.3.4 An examination of these sentencing practices highlights the difference in the sentencing ranges for murder and manslaughter. Although the percentage of those who received a sentence of immediate imprisonment for murder and manslaughter was similar, an examination of the lengths of immediate imprisonment sentences shows that there was virtually no overlap between the two sentencing ranges. For those sentenced to immediate imprisonment, the median imprisonment length for murder was 19 years, while for manslaughter it was seven years.

7.3.5 The most common combination of total effective sentence and non-parole period for murder was 18 years with a 14 year non-parole period (21 people), while for provocation manslaughter it was eight years with a six year non-parole period (three people) and for other categories of manslaughter it was five years with a three year non-parole period (16 people).

7.3.6 For murder, total effective sentence lengths ranged from ten years’ imprisonment with a non-parole period of seven years, to life imprisonment with no non-parole period. Total effective sentence lengths for provocation manslaughter ranged from four years with a two year non-parole period, to 15 years’ imprisonment with a non-parole period of 13 years. For other categories of manslaughter total effective sentence lengths ranged from three years with a non-parole period of four months, to 15 years’ imprisonment with a non-parole period of 12 years.

148 See further Appendix 4 and n 533.
149 Between 1998–99 and 2006–07, 92 per cent of people sentenced for murder received sentences of immediate imprisonment. Ninety per cent of those sentenced for manslaughter received immediate imprisonment sentences.
150 See further Appendix 4.
Figure 1: The number of persons sentenced to imprisonment for provocation manslaughter, ‘other’ manslaughter and murder by the length of imprisonment term and the non-parole period imposed, 1998–99 to 2006–07

Note: ‘No NPP’ refers to no non-parole period.
What range will apply to provoked murderers?

7.3.7 The first question that arises now that substantive provocation has been abolished is what sentencing practices will apply to offenders who are convicted of murder under the new law and raise provocation as a mitigating factor. As discussed above, an argument was raised under the new law in Tasmania that notwithstanding their conviction for murder, such offenders should be sentenced as though provocation had reduced the offence to manslaughter and that consequently the sentencing range for manslaughter should apply.\(^{151}\) The contrary view was taken by the sentencing judge and the Tasmanian Court of Appeal. They held that such offenders have been convicted of murder and should be sentenced accordingly. This is consistent with the approach to provocation in sentencing for non-fatal offences in Victorian courts and with the rationale behind the Victorian Law Reform Commission’s reforms. There is arguably much force in the approach taken by the Tasmanian Court of Appeal and it is likely to be the approach adopted by Victorian courts.

Will the new law affect homicide sentencing ranges?

7.3.8 A secondary question is whether the changes will have any impact on overall sentencing practices for murder or manslaughter. Under the new law in Tasmania, courts have taken the view that the previous divide between sentencing for intentional homicides (provocation manslaughter and murder) will be reduced as a result of the changes (reflecting the likelihood that all intentional killings (whether provoked or unprovoked) will now result in murder convictions). Even if this is the case, the bottom of the sentencing range for murder may be reduced by the incorporation of at least some ‘provoked killers’. This issue was recently raised by the Law Commission of Western Australia in relation to the possible effects of abolishing the defence of provocation (which is currently a complete defence to assault in that state) on the sentencing range for assault:

> It is the Commission’s provisional view that the complete defence of provocation should be abolished because the availability of full sentencing discretion for offences other than murder clearly enables any mitigating factors to be taken into account … [However] the repeal of the complete defence of provocation would be likely to have significant practical implications. Offences such as common assault and assault occasioning bodily harm are frequently committed and without the complete defence, the sentencing practices and outcomes for these types of offences would change. Currently, by virtue of the defence of provocation, a conviction for assault means that the assault was unprovoked. In the absence of the defence, assault convictions will include both provoked and unprovoked assaults. The sentences imposed for provoked assaults would, therefore, tend to be less severe than the sentences imposed for unprovoked assaults. If the complete defence is to be abolished, it will be necessary for all those involved in the criminal justice system, as well as the community, to fully understand the implications.\(^{152}\)

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\(^{151}\) Tyne v Tasmania (2005) 15 Tas R 221. Tasmanian courts rejected this argument, holding that the sentencing range for murder applies. See further [7.2.1]–[7.2.5].

\(^{152}\) Law Reform Commission (Western Australia) (2007), above n 31, 223. See also: above n 47.
7.3.9 As Figure 1 illustrates, there is only a small overlap between manslaughter and murder imprisonment sentencing ranges. For example, the highest provocation manslaughter sentence (15 years’ imprisonment with a non-parole period of 13 years) was higher than the lowest sentences for murder. The majority of provocation manslaughter imprisonment sentences fell well below the murder sentencing range. If similar cases attracted murder convictions under the new law, there is a possibility that even if there were an overall increase in sentences for this group, some of these may fall at or even below the lower end of the sentencing range for murder. Consequently there would be a downward extension of the lower end of the sentencing range for murder.

7.3.10 It is evident from the data presented in Figure 1 and Appendix 4 that the sentencing ranges for murder and manslaughter in Victoria are almost totally different. Based on the Tasmanian experience, it is more likely that the sentences for offenders convicted of murder where provocation exists will be higher than previous sentences these offenders might have faced if they had been convicted of manslaughter as the result of the operation of the partial defence. However, there may also be a downward extension of the lower end of the sentencing range for murder to reflect the incorporation of provoked, as well as unprovoked, murders. This issue was raised by the Law Reform Commission of Western Australia in relation to the sentencing consequences of abolishing provocation as a partial defence to murder:

It has been suggested that, in the absence of provocation, overall sentences for homicide may increase because some offenders who would be currently sentenced for manslaughter will instead be sentenced to a greater penalty for murder. The Commission agrees that if provocation is abolished, 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. Thus, it has been argued that abolishing provocation may lead to ‘inconsistent dealings with those who kill after losing self control’. However, this is precisely the point. 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.153

153 Ibid 221 (citations omitted).
8. Culpability: a framework for considering provocation in sentencing

8.1 The offender’s culpability for the offence

8.1.1 The Sentencing Act requires a court to have regard to a number of sentencing factors including the offender’s culpability for the offence. Culpability, or moral responsibility, is different from an offender’s legal responsibility or guilt for the commission of the offence. Once the legal responsibility for the offence is determined, the level of an offender’s culpability helps determine how serious that particular example of the offence was, as compared to other examples of the same offence.

8.2 Culpability as a measure of offence seriousness

8.2.1 Two of the sentencing factors set out in section 5(2)—the gravity of the offence and the culpability of the offender—in combination provide substantial measures of the objective and subjective seriousness of criminal conduct.

8.2.2 The gravity of an offence refers to the degree of harm caused or risked by the offender’s act (or omission). The most serious harm is generally considered to be that which affects a victim’s physical integrity, such as murder, sexual offences and other offences causing serious injury. Lower on the scale are offences which have an impact solely on economic well-being, such as theft.

8.2.3 Culpability, or blameworthiness, reflects the extent to which an offender should be held accountable for his or her actions by assessing the offender’s intention, awareness and motivation in committing the crime. Culpability has been described as:

the factors of intent, motive and circumstance that bear on the actor’s blameworthiness—for example, whether the act was done with knowledge of its consequences or only in negligent disregard of them, or whether, and to what extent, the actor’s criminal conduct was provoked by the victim’s own misconduct.

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155 See further [8.2.7]–[8.2.10] (Subjective seriousness).
157 Ibid.
Objective seriousness

8.2.4 The objective seriousness of an offence is its level of seriousness as compared to other offences in the criminal calendar. This has been described as ‘ordinal proportionality’ which is:

the requirement that the ranking of severity of penalties should reflect the seriousness-ranking of the criminal conduct. Punishments are to be ordered on the scale so that their relative severity corresponds to the comparative blameworthiness of the conduct.

... The size of the increment from one penalty to another should reflect, in relation to the dimensions of the whole scale, the size in the step-up in seriousness from one species of criminal conduct to another.160

8.2.5 In relation to non-fatal assaults, the seriousness of a particular offence (for example intentionally causing serious injury) is determined by both the harm caused (serious injury) and the offender’s culpability (including that he or she intended to cause the serious injury). For this reason intentionally causing serious injury is a more serious offence than negligently causing serious injury. Similarly, intentionally causing serious injury is more serious than intentionally causing injury, reflecting the different level of harm caused.

8.2.6 In contrast, in homicide cases, the harm caused is the same for murder and manslaughter: the offender’s actions have caused the victim’s death. Therefore the difference in seriousness between the two offences reflects the variation in the offender’s culpability and degree of criminal responsibility for these offences, rather than the relative gravity of the harm caused. For example intending to kill the victim is more serious than doing so negligently, which is why intentional conduct is encompassed in the more serious offence of murder, which attracts a higher maximum penalty.

Subjective seriousness

8.2.7 In addition to providing guidance as to the objective seriousness of one offence as against another (for example murder compared to manslaughter), the harm caused and the offender’s culpability are also important measures of the subjective seriousness of criminal conduct; that is, the relative seriousness of different examples of the same offence. This reflects the principle of ‘desert-parity’, that ‘defendants whose criminal conduct is equally blameworthy should be punished with equal severity’.161 This has been described by von Hirsch as follows:

The principle of commensurate-deserts permits differences in severity of punishment among offenders only to the extent these differences reflect variations in the blame justly due to them. When offenders have been convicted of crimes of equal seriousness, they therefore deserve punishments of the same severity—unless one can identify special factors (i.e., aggravating and mitigating circumstances) that render the offense, in the particular context in which it occurred, more or less deserving of blame than would normally be the case.162

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160 Ibid 213.
161 Ibid 212.
162 Ibid.
8.2.8 In the context of homicide, for example, the objective seriousness of the offence of murder is self-evident. The offence is punishable by a maximum penalty of life imprisonment and is regarded by the courts as one of utmost gravity. However, within that crime, there are degrees of seriousness, depending upon the particular circumstances in which the offence occurred. Murder can be committed intentionally or recklessly in respect of either death or grievous bodily harm. Therefore, the relative seriousness of one murder case against another will be primarily determined by the offender’s level of culpability. For example, an offence in which the offender killed in ‘cold blood’ for financial reward may be viewed as more serious than one in which the offender acted spontaneously while affected by severe emotional stress or serious psychiatric illness—short of mental impairment in law. Similarly, matters such as whether the offender’s actions were provoked may increase or reduce the assessed seriousness of a particular offence and consequently the sentence given (subject to other mitigating and aggravating sentencing factors). These factors are discussed in more detail in the next section of this paper (8.3).

8.2.9 Under the previous law, provocation was treated as a factor that was directly relevant to an offender’s culpability but, unlike other factors which reduce an offender’s culpability for a particular offence, it resulted in the offender being found guilty of the lesser offence of manslaughter, despite his or her intention to kill the victim. This was one of the objections to the partial defence raised by the VLRC, which took the approach that ‘differences in degrees of culpability for intentional killings should be dealt with at sentencing, rather than through the continued existence of partial defences to homicide’. More recently, the Law Reform Commission of Western Australia reached a similar conclusion:

Unlike the substantive criminal law, sentencing is a flexible process—it can accommodate the wide variety of circumstances that arise in homicide cases. Dealing with issues affecting culpability during sentencing allows those issues to be considered at the same time as other relevant sentencing factors. … The Commission believes that the sentencing process is uniquely suited to identifying those cases of provocation that call for leniency and those that do not. This is because the sentencing process is flexible and is accustomed to taking into account both aggravating and mitigating factors.

8.2.10 When it comes to sentencing, we argue that rather than being one of the many mitigating factors envisaged in the catchall provision in section 5(2)(g), provocation is directly relevant to an offender’s culpability as set out in section 5(2)(d) and consequently to the seriousness of the particular offence.

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165 Law Reform Commission (Western Australia) (2007), above n 31, 309. See also above n 47.
166 Ibid 220–221.
8.3 Factors that reduce culpability

8.3.1 A variety of factors can reduce an offender’s culpability or moral responsibility for an offence. As culpability is one element of the equation that links the severity of a punishment with the seriousness of the crime, these factors are relevant to the determination of the relative seriousness of a particular offence. For example, serious psychiatric illness—short of mental impairment in law—may reduce an offender’s culpability. Similarly, culpability may be reduced by the offender’s intellectual impairment, particularly where it influences the offender’s capacity to fully comprehend the nature or consequences of his or her behaviour. The Victorian Court of Appeal recently provided guidance ‘as to how, and to what extent, impaired mental functioning may reduce the blameworthiness of the offender’s conduct’, holding that the ‘effect on the Court’s assessment of culpability will, of course, vary with the nature and severity of the condition, and with the nature and seriousness of the offence’. Factors relating to the offender’s personal history, such as drug addiction and childhood abuse may also be important in evaluating the offender’s motive and culpability. For example, in *R v Rookledge*, Justice Smith commented:

As to moral culpability, it is relevant, in my view, that his lengthy drug abuse, a consequence of deep seated problems flowing from an appalling childhood, affected his thinking and judgment at the time. This diminished, to a limited extent, his moral culpability.

8.3.2 Similarly, emotional stress may be relevant to an offender’s culpability. In *Neale v The Queen*, Justice Brennan noted that:

Emotional stress which accounts for criminal conduct is always material to the consideration of an appropriate sentence, though its mitigating effect can be outweighed by a countervailing factor … The sentencing court takes account of emotional stress in evaluating the moral culpability of the offender just as it is entitled to have regard to the motive for the offence.

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167 See for example: Fox and Freiberg (1999), above n 63, [3.708]–[3.711], [3.723]–[3.727]; Judicial College of Victoria (2005), above n 60, [10.4.1], [10.9.1.2.1], [10.9.1.2.5], [10.10.3.3].

168 *R v Verdins; R v Buckley; R v Vo* [2007] VSCA 102 (Unreported, Maxwell P, Buchanan and Vincent JJA, 23 May 2007); *R v Tsariss* [1996] 1 VR 398, 400. See further Judicial College of Victoria (2005), above n 60, [10.9.1.1], [10.9.1.1.3], [10.9.1.2.1]–[10.9.1.2.5], [10.9.1.4].

169 *R v Verdins; R v Buckley; R v Vo* [2007] VSCA 102 (Unreported, Maxwell P, Buchanan and Vincent JJA, 23 May 2007); *Mason-Stuart v The Queen* (1993) 68 A Crim R 163 (CCA SA), 164; *DPP v Scott* [2000] VSC 247 (Unreported, Cummins J, 14 June 2000), [19]; Judicial College of Victoria (2005), above n 60, [10.9.1.1], [10.9.1.1.3], [10.9.1.2.1]–[10.9.1.2.5], [10.9.1.4].

170 *R v Verdins; R v Buckley; R v Vo* [2007] VSCA 102 (Unreported, Maxwell P, Buchanan and Vincent JJA, 23 May 2007), [25].

171 Ibid.

172 Fox and Freiberg (1999), above n 63, [3.727]–[3.730]; Judicial College of Victoria (2005), above n 60, [10.4.1].


174 Ibid [18].

175 *R v Karageorges* [2006] VSCA 49 (Buchanan, Vincent and Neave JJA, 9 March 2006); *Neale v The Queen* (1982) 149 CLR 305.


177 Ibid 324.
Likewise, provocation may also reduce an offender’s culpability for an offence. For example, in *R v Raby*, the offender was found guilty of provocation manslaughter for killing her husband after eleven weeks of an abusive marriage. The sentencing judge found that as a result of the provocation (viewed in the context of his past treatment of her), her actions were to be assessed as ‘indicating a relatively low level of moral culpability’.

In the following sections of this paper, we explore some general theories of culpability relevant to provocation that attempt to explain why some acts are viewed as more culpable than others. Given the public policy considerations behind the abolition of the partial defence, similar considerations should inform the consideration of provocation in sentencing. Determining the theory which provides the most principled basis for assessing culpability will help to resolve the question of how provocation in sentencing should be considered. This approach requires examining the concept of provocation afresh, free of the formal requirements of the substantive defence of provocation but with an awareness of the practical or common sense understandings of what it means to act ‘under provocation’ or when provoked.

Not all conduct that provoked an offender was considered legally ‘provocative’ for the purposes of the partial defence. Nor will it be for sentencing purposes. Under the new law when should provocative conduct by the victim warrant a reduction in the offender’s culpability? Is it necessary that the provocation caused the offender to lose self-control or is there a better approach to considering provocation at sentencing? Should there be a proportionate link between the provocation and the offender’s response? Are prevailing values relevant to the categories of provocation which will, and will not, reduce an offender’s culpability? And are the offender’s perceptions and personal characteristics relevant to the degree of provocation?

We argue that the answers to these questions will in part be determined by an understanding of the theoretical foundation for assessing culpability.

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178 (Unreported, Supreme Court of Victoria, Teague J, 22 November 1994).
179 Ibid 4.
8.4 The rationales for reducing culpability

8.4.1 A number of broad theoretical foundations have been identified which attempt to justify or explain why provocation should reduce an offender’s culpability. The three upon which we focus are:

1. character theory;
2. objective capacity theory; and
3. the reasons-based approach.

8.4.2 Both character theory and objective capacity theory are based on the formulation of provocation as a partial excuse rather than a partial justification. These theories underpinned the requirement for a loss of self-control and the ordinary person test in substantive provocation. A different approach to culpability—a reasons-based approach—was canvassed by the VLRC as a framework for understanding what types of conduct should, and should not, reduce an offender’s culpability. We take the view that the latter approach is preferable as a foundation for assessing culpability, and provocation, in sentencing.

Character theory

8.4.3 Character theory proposes that the actions of a person who has lost his or her self-control are partially excused on the basis that those actions were uncharacteristic or atypical of the person and therefore unlikely to be repeated. In the context of provocation, it was argued that when a person acts under the influence of a loss of self-control ‘it is not really “him” or “her”—not his or her “true” self—acting’. Because the offender’s character when angry was unlike that while calm, ‘[a]ctions done in that state do not reflect as badly upon [his or] her settled character as if they had been done whilst calm’.

8.4.4 This is consistent with section 5(2)(f) of the Sentencing Act, which requires a court to have regard to an offender’s ‘previous character’. In determining the character of an offender, the court is required to consider, among other things, the general reputation of the offender. The notion of ‘character’ as a sentencing factor may operate to mitigate an offender’s sentence for an offence, because, in light of the offender’s previous good character, the action was uncharacteristic or atypical of the person and therefore unlikely to be repeated, in which case, specific deterrence may be of lesser importance.

8.4.5 The invocation of good character in sentencing was illustrated in the Victorian County Court in R v Baird. The judge accepted that in the offender’s intoxicated state, he interpreted a question about his origin as a racist slur and that this ‘provocation prompted this violent conduct … which was completely out of character with [his] conduct when sober’. This was held to be a mitigating factor in determining the offender’s sentence.

180 See further [2.1.3]–[2.1.5] for a discussion of the difference between provocation as a partial excuse and provocation as a partial justification.
183 Sentencing Act 1991 (Vic) s 6(b).
184 (Unreported, County Court of Victoria, 8 February 1999). See further [8.8.17].
185 Ibid 3.
8.4.6 Similarly, in R v Karageorges,\(^{186}\) provocation was disproved by the Crown and the offender was convicted of his wife’s murder. He had stabbed her repeatedly in a fit of jealous rage having induced her to falsely confess adultery. The sentencing judge held that the rage in which he killed his wife was out of character stating that prior to the killing he was a ‘man of excellent character’. The judge stated that: ‘there is no evidence at all that there is anything in your character that shows you to be of violent dispositions, or a man who cannot control his emotions or temper’.

8.4.7 Other illustrations of the mitigatory effects of ‘previous character’ can be found in cases relating to the influence of alcohol or drugs which is said to produce conduct which was out of character.\(^{188}\) For example, the Victorian Sentencing Manual states that intoxication is ‘relevant to the assessment of the degree of deliberation involved in the offender’s conduct, and in the consistency of that conduct with the offender’s character; both of which are considerations going to moral culpability’.\(^{189}\) Similarly, Fox and Freiberg write that ‘the offender may assert that he or she has no alcohol or drug problem and that the voluntary or involuntary consumption of the substance produced results that were out of character and unexpected’.

8.4.8 While ‘good character’ is a mitigating factor which courts must take into account in sentencing offenders, the use of character theory as a basis for determining degrees of culpability has been criticised on the basis that it presupposes that a person’s character is ‘settled’, as otherwise it is difficult to assert or deny that particular behaviour was aberrant to that person’s character.\(^{191}\) Critics emphasise that criminal liability begins in childhood long before a person could be viewed as having a ‘settled character’ in the sense required by the theory.\(^{192}\) Using character theory as a basis for determining culpability is also flawed in situations such as where a perpetrator of family violence appears ‘charming’, ‘personable’ or even ‘a pillar of the community’.\(^{193}\) For example, if a person who is violent towards a certain family member, but behaves non-violently and politely towards other people, eventually kills the victim of his or her violence, it is flawed to characterise that killing as ‘out of character’ just because others testify as to his or her non-violent nature. It is important to recognise that perpetrators can appear of ‘good character’ to everyone but the family member or members upon whom they are perpetrating violence.

Objective capacity theory

8.4.9 The emergence of the ‘ordinary person’ component of the test for substantive provocation was founded on what has been termed ‘objective capacity’ theory. Capacity theory is a means of assessing the moral blameworthiness of an offender by reference to the capacity of the offender to avoid criminal behaviour. The subjective version of capacity theory looks at the actual ability of a

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187 Ibid [21]. For criticism of the use of ‘good character’ in family violence cases, see [8.4.8].
188 Judicial College of Victoria (2005), above n 60, [10.10.1.7]; A-G v Davis (Unreported, Victorian Supreme Court, Court of Criminal Appeal, Young CJ, Kaye and McGarvie JJ, 9 May 1980).
189 Judicial College of Victoria (2005), above n 60, [10.10.3.3], referring to R v Coleman (1990) 47 A Crim R 306 (CCA NSW), 237.
190 Fox and Freiberg (1999), above n 63, [3.727].
191 Horder (2004), above n 181, 122–123.
192 Ibid.
194 Ibid [2.42], [2.47] (citations omitted).
particular person to avoid offending, given that person’s circumstances and behaviour prior to that time. The objective version compares the person’s behaviour to a ‘morally salient standard’ but allows that standard to be adjusted to reflect the person’s age to ensure a fair assessment of their culpability.195 Supporters of an objective, rather than subjective, approach argue that: it makes little moral sense to excuse wrongdoing on the grounds that although [the defendant] failed miserably to come up to an adequate standard, he or she came up to the standards he or she sets for him- or herself.196

8.4.10 Some critics of character theory advocate objective capacity theory as a preferred approach to assessing culpability. Commenting on the ‘ordinary person test’, Jeremy Horder comments: The reason that the law now experiences little difficulty in handling provocation pleas by children and young people is that it adopts the objective version of the capacity theory, rather than the character theory. The question is whether [the defendant] lived up to the standards of self-control that could be expected of someone [the defendant]’s age; and to answer that question, one need know nothing at all about [the defendant]’s character development—such as it has been—to date.197

8.4.11 Capacity theory is also reflected in sentencing. A number of existing sentencing considerations reflect the view that offenders who lack the capacity to control or understand their conduct may, in some circumstances, be considered to be less morally culpable. Youth, mental disorder, intellectual incapacity, emotional stress, drugs, alcohol or other addictions, have at various times, and to various degrees, been recognised as mitigating factors in sentencing.198 However, in relation to some of these circumstances, courts may not only take into account the lesser moral culpability, but also the countervailing fact that such people may, on account of their inability to control their conduct, present a greater danger to the community.199 And while recognising that factors such as addiction may, at the moment of committing the offence, explain the offender’s conduct, it may not excuse it if the court believes that prior to committing the offence the offender had some degree of choice or control over his or her behaviour.

8.4.12 Capacity theory has been criticised as a foundation for provocation because it presupposes that people acting in the heat of passion caused by a provocation are incapable, or less capable, of controlling their conduct, and therefore less culpable. It is: based on an understanding of emotions as things we cannot control, but which control us. For example, the excuse of provocation is based on the notion that an emotion such as anger or jealousy can so overwhelm people that they are unable to control their behaviour. This approach assesses people’s reasons for acting and the emotions behind those reasons as evidence only of those people’s ability to control their behaviour.200

8.4.13 The criticisms of objective capacity theory are closely tied to criticisms of the element of a ‘loss of self-control’ in substantive provocation.201 In its report on homicide, the VLRC proposed a different approach to assessing culpability that instead focussed on the reasons for the offence, including the gravity of the provocation and the justifiability of the offender’s response.

195 Horder (2004), above n 181, 125.
196 Ibid 127.
197 Ibid 123 (citations omitted).
198 Fox and Freiberg (1999), above n 63, [3.708]–[3.711], [3.724]–[3.727], [3.731]–[3.733]; Judicial College of Victoria (2005), above n 60, [10.9.1.1], [10.9.1.3], [10.9.1.2.1]–[10.9.1.2.5], [10.9.1.4], [10.10.3.3].
199 See for example Fox and Freiberg (1999), above n 63, [3.724], [3.728].
201 See further [8.5.1]–[8.5.8].
A reasons-based approach to culpability in sentencing

8.4.14 The approach proposed by the VLRC ‘allows us to look beyond the act and the circumstances of the act to why people killed and to make judgments about the values and views that drove the accused’s decision to act’.\(^{202}\) This approach, which the Commission characterised as a ‘reasons-based’ approach, is intended to provide an appropriate framework in which the moral or social dimensions of culpability can be considered. The VLRC argued that:

emotion is not an uncontrollable irrational force. Instead our emotions embody judgments and ways of seeing the world for which we can and should be held to account. If we accept that emotions can be objectively assessed and judged, then arguably it is also possible to assess culpability based on people’s reasons for behaving (and the emotions underlying those reasons). … If criminal offences provide minimum standards of socially acceptable behaviour, then this reasons approach to defences assesses the extent to which accused persons’ behaviour departed from that standard of behaviour.\(^{203}\)

8.4.15 The VLRC gives the examples of a woman who kills her violent husband while he sleeps and a man who kills his wife after she tells him she is leaving him for someone else. The VLRC argues that if instead of looking at the capacity of the person in each example to control him- or herself:

we look at and assess the reasons for the killings in each instance we are likely to arrive at quite different conclusions. The woman has killed her husband because she fears that he will eventually kill her and she can see no other means of escaping the situation. If we assess this reason by reference to what we can expect of the normal socially responsible person, it is far more possible for us to arrive either at the conclusion that she was not departing from that standard at all or that she was doing so only to a limited degree. The husband, on the other hand, has killed because he does not think his wife should be permitted to leave and he believes also that she does not have the right to insult him. These are reasons indicative of an inappropriate set of beliefs about his rights as a husband and her rights as a woman. On this basis we could very easily conclude that the husband has behaved for reasons that completely depart from what we regard as the standards of a normal socially responsible person.\(^{204}\)

8.4.16 The VLRC contended that:

The reasons approach is a more transparent approach and it has the capacity for achieving greater consistency between cases. Evaluations of motives and reasons already form part of the process of assessing culpability, but this fact is obscured by the formulation of the defences themselves and confused by the requirement of volition or capacity. Both juries and judges are already influenced to some degree by their own notions of acceptable and unacceptable reasons when assessing provocative conduct, for example—so why not make these evaluations an explicit and defined element of that process? This would at least ensure that there is a consistent set of acceptable reasons and unacceptable reasons to apply from case to case.\(^{205}\)

8.4.17 The VLRC argued that changing provocation from a partial defence to a sentencing consideration would have the advantage of:

readily allow[ing] reasons to be taken into account along with the specific contexts and individual circumstances. … Reasons-based sentencing could then evaluate a defendant’s reasons for killing along with their life circumstances to arrive at an appropriate sentencing outcome.\(^{206}\)

\(^{202}\) VLRC Homicide Options Paper (2003), above n 25, [7.25].

\(^{203}\) Ibid [7.24]–[7.25] (citations omitted).

\(^{204}\) Ibid [7.29].

\(^{205}\) Ibid [7.31].

\(^{206}\) Ibid [7.37].
8.4.18 The reasons-based approach first looks at the gravity of the provocation and the emotions behind the offender’s response to it, such as desperation, fear, anger or jealousy. However, it recognises that human emotions are complex: for example a woman who kills her husband after years of violence may be as much motivated by anger and resentment as by desperation and fear. The focus, therefore, is not on the responsive emotions, but the reasons for those emotions. The offender’s conduct is mitigated, and the sentence reduced, only when the reasons for being frightened, angry or resentful are good reasons, though fear, anger or resentment in some cases may have led to excessive or inappropriate behaviour.

8.4.19 This approach also appears to be consistent with the approach taken in the recent United Kingdom Guideline Manslaughter by Reason of Provocation. The factors influencing sentence set out in the Guideline include assessing the offender’s culpability by reference to what emotions and reasons motivated the offender’s actions in responding to the provocation.207

8.4.20 There are also examples of a reasons-based approach to assessing provocation in Victorian sentencing for non-fatal assaults. For example, in R v Aboujaber,208 Ormiston JA commented:

> Here the element of provocation is not to be measured in any prescribed way, as it would be in answer to a charge of murder … It may be conceded that even where a response to provocation exceeds that which may fairly be expected, the sentencing discretion may be tempered by an understanding of the reasons which led to the committing of serious criminal behaviour.209

8.4.21 The reasons-based approach provides a useful foundation for assessing whether, in the circumstances of a particular case, the offender’s culpability for murder should be reduced as a result of the provocation. A reasons-based approach marks a return to the original rationale for provocation manslaughter as it focussed on the wrongfulness of the victim’s actions and the justifiability of the offender’s aggrievement, rather than on whether the offender lost self-control as a result of something done by the victim.210

8.4.22 Accepting that a reasons-based approach should be taken to assessing culpability, the next question is how this translates into a framework for considering provocation in sentencing. We address this in the next section of this paper in which we focus on the following questions:

1. Must the offender have ‘lost self-control’ for provocation to reduce an offender’s culpability?
2. Is a preferable approach that the provocation caused the offender to have a justifiable sense of being wronged?
3. What degree of provocation (as shown by its nature and duration) will justify the offender’s aggrievement?
4. Should the degree of provocation necessary to reduce the offender’s culpability be commensurate, or proportionate, with the gravity of the offence?
5. Must the provocation cause the offence?

207 Sentencing Guidelines Council (UK), Manslaughter by Reason of Provocation, Guideline (November 2005), [3.2] (the UK Guideline). The UK Guideline was produced following advice to the Council from the United Kingdom Sentencing Advisory Panel (the UK Panel) on 9 May 2005: Sentencing Advisory Panel (UK), Manslaughter by Reason of Provocation: The Panel’s Advice to the Sentencing Guidelines Council (9 May 2005). The UK Guideline is distinguishable from the Victorian position in that it relates to sentencing in homicide cases where the jury has already determined that the culpability of the offender is reduced, by virtue of finding the offender guilty of manslaughter rather than murder. However, despite this, the sentencing principles relating to provocation manslaughter in the UK Guideline remain relevant.

208 (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Tadgell, Ormiston and Kenny JJA, 9 October 1997).

209 Ibid 9–10 (citations omitted).

210 See further [2.1.3]–[2.1.5] for a discussion of the distinction between a partial-excuse and partial-justification.
8.5 Loss of self-control

Introduction

8.5.1 One of the grounds on which provocation, either as a partial defence or as a mitigating factor in sentencing, has previously been justified has been that the offender has, because of his or her loss of self-control, been less responsible for his or her actions.\(^\text{211}\) The requirement of a loss of self-control, and the emergence of the ordinary person test marked a change from provocation as a partial justification, to provocation as a partial excuse.\(^\text{212}\) While at the time provocation was first introduced, men acting under provocation were viewed as acting rationally in response to some kind of personal affront, over time greater emphasis came to be placed on the defendant’s emotional response to that provocation, and whether an ordinary person faced with provocation of similar gravity, might have reacted as the defendant did.\(^\text{213}\)

8.5.2 Though the element of a loss of self-control is commonly considered to be the essence of provocation, it is not the only, or necessarily the best, approach to its conceptualisation as a basis on which to reduce an offender’s level of culpability. As discussed above, ‘loss of self-control’ as an element of substantive provocation reflected the influence of character theory and objective capacity theory on the development of the partial defence. Given our belief that a reasons-based approach is a preferable foundation for provocation in sentencing, the question remains whether a ‘loss of self-control’ will be required for provocation to reduce an offender’s culpability.

Criticisms of ‘loss of self-control’ element in substantive provocation

8.5.3 The VLRC’s view was that the requirement of loss of self-control in the test for substantive provocation added to the gender bias in its operation.\(^\text{214}\) A 2006 report on family violence laws by the VLRC (‘the VLRC Family Violence Report’) reinforces the criticisms of the partial defence about gender and the purported inability to maintain self-control:

> Perpetrators usually have control over their own actions when they are violent but may state that they did not know what they were doing or were ‘out of control’ when they were violent. Recent research suggests that this is rarely the case. There are only a tiny number of people who, through illness or accident, do have a neurological or mental disorder which interferes with their way of thinking and may result in violence and impulsive behaviour. Instead: ‘The majority of violent or abusive men are just normal people who try to distance themselves from their actions by trying to blame others’.\(^\text{215}\)

8.5.4 Similarly, Professors Jenny Morgan and G.R. Sullivan have expressed scepticism about whether a loss of self-control is involved in such cases:

\(^{\text{211}}\) See for example: Judicial College of Victoria (2005), above n 60, [9.10.2]–[9.10.3], [20.6.5.2], [20.6.3]; Fox and Freiberg (1999), above n 63, [12.216]; R v Alexander (1994) 78 A Crim R 141 (SC NSW), 144.

\(^{\text{212}}\) See further [2.1.3]–[2.1.5]; VLRC Homicide Report (2004), above n 3, [2.6]–[2.7]; VLRC Homicide Options Paper (2003), above n 25, [7.78], n 327.

\(^{\text{213}}\) See further [2.1.3]–[2.1.5].

\(^{\text{214}}\) VLRC Homicide Report (2004), above n 3, [2.28], [2.86]–[2.90], [2.103].

The anger inducing the killing may be nothing more than outrage at a failure to dominate. This consideration aside, there may, on particular occasions, be grounds for scepticism as to the reality of the loss of control. The man who strangles his unfaithful wife ... would [he] have acted in similar fashion if infuriated by the conduct of a person of superior strength?  

8.5.5 It has been argued that in intimate partner killings, rather than losing control of themselves, “the real ‘loss of control’ is that the men have lost control of their women”. In the homicide consultation by the VLRC:

the conceptualisation of men’s behaviour as a loss of self-control was also criticised as misconceived. Rather than a loss of self-control, the use of anger and violence by men against women is often instrumental—a deliberate and conscious process—intended to gain compliance and control. Those who inflict violence, including in the context of a relationship of sexual intimacy ... generally make a decision to act or not to act.

8.5.6 Self-control as an element of the test for provocation as a partial defence was criticised on the following basis by the United Kingdom Law Commission in its final report on partial defences to murder:

The term loss of self-control is itself ambiguous because it could denote either a failure to exercise self-control or an inability to exercise self-control. To ask whether a person could have exercised self-control is to pose an impossible moral question. It is not a question which a psychiatrist could address as a matter of medical science, although a noteworthy issue which emerged from our discussions with psychiatrists was that those who give vent to anger by ‘losing self-control’ to the point of killing another person generally do so in circumstances in which they can afford to do so. An angry strong man can afford to lose his self-control with someone who provokes him, if that person is physically smaller and weaker. An angry person is much less likely to ‘lose self-control’ and attack another person in circumstances in which he or she is likely to come off worse by doing so. For this reason many successful attacks by an abused woman on a physically stronger abuser take place at a moment when that person is off-guard.

8.5.7 The Law Commission recommended against the inclusion of a loss of self-control in the test for provocation, preferring an approach that focused instead on the nature and gravity of the provocation and its impact on the offender: ‘words or conduct or a combination of words and conduct which caused the defendant to have a justifiable sense of being seriously wronged’.

Professor Bernadette McSherry adopts a similar approach. In reviewing cases in which men kill their partners in anger, she argues that basing provocation on a loss of self-control:

implies that [such men] could have controlled themselves, but lacked the strength of will to do so. This raises the issue as to whether the criminal law should be about setting standards of self-control and punishing those who breach them, rather than partially excusing people from criminal responsibility because they killed in anger.

8.5.8 The Law Commission’s approach is consistent with a return to provocation as a partial justification—to the extent that there is a focus on the gravity of the victim’s conduct and the reasons it caused the offender to commit the offence, rather than on the capacity of the offender to control him- or herself and whether or not the conduct caused the offender to lose self-control.

216 Sullivan (1993), above n 16, 427. See also Morgan (1997), above n 6, 257–262.
218 VLRC Homicide Report (2004), above n 3, [2.28].
220 Law Commission (UK), Murder, Manslaughter and Infanticide (2006), [5.11]. See further [8.5.9]–[8.5.14]. See Appendix 2 for the elements of the Law Commission’s reformulated test.
A justifiable sense of being wronged

8.5.9 An approach to provocation that moves away from focussing on a loss of self-control, and instead looks at the justifiability of the offender’s aggrievement at the provocation has been canvassed in the United Kingdom in relation to substantive provocation. We suggest that a modified version of this formulation could be used in Victorian sentencing to assess whether provocation should reduce an offender’s culpability.

8.5.10 In its 2004 report on partial defences to murder, the United Kingdom Law Commission attempted to articulate the rationale for provocation and its relationship to culpability:

Putting it in broad and simple terms, we think that the moral blameworthiness of homicide may be significantly lessened where the defendant acts in response to gross provocation in the sense of words or conduct (or a combination) giving the defendant a justified sense of being severely wronged.

8.5.11 In its subsequent 2006 report, Murder, Manslaughter and Infanticide, the Commission identified two key elements to establish the partial defence, the first of which was that the defendant had acted in response to ‘gross’ provocation or the ‘fear of serious violence towards the defendant or another’ or a combination of both. The Commission considered that ‘the essence of gross provocation’ was:

words and/or conduct which caused the defendant to have a justifiable sense of being seriously wronged. The preferred moral basis for recognising a partial defence of provocation is that the defendant had legitimate ground to feel strongly aggrieved at the conduct of the person at whom his/her response was aimed, to the extent that it would be harsh to regard their moral culpability for reacting as they did in the same way as if it had been an unprovoked killing.

8.5.12 The UK Commission’s broad conception of substantive provocation can hold equally well as the basis of mitigation of sentence and is consistent with the reasons-based approach advocated by the VLRC. Now that provocation has moved to the sentencing arena, the key determinative of the offender’s culpability should be the reasons for the commission of the offence, including the gravity of the victim’s provocative conduct and the justifiability of the offender’s aggrievement. The conception of provocation as having some legal force when a defendant is justifiably aggrieved by the provocation has the result that actual loss of self-control (or a perception of loss of self-control) will not be of special importance in sentencing, except where it is relevant to the degree of premeditation.

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222 Law Commission (UK) (2004), above n 219, [3.63].
223 Law Commission (UK) (2006), above n 220, [5.11]. The second element of the Commission’s reformulation of the partial defence was that ‘a person of the defendant’s age and of ordinary temperament … in the circumstances of the defendant might have reacted in the same or in a similar way’. The Commission set out another four principles that elaborated on these two elements. See further Appendix 2.
225 See further [8.4.21].
226 The Victorian Sentencing Manual states that: “Generally, premeditated killings are regarded as more serious than spontaneous killings on the basis that an offender has the opportunity fully to consider the nature and consequences of his or her act before it is committed. The offender has time to make a reasoned choice in relation to his or her future actions”. Judicial College of Victoria (2005), above n 60, [19.6.1]. This view was taken in Iddon v The Queen (1987) 32 A Crim R 315 (CCA Vic), in which the court held that: “a distinction is to be drawn between premeditated murder and murder committed in a momentary act of passion: at 328 (Crockett, Murray and Hampel JJ).
The UK Commission’s formulation limited the partial defence of provocation to murder to ‘gross provocation’ which gave the offender a justifiable sense of being ‘seriously’ wronged. However, given the more flexible approach to provocation in sentencing and our focus on sentencing for the full spectrum of offences against the person (in contrast to the UK Commission’s focus on provocation as a partial defence to murder), the next question is the degree of provocation necessary to justify the offender’s aggrievement. Should reductions in culpability only be warranted in cases of serious provocation or should the required degree of provocation be commensurate with the gravity of the offence?

We suggest that whether, and to what extent, an offender’s culpability will be reduced by provocation will depend on whether, in all the circumstances of the case, the provocation caused the offender to have a justifiable sense of being wronged. In the next section of this paper we look at how the degree of provocation may be assessed. In the subsequent section we argue that, rather than having a blanket requirement for ‘serious’ or ‘gross’ provocation to reduce an offender’s culpability (as advocated by the UK Law Commission as the trigger for the partial defence of provocation to murder), the degree of provocation necessary to warrant such a reduction will depend on the gravity of the offence which has been committed (proportionality). Provocation which may be sufficient to reduce an offender’s culpability for a minor assault may not reduce his or her culpability for murder.

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227 From [8.6.1]–[8.6.34].
228 From [8.7.1]–[8.7.6].
8.6 Degree of provocation

Assessing the degree of provocation

8.6.1 A number of jurisdictions have emphasised the logical relationship between the degree of provocation and the degree to which a reduction in the offender’s culpability is warranted. For example, the UK Sentencing Advisory Panel, in providing advice on sentencing for provocation manslaughter to the Sentencing Guidelines Council, thought that ‘an assessment of the degree of the provocation as shown by its nature and duration is the critical factor in the sentencing decision’.

The UK Panel supported an approach that classified provocation into different levels and allowed commensurate reductions in culpability and sentence:

The provocation does not itself have to be a wrongful act but where it involves gross and extreme conduct on the part of the victim, for example in some instances of domestic violence, it is viewed as being a more significant mitigating factor than conduct which, although significant, is not as extreme. Reflecting this distinction between types of provocation, Court of Appeal decisions have identified degrees of provocation through the use of descriptions such as ‘great or intense’, ‘moderate’ or ‘little or low’ to indicate the weight attached to the provocation in individual cases. These terms apply whatever the nature of the provocation and directly impact on the sentencing range into which a case will fall.

8.6.2 The subsequent Guideline lists a number of factors which should be taken into account in assessing the degree of provocation, including the ‘nature of the conduct, the period of time over which it took place and its cumulative effect’. The Guideline specifies that ‘gross and extreme conduct on the part of the victim … is a more significant mitigating factor than conduct which, although significant, is not as extreme’. Our approach goes further than the UK Guideline, as we suggest that provocation should not reduce an offender’s culpability at all if it does not provide adequate justification for the offender’s aggrievement.

8.6.3 We advocate a modified version of the UK Commission’s formulation which looks at whether the offender had a justifiable sense of being wronged and the degree to which his or her response to the provocation was disproportionate (taking into account the surrounding circumstances). Therefore, the degree of provocation necessary to warrant a reduction in the offender’s culpability will be commensurate with the gravity of the offence. Where the offender reacted particularly violently or intentionally caused serious harm or death, only the most serious examples of provocation are likely to be found 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.

8.6.4 The centrality of the gravity of the provocation to the assessment of the offender’s level of culpability is consistent with the approach taken in sentencing guidelines laid down in other jurisdictions. For example, for provocation to warrant mitigation of sentence under the United States’ Federal Sentencing Guidelines, there must be wrongful conduct by the victim which contributed significantly to...
provoking the offence behaviour. If established, ‘the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense’. The use of the adjective ‘wrongful’ in relation to the victim’s conduct in the United States Guidelines suggests the concept of justifiability. The Utah and Ohio guidelines require that the offender acted while under strong provocation. The District of Columbia Guideline requires that the victim provoked the offender to such a degree that the offender’s ‘culpability is substantially less than that typically associated with the offense’, suggesting a similar requirement for significant provocation. This limitation of mitigating provocation to ‘wrongful conduct’ or ‘serious provocation’ is consistent with the requirement for ‘gross’ provocation in the UK Commission’s reformulation of substantive provocation. In contrast, the UK Panel left room for less serious provocation to mitigate sentence, although it was emphasised that the degree of mitigation would be linked to the degree of provocation.

8.6.5 Our approach falls somewhere between these approaches. Like the UK Panel we take the view that the degree to which an offender’s culpability will be reduced by provocation should depend on its gravity. However, we also argue that for culpability to be reduced at all, it is necessary to consider whether the provocation was sufficient to justify the offender’s aggrievement in all the circumstances of the case and the degree to which the provocation was disproportionate to the gravity of the offence. For the most serious offences against the person, such as homicide, it is unlikely that any conduct short of serious provocation would be sufficient to warrant a reduction in the offender’s culpability. Where an offender has committed a less serious offence against the person, such as a minor assault, a lower degree of provocation may warrant a reduction in his or her culpability. Serious provocation may therefore result in a significant reduction in the offender’s culpability for a minor assault, depending on all of the circumstances.

8.6.6 The degree of provocation is determined by both its duration and nature. Evaluating the nature of the provocation may require consideration of both the offender’s relevant personal characteristics on the one hand, and the expectations of society and the need for normative change on the other.

The duration of the provocation

8.6.7 The duration of the provocation is relevant to its gravity. A long course of conduct by a victim is likely to be viewed as more ‘provocative’ than an isolated incident. Even prior to the abolition of substantive provocation, it was recognised that the effect of provocation can be a gradual process caused by the cumulative effect of ‘unalleviated pressure’ from a series of provocative incidents. Thus, it was accepted that a ‘sustained course of cruelty may build up to and ultimately precipitate an explosion of passion’. In these types of cases, ‘the whole chain of events, and not merely the concluding episode is relevant to the question of adequacy of provocation’.

237 Parker v The Queen (1963) 111 CLR 610.
238 Nash (1996), above n 117, [s 3.135].
239 R v Jeffrey [1967] VR 467, 484 (Smith J).
8.6.8 This principle is reflected in the UK Sentencing Guideline which provides that ‘whether the provocation was suffered over a long or short period is important to the assessment of gravity’.\textsuperscript{240} The UK Guideline emphasises that ‘the impact of provocative behaviour on an offender can build up over a period of time’ and that ‘consideration should not be limited to acts of provocation that occurred immediately before the victim was killed’.\textsuperscript{241} It provides the example that ‘in domestic violence cases, cumulative provocation may eventually become intolerable, the latest incident seeming all the worse because of what went before’.\textsuperscript{242} Similarly, the cumulative effect of provocative conduct would be encompassed in several of the factors set out in the grounds for departure under the US Federal Guideline including the persistence of the victim’s conduct, any efforts by the defendant to prevent confrontation, the danger reasonably perceived by the defendant, including the victim’s reputation for violence, the danger actually presented to the defendant by the victim and any other relevant conduct by the victim that substantially contributed to the danger presented.\textsuperscript{243}

The nature of the provocation: prevailing values and their protection

Introduction

8.6.9 How best to assess provocation has been the subject of much analysis under the previous law, some of which will be relevant in assessing the culpability of the offender, and consequently, the seriousness of the offence for sentencing purposes. There are circumstances in which courts have considered that an offender’s criminal behaviour in causing death or injury did not warrant mitigation of sentence, even if the person maintained that he or she had been acting under the influence of what he or she considered to be gross provocation. Courts have done so where public policy reasons outweigh individual considerations which may tend to mitigation.

8.6.10 In the past, some sentencers have made reference to the ‘ordinary person’ test while assessing provocation at sentencing. The 2005 changes to the law of provocation leave open the question of whether there remains a place for the ordinary person in assessing provocation in sentencing or whether there is a better approach in light of the public policy reasons for abolishing the partial defence.

8.6.11 We have argued that, regardless of whether the offender can prove that he or she lost self-control because of provocation by the victim, the key to whether a reduction in the offender’s culpability is warranted is the justifiability of the offender’s aggrievement. In assessing whether the conduct gave the offender a justifiable sense of being wronged, of what relevance is public policy and the need for normative behavioural change? And how may this be reflected in assessing the provocation? If there is a normative aspect to considering the types of provocation which may justify an offender’s sense of being wronged, will the personal characteristics of the offender be a relevant consideration?

\textsuperscript{240} Sentencing Guidelines Council (UK) (2005), above n 207, 3.2(b).
\textsuperscript{241} Ibid.
\textsuperscript{242} Ibid. See also: Sentencing Advisory Panel (UK) (2005), above n 207, [44].
\textsuperscript{243} USSC (2007), above n 233, §5K2.10. See further Appendix 1.
Equality principles: the preferred approach

8.6.12 In the course of its review of substantive provocation, the VLRC explored the option of incorporating an equality analysis into the test for substantive provocation to ‘attempt to ensure that legal rules operate without reinforcing systemic or historically discriminatory perspectives’.\(^{244}\) The VLRC described this as modifying the law ‘in such a way as to ensure that it is compatible with the right to equality’.\(^{245}\) The VLRC sets out three ways of incorporating an equality analysis:

(i) Inclusive test: ‘Provocative conduct’ could be limited to conduct that undermines the accused’s equality rights (e.g., racist taunts, crimes of homophobia, violence against women);

(ii) Exclusive test: The defence could exclude alleged ‘provocative conduct’ that arose due to the deceased exercising their equality rights. Such a test could exclude, for example, the possibility of provocation based on infidelity or a non-violent homosexual advance, on the basis that the deceased had a right to sexual autonomy;

(iii) Modification of the ordinary person test: In determining how the ‘ordinary person’ may have reacted to the provocative conduct, behaviour motivated by stereotypes of sex, race, sexual orientation, age or disabilities would not be considered ‘reasonable’. The ‘ordinary person’ could be defined as having knowledge of equality rights and behaving consistently with these rights.\(^{246}\)

8.6.13 Although the VLRC canvassed the equality framework in relation to substantive provocation law, its approach can be of assistance in determining the values that should inform what types of conduct by the victim may give an offender a justifiable sense of being wronged, how serious that wrong is, and whether it should therefore appropriately reduce the offender’s culpability.

8.6.14 We advocate the ‘exclusive test’ as a mechanism for delineating categories of conduct by the victim which should not be sufficient to justify an offender’s sense of aggrievement and thus warrant the reduction of the offender’s culpability. 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, commencing an intimate relationship with a new partner, choosing to work or gain an education or forming social relationships). There may be objections to the inclusion of morally or ethically uncertain concepts such as ‘equality’ or ‘justifiability’ on the grounds that the courts are not necessarily the best institutions to decide what may be political or moral issues. In fact, courts have long been invested with such powers in other legal contexts, such as self-defence and other contentious areas of the law and can do so properly in the area of provocation.

\(^{244}\) VLRC Homicide Options Paper (2003), above n 25, [3.163].

\(^{245}\) Ibid.

\(^{246}\) Ibid [3.164].
Is there a place in sentencing for the ordinary person test?

8.6.15 We argue that assessing provocation by reference to an equality framework is preferable to retaining the ordinary person test as an element of the consideration of provocation in sentencing.

8.6.16 Under the previous law the first limb of the test for substantive provocation required consideration of whether the provocation was ‘such as could cause an ordinary person to lose self-control and to act in the way in which the accused did’ (the ‘ordinary person’ test). There were two aspects of the ordinary person test:

1. assessing the gravity of the provocation by reference to the relevant characteristics of the defendant (including age, sex, ethnicity, physical features, personal attributes, personal relationships and past history); and
2. asking the question whether provocation of that degree of gravity could (or might) cause an ordinary person to lose self-control and act in a manner which would encompass the defendant’s actions (the only attribute of the accused that could be taken into account in asking this question was age).

8.6.17 Prior to the abolition of substantive provocation, the ordinary person test attracted much criticism. For example, Graeme Coss comments that ‘ordinary people, when affronted, do not resort to lethal violence … it is clear that the ordinary person does not kill. Only the most extraordinary person does’.

8.6.18 Historically, the approach to assessing provocation at sentencing was less restrictive than the test for substantive provocation; for example it was not essential to establish that the provocation was capable of causing an ordinary person to lose self-control. However elements of the partial defence occasionally ‘crept back’ into sentencing.

248 The justification for assessing the gravity of provocation by reference to the relevant personal characteristics of the defendant was set out in Masciantonio v The Queen, as follows: ‘Conduct which might not be insulting or hurtful to one person might be extremely so to another because of that person’s age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history. The provocation must be put into context and it is only by having regard to the attributes or characteristics of the accused that this can be done’: Masciantonio v The Queen (1995) 183 CLR 58, 67. See also Stingel v The Queen (1990) 171 CLR 312.
249 R v Thorpe (No 2) [1999] 2 VR 719, 724.
250 Masciantonio v The Queen (1995) 183 CLR 58, 66–67. For some time there was debate over whether the second limb of the ordinary person test could encompass personal characteristics of the offender such as ethnicity or race. Ultimately it was held that the only characteristic that could be taken into account was the accused person’s age.
251 Coss (2006), above n 31, 142 (original emphasis).
252 The test for substantive provocation is set out at [1.1.1] above.
253 Judicial College of Victoria (2005), above n 60, [9.10.1].
254 Ibid [20.6.5.2]: ‘When assessing the seriousness of the offence a sentencer may take into account whether the reasonable person would have been provoked by the conduct of the victim and, if so, to what degree. The higher the objective provocation offered by the victim, the less serious the offence’. A number of Victorian sentencing decisions incorporated an objective standard into assessing the provocation. In one case the victim had twice brutally assaulted the offender’s sister and had also assaulted the offender. The Court of Appeal held that “[n]o one could witness such conduct to a close relative without reacting. That the applicant did react is entirely understandable. His fault is that he went too far”: R v Redman (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, Starke and Crockett JJ, 14 December 1977), 13. In another case, the sentencing judge said that the offender ‘bravely sought to rescue those friends from the predicament in which they found themselves, and to defend himself, by tackling the victim when armed and so disarming him. Where the [offender] … went wrong was to react further and, in the heat of the moment, to fire the shot which killed the deceased’: R v Sanerive (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Southwell, Ormiston and McDonald JJ, 23 June 1995), 28.
8.6.19 In *Tyne v Tasmania*, Justice Blow emphasised that under the new law in Tasmania, provocation should be treated as a sentencing factor in murder cases in the same way that it was for crimes other than murder. He said that although the issues of whether an ordinary person would have been deprived of the power of self-control, and whether or not there was time for the offender's passion to cool are relevant to the assessment of provocation as a sentencing factor; these issues are not frequently raised before the sentencing judge. While similarly acknowledging the more flexible approach to provocation in sentencing, Chief Justice Underwood also left open the possibility of considering the ordinary (or reasonable) person in assessing the mitigatory weight of the provocation. He commented that while it was unnecessary in sentencing to assess whether the provocation could have caused an ordinary person to lose self-control:

> In a suitable case, no doubt it could be urged that greater mitigatory weight than usual should be given to the provocation because not only did the insult cause the accused to lose the power of self-control, but it was so grave it would also have caused a reasonable person to lose that power.\(^{257}\)

8.6.20 The approach in *Tyne v Tasmania*\(^ {258}\) would seem to suggest that while it is not necessary to evaluate an offender's conduct in a particular case by reference to the hypothetical ordinary person, the provocation may carry greater weight in reducing an offender's culpability if it can be demonstrated that an ordinary person would also have been provoked by the conduct. Although it is clearly necessary to assess provocation by reference to social norms and values to determine whether there is justification in a case for reducing an offender's culpability, we argue that a better approach is to assess the victim's conduct according to equality principles, rather than attempting to determine what an ordinary person might have done.

**Are the offender’s personal characteristics relevant?**

8.6.21 While we argue that assessing provocation at sentencing does not require the application of the ordinary person test, the question nevertheless remains as to what relevance the personal characteristics of the offender should have on the assessment of the provocation. There is some authority that in assessing the extent to which the provocation contributed to the offence and the weight, if any, to be given to it in sentencing, the relevant personal characteristics of the offender should be taken into account by the sentencing judge.\(^ {259}\)

8.6.22 In some cases, the offender’s personal characteristics may assist in placing the provocative conduct in context.\(^ {260}\) For example, if the conduct consists of grave racial vilification, the fact that the provoked person is a member of the vilified race is relevant to the assessment of gravity because these personal characteristics provide an understanding of why the offender might have behaved as he or she did. While many people could be 'provoked' by a breach of the equality rights of the vilified group, the fact that the offender was a member of the vilified group could lead to a conclusion that the provocation was more serious for him or her.

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255 (2005) 15 Tas R 221. See further [7.2.2]–[7.2.5] for a discussion of the facts of this case.
256 Ibid 229.
257 Ibid 227. See further [7.2.3].
258 (2005) 15 Tas R 221. See further [7.2.2]–[7.2.5] for a discussion of the facts of this case.
260 Judicial College of Victoria (2005), above n 60, [10.4.1]; *Tyne v Tasmania* (2005) 15 Tas R 221, 229.
This was recognised by the UK Sentencing Advisory Panel which was of the view that:

the court must consider whether, in the individual circumstances of the case, the actions of the victim would have had a particularly marked effect on the offender. For example, taunting or defamatory words used by a victim may have a particular significance for an individual offender in all the circumstances of a given case. The Court of Appeal has also acknowledged that those who are young or have a low IQ have a reduced capacity to deal with provocation.261

However, in the context of substantive provocation, the issue of culture or race often arose through a suggestion that because of the offender’s culture—in particular the culture’s attitude to women—the behaviour of a partner such as leaving the offender or commencing a relationship with someone else, was seriously provocative. Even other exercises of equality rights, such as joining the workforce or forming social relationships, were elevated to mitigating provocation in some cases due to considerations of the offender’s race or culture.262 There is doubt as to whether these generalised claims about a particular culture were or are true.263 There is no doubt that these generalisations had the effect of diminishing the rights of the women of a particular culture:

To assume that there is one relevant ethnic experience within each group leaves out of account that members of any ethnic group, as well as having an ethnicity, also have a class status, a sexual orientation, a particular physical ability, and, of course … a sex. … Any useful description of an ethnic group will need to encompass the experience of all of its members, not just some.264

Although there is a need to contextualise the victim’s conduct, which includes reference to the offender’s personal characteristics, the overriding consideration should be whether the offender’s sense of aggrievement at this conduct is justified in the circumstances, not whether it is understandable. Thus an appropriate approach to considering the offender’s personal characteristics would be to ask whether the victim’s conduct gave the offender a justifiable sense of being wronged, judged not only by reference to the offender’s personal circumstances, but also to broader community standards. Any consideration of whether the offender’s sense of being wronged was ‘justifiable’ must be consistent with equality principles.265 Where the victim in a particular case was engaging in conduct that involved assertions of the right to equality (such as the right to leave a relationship or engage in employment) the personal background and circumstances of the offender should not be interpreted to provide the offender with a justifiable sense of being wronged by that conduct. If such an approach is adopted, it is unlikely that the culpability of an offender for an offence against the person will ever be reduced because he or she claims to have been provoked by the victim’s enjoyment of equality rights, regardless of whether the offender can point to personal characteristics that caused him or her to find such behaviour provocative.

261 Sentencing Advisory Panel (UK) (2005), above n 207, [38] (citations omitted, emphasis removed).
262 See, for example: R v Estabillo (Unreported, County Court of Victoria, 21 August 2001), 2.
264 Ibid 267.
265 See further [8.6.12]–[8.6.14].
Self-induced provocation

8.6.26 In the context of the partial defence of provocation, there was some authority that conduct by the victim which was the predictable result of the defendant’s own wrongdoing could not constitute provocation at law. An extreme response by the victim to the defendant’s wrongdoing, however, could be sufficient to satisfy the test.\(^{266}\)

8.6.27 We advocate a consistent approach in sentencing. Generally, conduct by the victim which is the predictable result of the offender’s own wrongdoing, will not be considered to have provided the offender with a justifiable sense of being wronged and thus to warrant a reduction in the offender’s culpability.

8.6.28 The issue of self-induced provocation has commonly arisen in cases where a person has killed his or her partner or former partner in the context of the breakdown of the relationship or allegations of unfaithfulness.\(^{267}\) Although substantive provocation has been abolished, the following cases under the previous law illustrate the situations in which self-induced provocation might occur:

In these cases the trial judges refused to allow provocation to be left to the jury on the basis that the victim’s conduct had been induced by the offender.

8.6.29 In *R v Allwood*,\(^{268}\) the defendant separated from his partner after she commenced a relationship with another man. The defendant alleged that following the break up, his partner had denied him contact with his daughter and refused his offer of marriage. He wrote to her in threatening terms. Eventually he visited her with a loaded rifle, shot and killed her and attempted to kill himself. He alleged that he had asked her why she had left and she had replied ‘to have sex’. He asked her how many times she had had sex with the other man, to which she replied four times. He had called her a ‘lying bitch’ and she had laughed ‘mockingly’ and said ‘prove it’. Prior to the killing he had written a letter stating ‘I am personally guilty of this crime being in sane mind. All women should take notice of this letter never take a man’s family away from him he works hard to get it and maintain it’. The trial judge did not allow the jury to consider provocation. On appeal, the Victorian Court of Appeal agreed with the trial judge, relying on *Edwards v The Queen*\(^{269}\) to hold that even if the words were provocative it could not be provocation in law as the defendant had induced the provocation in forcing her to make the admissions. The Court held that ‘[o]nly if the hostile reaction goes beyond the reasonably predictable can provocation that is itself provoked be fit for consideration by a jury’.\(^{270}\)

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266 In *Edwards v The Queen* [1973] AC 648, the Privy Council commented: ‘On principle, it seems reasonable to say that— (1) a blackmailer cannot rely on the predictable results of his own blackmailing conduct as constituting provocation … and the predictable results may include a considerable degree of hostile reaction by the person sought to be blackmailed … (2) but if the hostile reaction by the person sought to be blackmailed goes to extreme lengths it might constitute sufficient provocation even for the blackmailer; (3) there would in many cases be a question of degree to be decided by the jury’: *Edwards v The Queen* [1973] AC 648, 658. *Edwards v The Queen* was later distinguished in *R v Johnson* [1989] 2 All ER 839, in which it was held that the partial defence of provocation can arise even in cases where the wrongful conduct of the offender causes the provocative act of the victim.

267 See further [8.10.54]–[8.10.91] for a discussion of this category of provocation.


269 *Edwards v The Queen* [1973] AC 648. See further above n 266.

270 (1975) 18 A Crim R 120 (CCA Vic) 133.
8.6.30 In *R v Borthwick*, the defendant sought leave to appeal against his conviction for murder on the ground that the trial judge had erred in failing to leave provocation before the jury. In his application for leave to appeal it was suggested by the defendant’s Counsel that prior to killing the victim the defendant had lost control, which ‘might have occurred as a result of the victim’s being abusive and aggressive to the applicant when he failed to desist from continuing to seek sexual gratification after she had asked him to stop because of the pain he was causing her’. The Court unanimously dismissed the application holding that provocation ‘induced in turn and by the provocative action of the accused person is inoperative in law to produce a defence’.

8.6.31 Prior to the abolition of the partial defence of provocation, Professor Morgan wrote that:

> Unless, say, the partner’s separation rather than her sexual taunts are emphasised, and/or explicit emphasis is given to the way in which the accused provoked the provocation, and/or a wide focus on the whole context of the relationship is encouraged (so that, for example, previous violence by the accused is relevant to the alleged provocative scenario), we should not be surprised to discover that juries find that the Crown has not negatived provocation in these cases.

8.6.32 Similarly, Ian Leader-Elliott argued that ‘enraged men who engineer a confrontation, lose all self-control and kill their wives, lovers or rivals after separation, are likely candidates for the ranks of those who are, morally speaking, murderers’.

8.6.33 Self-induced provocation is excluded from the definition of provocation under Queensland and Western Australian legislation. For example, the Queensland *Criminal Code* provides that ‘[a]n act which a person does in consequence of incitement given by another person in order to induce the person to do the act, and thereby to furnish an excuse for committing an assault, is not provocation to that other person for an assault’.

8.6.34 Demoting provocation from a substantive issue at trial to one of many sentencing factors means that the trial judge can weigh up the severity of the victim’s conduct in the context of the surrounding circumstances to determine what, if any, reduction in the offender’s culpability is merited. The fact that an offender induced the victim’s provocative conduct would be highly relevant to whether any weight is attributed to the provocation in sentencing the offender. It is expected that self-induced provocation would generally be of little or no weight in determining the offender’s level of culpability. For self-induced provocation to reduce an offender’s culpability for an offence against the person, it is likely that the victim’s conduct would have to be an extreme reaction to the offender’s wrongdoing which justified the offender’s aggrievement in the circumstances of the case, including the fact that the offender induced it. For homicides and the most serious non-fatal offences against the person, it is expected that only the most severe reaction by a victim to the offender’s conduct would justify the offender’s aggrievement and thus warrant any reduction in the offender’s culpability.

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271 (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Crockett, Gobbo and Smith JJ, 18 March 1991).
272 Ibid 1–2.
273 Ibid 3.
274 Morgan (1997), above n 6, 255 (emphasis added).
276 *Criminal Code Act 1899* (Qld) s 268(4). Section 245 of the *Criminal Code Act Compilation Act 1913* (WA) makes similar provision.
8.7 Proportionality

8.7.1 We argue that whether an offender's culpability should be reduced by provocation should not only depend on the degree of the provocation but also on the severity of the offender's reaction, including the offence committed and the offender's state of mind in committing that offence. Modifying the UK Commission's formulation to incorporate proportionality (rather than limiting the operation of provocation to only serious wrongs) reflects the application of our formulation to the full spectrum of offences against the person (rather than just murder) and the more flexible approach to provocation in sentencing.

8.7.2 Although proportionality was not a separate component of the modern test for substantive provocation, it has often been identified as a relevant factor in considering provocation in sentencing for offences against the person. For example, in R v Burgess, the offender pleaded guilty to intentionally causing injury and affray, having assaulted the victim during a dispute. Having overpowered the victim, the offender and her partner continued to assault her while she was on the ground, including the offender's partner deliberately breaking the victim's arm and the offender kicking her with all her might in the face. The sentencing judge found that, although there had been provocation, the attack was vicious and out of all proportion to anything said or done to the offender, commenting:

it is beyond my comprehension how even under extreme provocation someone could behave as you did, particularly ... kicking [the victim] in the face at a time when she was defenceless. I am sorry to say that shows that you have an underlying violent streak which is a source of considerable concern.

8.7.3 Other jurisdictions have similarly recognised proportionality as a relevant factor in considering the weight to be given to provocation in sentencing. For example, the United States Federal Sentencing Guidelines specifically include proportionality as a relevant factor. They provide that: ‘[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense’. In deciding whether the provocation warrants a sentence reduction, and the extent of such a reduction, the court should consider factors including the ‘proportionality and reasonableness of the defendant's response to the victim's provocation’.

8.7.4 Proportionality as a concept has its limitations. The fact that an offender has been convicted of a violent offence suggests, as a starting point, that his or her response to the victim's conduct was disproportionate. From that point, it could be argued, ‘one can only move to increasingly shocking degrees of disproportionality’. There was no need in the test for substantive provocation to consider proportionality separately, as it was absorbed into the ordinary person test which insisted ‘that the mode of retaliation be objectively proportionate to the provocation’; Masciantonio v The Queen (1995) 183 CLR 58, 80, 67 (Brennan, Deane, Dawson and Gaudron JJ); Johnson v The Queen (1976) 136 CLR 619. See further: Bronitt and McSherry (2005), above n 51, 263–4.

277 There was no need in the test for substantive provocation to consider proportionality separately, as it was absorbed into the ordinary person test which insisted ‘that the mode of retaliation be objectively proportionate to the provocation’; Masciantonio v The Queen (1995) 183 CLR 58, 80, 67 (Brennan, Deane, Dawson and Gaudron JJ); Johnson v The Queen (1976) 136 CLR 619. See further: Bronitt and McSherry (2005), above n 51, 263–4.

278 (Unreported, County Court of Victoria, 2 December 2002). See also R v Winter [2004] VSC 329 (Unreported, Osborn J, 3 March 2004), [33]; R v Alexander (1994) 78 A Crim R 141 (SC NSW), 144.

279 R v Burgess (Unreported, County Court of Victoria, 2 December 2002), 4.

280 USSC (2007), above n 233, §5K2.10, p.s. See further Appendix I.

281 Ibid §5K2.10(6), p.s. (emphasis added).

282 Ian Leader-Elliot, Adelaide University Law School (personal correspondence).
8.7.5 However, although provocation rarely justifies or excuses an offence of violence, it can mitigate the penalty for the offence. Unlike guilt and innocence, mitigation varies on a continuum from significant to non-existent. Because of the wide variation in offences against the person, some measure is required to assess the extent to which a reduction in the offender’s culpability is warranted by provocation. Whether a reduction is justified, and the extent of such a reduction, whether significant or insignificant, will vary with the degree of provocation by the victim and the degree to which the offender’s response was disproportionate to that provocation. If the offender’s retaliation was particularly violent or if it was intended to cause serious injury or death, provocation is unlikely to mitigate the penalty unless the offender’s response was prompted by serious provocation by the victim of the attack. Thus where the offender’s reaction is grossly disproportionate to the provocation, the significance of the provocation to the offender’s culpability may, as a matter of policy, be negated or decreased.

8.7.6 Therefore, under the new law, proportionality is likely to remain a central consideration in determining whether there was sufficient provocation in a particular case to have caused the offender such a justifiable sense of being wronged that the law should recognise the offender’s reduced culpability for acting as he or she did. That is, the degree of provocation necessary to warrant a reduction in the offender’s culpability will be commensurate with the gravity of the offence which has been committed. For example, where the offender intentionally caused serious harm or death, only the most serious examples of provocation are likely to reduce the offender’s culpability.
8.8 Causation

Provocation as an operative cause of offending

8.8.1 Our proposed formulation of sentencing provocation implies that there is a causal nexus between the behaviour of the victim and that of the perpetrator. For provocation to reduce an offender’s culpability for an offence, it must have caused the offender’s sense of aggrievement, which in turn must have caused the offender to commit the offence.

8.8.2 We advocate a similar formulation of causation as that set down in the recent New Zealand case R v Taueki.\textsuperscript{283} The Court held that, for provocation to reduce the seriousness of a grievous bodily harm offence, ‘the sentencing judge will need to be satisfied that there was serious provocation which was an operative cause of the violence inflicted by the offender, and which remained an operative cause throughout the commission of the offence.’\textsuperscript{284}

8.8.3 Similar formulations have been advocated in some Australian jurisdictions. Sentencing legislation in the Australian Capital Territory requires that in sentencing an offender, the court must have regard to matters including ‘the degree to which the offence was the result of provocation’.\textsuperscript{285} In R v Niceski,\textsuperscript{286} the court commented that in sentencing the offender it was ‘obliged to take into account all of the surrounding circumstances, including the making of [the] threat and its impact upon the accused’.\textsuperscript{287}

8.8.4 In the Victorian case of R v Kelly,\textsuperscript{288} the court discussed provocation as a mitigating sentencing factor outside the context of homicide, commenting:

\begin{quote}
The provocative conduct … recognised … as being relevant to mitigation was constituted by acts or words on the part of the victim which incited or induced the accused to respond almost immediately or very shortly thereafter in the form of the offending conduct while in an agitated or angry state.\textsuperscript{289}
\end{quote}

8.8.5 We suggest that for an offender’s culpability to be reduced, there must have been provocation of a sufficient degree to have given the offender a justifiable sense of being wronged (commensurate with the gravity of the offence committed). The provocation and the offender’s sense of aggrievement must have been an operative cause of the offence and must have remained an operative cause throughout the commission of the offence.

8.8.6 If this is accepted, the question of the timing of the provocation in relation to the offence becomes even more salient.\textsuperscript{290} What significance does a delay between the provocative conduct and the subsequent offence have on the assessment of the offender’s culpability?

\begin{itemize}
\item \textsuperscript{283} [2005] 3 NZLR 372.
\item \textsuperscript{284} Ibid [32].
\item \textsuperscript{286} [2005] ACTSC 62 (Unreported, Crispin J, 3 March 2005).
\item \textsuperscript{287} Ibid [29].
\item \textsuperscript{288} [2000] VSCA 164 (Unreported, Charles, Buchanan and Chernov JJA, 6 September 2000).
\item \textsuperscript{289} Ibid [14] (emphasis added).
\item \textsuperscript{290} See further Justice Blow in Tyne v Tasmania (2005) 15 Tas R 221 (discussed at [5.2.5] above).
\end{itemize}
Delay between the provocation and the offending conduct

8.8.7 In the test for substantive provocation, a delay between the provocation and the defendant’s response was relevant to the issue of whether the defendant acted while experiencing a loss of self-control, which is not an element of provocation in sentencing. Delay did not necessarily negate the provocation, but the longer the delay the more difficult it was to establish that the offender committed the offence while experiencing a loss of self-control.291 Therefore the existence of a ‘cooling off’ period after the conduct alleged to be provocation was significant.292 In Masciantonio v The Queen,293 it was held that the trial judge could leave provocation to the jury even in circumstances where the ‘loss of self-control did not follow immediately upon, or as the result of a specific incident of, provocative conduct’.294 However, in Parker v The Queen,295 it was held that:

some provocative act must not be seized upon by the accused (who does not as a result act suddenly and in the heat of passion) as providing an appropriate moment and a convenient excuse for carrying out some previously existing purpose or acting upon an old grudge.296

8.8.8 In assessing the weight to be given to provocation in sentencing, the period of time between the provocative conduct and the offender’s response is likely to remain a relevant consideration.297 In Tasmania following the abolition of the partial defence the timing of the provocation in relation to the killing has been identified as one of the circumstances which is relevant to the consideration of the provocation in sentencing an offender for murder.298

8.8.9 Where there is a short period of time between the provocative conduct and the offence, the offender may be more likely to be viewed as responding directly to the provocative conduct in committing the offence which may increase the mitigatory weight of the provocation.299 Similarly, a significant delay between the cessation of the provocative conduct and the offender’s response may suggest that, rather than committing the offence while provoked, the offender was in fact motivated by a desire for vengeance.300 For this reason evidence of premeditation and planning may minimise the impact of the provocation, even if it does not negate the provocation entirely.301 However, the significance of any delay between the provocation and the offence will depend on the context in which both occur. The more important issue is the justifiability of the offender’s sense of being wronged and whether it was, and remained, an operative cause of the offending.

294 Ibid 71 (McHugh J).
295 (1963) 111 CLR 610.
296 Ibid 681.
298 As discussed by Justice Blow in Tyne v Tasmania (2005) 15 Tas R 221 (see further [5.2.5]).
300 Morabito v The Queen (1992) 62 A Crim R 82 (CCA NSW).
301 Ibid.
8.8.10 The significance of the time period between the victim’s conduct and the offender’s response was highlighted in the UK Sentencing Advisory Panel’s advice that:

The circumstances of the killing itself will be relevant to the defendant’s culpability, and hence to the appropriate sentence. In general, the defendant’s violent response to provocation is likely to be less culpable the shorter the time-gap between the provocation (or the last provocation) and the killing.\footnote{Sentencing Advisory Panel (UK) (2005), above n 207, [43]. This was reflected in the UK Guideline: Sentencing Guidelines Council (UK) (2005), above n 207, [3.4].}

8.8.11 A number of Victorian cases illustrate the relevance of delay in non-fatal offences against the person. In \textit{R v Rushby},\footnote{[2002] VSCA 44 (Unreported, Callaway, Batt and Vincent JJA, 27 March 2002).} the offender pleaded guilty to charges including recklessly causing serious injury. He and his brother had been involved in a confrontation with one of the victims (Dunlop) and later went in search of him. Upon finding Dunlop, the offender attacked him and punched his female friend, knocking her to the ground. In dismissing an appeal against sentence by the offender; Justice Batt of the Court of Appeal (with whom Vincent and Callaway JJA agreed) stated that:

whilst thinking that his brother had been wronged by Dunlop … might go some way to explain the applicant’s offending, it did not palliate the offences. It was not a mitigating factor of any significance, for any ‘provocation’ (in the non-technical sense) offered … was far too distant in time from the offending some hour or hours later. The attack was not committed on the spur of the moment or in a paroxysm of anger that was sudden.\footnote{Ibid [12].}

8.8.12 In \textit{DPP v North},\footnote{[2002] VSCA 57 (Unreported, Phillips CJ, Phillips JA and O’Bryan AJA, 18 April 2002).} the offender was sentenced to a community-based order without conviction after pleading guilty in the County Court to charges including intentionally causing injury. The offender and the two victims had been involved in a fight in which the offender had punched one victim. Later that night the offender broke into a house in which the victims were asleep and attacked the second victim. In allowing a Crown appeal against sentence, O’Bryan JA (with whom Phillips CJ and Phillips JA agreed) stated that ‘on any view the attack was vicious and cowardly. There may have been some provocation offered … but a cooling-off period of some hours had elapsed before the attack.’\footnote{Ibid [16].}

8.8.13 There may be circumstances where provocation is found to be an operative cause of an offence notwithstanding a significant delay between the provocation and the offending behaviour. In certain circumstances the impact of provocation on an offender can be a cumulative process that eventually causes the offender to react, for example where the victim has perpetrated family violence upon the offender over a long period.\footnote{See further [8.6.7]–[8.6.8], [8.10.37]–[8.10.53].} This issue was raised by the UK Panel which expressed the view that:

Although there will usually be less culpability when the retaliation to provocation is sudden, it is not always the case that greater culpability will be found where there has been a significant lapse of time between the provocation and the killing. It is for the sentencer to consider the impact on a defendant of provocative behaviour that has built up over a period of time.\footnote{Sentencing Advisory Panel (UK) (2005), above n 207, [45].}
8.8.14 Similarly, the VLRC has recognised that delays between provocation and the offender’s response may reflect the relative strength of the offender and the victim; this does not necessarily mean that the effects of the provocation have dissipated:

Because men are often physically stronger than their female partners and can easily overpower them, women often kill their partners when they are asleep or have their guard down. Women also typically use a weapon to protect themselves. In some cases, women enlist the assistance of others to kill their violent partners.309

8.8.15 In cases involving cumulative provocation, the culpability of an offender may be reduced, even significantly, by the provocation despite a delay between the last provocation and the offending behaviour. The justifiability of, or reasons for, the offender’s reaction to the provocation are likely to be highly significant in assessing the relevance of delay in a particular case.

A mistaken perception of provocation

8.8.16 Under substantive provocation law there was some uncertainty as to whether a mistaken perception of provocation by the defendant could be taken into account in assessing the gravity of the victim’s conduct. In R v Voukelatos,310 the majority of the Supreme Court held that the partial defence of provocation may be available even where it was based on delusional beliefs. In R v Abebe,311 the Court stated that ‘[t]here is … much to be said for the view that provocation mistakenly believed to have come from the victim should be available for consideration by the jury, provided, however, that the mistaken belief is reasonably held’.312 However, in the New South Wales case of R v Dib,313 Hulme J stated that the terms of the NSW provision which sets out the partial defence of provocation resolves ‘with unambiguous clarity’ any suggestion that acts which did not occur, or acts which were not done by the deceased (or with the complicity of the deceased) but were mistakenly believed by the defendant to have been done by the deceased, amounted to ‘any conduct of the deceased’. He concluded that ‘[a]s a matter of simple ordinary English, they are not’.314

8.8.17 In Victoria it would appear that the partial defence of provocation was open to a defendant even where it was based on a mistaken belief. Similarly, in sentencing, there are examples of cases in which mistaken provocation was raised in mitigation. Two County Court sentences for non-fatal offences against the person illustrate the approach that has been taken in such cases. In R v Baird,315 the victim and offender were acquaintances who were drinking together at the pub. The victim alleged that the offender had started lamenting the treatment of Aboriginal people in Australia, in

312 Ibid 445.
314 Ibid [35].
315 (Unreported, County Court of Victoria, 8 February 1999).
response to which the victim had asked the offender whether he was part Aboriginal. In response
the offender struck the victim in the face with his beer glass. The judge accepted that in the
offender’s intoxicated state, he interpreted the question about his origin to be a racist slur and that
this ‘provocation prompted this violent conduct … which was completely out of character with
[the offender’s] conduct when sober’. This was taken into account in mitigating the offender’s
sentence.

8.8.18 In contrast, in R v Patterson, the offender (accompanied by his brother) broke into the victim’s
house because he believed that the victim’s oldest son had stolen his video cassette recorder. The
sentencing judge rejected provocation as a relevant sentencing factor, reaching the view that given
the tenuous basis for suspecting that the son had stolen his property he did not accept that the
offender had a belief based on reasonable grounds.

8.8.19 We suggest that when considering provocation in sentencing, the fact that the provocation
stemmed from the mind of the offender, rather than the conduct of the victim, is likely to be
viewed as a matter for the sentencing judge to weigh up with all of the other circumstances of
the offence, to determine whether the offender had a justifiable sense of being wronged and,
consequently whether any reduction in the offender’s culpability is warranted. The reasonableness
of the offender’s belief is likely to be a significant consideration in this assessment.

316 Ibid 3.
317 (Unreported, County Court of Victoria, 4 March 1999).
8.9 When may provocation mitigate sentence?

8.9.1 In this section we have looked at the principles that are likely to inform the consideration of whether provocative conduct by the victim in a particular case reduces an offender’s culpability.

8.9.2 Our approach to assessing whether the victim’s conduct in a particular case justifies a reduction in the offender’s culpability and consequently the possible mitigation of the offender’s sentence draws from the ‘reasons-based’ approach to assessing culpability advocated by the VLRC as well as approaches to provocation in sentencing in other jurisdictions.

8.9.3 We argue that for provocation to reduce an offender’s culpability, it is not necessary to show that the offender lost self-control or that the provocation was capable of causing an ordinary person to lose self-control. Rather, the foundation for mitigating provocation is the fact that a victim’s words and/or conduct caused the offender to have a justifiable sense of being wronged in all of the circumstances of the case.

8.9.4 That the provocation caused, or provided some explanation or justification for, the offender’s sense of aggrievement is a necessary, but not sufficient, condition for the provocation to warrant mitigation of sentence. This aggrievement must also be legitimated or justified by considerations other than the offender’s own perceptions or beliefs. The modern approach to provocation was never fully subjective: the ordinary person test provided an objective standard against which to measure a defendant’s homicidal conduct.318 We suggest the incorporation of an equality framework into the assessment of whether the provocation in a particular case supports a reduction in the offender’s culpability.319 Understanding the circumstances in which a reduction of an offender’s culpability for an offence may be justified is essential to assessing the types of conduct by the victim that should (and should not) amount to a sufficient wrong to justify mitigation of sentence.

8.9.5 This view is consistent with the original rationale for provocation as a partial justification for the offender’s reaction, to the extent that the gravity of the victim’s conduct becomes the crucial element in the assessment of culpability.320 The relationship, or proportionality, between the gravity of the provocation and the gravity of the offence is also relevant to considering whether a reduction in the offender’s culpability is justified. The more serious the offence that has been committed, the more serious the provocation required to reduce the offender’s culpability. It is also necessary to establish that the provocation, and the offender’s response, were and remained an operative cause of the offence.

318 See further [2.1.3].
319 See further [8.6.12]–[8.6.14].
320 See further [2.1.3]–[2.1.5].
8.9.6 Under our suggested framework, whether, and to what extent, an offender’s culpability will be reduced by provocation will depend on:

1. The degree of provocation, that is whether, in all of the circumstances of the case, the provocation caused the offender to have a justifiable sense of being wronged, considering:
   (a) the nature and context of the provocation, including whether it consisted of the victim exercising his or her equality rights; and
   (b) the duration of the provocation.

2. The degree to which the offender’s response was disproportionate to the provocation: the greater the disproportionality the lower the reduction in the offender’s culpability. For the most serious examples of offences against the person, only serious provocation is likely to warrant a reduction in the offender’s culpability.

3. Whether the provocation was an operative cause of the offence, and remained an operative cause throughout the duration of the offence.

8.9.7 The next section of this chapter applies these principles to traditional categories of provocation.
8.10 The new approach in practice: assessing degrees of provocation

Introduction

8.10.1 In this section, we apply the principles outlined above to accepted categories of ‘substantive provocation’ and look at particular policy considerations that are relevant to whether these types of conduct could (or should) be capable of justifying an offender’s aggrievement.

Actual or anticipated violence

8.10.2 Conduct such as actual or anticipated violence by the victim against the offender or an associate of the offender is likely to be viewed as serious provocation, capable of reducing the culpability of an offender who has committed an offence against the person in response to such provocation.\(^{321}\) Even in relation to serious offences against the person, such conduct may be found to have caused the offender to have a justifiable sense of being wronged and, subject to other considerations such as causation, be capable of reducing the offender’s culpability.

8.10.3 Examples of conduct accepted as substantially mitigating provocation in the context of non-fatal offences in the County Court have included:

- aggressive behaviour, violent conduct or sexual assault towards the offender; and
- aggressive behaviour, violent conduct or sexual assault, or a threat of such behaviour, towards another person (most commonly a family member or friend of the offender).\(^{322}\)

8.10.4 Actual or threatened violence has similarly been emphasised as serious provocation in sentencing guidelines in other jurisdictions. The UK Sentencing Guideline provides that where the victim has been violent or caused the offender to anticipate violence, the offender’s culpability will usually be less than in cases where the victim has verbally provoked the offender.\(^{323}\) The Guideline drew from advice from the UK Panel including that:

> in general, a violent response to provocation is more understandable where it results from violence (or anticipated violence) from the victim, rather than to abusive behaviour, infidelity or offensive words. In cases involving actual or anticipated violence, the culpability of the offender would therefore be less than in cases involving verbal provocation.\(^{324}\)

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\(^{321}\) See for example: R v Stavreski (2004) 145 A Crim R 44 (VSC) in which the offender was sentenced to three years’ imprisonment, wholly suspended, after pleading guilty to provocation manslaughter. The offender had defended himself and his wife from their daughter’s attack. See also: DPP v Kallipolitis (Unreported, Ormiston, Callaway and Kenny JJA, 8 May 1998); R v Sanerive (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Southwell, Ormiston and McDonald JJ, 23 June 1995).

\(^{322}\) See for example: R v Phillips (Unreported, County Court of Victoria, 20 August 2001); R v Close (Unreported, County Court of Victoria, 18 March 2004). See further [8.10.8]–[8.10.12] (sexual assault).

\(^{323}\) Sentencing Guidelines Council (UK) (2005), above n 207, [3.2 (c)].

\(^{324}\) Sentencing Advisory Panel (UK) (2005), above n 207, [37] (citations omitted). The UK Commission also emphasised serious violence in its reformulation of substantive provocation (see further [8.5.11]).
8.10.5 The US Guidelines require that in deciding whether a reduction of the offender’s sentence is justified, and the extent of that reduction, consideration should be given to factors including the ‘danger reasonably perceived by the defendant, including the victim’s reputation for violence … the danger actually presented to the defendant by the victim … [and] any other relevant conduct by the victim that substantially contributed to the danger presented’.325

8.10.6 The victim’s use or threatened use of a weapon against the offender is likely to be viewed as serious provocation which may justify the offender’s aggrievement and, subject to other considerations, reduce his or her culpability.326 The type of weapon and the threat posed (or perceived by the offender) are likely to be highly relevant in assessing the gravity of such provocation.

8.10.7 The gravity of this type of conduct was illustrated in R v Sanervi.327 The offender pleaded guilty to provocation manslaughter after shooting and killing the victim who had abused and harassed the offender’s aunt and later threatened the offender and his friends with a shotgun. The court determined that the victim’s conduct had been ‘highly’ provocative, reducing the offender’s culpability and warranting the mitigation of his sentence. The offender was sentenced to a community-based order. It was held that although, initially, the offender sought to defend himself and his friends he ultimately went further than necessary for self-defence by firing the shot which killed the victim:

The whole incident stemmed from the grossly insulting language of the deceased as a result of which the applicant sought to protect his aunt. That provocation was exacerbated when the author of the language deliberately went away to seek a gun and to confront the applicant and his friends. The applicant bravely sought to rescue those friends from the predicament in which they found themselves, and to defend himself, by tackling the deceased when armed and so disarming him. Where the applicant went wrong was to react further and, in the heat of the moment, to fire the shot which killed the deceased.328

325 USSC (2007), above n 233, §5K2.10(3)–(5). See further Appendix I.
326 Judicial College of Victoria (2005), above n 60, [20.6.5.2]. See for example: R v Tam Van Le (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Crockett, King and Vincent JJ, 17 October 1988).
327 (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Southwell, Ormiston and McDonald JJ, 23 June 1995).
328 Ibid [28]. It is possible that under the new law circumstances such as these may result in a conviction for defensive homicide, rather than murder: see further [2.2.4]–[2.2.5].
Sexual advances and sexual assault

Introduction

8.10.8 Under the new law, what examples of sexual conduct by the victim should appropriately provide an offender with a justifiable sense of having been wronged? As with all examples of provocation the context in which such conduct occurs will remain important.

Sexual assault and other unlawful violations of sexual autonomy

8.10.9 Sexual assault, threatened sexual assault or another unlawful violation of an offender’s sexual integrity or autonomy is likely to be viewed as serious provocation which warrants a reduction in the offender’s culpability for a responsive offence. As for all categories of provocation, the extent to which the offender’s culpability will be reduced will depend on the surrounding circumstances and the degree of disproportionality between the provocation and the offence.

8.10.10 Sexual violation or the threat of sexual violation has long been regarded as serious provocation in sentencing for non-fatal offences against the person. For example in R v Phillips, the discovery by the offender that his daughter allegedly had been raped by his father (her grandfather) was held to be strong provocation warranting a reduction in the offender’s culpability for intentionally causing serious injury. However, the judge emphasised that despite the provocation, general deterrence remained a significant purpose of the sentence which he imposed, commenting ‘one must not take the law into one’s own hands by seeking to avenge or punish those perceived as wrongdoers, no matter how heinous the alleged crime’. In R v Close, the offender was found guilty of recklessly causing serious injury to the victim. The victim’s conduct, including punching the offender, admitting to having raped the offender’s wife and threatening to rape the offender’s daughter, was held to be substantial provocation.

8.10.11 In other contexts, ‘sexual assault and other sexually coercive behaviour’ have been specifically recognised as serious forms of violence. In a recent review of family violence laws, the VLRC defined family violence as ‘violent or threatening behaviour or any other form of behaviour which coerces, controls and/or dominates a family member/s and/or causes them to be fearful’ and included in the definition ‘sexual assault and other forms of sexually coercive behaviour’. The VLRC emphasised that family violence, in all its forms, is a ‘fundamental violation of human rights’. In recommending that sexual forms of family violence be specifically referred to in the new definition of family violence, the VLRC commented:

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329 (Unreported, County Court of Victoria, 20 August 2001).
330 Ibid 8–9.
331 Ibid 11.
332 (Unreported, County Court of Victoria, 18 March 2004).
333 Ibid [4], [10].
335 Ibid 105–106 (Recommendation 15).
336 Ibid [3.4].
337 Ibid 103 (Recommendation 13).
Including sexual forms of family violence in the definition serves two main purposes. First, it makes it clear to family violence victims that they do not have to endure sexual assault, that it is not considered acceptable in our society and that legal protection is available. Secondly, it educates the community about sexual violence within family relationships and that it is unacceptable. Sexual forms of family violence should be explicitly recognised in the definition of family violence.338

8.10.12 Depending on the circumstances, a person who uses force in response to family violence may escape conviction on the ground of self-defence, even though the force resulted in death. In cases where the retaliation was excessive and the victim of family violence is convicted of an offence against the person, the fact that the offence was committed in response to sexual assault or other sexually coercive behaviour may nevertheless mitigate the penalty.

Unwanted sexual advances

8.10.13 Though it is generally accepted that an actual or threatened sexual assault or violation can mitigate the penalty for a crime of violence, it is necessary to ensure that the plea in mitigation does not provide camouflage for homophobic prejudice. Prior to abolition of the partial defence of provocation there were cases in which defendants who had deliberately targeted and fatally assaulted homosexual men sought, with occasional success, to escape conviction for murder on the ground that they had been ‘provoked’ by a sexual advance.339 In a New South Wales study of 16 trials of homosexual-hate killings, 13 of the cases contained an allegation that the victim had made a sexual advance or assault. In two out of the 13 cases the defendant was acquitted and in six the defendant was convicted of manslaughter.340

8.10.14 One of the reasons for abolishing substantive provocation in Victoria was to help combat the very serious problem of predatory violence, often associated with enticement or entrapment, against gay men in our community.341 ‘Homosexual advance’ provocation was criticised for condoning violence based on homosexual-hatred342 and for allowing the defamation of the dead.343 Other jurisdictions have also grappled with this problem. In the Australian Capital Territory, legislation governing substantive provocation explicitly provides that a non-violent sexual advance (or advances) towards the defendant will not be sufficient, in itself, to amount to provocation as a partial defence to murder but may be taken into account together with other conduct of the victim in deciding whether there has been an act or omission that amounts to provocation.344

338 Ibid [4.43].
339 In a study of anti-homosexual homicides in New South Wales between 1980 and 2000, Stephen Tomsen raises the possibility that claims by offenders that they have been provoked by a sexual advance or advances ‘are merely a convenient rationalisation for attacks with anti-homosexual motives’: Stephen Tomsen, ‘Hatred, Murder and Male Honour, Anti-homosexual Homicides in New South Wales, 1980–2000’ (43) (2002) Australian Institute of Criminology Research and Public Policy Series, 57.
341 The Attorney-General, the Honourable Rob Hulls, Speech at the Crimes (Homicide) Bill launch, Melbourne, 4 October 2005. See further [2.2.2].
342 The VLRC comments: ‘Concern about the use of the argument concerning unwanted homosexual advance must be considered in the broader context of violence against gay men and lesbians generally. The Australian Institute of Criminology has described the level of such violence in Australia as ‘disturbing’, and suggests that it is rising. This indicates that there is a high level of prejudice against gay people within Australia’: VLRC Homicide Options Paper (2003), above n 25, [3.66]. See further: Tomsen (2002), above n 339, 57.
344 Crimes Act 1900 (ACT) ss 13(3)(a) and 13(3)(b).
8.10.15 In assessing whether sexual conduct by the victim in a particular case warrants a reduction in the offender’s culpability, it is important that a distinction be drawn between conduct such as an unlawful sexual assault and conduct such as a sexual advance made in the absence of a threat of assault or other unlawful violation. Stephen Tomsen highlights the importance of drawing such a distinction:

Given the apparent number of cases in which allegations of a sexual advance may be true, considerable difficulties surround the inevitable need to distinguish such advances by degree. Warding off the dishonour that can result from a homosexual pass is distinct from fearing or fighting a sexual assault. But aggression and violence are viewed by perpetrators and some others as the most appropriate response to a sexual advance by another male.³⁴⁵

8.10.16 The importance of this distinction was also emphasised in Victoria in a case in which ‘sexual advance provocation’ was raised and rejected and the offender was convicted of murder.³⁴⁶ The sentencing judge commented:

It is absolutely true that no-one should have to suffer the unwanted sexual advances of another. The right to say ‘no’ is a right which must be protected. I am prepared to find that [the victim] did not always respect that right, although I am not prepared to hold that he violated your physical integrity on particular occasions when either you had made it clear to him that you refused to cooperate or you were too drunk to appreciate what was happening. This was not a case in which he was the predator and you were his helpless victim.³⁴⁷

8.10.17 The complexities involved in drawing the line between situations in which sexual misconduct by the victim should, or should not, warrant the reduction of an offender’s culpability are illustrated by the gulf between the majority and dissenting judgments in the High Court in Green v The Queen,³⁴⁸ and the consequent divergence of opinion expressed about this case.³⁴⁹

8.10.18 In some jurisdictions, sentencing guidelines have specifically provided that it is an aggravating factor in sentencing an offender if the offence was motivated by hatred. Various United States sentencing guidelines provide that it is an aggravating circumstance that an offence is motivated by prejudice such as that based on sexual orientation. The US Guidelines provide for a sentence to be increased if it is proved beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race,

³⁴⁵ Tomsen (2002), above n 339, 78. See also: VLRC Homicide Options Paper (2003), above n 25, [3.67].
³⁴⁷ Ibid [20].
color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.\(^{350}\) Therefore killing a person intentionally targeted because of their sexual orientation would increase the offender’s sentence. Other US jurisdictions make similar provision.\(^{351}\)

8.10.19 New Zealand legislation sets out aggravating\(^{352}\) and mitigating\(^{353}\) factors that a court must take into account in sentencing an offender to the extent that they are applicable in a case. Aggravating factors include where the offence was committed partly or wholly because of homophobia.\(^{354}\)

8.10.20 It is important to ensure that sentencing law does not provide an arena for the promulgation of prejudice or the presentation of stereotypes of homosexual predation.\(^{355}\) The shift in the burden of proof resulting from abolition of the partial defence should go some way towards eliminating spurious claims of homosexual advances; offenders will now have the onus of proving that they were subjected to provocation of a sufficient degree to warrant a reduction in their culpability.\(^{356}\)

8.10.21 In the absence of a threat of assault or other unlawful violation, a sexual advance, however unwelcome or offensive, should not mitigate the penalty for any crime of violence committed in response to such conduct. It is important to ensure that prejudicial attitudes are not permitted to flourish under the guise of ‘provocation’, either in the substantive law or in sentencing.

8.10.22 It is equally important also to recognise, however, that there is a serious problem in our community of unlawful sexual predation against victims of either gender. That very widespread problem has the occasional consequence of reactive violence by its victims. Cases of violent reaction to predation are comparatively rare: predators will usually take care to select victims who are unable, for whatever reason, to reject an assault or violation. However, in those comparatively rare cases in which the victim does respond with excessive violence, sexually predatory conduct may provide grounds for reducing the offender’s culpability.

\(^{350}\) USSC (2007), above n 233, [§3A1.1]. It is doubtful whether a non-violent sexual advance from the deceased would amount to ‘wrongful conduct’ which ‘contributed significantly to provoking the offense behavior’ as required to establish provocation under the US Guidelines: USSC (2007), above n 233, §5K2.10; United States v. Paster 173 F.3d 206 (3rd Cir. 1999).

\(^{351}\) Under the Maryland Guidelines, one of the reasons for departures above the Guidelines (increasing sentence) is the vicious or heinous nature of the conduct: Maryland State Commission on Criminal Sentencing Policy, Maryland Sentencing Guidelines Manual, (February 2007), [13.3] (Reason 16). This is defined in the Guideline as including offences motivated by sexual orientation: at [13.4]. In Ohio, sentencing guidelines provide factors to consider in every case, including mitigating and aggravating factors. An offender’s conduct may be viewed as less serious if the [i]n committing the offense, the offender acted under strong provocation’: Ohio Revised Code (November 2007), §2929.12(C)(2). The offence may be found to be more serious where the [o]ffender was motivated by prejudice based on … sexual orientation’: Ohio Revised Code (November 2007), §2929.12(B)(8).

\(^{352}\) Sentencing Act 2002 (NZ), s 9(1).

\(^{353}\) Sentencing Act 2002 (NZ), s 9(2).

\(^{354}\) Sentencing Act 2002 (NZ), s 9(1)(h); R v Taueki [2005] 3 NZLR 372, [31](h). In R v Taueki the court held that ‘[g]etting the appropriate starting point for sentencing will involve an assessment of a number of features which add to reduce the seriousness of the conduct and the criminality involved’: at [28]. It is doubtful whether a non-violent homosexual advance would meet the requirement set out in R v Taueki that the provocation be ‘serious’: at [32]. In any event, provocation would need to be balanced against aggravating factors including where the offence was committed partly or wholly because of homophobia (Sentencing Act 2002 (NZ), s 9(1)(h); R v Taueki [2005] 3 NZLR 372, [31]).

\(^{355}\) The VLRC pointed out the double standard implicit in the ‘homosexual advance’ branch of provocation, stating that ‘there are few, if any, cases where a woman has killed a man in response to unwanted sexual advances and relied on a similar defence’: VLRC Homicide Options Paper (2003), above n 25, [3.65]. In the sample of cases studied by the VLRC, two women killed men whom they alleged had made unwanted sexual advances towards them. Both were unsuccessful in raising the partial defence of provocation at trial: ibid 66, n 315.

\(^{356}\) See further Section 5.3 (Onus and standard of proof).
8.10.23 As with other categories of provocation, sexual conduct by the victim towards the offender must be considered in context, including past conduct of the victim towards the offender, or the offender’s family or friends, in deciding whether the victim’s conduct caused the offender to have a justifiable sense of being wronged. Sexual conduct falling short of a threatened or actual sexual assault or other unlawful violation will be unlikely to meet this standard unless there were contextual reasons why the conduct was particularly harmful to the offender, for example where the victim had previously been sexually violent towards the offender.

Trivial conduct and offensive words

Trivial conduct

8.10.24 As a general rule, provocation which is annoying or trivial in nature will not justify an offender’s aggrievement and will therefore not reduce his or her culpability for an offence against the person. This is already an established sentencing principle in the context of non-fatal offences against the person. For example, in R v Davies, the offender broke into the victim’s property and assaulted him after the victim refused to turn down his loud music at 5.00 a.m. In sentencing the offender to a community-based order for aggravated burglary and intentionally causing injury, the judge accepted that the offender had become frustrated by the victim’s conduct but emphasised that the conduct did not justify a reduction in the offender’s culpability:

While it may be inconsiderate to play loud music at such an hour, that can be no justification for violently invading that neighbour’s home, let alone a violent assault on him, in particular at a time when, whether intoxicated or not, he was lying vulnerable on a bed and certainly not in a position to defend himself or, for that matter, in any way to threaten you.

Offensive words

8.10.25 Offensive words spoken by the victim towards the offender or the offender’s family or friends should generally be considered low-level provocation, insufficient to have given an offender who has killed or assaulted the utterer of the words a justifiable sense of being wronged thus warranting a reduction in the offender’s culpability.

8.10.26 This is consistent with the principles of substantive provocation. The early test for provocation as a partial defence excluded insulting words or gestures. The modern test for substantive provocation potentially included provocation arising from conduct or words, provided they were such as would provoke the ordinary person. However ‘merely insulting’ words were unlikely to meet this test. In Moffa v The Queen, Justice Mason said:
There is no absolute rule against words founding a case of provocation. The existence of such an absolute rule would draw an arbitrary distinction between words and conduct which is insupportable in logic. No doubt provocative acts justifying the reduction of murder to manslaughter are more readily imagined and more frequently encountered than provocative words which justify the same result. Violent acts, rather than violent words, are more likely to induce an ordinary person to lose his self-control. And a case of provocation by words may be more easily invented than a case of provocation by conduct, particularly when the victim was the wife of the accused. There is, therefore, an element of public policy as well as common sense in requiring the closest scrutiny of claims of provocation found in words, rather than conduct.363

8.10.27 The proposition in substantive provocation that violent acts rather than violent words are more readily accepted as ‘provocation’ is equally applicable in sentencing, despite the less restrictive test. This has been illustrated in numerous County Court sentencing decisions for non-fatal offences against the person. In R v Bright,364 the victim verbally abused the daughter of one of the offenders while the offenders were celebrating a family birthday at a local hotel. Later the offenders assaulted the victim outside the hotel, recklessly causing him serious injury. While accepting that the victim’s ‘unwanted and abusive actions provoked the situation’, the judge emphasised that ‘[n]o community … is prepared to tolerate violent behaviour on its streets, whatever the reason. No amount of provocation by way of verbal abuse should ever end the way this incident did.’365

8.10.28 The approach taken in the United Kingdom and United States Sentencing Guidelines is consistent with the principle that offensive words will generally be viewed as low-level provocation.366

8.10.29 Where the words amount to a severe racial taunt or occur in the context of prior violence by the victim,367 they may be sufficient to justify a reduction in the offender’s culpability. There may also be circumstances where offensive words justify the offender’s aggrievement, particularly when they occur in the context of an abusive relationship or involve threats of violence made against the offender or others.368 Sometimes words or actions that, viewed alone, seem inoffensive take on significance when placed in the context of the victim’s prior conduct towards the offender.

8.10.30 For example in R v R,369 the defendant had killed her husband with an axe while he slept. During their relationship he had been manipulative and controlling and very violent towards her and their children.370 She was convicted of murder after a trial in which the trial judge refused to leave provocation to the jury. While the acts alleged to be provocation appeared minor—prior to falling asleep on the night that she killed him, he had stroked her arm, cuddled up to her in bed and told her that their daughters would not be leaving home and that they’d be one happy family—a majority of the South Australian Supreme Court371 allowed her appeal against conviction and ordered a new trial, holding that provocation should have been left to the jury because his actions had to be placed against the background of his previous conduct:

363 Ibid 620–621 (Mason J).
364 (Unreported, County Court of Victoria, 7 August 2003).
366 Sentencing Guidelines Council (UK) (2005), above n 207, [3.2(c)]; USSC (2007), above n 233, §5K2.10, p.s. (see further Appendix I).
367 See further [8.10.31]–[8.10.36] (Racial abuse) and [8.10.37]–[8.10.53] (Family violence).
368 See further [8.10.2]–[8.10.5] (Actual or anticipated violence).
370 Ibid 323, 328.
371 King CJ and Jacobs J (Zelling J dissenting).
The deceased’s words and actions in the presence of the appellant on the fatal night might appear innocuous enough on the face of them. They must, however, be viewed against the background of brutality, sexual assault, intimidation and manipulation. When stroking the appellant’s arm and cuddling up to her in bed, and when telling her that they could be one happy family and that the girls would not be leaving, the deceased was not only aware of his own infamous conduct but must also have at least suspected that the appellant knew or strongly suspected that, in addition to the long history of cruelty, he had habitually engaged in sexual abuse of her daughters. The implication of the words was therefore that this horror would continue and that the girls would be prevented from leaving by forms of intimidation and manipulation which were only too familiar to the appellant. In this context it was … open to the jury to treat the words themselves and the caressing actions which accompanied them as highly provocative.372

Racial abuse

8.10.31 In the section above we discussed how provocative words should be treated in sentencing, touching on the issue of racial taunts. Conduct of the victim which consists of a single racial taunt, while it is to be deplored, may not be sufficient in itself to lessen the culpability of an offender who responds with malicious intent and kills or seriously injures the utterer of the comment. However, the context of the comment, including whether it contained threatening undertones or occurred against a background of discrimination, is relevant to whether the offender’s aggrievement is justified and, along with the degree of disproportionality between the comment and the offence, is relevant to whether—and to what degree—the offender’s culpability should be reduced.

8.10.32 An examination of Australian sentencing decisions in which the victim racially abused the offender illustrates the importance of contextualising the conduct. Whether the conduct justified a reduction in the offender’s culpability in each case depended on the particular circumstances including any history of racist conduct and the gravity of the racist taunt.

8.10.33 In the Victorian case of *Pearce v The Queen*,373 the offender and two co-offenders were abused and forced to leave a party by other guests because they were Aboriginal. After leaving the party, they returned with weapons and an additional three people. During the fight that ensued the offender discharged a shotgun, wounding another person in the leg. The offender and his five co-offenders were convicted of unlawful assembly and the offender alone was also convicted of malicious wounding. The offender was given a total effective sentence of two years and six months’ imprisonment with a non-parole period of 18 months. The Victorian Court of Criminal Appeal upheld an appeal against sentence by the offender, holding that the provocation offered to the offender ‘mitigated the offences to a very substantial degree’. Justice Brooking (with whom Young CJ and Kaye J agreed) held that:

372 Ibid 326 (King CJ).
The one matter which seems to me to make this case unusual and to mitigate the offences to a very substantial degree is what I will for want of a better word call the provocation that had been offered to the applicant. He and his companions had been invited to the party. They had ... settled in ... and were behaving themselves when they were suddenly and most offensively told to leave by persons who had no authority to do so and who wanted to get rid of them simply because they were Aboriginals. This conduct, and the applicant’s reaction to it, are moreover to be judged against what the evidence disclosed concerning the applicant’s background and the disadvantages faced by Aboriginals in the district. It was not and could not have been suggested that there was provocation as that expression is generally understood in the criminal law, but the insult offered to the applicant and his companions is a highly significant extenuating circumstance.374

8.10.34 In R v Dang,375 an altercation occurred at a kebab van. The victim made some racially abusive comments to the offender. The offender drove his vehicle at the victim causing very serious injuries to the victim’s legs. The racial abuse was taken into account along with other factors in mitigation and the offender received a partially suspended sentence. In contrast, in R v Bezuidenhout,376 the judge indicated that the offender had let the racial abuse by the victim aggravate his anger and should instead have treated it and the victim with contempt, instead of attacking the victim with a golf club. In sentencing the offender, it appears that the racial abuse was given little or no mitigatory weight, although the offender had other mitigating factors in his favour:

8.10.35 Under the US Guidelines, racial abuse—like any other provocation—needs to be examined in the context of factors including the persistence of the victim’s conduct and any efforts by the defendant to prevent confrontation, and the proportionality and reasonableness of the defendant’s response.377

8.10.36 Even where racial abuse towards the offender by the victim is found to have given the offender a justifiable sense of being wronged, a particularly serious or violent offence committed in response to the victim’s conduct is likely to be viewed as grossly disproportionate, negating or lessening any reduction in the offender’s culpability, depending on all of the circumstances of the case.

374 Ibid 150.
375 (Unreported, County Court of Victoria, 7 August 2003).
376 (Unreported, County Court of Victoria, 4 November 2002). The offender in this case pleaded guilty to one count of recklessly causing serious injury.
377 USSC (2007), above n 233, §5K2.10(2) and (6), p.s. See further Appendix I.
Family violence

8.10.37 Family violence has recently been defined as ‘violent or threatening behaviour or any other form of behaviour which coerces, controls and/or dominates a family member/s and/or causes them to be fearful’ and includes ‘causing a child to see or hear or be otherwise exposed to such behaviour’.378 The VLRC recommended that the definition include: ‘assault or personal injury…; sexual assault and other forms of sexually coercive behaviour; damage to a person’s property; kidnapping or depriving a person of his or her liberty (e.g. forced social isolation); emotional, psychological and verbal abuse…; and economic abuse’.379 Family violence is regarded as a fundamental violation of human rights.380 Although the majority of family violence is perpetrated by men against their female partners (or former partners),381 family violence can occur in the context of any close personal relationship, including between same sex partners382 and between parents and children.383

8.10.38 In the VLRC’s Homicide reference, the Commission aimed ‘to overcome the gender bias which exists in the law relating to defences to homicide’.384 Under the provisions of the 2005 Act, people who previously might have been found guilty of provocation manslaughter after killing a violent partner may successfully raise the new codified defence of self-defence (resulting in an acquittal if successful) or may be found guilty of the new offence of defensive homicide.385 However, it is possible that in some cases such people will still be found guilty of murder. There is also the possibility that offenders who kill in such circumstances may choose to plead guilty to other forms of manslaughter (such as unlawful and dangerous act manslaughter), rather than to contest the charges and risk a conviction for murder which carries a maximum sentence of life imprisonment.

8.10.39 The VLRC wished to ensure that the issue of family violence was adequately considered in sentencing offenders who kill in this context. The 2005 changes to homicide defences raised some important policy issues which were identified by the Commission, such as:

- the need to make certain that sentencing courts have sufficient regard to family violence in cases where an offender has demonstrated previous violence towards the victim or where an offender has killed a violent partner;
- the risk that a consequence of abolishing provocation may be that provoked killers, and particularly women who have killed their violent partners, receive longer prison sentences than they might otherwise have received; and
- the need to promote judicial consistency in sentencing in cases in which family violence has occurred, including cases of excessive self-defence.386

381 See for example VLRC Family Violence Report (2006), above n 193, [2.19], [2.23].
382 For a discussion of issues relating to violence in same sex relationships see VLRC Family Violence Report (2006), above n 193, [2.89]–[2.91]. See also VLRC Homicide Report (2004), above n 3, [3.9].
383 See VLRC Homicide Report (2004), above n 3, [3.9].
384 Ibid [7.5].
385 See discussion of self-defence and defensive homicide at [2.2.4]. The new section 9AH of the Crimes Act 1958 (Vic) varies the ambit of self-defence to allow its use in circumstances involving family violence even if the harm is not immediate (s 9AH(1)(c)) or where the response involves the use of excessive force (s 9AH(1)(d)). Sub-sections 9AH(2) and (3) set out certain evidence that may be relevant in cases involving circumstances where family violence is alleged.
386 VLRC Homicide Report (2004), above n 3, xliii; [7.44]–[7.47].
The VLRC recommended that it was more appropriate for provocation to be considered together with other circumstances surrounding an offence, including aggravating and mitigating factors, as part of the sentencing process. The VLRC argued that this would give the court more flexibility in assessing a person's culpability by allowing consideration to be given to a broad range of factors (such as the circumstances of the offence, the offender's motivation, the nature of the provocative conduct, the use of a weapon, the vulnerability of the victim and the personal circumstances of the offender). It noted that “[w]omen who kill violent husbands and plead guilty to manslaughter will often receive relatively short sentences.” However the Commission conceded that “the sentence imposed in such a case will also reflect the individual background and circumstances of the accused (and how sympathetically these are viewed by the court).”

The Commission believed that the principles of sentencing set out in the *Sentencing Act* were sufficiently flexible to take into account the wide range of factors which affect the offender’s culpability.

A major concern expressed in submissions to the VLRC was that women who kill abusive partners, who cannot establish self-defence and who can no longer raise provocation as a partial defence, would receive longer sentences when they come to be sentenced for murder, murder being a more serious crime on the offence hierarchy. This concern has in part been addressed by changes to the definition of self-defence in cases involving family violence and the inclusion of the new offence of defensive homicide as part of the suite of 2005 changes.

The VLRC noted that in manslaughter sentencing, women were generally likely to receive lower sentences than men. A comparison of sentencing outcomes for men and women convicted of manslaughter from 1998–99 to 2006–07 confirms that outcomes for women tend to be less severe than for men. A detailed comparison of manslaughter sentencing and the VLRC’s findings about the context in which men and women kill are summarised in Appendix 3.

Figure 5 in Appendix 3 shows that 93 per cent of men received a sentence of immediate imprisonment for manslaughter from 1998–99 to 2006–07 compared to 70 per cent of women. Of those sentenced to imprisonment, on average, men received longer sentences than women. This is consistent with research indicating that the circumstances of killing differ between men and women, and also accords with the VLRC’s findings that women who kill the perpetrator of family violence may receive shorter sentences. In relation to this, the VLRC considered that it was:

important to address the concern that a conviction for murder will necessarily attract a higher sentence than would have been the case for a manslaughter conviction, if provocation were retained. There is no minimum sentence for either murder or manslaughter. Sentencing judges should be prepared to use the full range of options available when the offender has been subjected to violence by the victim. Where an offender is convicted of murder, the court should consider whether the violence

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387 Ibid 58 (Recommendation 1).
388 Ibid [2.100].
389 Ibid [7.46].
390 Ibid.
391 Ibid xlii; [7.21].
392 Ibid [2.51], [2.101], [7.2]–[7.5].
393 See further the discussion of self-defence and defensive homicide at [2.2.4].
394 VLRC Homicide Options Paper (2003), above n 25, [2.77].
395 See further Appendix 3, particularly Table 2 and Figure 5.
396 The average imprisonment lengths were seven years for men and five years and nine months for women. The average non-parole periods were four years and six months for men and three years and one month for women.
experienced by the offender, combined with other factors, justifies imposing a very short custodial sentence or even suspending it altogether. In other words, the full range of sentencing options should be considered, even where the offender is convicted of murder.\footnote{VLRC Homicide Report (2004), above n 3, [7.53].}

8.10.45 Although the VLRC recommended that in sentencing such offenders for murder, judges should consider the full range of sentencing options,\footnote{Ibid 293 (Recommendation 50).} it noted concerns that ‘judges sentencing offenders who had been convicted of murder would feel under public pressure to impose longer sentences, even where this was inappropriate because of the circumstances of the killing’.\footnote{Ibid [7.54].} The VLRC observed that ‘[a]t present, the shorter sentences imposed on offenders who kill in response to violence or other types of provocation can be attributed to the fact that they were convicted of manslaughter, rather than murder’\footnote{Ibid.} The VLRC referred to concerns that there might be increased community dissatisfaction with the sentencing process if the community perceives judges to be imposing lighter sentences on ‘murderers’ which could lead to calls for tougher sentences and even for the imposition of mandatory minimum sentences.\footnote{Ibid [2.52].}

8.10.46 In making its original recommendations, the VLRC envisaged that the majority of those who killed their violent partners and might previously have raised provocation should instead be able to rely on self-defence (resulting in an acquittal) or excessive self-defence (formulated under the Act as the offence of defensive homicide). However, there remained concerns that in some cases a conviction for murder might result. If an offender is convicted of either murder or manslaughter under the new law after killing a violent partner, it is imperative that the victim’s violence towards the offender is appropriately taken into account in assessing the offender’s culpability for the offence.

8.10.47 The VLRC pointed to research identifying several ways in which:

- a lack of understanding of the dynamics of family violence may prevent it from being adequately taken into account in sentencing;
- the court may not give sufficient weight to a history of violence in a relationship because it does not recognise the connection between the killing and prior violence;
- if a woman uses physical force in self-defence the court may characterise the situation as one of mutual violence or ‘family dysfunction’ rather than as a response to a continuing pattern of violence;
- women who fight back or ‘are not passive and helpless or who do not otherwise conform to accepted stereotypes’ may be judged more harshly than women who are depicted as helpless victims;
- the social factors which lead people in particular communities to react violently may be insufficiently recognised;
- women who abuse alcohol or drugs, or abuse or neglect their children, may be less favourably treated than women who ‘cope’ better, even though the woman’s negative behaviour may be caused or related to the fact she has been in a violent relationship.\footnote{Ibid [7.47] (citations omitted).}

8.10.48 A consideration of how to ensure family violence provocation is appropriately included in sentencing under the new law can be assisted by the approaches to family violence in sentencing guidelines in other jurisdictions.

\footnote{VLRC Homicide Report (2004), above n 3, [7.53].}
\footnote{Ibid 293 (Recommendation 50).}
\footnote{Ibid [7.54].}
\footnote{Ibid.}
\footnote{Ibid [2.52].}
\footnote{Ibid [7.47] (citations omitted).}
8.10.49 In its advice to the UK Guidelines Council, the UK Sentencing Advisory Panel was of the view that some instances of family violence will constitute ‘gross’ or ‘extreme’ provocation and be a significant mitigating factor. The subsequent UK Sentencing Guideline provides that, in assessing the degree of provocation for the purposes of sentencing, one of the important factors to be considered is an offender’s previous experience of abuse and violence by the victim and other people. The Guideline further provides that:

When looking at the nature of the provocation the court should consider both the type of provocation and whether, in the particular case, the actions of the victim would have had a particularly marked effect on the offender:

- actual (or anticipated) violence from the victim will generally be regarded as involving a higher degree of provocation than provocation arising from abuse, infidelity or offensive words unless that amounts to psychological bullying
- in cases involving actual or anticipated violence, the culpability of the offender will therefore generally be less than in cases involving verbal provocation
- where the offender’s actions were motivated by fear or desperation, rather than by anger, frustration, resentment or a desire for revenge, the offender’s culpability will generally be lower.

8.10.50 The UK Panel noted the importance of the context in which the provocation occurs. In an ongoing intimate relationship, consideration needs to be given to the balance of power and to other family members who may have been victims of the provocation.

8.10.51 The US Guidelines provide that, in assessing whether a reduction in sentence is warranted and, if so, the extent of the reduction, consideration must be given to factors including the ‘danger reasonably perceived by the defendant, including the victim’s reputation for violence’, the ‘danger actually presented to the defendant by the victim’, and ‘any other relevant conduct by the victim that substantially contributed to the danger presented’. The Guidelines also require consideration of the relative size and strength, or other ‘relevant physical characteristics’ of the victim and the defendant.

8.10.52 The sentencing guidelines in the United States and United Kingdom provide a useful framework for assessing family violence. Taking into account factors such as those explored in these guidelines, family violence is likely to be viewed as ‘serious provocation’, which gives the offender a justifiable sense of being wronged.

8.10.53 In our view, family violence, like other types of violent conduct, is likely to be considered serious provocation which causes the offender a justifiable sense of being wronged. Such conduct should be considered in context, taking into account factors such as:

- past violence by the victim towards the offender or other family members;
- the danger presented or reasonably perceived by the offender, taking into account the victim’s reputation for violence;
- the balance of power between the victim and the offender; and
- the relative size and strength of the victim and the offender and other relevant physical characteristics.

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403 Sentencing Advisory Panel (UK) (2005), above n 207, [30].
404 Sentencing Guidelines Council (UK) (2005), above n 207, [3.2 (a)].
405 Ibid [3.2(c)]. The last factor is consistent with a reasons-based approach to assessing culpability.
406 Sentencing Advisory Panel (UK) (2005), above n 207, [39].
408 Ibid §5K2.10(1). See further Appendix 1.
Sexual jealousy, possessiveness and control

*Lessons from the partial defence*

**Infidelity and ‘sexual taunts’ as a category of provocation**

8.10.54 The inclusion of ‘infidelity’ as a category of provocation goes back to the seventeenth and eighteenth centuries. In *R v Mawgridge*, 409 Lord Chief Justice Holt identified killing a man caught in the act of adultery with one’s wife as a category of provocation manslaughter. 410 Ian Leader-Elliott suggests that prior to the nineteenth century the partial defence might have been confined to the killing of sexual rivals, rather than the adulterous wife, and even then it was necessary for the defendant literally to catch the adulterers in the act. 411

8.10.55 Where infidelity is raised in modern provocation cases it is generally in circumstances where a man kills his wife, rather than her lover, and alleges he did so after finding out that she had been unfaithful and he had lost self-control. 412 Professor Jeremy Horder questions:

> whether the doctrine of provocation, under the cover of an alleged compassion for human frailty, simply reinforces the conditions in which men are perceived and perceive themselves as natural aggressors, and in particular women’s natural aggressors. Unfortunately, the answer to that question is yes. 413

8.10.56 Ian Leader-Elliott, after considering statutory provisions in some Australian jurisdictions that limit the partial defence of provocation to homicide provoked by a *wrongful* act or insult, states that if ‘provocation is based on a “wrongful” act by the victim, the continued existence of a defence based on sexual infidelity appears no more justifiable than the husband’s marital immunity from conviction for a rape’. 414

8.10.57 Now that substantive provocation has been abolished, it is important to consider the approach that should be taken to sexual jealousy provocation in sentencing under the new law.

8.10.58 One of the aims of abolishing substantive provocation was to enable a fresh examination of the relationship between provocation and culpability, free from the shackles of the partial defence. As the VLRC recognised, it is important to ensure that the problems with the partial defence, such as those associated with ‘sexual jealousy provocation’, do not resurface in the sentencing arena. The VLRC was concerned that once provocation became part of the sentencing exercise, a:

> Lack of information about usual patterns of family violence may … lead courts to impose inappropriately low sentences on offenders who have been violent to their partners throughout their relationship, but who argue in mitigation that the killing was a one-off emotional response to a particular situation, such as the partner’s decision to leave. 415

8.10.59 For this reason, the VLRC conducted a comprehensive study of the context in which men and women kill, which is discussed in Appendix 3.

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409 (1707) 84 ER 1107. See further [2.1.2].
410 Ibid 1115. See further above n 23 for Lord Holt CJ’s explanation of this category of provocation.
412 See further [8.5.1]–[8.5.8] for a discussion of the element of a ‘loss of self-control’ in the test for substantive provocation.
414 Leader-Elliott (1997), above n 411, 158.
415 VLRC Homicide Report (2004), above n 3, [7.48].
8.10.60 Professor Morgan points out that allegations of infidelity made by an offender against the partner or ex-partner that he has killed frequently mask the issue of his controlling behaviour in the context of her exercising her right to leave a relationship. In a 1997 paper, Professor Morgan supported the abolition of provocation as a partial defence but expressed concern that leaving ‘provocative’ facts to the discretion of a judge in sentencing:

will do nothing to remove the gendered assumptions embodied in the current use of the provocation defence by men in situations of ‘sexual jealousy’. To be sure, the removal of these considerations to the realms of sentencing does send an important cultural message: these men remain murderers. … [I]t will be harder for us to discern whether gendered violence continues, in some senses, to be condoned by sentencers; that is, whether and how it is described by judges as mitigatory in sentencing. … Hence, if provocation were to be abolished, its abolition should be accompanied by a clear statement of the general irrelevance of sexual jealousy as a mitigating factor in sentencing.416

8.10.61 An analysis of the attempts by trial judges to limit the operation of sexual jealousy provocation in cases under the previous law and a consideration of approaches to this category of provocation in sentencing in other jurisdictions is useful to the reformulation of provocation for the new regime.

**Trial judges as ‘gatekeepers’: preventing the use of sexual jealousy provocation**

8.10.62 Under the law relating to the partial defence of provocation, a trial judge could remove provocation from the jury where, on the version of events most favourable to the defendant suggested by material in the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the killing was unprovoked in the relevant sense.417 This test was referred to in the English case of *R v Smith*,418 in which Lord Hoffmann said:

The High Court of Australia held that the judge was right to withdraw the issue of provocation from the jury on the ground that such conduct could not raise even a reasonable doubt as to whether the objective element in the defence had been satisfied. I respectfully agree. Male possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide, whether inflicted upon the woman herself or her new lover.419

8.10.63 In the 1990s and early 2000s a series of Supreme Court cases involved offenders who were charged with murdering their partner or former partner and allegations that the killings had been provoked by conduct such as infidelity or taunts about the relationship. In each of these cases it is arguable that these allegations masked the real issue—that the victim was exercising, or attempting to exercise, her right to leave the relationship and the offender killed out of jealousy, possessiveness or to assert his control. In each of these cases the trial judge used his or her ‘gatekeeper’ role to prevent the partial defence of provocation from being placed before the jury. These cases have been described as ones in which ‘trial judges have sought to delineate the boundaries of the defence of provocation in intimate homicides’.420

8.10.64 Although these cases relate to substantive provocation, they represent an attempt by trial judges to make a policy decision that certain conduct was not sufficient to justify reducing an offender’s culpability. These decisions were consistent with an equality approach to assessing provocation

417  *Singel v The Queen* (1990) 171 CLR 312.
418  [2001] 1 AC 146.
419  Ibid 169.
420  McSherry (2005), above n 221, 915.
and a reasons-based approach to considering the offender’s response. The policy reasoning behind these decisions is relevant to the consideration of how this category of provocation should be treated at sentencing.

8.10.65 In each of DPP v Parsons,421 DPP v Leonboyer,422 and DPP v Kumar,423 the trial judge refused to allow the jury to consider the partial defence of provocation. In each case the defendant had brutally stabbed his partner or former partner to death. The provocation alleged in these cases ranged from taunts and ‘mocking’ laughter outside the family court (Parsons) to admitting infidelity and taunting the defendant about his sexual prowess (Leonboyer). However in each case the killing occurred during or after the breakdown of the relationship.

8.10.66 The Court of Appeal upheld the decision of the trial judge in each case. However, in R v Kumar,424 Justice Eames dissented, stating that in his opinion the trial judge had erred in law and a re-trial should have been ordered. He referred to several reasons why trial judges should be cautious about preventing evidence of provocation from being placed before the jury. After the decision in Kumar, the dissenting approach of Justice Eames won favour in the Court of Appeal, changing the way in which trial judges were required to treat provocation in such cases.

Opening the gates: allowing sexual jealousy provocation to go to the jury

8.10.67 After the decision in Kumar, another two cases were heard in the Supreme Court in which it was alleged that the defendant had stabbed his former partner because he had been provoked by her conduct. Again, both cases occurred in the context of the victim attempting to leave an intimate relationship with the offender. Once again, in both cases the trial judge refused to allow the partial defence of provocation to be raised before the jury.

8.10.68 In R v Yasso,425 the alleged provocation ranged from the victim refusing to give the defendant her mobile phone as a guarantee to return some of his property (she had agreed to give him her handbag), to her having previously obtained an intervention order against him. The trial judge commented:

Cultural values inevitably change over time. In our modern society persons frequently leave relationships and form new ones. Whilst this behaviour may cause a former partner to feel hurt, disappointment and anger, there is nothing abnormal about it.

What is abnormal is the reaction to this conduct in those small percentage of instances where that former partner (almost inevitably a male) loses self control and perpetuates fatal violence with an intention to kill or to cause serious bodily injury.

In my view, this will rarely, if ever, be a response which might be induced in an ordinary person in the twenty-first century. Significant additional provocative factors would normally be required before the ordinary person test could be met.426

8.10.69 A majority of the Court of Appeal held that the trial judge erred in law in failing to leave provocation to the jury, quashing the conviction for murder and ordering a re-trial. However, Justice Vincent dissented, holding that the applicant’s conduct fell far below the minimum limit of the

426 Ibid 243–244.
range of powers of self-control that must be attributed to the ordinary person and was grossly disproportionate.\textsuperscript{427} Following the Court of Appeal decision, Yasso was retried and the partial defence of provocation placed before the jury. The jury found him guilty of murder, clearly being satisfied beyond reasonable doubt that he did not kill his wife under provocation.\textsuperscript{428} The offender was sentenced to 20 years' imprisonment with a minimum non-parole period of 15 years.

8.10.70 In \textit{R v Conway},\textsuperscript{429} in ruling that provocation should not be left to the jury, the trial judge referred to Lord Hoffman's comments in \textit{R v Smith},\textsuperscript{430} that '[m]ale possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide.'\textsuperscript{431} Again, the Court of Appeal held that the trial judge had erred in failing to leave provocation to the jury. The Court of Appeal quashed the conviction and ordered a re-trial, taking the view that, on the view of the evidence most favourable to the applicant, the case before it was not a case of mere possessiveness and jealousy.\textsuperscript{432} Following the Court of Appeal decision, Conway was re-tried and provocation left to the jury. The jury rejected provocation and found him guilty of murder. He was sentenced to 19 years' imprisonment with a minimum non-parole period of 14 years.

8.10.71 In the recent case of \textit{R v Ramage},\textsuperscript{433} the trial judge placed provocation before the jury in accordance with the Court of Appeal decisions discussed above, commenting 'I of course must apply the current law whatever view I may hold as to the desirability of change to it.'\textsuperscript{434} In contrast to Yasso and Conway, the jury found that the Crown had not disproved provocation and found the defendant guilty of provocation manslaughter rather than murder. Once again, although the case was presented as one in which the victim had been unfaithful and taunted the defendant about his sexual prowess, the case could be retold as a story about male possessiveness, jealousy and control in the context of a relationship breakdown.

8.10.72 Shortly after the verdict in this case and the release of the VLRC's Final Report on defences to homicide, the Victorian Government announced that it would abolish the partial defence of provocation.

\textit{Manslaughter sentencing in sexual jealousy cases}

8.10.73 Under the previous law, numerous provocation manslaughter cases occurred in the context of intimate relationships where a man had killed his female partner who had ended or was attempting to end the relationship.\textsuperscript{435} Even where provocation successfully reduced a charge of murder to one of manslaughter, sentencing judges generally treated such cases as very serious examples of manslaughter. A review of several provocation manslaughter cases that occurred in the context of the breakdown of an intimate relationship illustrates that although the individual sentences necessarily fell short of the sentence that might have been imposed had the offender been found

\textsuperscript{427} \textit{R v Yasso (No 2)} (2004) 10 VR 466, 486.
\textsuperscript{428} \textit{R v Yasso} [2005] VSC 75 (Unreported, Hollingworth J, 21 March 2005), [79].
\textsuperscript{430} [2001] 1 AC 146.
\textsuperscript{431} \textit{R v Conway} [2002] VSC 383 (Unreported, Teague J, 28 October 2002), [7].
\textsuperscript{434} \textit{R v Ramage} [2004] VSC 508 (Unreported, Osborn J, 9 December 2004), [28].
\textsuperscript{435} See Appendix 3 for further discussion of the context in which men and women kill.
guilty of the more serious crime of murder when compared to other sentences for manslaughter, the sentences imposed were generally at the high end of the range.

8.10.74 Figure 1 compares the imprisonment sentencing ranges (total effective sentence and non-parole period) for provocation manslaughter, ‘other’ manslaughter and murder in the period 1998–99 to 2006–07.

8.10.75 Imprisonment sentences for provocation manslaughter ranged from four years’ imprisonment with a two-year non-parole period, to 15 years’ imprisonment with a non-parole period of 13 years. The median imprisonment sentence for provocation manslaughter in this period was eight years and the median non-parole period was five years. By way of comparison, imprisonment sentence lengths for other types of manslaughter ranged from three years with a non-parole period of four months, to 15 years’ imprisonment with a non-parole period of 12 years. The median imprisonment sentence for manslaughter in this period was seven years and the median non-parole period was four years.

8.10.76 A comparison of some of the sexual jealousy provocation manslaughter sentences with the sentencing range illustrated in Figure 1 shows that the sexual jealousy sentences were above average, falling towards the high end of the sentencing ranges for provocation manslaughter and other categories of manslaughter. For example:

- In R v Ramage, the offender was sentenced to 11 years’ imprisonment with a non-parole period of eight years. This was the second highest sentence for provocation manslaughter in the review period and the fifth highest for manslaughter.
- In R v Farfalla, the offender was sentenced to nine years’ imprisonment with a non-parole period of seven years, the third highest sentence for provocation manslaughter in the review period.
- In R v Butay, the offender was sentenced to eight years’ imprisonment with a non-parole period of six years. This was the fifth highest sentence for provocation manslaughter in the review period.

8.10.77 Furthermore, these cases and other provocation manslaughter sentencing decisions demonstrate that even where juries returned a verdict of provocation manslaughter in circumstances involving possessiveness and sexual jealousy, courts used the sentencing process to denounce and condemn the offender’s responding use of violence.

8.10.78 For example in R v Ramage, the sentencing judge said:

Domestic killings involve the cruel and brutal subjugation of one party to a relationship to the emotional inadequacy and violence of the other. The deliberate taking of another’s life is an act of the utmost gravity and in the domestic context often carries with it not only the tragic and untimely loss of life of the victim but also severe consequential emotional trauma to all those who knew and loved that victim.

437 Refer to fold-out, facing page 124.
... The Court cannot allow the law to be seen to condone deliberate domestic killings whether or not they are to be characterised as murder or manslaughter. Such killings strike at the foundations of society. In the case of manslaughter such killings will deserve particular condemnation in cases where the killing was done with murderous intent and savage brutality and where, although the jury has accepted the reasonable possibility of provocation, it is apparent that such provocation was not objectively extreme.\textsuperscript{443}

8.10.79 Similarly, in \textit{R v Butay},\textsuperscript{444} in sentencing the offender for the provocation manslaughter of his wife during the breakdown of their relationship, the sentencing judge said:

The courts through the sentences they impose must denounce this kind of conduct and give practical effect to the stated values of society which they represent. Whilst the principle of general deterrence should be regarded as having less significance where the jury has not excluded the possibility that you have acted under provocation it should nevertheless be taken into account in the determination of an appropriate sentence ... particularly ... where the violence has occurred against the background of a husband who refused to accept that his wife had the right to make her own choice.\textsuperscript{445}

8.10.80 The sentencing remarks in these provocation manslaughter cases are relevant to the consideration of the principles that should apply under the new law. In particular, they are relevant to the policy decision as to whether conduct by a person such as leaving a relationship, becoming involved in another relationship, or other examples of exercising personal autonomy should ever provide an offender with a justifiable sense of being wronged.

\textit{Murder sentencing in sexual jealousy cases}

8.10.81 Sentencing remarks in murder cases in which provocation has been raised but rejected are also useful in considering how sexual jealousy provocation should be treated in sentencing under the new law.

8.10.82 For example, in \textit{R v Karageorges},\textsuperscript{446} the offender was convicted of murder after stabbing his wife repeatedly in a fit of jealous rage after inducing her to falsely confess adultery. The partial defence of provocation failed because the prosecution had successfully negatived the objective limb of the defence.\textsuperscript{447} In sentencing the offender to 18 years' imprisonment with a non-parole period of 14 years, the sentencing judge accepted that the murder was unpremeditated due to the offender’s state of uncontrolled anger precipitated by the argument between him and his wife, but commented:

Your killing of your wife was found by the jury to be without justification, and understandably so. Whatever your feelings of anger, or indeed rage, they provided no excuse or justification for you inflicting violence on her, let alone repeatedly stabbing her as she desperately fought to protect herself. The sentence I must impose upon you must adequately express the Court’s condemnation of your crime, and must be of sufficient severity to send a clear and unequivocal message to the community that such violence by a husband against his wife or partner is utterly unacceptable.\textsuperscript{448}

8.10.83 On appeal it was submitted that the sentencing judge ‘gave insufficient weight to the appellant’s reduced moral culpability as a result of the extreme emotional stress he was under at the time of the killing, because he believed that [his wife] had been unfaithful to him’.\textsuperscript{449}

\textsuperscript{443} Ibid [49], [53].
\textsuperscript{445} Ibid [33].
\textsuperscript{446} [2005] VSC 193 (Unreported, Kaye J, 14 June 2005). See also [8.4.6].
\textsuperscript{448} \textit{R v Karageorges} [2005] VSC 193 (Unreported, Kaye J, 14 June 2005), [17].
\textsuperscript{449} \textit{R v Karageorges} [2006] VSCA 49 (Unreported, Buchanan, Vincent and Neave JJA, 9 March 2006), [9]. See further [8.2.8], [8.3.2], [8.4.11] for a discussion of moral culpability and emotional stress in sentencing.
The Court of Appeal held that the sentencing judge gave appropriate weight to factors relevant to the offender’s culpability, stating that:

The infliction of violence, whether in a domestic setting or otherwise, is unacceptable, and cannot be justified simply because it is triggered by extreme anger … While in one sense the appellant murdered his wife as a result of his extreme emotional stress, this occurred in a context where he had previously questioned his wife’s fidelity. She had denied his unfounded allegations on a number of earlier occasions and initially did so on this occasion as well.450

8.10.84 Paul Margach451 was one of the last people in Victoria to raise the partial defence of provocation, his wife’s death having occurred prior to the date on which the Crimes (Homicide) Act 2005 (Vic) came into operation. He pleaded not guilty to murder, alleging that he had stabbed his wife when she falsely told him that she had slept with another man whom she had recently met at a girls’ weekend.452 Campaigner for provocation law reform, Phil Cleary, referring to the case of Margach, states: ‘[a]s with every provocation case, it was the woman not the killer husband who the family believed was on trial’.453

8.10.85 The trial judge stated that Margach’s behaviour in the relationship indicated to a ‘strong degree’ that he was ‘a possessive and jealous man’ in respect of his wife, including his covertly recording her home telephone conversations for at least five months before her death.454 On 15 February 2006 the jury found Margach guilty of the murder of his wife, rejecting provocation.455 In sentencing him to 17 years’ imprisonment with a non-parole period of 13½ years, the judge said:

No person, male or female has the right to kill another person because they are angry with them for words or actions that have taken place. Your wife had a right to live and enjoy her life … In our community there is a mechanism for couples who are in troubled marriages, and it is called separation and divorce. There is a court especially designed to deal with this painful breakdown.456

Sexual jealousy provocation under the new law

8.10.86 In its Homicide report, the VLRC acknowledged that one of the purposes behind its recommendation to abolish the partial defence of provocation (overcoming gender bias)457 would ‘be undermined if men who kill their sexual partners were to receive significantly reduced murder sentences on the sole ground they were “provoked” to kill because they suspected their partner was unfaithful or was threatening to leave the relationship’.458

450 Ibid [16], [18].
451 R v Margach [2006] VSC 77 (Unreported, King J, 8 March 2006).
452 Their eight year-old daughter gave evidence that prior to the stabbing she heard her mother saying ‘I’m just going to pack my bags’. She then heard her father say ‘No, I want you to stay here’, to which her mother replied ‘You are just an idiot’. Shortly afterwards her mother screamed for help. (Karen Kissane, ‘Daughter Tells of Attack on Mother’, The Age (Melbourne), 3 February 2006, 7).
454 R v Margach [2006] VSC 77 (Unreported, King J, 8 March 2006), [9].
455 Kate Uebergang, ‘Husband guilty of stabbing murder’, The Herald Sun (Melbourne), 16 February 2006, 4. However, in an appeal against conviction, the Court of Appeal held that there had been a miscarriage of justice due to a misdirection of the jury in relation to the ordinary person test and a re-trial was ordered: R v Margach [2007] VSCA 110 (Unreported, Vincent and Redlich JJA and Habersberger AJA, 30 May 2007).
456 R v Margach [2006] VSC 77 (Unreported, King J, 8 March 2006), [24]–[25].
457 VLRC Homicide Report above n 3, [7.5]. See further Appendix 3.
458 Ibid.
8.10.87  Similar concerns were raised by Phil Cleary who states: ‘[w]ith provocation gone, is it the end of women being blamed for men’s violence? There is nothing in the legislation to say a woman’s infidelity, alleged or otherwise, won’t be dissected in a murder trial. Certainly, it will not be excluded when a judge calculates a sentence.’ As we have canvassed in other contexts, the shift in the burden of proof will go some way to eliminating allegations by men who kill their partners that they did so in response to provocation.

8.10.88  How to assess the gravity of provocation based on actual or perceived unfaithfulness was an issue addressed by the UK Panel in its advice on sentencing for provocation manslaughter. The Panel commented that people consulted were:

| divided over this issue: some who felt that infidelity could amount to a high level of provocation put forward additional factors such as severe taunting, or the fact that the defendant was an extremely insecure person, as justification for their position; others who believed that infidelity, whilst morally reprehensible, is not in itself a criminal act, took the view that it would be perverse for a defendant to be able to claim that infidelity was of the highest level of provocation and sufficient to justify the taking of a life. |

8.10.89  The UK Panel concluded that while long-term taunting of an offender may need to be considered when assessing the cumulative impact of a victim’s behaviour, unfaithfulness on its own does not constitute a high level of provocation. Prior to finalisation of the UK Guideline, the British Home Secretary responded to the draft UK Sentencing Guideline and expressed strong support for this principle and indicated that the Guideline could be improved by specifically accepting the Panel’s conclusion that infidelity does not constitute a high level of provocation.

8.10.90  In light of the policy reasons behind the abolition of provocation in Victoria and the approach in the trial division of the Victorian Supreme Court to sexual jealousy provocation under the previous law, it is arguable that sexual jealousy provocation will not be found to provide justification for reducing an offender’s culpability for an offence against the person in sentencing under the new law. Conduct by the victim that involves the exercising of equality rights, such as choosing to leave an intimate relationship, commencing another intimate relationship, or exercising the right to study, to work, or form social relationships, should not be considered capable of justifying an offender’s aggrievement, regardless of whether the offender’s personal characteristics contributed towards his or her feelings. In addition, an offence against the person committed upon a victim in response to his or her exercise of equality rights is likely to be viewed as grossly disproportionate. The enjoyment of personal autonomy and equality rights by the victim should not warrant a reduction in the offender’s culpability, regardless of whether the offender felt aggrieved by such conduct or if it caused the offender to lose self-control.

8.10.91  These principles also apply to offences against the person in the context of other intimate or family relationships where the offender committed the offence as a result of his or her aggrievement at the victim’s pursuit of his or her right to equality and personal autonomy.

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460  See further Section 5.3 of this paper.
461  Sentencing Advisory Panel (UK) (2005), above n 207, [33].
462  Ibid.
463  Mr Charles Clarke, Home Secretary, Letter to Lord Chief Justice, Lord Woolf ‘Draft Sentencing Guideline on Manslaughter by Reason of Provocation’ (5 August 2005), 2. The Lord Chancellor and the Attorney-General agreed with the comments made in the Home Secretary’s Letter.
9. Victim impact and aggravating factors

9.1 The impact on the victim

9.1.1 Section 5(2)(daa) of the Victorian Sentencing Act requires a court to have regard to ‘the impact of the offence on any victim of the offence’. In non-fatal offences, the harm caused to the victim can extend to the most serious of injuries short of death. Homicide cases inflict the greatest level of harm in the criminal calendar: the death of another person. However, in addition to the primary victim who has been killed by the offender there are likely to have been numerous other victims, such as family members of the primary victim, who have been severely harmed by the offender’s conduct.

9.1.2 Where the harm caused is an element of the offence, this should be kept in mind in considering the impact of the offence on the victim:

The manner in which an offence is defined in the statute may include as an element the impact of the offender’s act upon the victim. For instance, Crimes Act 1958 s 16 and s 18 require that a victim suffer serious injury or injury respectively. In fixing the maximum penalty applicable to these offences, the Legislature has already taken into account that there was a physical consequence for the victim. Sentencers must exercise care not to give double weight to this factor. That there was ‘serious injury’ or ‘injury’ is a statutory factor whilst the actual injury is an indication of the gravity of the instant offence.465

9.1.3 Even if it is established that the offender had a justifiable sense of being wronged by provocation by the victim, that the offence was not grossly disproportionate and therefore that the offender’s culpability should be reduced, this is but one of the many factors that the sentencing judge must weigh up in sentencing the offender. The harm caused to the victim or victims of the offence is also likely to carry great weight in the sentencing process, particularly in homicide cases and those involving the causing of serious injury.

9.1.4 One of the criticisms of substantive provocation was that the partial defence encouraged ‘victim blaming’, causing families of homicide victims to feel that the victim, rather than the defendant, was on trial.466 As discussed above, the abolition of the partial defence shifts the onus of proving provocation to the offender.467 Under our proposed framework, for an offender’s culpability to be reduced, the offender will not only have to establish that he or she was provoked by the victim, but that the victim’s conduct gave him or her a justifiable sense of being wronged and that his or her response was not grossly disproportionate. Furthermore, conduct by the victim which constitutes an exercise of equality rights, such as the right to participate in the workforce, leave an intimate relationship or commence a new intimate relationship, will not provide justification for an offender’s aggrievement.468

465 Judicial College of Victoria (2005), above n 60, [9.12.2].
466 See for example: Cleary (2006), above n 453, 21; VLRC Homicide Report (2004), above n 3, [1.22], [2.29]–[2.30]; VLRC Homicide Options Paper (2003), above n 25, [3.79]. See further: [5.3.11], [8.10.20], [8.10.84].
467 See further [5.3.1]–[5.3.11] (Onus and standard of proof).
9.2 Balancing provocation and aggravating factors

Introduction

9.2.1 Section 5(2)(g) of the Victorian Sentencing Act requires a court to have regard to 'the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances'. This catch-all provision incorporates myriad sentencing factors which must be considered. Therefore even if a reduction in an offender's culpability due to provocation is warranted, it will be but one of many factors that the sentencing judge must consider. Some examples of aggravating factors with particular relevance in homicide cases are discussed below.

The offender's use of a weapon

Weapon use

9.2.2 In sentencing offenders for a wide variety of offences, the use of a weapon in the commission of the crime will generally be an aggravating factor which will call for a more severe sentence. The degree of aggravation may increase where the weapon is of a type likely to cause very serious injury (such as a gun). In sentencing an offender who has used a weapon during the commission of an offence, it is common for the sentencing judge to denounce the use of a weapon to resolve a confrontation and to seek to deter others from resorting to weapons to resolve disputes.

9.2.3 However, sentencing is a complex exercise which requires the sentencer to balance aggravating factors—such as the offender's use of a weapon—with mitigating factors, including the extent to which the offender was provoked into committing the offence. This requires the sentencing judge to consider the context and circumstances of the homicide or non-fatal offence against the person and the relationship between the offender and the victim.

9.2.4 The offender's use of a weapon to commit the offence in response to provocation may also support an argument that his or her response was grossly disproportionate. This may decrease or nullify the significance of the provocation in considering the offender's culpability.

9.2.5 The need to balance mitigating factors (like provocation) with aggravating factors (such as the offender's use of a weapon) is illustrated in the New South Wales case of R v Popovic. The offender was convicted of one count of provocation manslaughter and nine counts of malicious wounding. The Court of Appeal characterised the provocation by the victim (including threats to kill the offender, his mother and his son) as 'great' but found that the sentencing judge's sentence was appropriate for reasons including that the offender had armed himself with a double barrel shotgun prior to the final confrontation:

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470 See further [8.7.1]–[8.7.6] (Proportionality).
The Applicant’s failure to do a lot more by way of dealing with the provocative conduct in a more
civilised manner, in going more than once to the police if he could not achieve the satisfaction he
wanted from them, in arming himself, not with only one but with two weapons, in carrying those one
or other of the weapons with him, often in a loaded state, on the day in question, on not departing
when he saw the deceased in the street, and then in taking the weapon from the car with him at a
time when he wished to accost the deceased, are all matters of conduct to be weighed in the balance
against the extent of provocation.472

9.2.6 The following County Court cases illustrate this balancing exercise in the context of non-fatal
assaults. In R v Diamond473 the offender stabbed his partner once after constant physical and
verbal abuse from her throughout the course of the day, despite his frequent requests for her to
stop. The judge balanced the provocation by the victim with the fact that the offender used a knife
in committing the offence:

Whatever the rights and wrongs of the argument between you and her and whatever the degree
of goading, harassment and unreasonable behaviour by her, the fact remains that you introduced into
the situation a knife. It was a foolish, dangerous and wrong action on your part. … I have little doubt
that a sentence of imprisonment is the appropriate sentence in this case. I can see no other sentence
that would manifest or make clear the denunciation by the court of your behaviour in obtaining the
knife and using it in the reckless manner that you did. I can see no other way to affirm the value of
[her] person and life and her entitlement, regardless of the level or type of disputation that developed
between you, not to be confronted by your brandishing a knife. It is the disposition that reflects the
gravity of the injury that you caused her.474

9.2.7 In R v Gudgeon,475 the victim and the offender had been drinking in a hotel. The victim acted
aggressively towards the offender and continued to do so, even as the offender walked away.
The offender hit the victim with a glass. Although the judge found that the victim had provoked
the incident he balanced this against the severe assault with a glass, commenting ‘no provocation
warrants an attack such as this’.476

9.2.8 These cases illustrate that the offender’s use of a weapon is but one of many factors to be
considered by the sentencing judge in determining sentence. The weight to be attributed to the
use of the weapon will depend on the detailed circumstances of a particular case.477

9.2.9 The offender’s conduct in using the weapon must be considered in the context of the particular
circumstances of the incident, including the type of weapon (and the relative danger it presented),
the means by which the weapon became available (including whether there was any premeditation
in its use) and the relative size and strength of the offender and victim.

472 Ibid [94]–[95].
473 (Unreported, County Court of Victoria, 22 July 2003).
474 Ibid 2–3, 12.
475 (Unreported, County Court of Victoria, 27 February 2003). See further [4.3.6].
476 Ibid 8.
The type of weapon and how it became available

9.2.10 The more dangerous the weapon and the higher its capacity to provoke fear in the victim, the greater the weight that may be attributed to it as an aggravating factor. Similarly where a particular type of weapon is frequently used in the commission of particular crimes, it will be an aggravating feature of the crime if it establishes the offence as being ‘prevalent’. In this type of case the sentencing purposes which are generally emphasised are punishment and general deterrence.

9.2.11 The UK Panel advised the UK Council that a weapon brought to the scene in contemplation of committing the offence is likely to be an aggravating factor. The UK Panel noted that:

Statistics published for homicide show that the most common method of killing is with a sharp instrument. In 2002–03, 27% of all victims were killed by this method. The Court of Appeal has on many occasions emphasised that the carrying and use of weapons is an aggravating factor. Courts must consider the type of weapon used and, importantly, whether it was to hand or carried to the scene and who introduced it to the incident.

9.2.12 In 2005–06 the most common weapon used against male homicide victims in Victoria was a knife/sharp instrument (50 per cent), while the second most common was a blunt instrument (19 per cent). A firearm was used against 10 per cent of male homicide victims. Correspondingly, most men died from a stab wound (46 per cent), while the second most common cause of death for male homicide victims was a beating (24 per cent). During the same period in Victoria, the most common weapon types used against female homicide victims was a knife/sharp instrument (43 per cent) and hands/feet (29 per cent). Most women died from stabbing or beating (both 39 per cent).

9.2.13 The fact that a weapon is used proactively (brought to the scene in contemplation of committing the offence), rather than reactively (where the weapon happens to be available) is likely to increase its impact as an aggravating factor. However, this in turn will also depend on the particular context of a case including the relationship between the offender and the victim and their relative size and strength.

Relative size and strength of the victim and the offender

9.2.14 The relative size and strength of the victim and the offender are important in assessing the weight to be given to weapon use by the offender as an aggravating factor. The introduction of a weapon to a violent situation may reflect an imbalance in strength. Women often lack the physical strength of men and may resort to weapons in these circumstances.

480 Sentencing Advisory Panel (UK) (2005), above n 207, [54].
481 Ibid [48] (citations omitted). The Panel referred (at [49]–[53]) to several cases in which the Court of Appeal balanced the carrying or use of a weapon and provocation.
483 Ibid 53.
484 Ibid 54.
485 Ibid 53.
486 It may also have bearing on whether the offender was, in fact, provoked. Evidence that the offender brought the weapon to the confrontation may negate the evidence that he or she was provoked. See further part 5.3 of this paper (Onus and standard of proof).
9.2.15 This principle is set out in the UK Sentencing Guideline, which provides that while the use of a
weapon may constitute an aggravating factor it must be examined in the context of the comparative
physical strength of the offender and the victim and how that weapon became available.\footnote{488} Prior to
the publication of the Sentencing Guideline, the UK Panel advised the UK Council that:

The use or not of a weapon is another factor heavily influenced by the gender of the offender. Research and case law show that whereas men can and do kill using physical strength alone, women often cannot and thus resort to using a weapon. Some who responded to our consultation believed that although the law should recognise the relative physical advantage that a man has over a woman and so make some limited allowance for the use of weapons by women, sentencing principles should be applied in a gender neutral way. The Panel’s view is that use of a weapon should not necessarily move a case into another sentencing bracket when there is a considerable imbalance between the physical strength of the offender and the victim. The issue of key importance is whether the weapon was to hand or carried deliberately to the scene, although the circumstances in which the weapon was brought to the scene will need to be considered carefully.

The Panel’s view is that the use of a weapon should not necessarily move a case into another sentencing bracket. In cases of manslaughter by reason of provocation, use of a weapon may reflect the imbalance in strength between the offender and the victim and how that weapon came to hand is likely to be far more important than the use of the weapon itself. It will be an aggravating factor where the weapon is brought to the scene in contemplation of use before the loss of self-control (which may occur some time before the fatal incident).\footnote{489}

9.2.16 The UK Panel’s advice provides a sensible and balanced approach to weighing up how aggravating
weapon use is in the context of all of the surrounding circumstances in a particular case.

9.2.17 The use of a weapon by an offender is likely to be an aggravating factor which increases the
gravity of the offence and the offender’s culpability, particularly where an offender has deliberately
brought a weapon with him or her for the purposes of committing a criminal offence. However,
the offender’s use of a weapon must be assessed by reference to the relative strength of the
offender and victim and/or how the weapon became available (including whether it was brought
to the scene for the purpose of committing an offence).

Conduct after an offence in homicide cases

9.2.18 An offender’s behaviour after committing an offence can be relevant to sentence as an aggravating
factor to be weighed against any mitigation offered by the provocation. It can also be relevant to
the question of the offender’s remorse. The UK Panel raised this in advice to assist the preparation
of the UK Sentencing Guideline on provocation manslaughter:

Immediate and genuine remorse may be demonstrated by the summoning of medical assistance,
remaining at the scene, and co-operation with the authorities. On the other hand, concealment or
attempts to dispose of evidence or dismemberment of the body may aggravate the offence.\footnote{490}

9.2.19 This is illustrated in the English provocation manslaughter case of \textit{R v Brooks}.\footnote{491} The offender
had been subjected to prolonged, substantial provocation by the victim with whom he resided

\footnote{488} Sentencing Guidelines Council (UK) (2005), above n 207, [3.7].
\footnote{489} Sentencing Advisory Panel (UK) (2005), above n 207, [54] (citations omitted).
\footnote{490} Ibid [46] (citations omitted).
\footnote{491} [2004] I Cr App R (S) 53.
(including sexual grooming and abuse over a period of about six years from childhood). When the offender was 17 years old, a young boy visited the offender and victim’s home, and the victim indicated that sexual activity was about to occur. The offender killed the victim by stabbing him several times and hitting him with a dumbbell. He then dismembered his body, placed it in his car boot and transported it elsewhere. In sentencing him for provocation manslaughter, the judge treated the dismemberment of the victim’s body as an aggravating factor. This formed one of the grounds of an appeal against the sentence. The Court of Appeal confirmed that dismembering the victim’s body was an aggravating factor that had to be balanced with other factors, including the provocation. On balance, the Court held that the sentence was too long and upheld the appeal.

9.2.20 In *R v Hunter*, the offender was sentenced to seven years’ imprisonment with a non-parole period of four years and six months for the provocation manslaughter of his wife. He had buried her body in the floor of his shed and told their children that she had left with a man during the night. Ten years later he built a bigger shed and buried her beneath the floor of that shed. The sentencing judge held that denunciation and general deterrence were important in sentencing the offender, stating that: ‘I must take account of the aggravating circumstances of how you acted after the killing’.

9.2.21 While the UK Sentencing Guideline indicates that dismembering a body or concealing or attempting to conceal evidence may have an aggravating impact on an offender’s sentence, it makes clear that the circumstances of the offence must be carefully examined. The UK Panel advised that, although the offender’s behaviour after killing the victim may impact sentence, ‘it will not always be an aggravating factor … the judge should consider the motivation behind the offender’s actions’. The Panel cautioned that:

The majority of those who responded to our consultation agreed that post-offence behaviour was relevant to the sentence but felt that care should be taken to recognise that in some cases disposal of the body can be motivated not by rational thought but by panic at the realisation of the enormity of the crime committed. It would be harsh, therefore, automatically to treat such actions as aggravating the offence. It should be recognised also that co-operation with the authorities, which could be seen as mitigation, could in some cases be part of a planned deception. It follows that cases must be considered on their individual merits.

9.2.22 The Panel’s advice to consider the motivation for the offender’s conduct is consistent with the reasons-based approach to culpability advocated by the VLRC and in this paper. It provides a sensible approach to determining whether post-offence conduct should affect an offender’s sentence in all the circumstances of the case.

492 Ibid [4]–[5].
493 Ibid [18]–[19].
494 [2002] VSC 162 (Unreported, Teague J, 14 May 2002). His wife had mental health problems and had badly mistreated three of their children. The defendant alleged that he had argued with his wife and she had come at him with a knife. He said that it was not the first time that she had done so. He hit her on the head with a stick two or three times and killed her. He then buried her body in the floor of his shed and told their children that she had left with a man during the night. Ten years later he built a bigger shed and buried her beneath the floor of that shed. Eventually after being confronted by police he confessed to the killing.
495 Ibid [9].
496 Sentencing Guidelines Council (UK) (2005), above n 207, [3.6].
497 Sentencing Advisory Panel (UK) (2005), above n 207, [47].
498 Ibid [47].
10. Conclusion: Key Principles

10.1.1 The abolition of the partial defence of provocation in November 2005 in Victoria has raised a number of policy issues relating to the law of sentencing for murder and other offences against the person. Under the new law, provocation will play a different role in the trial process. It will be considered along with other sentencing factors that the court must take into account in arriving at the appropriate and proportionate sentence.

10.1.2 The change from substantive provocation to provocation as a sentencing factor changes not only its weight as an issue in the trial and sentencing of the offender, but also the application of the rules of evidence. Under the old law, if provocation was raised as an issue in a murder trial, the Crown had to prove beyond reasonable doubt that the offender had not been provoked in the relevant sense. In contrast, under the new law, offenders will have to prove on the balance of probabilities that they were provoked by the victim to a sufficient extent so as to justify the mitigation of their sentences.

10.1.3 We have suggested an approach that will prevent the deficiencies of the partial defence of provocation from re-emerging in a sentencing context. Rather than being justified on the uncertain, outdated or unacceptable doctrinal considerations that underpinned substantive provocation, sentencing provocation will need to be justified on its own terms within the broad framework of sentencing theory.

10.1.4 The Sentencing Act already identifies a number of factors to which a court must have regard in sentencing an offender, from which the relevance of provocation will need to be inferred. One of these factors, the culpability of the offender, reflects the extent to which an offender should be held accountable for his or her actions, and is an important measure of the seriousness of the offence. We have argued that provocation has particular relevance to the degree of an offender’s culpability and therefore to the seriousness of the offence.

10.1.5 For this reason we suggest that the formulation of principles governing the circumstances in which provocation should mitigate sentence should be guided by theories of culpability, which attempt to explain why some acts are more blameworthy than others. Provocation should only mitigate an offender’s sentence if a reduction in the offender’s culpability for the offence is justified by the nature and degree of the provocation, regardless of whether the same conduct would have afforded the offender a partial defence under the previous law.

10.1.6 In its review of homicide, the VLRC proposed an approach to assessing culpability that ‘allows us to look beyond the act and the circumstances of the act to why people killed and to make judgments about the values and views that drove the accused’s decision to act’.499 This approach, which is characterised as ‘reasons-based’, is intended to provide a philosophical foundation for the moral or social dimensions of culpability.

10.1.7 We have drawn on this, and the approach to provocation in other jurisdictions, to formulate a framework for considering provocation in sentencing. We recommend a move to a reasons-based formulation that looks at the nature and gravity of the victim’s conduct and the justifiability of the offender’s corresponding feeling of aggrievement.

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499 VLRC Homicide Options Paper (2003), above n 25, [7.25].
10.1.8 According to this conception, the degree of provocation necessary to reduce an offender’s culpability for an offence will also relate to the seriousness of the offence which has been committed. The degree of provocation (as shown by its nature and duration) is the determinative factor in deciding whether a reduction in the offender’s culpability is justified.

10.1.9 We have argued that generally an offender’s moral culpability is reduced in offences against the person when conduct by the victim causes the offender to have a justifiable sense of having been wronged and the offence is not grossly disproportionate to the provocation. In sentencing terms, there will be continuum from mitigation when the sense of being wronged is justified, to no mitigation at all when it is utterly unacceptable. Under this conception of provocation and culpability, issues of loss of self-control (or a perception of loss of self-control) and the concept of the ordinary person will not be of special importance in sentencing.

10.1.10 Rather, it is contended, the central issues to determining whether, and to what extent, an offender’s culpability will be reduced by provocation should be:

1. The degree of provocation, that is whether, in all of the circumstances of the case, the provocation caused the offender to have a justifiable sense of being wronged, considering:
   (a) the nature and context of the provocation, including whether it consisted of the victim exercising his or her equality rights and whether it was induced by the offender; and
   (b) the duration of the provocation.

2. The degree to which the offender’s response was disproportionate to the provocation: the greater the disproportionality the lower the reduction in the offender’s culpability. For the most serious examples of offences against the person, only serious provocation is likely to warrant a reduction in the offender’s culpability.

3. Whether the provocation was an operative cause of the offence, and remained an operative cause throughout the duration of the offence.

10.1.11 Therefore in assessing whether an offender’s culpability for an offence against the person is reduced, the crucial question is whether the provocation gave the offender a justifiable sense of being wronged. In homicide cases (including murder, manslaughter and defensive homicide) and the most serious non-fatal offences against the person, it is likely that only serious provocation will be capable of reducing an offender’s culpability. For less serious non-fatal offences, moderate provocation may be sufficient to reduce an offender’s culpability. Where a reduction in culpability is warranted, the extent of the reduction will depend on the severity of the provocation and the degree to which the offence was disproportionate. However, trivial provocation is unlikely to justify an offender’s aggrievement no matter how minor the responsive offence is deemed to be.

10.1.12 Conduct that arises out of the victim exercising his or her right to equality, such as the right to personal autonomy (including the right to form relationships, work and otherwise assert his or her independence), should not provide justification for an offender’s aggrievement. Although the personal characteristics of an offender will generally be relevant to assessing the nature and degree of provocation and whether it justified the offender’s aggrievement, this assessment should be consistent with equality rights. If such an approach is adopted, it is unlikely that the culpability of an offender for an offence against the person will ever be reduced because he or she claims to have been provoked by the victim’s enjoyment of equality rights, regardless of whether the offender can point to personal characteristics that caused him or her to find such behaviour provocative.

10.1.13 This approach is illustrated in Figure 2.
Whether the provocation warrants a reduction in the offender’s culpability, and the extent of any such reduction, will depend on:

1. **The degree of provocation**
   - Did the provocation cause the offender to have a justifiable sense of being wronged?

   **NO**

2. **Proportionality**
   - Was the offence grossly disproportionate to the provocation?

   **YES**

3. **Causation**
   - Did the provocation cause the offence?

   **NO**

   - There may not be sufficient provocation to justify reducing the offender’s culpability.

   **YES**

   - There may be sufficient provocation to justify reducing the offender’s culpability.

Consider:
- The nature and context of the provocation, including:
  - whether it consisted of the victim exercising his or her equality rights (while the offender’s personal characteristics are relevant to contextualise the victim’s conduct, the overriding consideration should be whether the offender’s aggrievement at the conduct is justified, and this consideration should be consistent with equality principles); and
  - whether it was induced by the offender (if so, the victim’s conduct would have to be such an extreme reaction to the offender’s own wrongdoing that the offender’s aggrievement was justified).
- The duration of the provocation.

Consider:
- The greater the disproportionality, the lesser the reduction in the offender’s culpability.
- For the most serious examples of offences against the person, such as homicide, attempted homicide and serious non-fatal assaults, only serious provocation is likely to warrant a reduction in the offender’s culpability.
- Where the offence is grossly disproportionate to the provocation, the provocation is unlikely to warrant a reduction in the offender’s culpability, even if it gave the offender a justifiable sense of being wronged.

Was the provocation an operative cause of the offence and did it remain an operative cause throughout the commission of the offence, taking into account the surrounding circumstances including:
- whether there was any delay between the provocation and the offence; and
- whether the offender was mistaken about the provocation and, if so, the reasonableness of the offender’s mistake.
Understanding the circumstances in which a reduction of an offender’s culpability for an offence may be justified by the victim’s conduct is essential to analysing the accepted categories of provocation under the previous law and to formulating principles about the types of conduct by the victim that should (and should not) warrant the mitigation of the offender’s sentence. We applied the model outlined in Figure 2 to some of the traditional categories of substantive provocation and formulated the following broad principles:

<table>
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<tr>
<th>Table 1: Assessing ‘categories’ of provocation under the new law</th>
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| **Actual or anticipated violence**
  
  [8.10.2]–[8.10.5] |
| Conduct such as actual or anticipated violence by the victim against the offender or an associate of the offender is likely to be viewed as serious provocation, capable of reducing the culpability of an offender who has committed an offence against the person in response to such provocation. |
| **Use of a weapon by the victim**
  
  [8.10.6]–[8.10.7] |
| The victim’s use or threatened use of a weapon against the offender is likely to be viewed as serious provocation which is capable of reducing the offender’s culpability. |
| **Sexual advances and sexual assaults**
  
  [8.10.8]–[8.10.23] |
| In the absence of a threat of assault or other unlawful violation, a sexual advance, however unwelcome or offensive, should not reduce an offender’s culpability for a crime of violence committed in response to such conduct. It is important to ensure that prejudicial attitudes are not permitted to flourish under the guise of ‘provocation’, either in the substantive law or in sentencing.

Sexual assault and other unlawful sexual predatory conduct towards the offender by the victim is likely to warrant a reduction in the offender’s culpability. It is equally important to recognise that there is a serious problem in our community of unlawful sexual predation against victims of either gender.

As with other categories of provocation, sexual conduct by the victim towards the offender must be considered in context, including past conduct of the victim towards the offender, or the offender’s family or friends, in deciding whether the victim’s conduct caused the offender to have a justifiable sense of being wronged. Sexual conduct falling short of a threatened or actual sexual assault or other unlawful sexual predation will be unlikely to provide sufficient justification for the offender’s aggrievement unless there were contextual reasons why the conduct was particularly harmful to the offender, for example where the victim had previously been sexually violent towards the offender.
## Conclusion: Key Principles

| Trivial conduct or offensive words [8.10.24]–[8.10.30] | As a general rule, provocation which is annoying or trivial in nature will not justify an offender’s aggrievement and will therefore not reduce his or her culpability for an offence against the person.

Offensive words spoken by the victim towards the offender or the offender’s family or friends should generally be considered low-level provocation, insufficient to have given an offender who has killed or assaulted the utterer of the words a justifiable sense of being wronged and consequently justifying a reduction in the offender’s culpability.

However, there may be circumstances where offensive words justify the offender’s aggrievement, particularly when they occur in the context of an abusive relationship or involve threats of violence made against the offender or others. Sometimes words or actions that, viewed alone, seem inoffensive take on significance when placed in the context of the victim’s prior conduct towards the offender. |
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<td>Racial abuse [8.10.31]–[8.10.36]</td>
<td>Conduct of the victim which consists of a single racial taunt, while it is to be deplored, may not be sufficient in itself to lessen the culpability of an offender who responds with malicious intent and kills or seriously injures the utterer of the comment. However, the context of the comment, including whether it contained threatening undertones or occurred against a background of discrimination, and the degree of disproportionality between the comment and the offence, are relevant to whether the offender’s aggrievement is justified and consequently whether—and to what degree—the offender’s culpability should be reduced.</td>
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| Family violence [8.10.37]–[8.10.53] | Like other types of violent conduct, family violence is likely to be viewed as serious provocation. Factors relevant to the consideration of such conduct include:

- the context in which the conduct occurs, including past violence by the victim towards the offender or other family members;
- the danger presented or reasonably perceived by the offender, taking into account the victim’s reputation for violence;
- the balance of power between the victim and the offender; and
- the relative size and strength of the victim and the offender and other relevant physical characteristics. |
| Sexual jealousy [8.10.54]–[8.10.91] | Conduct by the victim which amounts to him or her exercising equality rights, including the right to personal autonomy (such as leaving an intimate relationship, engaging in another intimate relationship, forming social relationships, seeking an education and choosing to work) should not be capable of justifying an offender’s aggrievement. Therefore such conduct should not reduce an offender’s culpability, regardless of whether the offender’s personal characteristics contributed towards his or her feeling of aggrievement at this conduct or whether the offender is found to have lost his or her self-control as a result of the conduct.

These principles also apply to offences against the person in the context of other intimate or family relationships where the offender committed the offence as a result of his or her aggrievement at the victim’s pursuit of his or her right to equality and personal autonomy. |
10.1.15 Even in cases in which it is established that an offender’s culpability should be reduced due to provocation by the victim, the offender’s reduced culpability will still need to be balanced with multiple other aggravating and mitigating sentencing factors, in order to arrive at the appropriate sentence. The sentencing judge will have to determine what purposes the particular sentence should serve. Generally, in sentencing for homicide, the central purposes are punishment and deterrence, acknowledging the severity of taking a life. Even where the victim’s conduct has given an offender a justifiable sense of being wronged, these sentencing purposes may still be emphasised by the sentencing judge. However, there may be some cases in which these purposes are given less weight because of the provocation. In relation to all non-fatal offences against the person, the provocation and the degree of disproportionality of the offender’s response will need to be balanced with other sentencing factors to determine which sentencing purposes should have precedence in the circumstances of a particular case.

10.1.16 The impact on sentencing outcomes of the reforms initiated by the VLRC Homicide Report for offenders who otherwise might have been convicted of provocation manslaughter is still uncertain and will only become apparent in years to come. It is likely that some of these offenders will be found guilty of murder under the new law and face the higher maximum penalty and sentencing range that applies to this offence. Others may be acquitted altogether on the grounds of self-defence, or instead be found guilty of defensive homicide, particularly in cases involving family violence by the victim towards the offender. Yet others may be convicted of other types of manslaughter, such as unlawful and dangerous act manslaughter or negligent manslaughter.

10.1.17 Whatever the context in which provocation is raised in sentencing for offences against the person, we hope that this paper contributes to the development of a more principled and sophisticated jurisprudence that appropriately reflects changed community standards and expectations.
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Provocation in Sentencing

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**United States**

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<td>[8.10.18]</td>
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Appendix 1: United States’ Federal Sentencing Guidelines

The United States’ Federal Sentencing Guidelines are contained in the United States Sentencing Commission Guidelines Manual, §3E1.1 (Nov 2007) which includes the guidelines, policy statements (including grounds for departure from the guidelines) and commentary.

One of the grounds for departing from the guideline range is on the basis of the victim’s conduct. The Guidelines provide that:

§5K2.10. Victim’s Conduct (Policy Statement)

If the victim’s wrongful conduct contributed significantly to provoking the offense behavior; the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding whether a sentence reduction is warranted, and the extent of such reduction, the court should consider the following:

(1) The size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant.

(2) The persistence of the victim’s conduct and any efforts by the defendant to prevent confrontation.

(3) The danger reasonably perceived by the defendant, including the victim’s reputation for violence.

(4) The danger actually presented to the defendant by the victim.

(5) Any other relevant conduct by the victim that substantially contributed to the danger presented.

(6) The proportionality and reasonableness of the defendant’s response to the victim’s provocation.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.  

500 USSC (2007), above n 233, §5K2.10, policy statement.

501 Ibid.
Appendix 2: UK Commission’s 2006 report

The following extract from the UK Commission’s report *Murder, Manslaughter and Infanticide* sets out the Commission’s recommendations for the reformation of substantive provocation. We have drawn heavily from the Commission’s definition of ‘gross provocation’ which is consistent with a reasons-based approach to determining culpability. As we have focussed on sentencing provocation, other elements of the Commission’s formulation of substantive provocation have not been taken up—for example we do not advocate the incorporation of the ‘ordinary person’ test into the assessment of sentencing provocation.

THE SUBSTANCE OF THE DEFENCE

In our review of the defence of provocation in 2004, we concluded that the circumstances in which it should in future be available ought to be changed, in the ways indicated below. Our conclusions were reached after widespread and detailed consultation. We see no compelling reason to depart from them in substance, although we will indicate below where our conclusions remain controversial and, therefore, where there is an issue that could profitably be taken further in the next stage of the review. We are recommending that the defence be reformed as follows:

1. Unlawful homicide that would otherwise be first degree murder should instead be second degree murder if:
   a. the defendant acted in response to:
      i. gross provocation (meaning words or conduct or a combination of words and conduct) which caused the defendant to have a justifiable sense of being seriously wronged; or
      ii. fear of serious violence towards the defendant or another; or
      iii. a combination of both (i) and (ii); and
   b. a person of the defendant’s age and of ordinary temperament, i.e., ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or in a similar way.

2. In deciding whether a person of the defendant’s age and of ordinary temperament, i.e., ordinary tolerance and self-restraint, in the circumstances of the defendant, might have reacted in the same or in a similar way, the court should take into account the defendant’s age and all the circumstances of the defendant other than matters whose only relevance to the defendant’s conduct is that they bear simply on his or her general capacity for self-control.

3. The partial defence should not apply where:
   a. the provocation was incited by the defendant for the purpose of providing an excuse to use violence; or
   b. the defendant acted in considered desire for revenge.

4. A person should not be treated as having acted in considered desire for revenge if he or she acted in fear of serious violence, merely because he or she was also angry towards the deceased for the conduct which engendered that fear.

5. A judge should not be required to leave the defence to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.

Appendix 3: Sexual intimacy homicides

The context in which male and female offenders kill

In the study of 182 homicide prosecutions conducted by the VLRC between 1 July 1997 and 30 June 2001, it was found that homicides were overwhelmingly committed by men (84.1 per cent of the defendants in the study). Similarly, more recent research indicates that of the 70 homicides that occurred in Victoria in 2006–07, 89 per cent were perpetrated by men. Figure 3 (below) demonstrates that the context in which homicides occur differs depending on the gender of the defendant. However, the largest category of homicides by both male and female defendants was homicides occurring in the context of ‘sexual intimacy’ (31.5 per cent of homicides involved a person killing a partner, former partner, or a sexual rival).

Figure 3: The context in which male and female offenders kill

<table>
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<th>Broad context category</th>
<th>Male accused (n = 153)</th>
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<td>Conflict resolution</td>
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<td>Originating in other crime</td>
<td>14.4</td>
<td>10.3</td>
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<td>Sexual predation</td>
<td>10.3</td>
<td>10.3</td>
</tr>
<tr>
<td>Homophobic killing</td>
<td>3.3</td>
<td>3.4</td>
</tr>
<tr>
<td>Other killing</td>
<td>3.4</td>
<td>2.6</td>
</tr>
<tr>
<td>Sexual intimacy</td>
<td>27.6</td>
<td>34.5</td>
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<tr>
<td>Child killings</td>
<td>6.5</td>
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<td>Other family member</td>
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<td>Mental impairment</td>
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<tr>
<td>Misc</td>
<td>13.8</td>
<td>13.8</td>
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(i) Base: All homicide accused (n=182)
(ii) Note: Unusually, the child killings in this study were all of boys under 6 years old by their fathers or stepfathers. However, these numbers are small and should be treated with caution. The female accused who killed in the context of sexual predation was assisting a male accused. It was the male accused who sexually assaulted the deceased.

503 VLRC Homicide Report (2004), above n 3, [1.40]; referring to VLRC Homicide Options Paper (2003), above n 25, [2.12]. The sample involved all cases which proceeded beyond the committal stage on a charge of murder, manslaughter or infanticide. In the period of the study a total of 182 people were charged with homicide and had murder or manslaughter charges which proceeded beyond the committal stage (involving 143 incidents of homicide). Of these 182 people, 153 were men and 29 were women (VLRC Homicide Options Paper (2003), above n 25, [2.3]–[2.4]).

504 Davies and Mouzos (2007), above n 482, 60.

505 VLRC Homicide Report (2004), above n 3, [1.40]; VLRC Homicide Options Paper (2003), above n 25, [2.43], [2.46]–[2.48], [2.50].

506 VLRC Homicide Options Paper (2003), above n 25, 27 (Graph 7) (footnotes omitted). Often the context can be classified multiple ways: VLRC Homicide Options Paper (2003), above n 25, [2.39]–[2.42], n 119. For example, the mental impairment category includes five adult offspring killing a parent and two accused killing their other family members (partners).
When looking at victims (rather than those accused) of homicide, research suggests that while women are more likely to be killed by their intimate male partners, men are more likely to be killed by a friend or stranger. This trend is apparent in Victoria—in 2005–06 in Victoria women were more likely to be killed by an intimate partner (56 per cent) or family member (22 per cent) whereas men were more likely to be killed by a stranger (43 per cent) or a friend/acquaintance (25 per cent).507

Motivation behind homicides of male and female victims

The motivation behind homicides of male and female victims differs. In 2005–06 in Victoria, the majority of female homicide victims were killed as a result of a ‘domestic altercation’ (64 per cent), which included arguments ‘based on jealousy, separation or termination of a relationship, and other domestic arguments that may relate to infidelity, children and custody issues, alcohol-fuelled domestic altercations and other issues between intimate or past-intimate partners’.508 In contrast, a domestic altercation was listed as the motive for 17 per cent of the male homicide victims.509

A monograph by the NSW Judicial Commission analysed all the cases in which provocation was raised between 1 January 1990 and 21 September 2004. Of the 115 cases in which provocation was raised, 75 resulted in manslaughter convictions on the basis of provocation and 40 in murder convictions.510 The NSW Commission found that both offenders and victims in provocation manslaughter cases are likely to be men: 58 of the 75 offenders were men and 67 of the 76 victims of provocation manslaughter were men.511 The NSW Commission divided the 75 provocation manslaughter cases into seven broad categories. The largest category of provocation manslaughter cases was ‘violent physical confrontations’ (28 out of 75 offenders) which did not include family violence, domestic violence or intimate relationship confrontations.512 The second highest category was domestic violence (between partners) (13 out of 75 offenders).513 However, if the Commission’s categories of ‘intimate relationship confrontations’ and ‘domestic violence (between partners)’ are combined, then 24 out of 75 provocation manslaughters could be said to have occurred in the context of an intimate relationship.

508 Davies and Mouzos (2007), above n 482, 17, 58 (in Australia, 58 per cent of female homicide victims (n=66) were killed in this context).
509 Ibid (in Australia, 16 per cent of male homicide (n=30) victims were killed in this context).
510 Judicial Commission (NSW) Partial Defences to Murder in New South Wales 1990–2004, 36. Of the 75 cases resulting in provocation manslaughter convictions, 65 offenders were sentenced on the basis of provocation only and 10 were sentenced on the basis of provocation and diminished responsibility or substantial impairment.
511 Ibid 37. The 75 offenders who were found guilty of provocation manslaughter killed 76 victims (in one case the offender killed two victims).
512 Ibid 38. The categories were: 1—words alone (11/75); 2—violent physical confrontations (28/75); 3—intimate relationship confrontations (11/75); 4—alleged homosexual advance (11/75); 5—domestic violence (between partners) (13/75); 6—family violence (8/75) and 7—non-family sexual assault (3/75).
513 Ibid.
Motivations of male and female ‘sexual intimacy’ killers

Research also suggests that men and women who kill in the context of sexual intimacy have different motivations. A 1994 study by Kenneth Polk reported that of the men who killed in the context of sexual intimacy, 79.4 per cent killed out of jealousy or the desire to control their partner. By contrast, women who killed their male partners were more likely to do so in response to violence. Similarly, Graeme Coss argued in relation to sexual intimacy killings that a ‘fundamental … research finding is that there are crucial differences between male violence and female violence (when it occurs), that they are truly asymmetrical’. Coss identified that ‘[k]ey indicators of lethal male violence—prior violence by him, separation by her (and stalking by him), his sense of honour affronted—all feature in discussions about proprietoriness’.

The NSW Commission’s study of provocation manslaughter cases found that in 11 out of 75 provocation manslaughter cases the ‘provocation was successfully claimed in a factual context of infidelity or the breakdown of an intimate relationship. Four were jury verdicts and seven were guilty pleas accepted by the Crown. In all cases the offender was male.’ The Commission found that in seven of the 11 cases, the victim was a man who the offender believed had been intimate with his partner; in two of the 11 cases, the victim was the wife of the offender and in two cases the victim was the offender’s homosexual partner. The NSW Commission found that 13 of the 75 provocation manslaughter cases occurred in the context of domestic violence perpetrated upon the offender by the victim. In ten of these cases, the offender was a woman who killed her husband or de facto husband in this context. In three cases the offender was a man who killed his de facto wife. In each of these three cases the offender alleged that his wife had hit him during an argument. The Commission reports that in at least one of these three cases the provocation alleged against the victim was ‘apparently minor’—the offender claimed that a threat by the victim to smash his car windows and an alleged assault caused him to beat her with a dumb-bell and a weight-lifting bar.

Ian Leader-Elliott points to research which suggests that in Australia, England and Canada ‘women are at least three times more likely to be victims rather than perpetrators of a domestic killing’. He states that this ‘difference is even more striking in cases of separation homicide, when killing is motivated by possessiveness or jealousy resulting from the breakdown of a relationship’. He refers to a New South Wales study of homicides spanning 1969 to 1981 which reported that separation was relevant in only three out of 79 cases in which women killed their partners. Self-defence or escaping from violence or

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517. Ibid 58.
518. Judicial Commission (NSW), above n 509, 42.
519. Ibid.
520. Ibid 45–46. The Commission points out that this offender received the equal second-highest sentence and the highest non-parole period among all the provocation cases. The Commission also notes that the sentencing judge said that ‘the provocation asserted by the prisoner was not great’ and that the offender’s culpability for the offence was at the ‘very high’ end of the spectrum: *R v Williams* [2004] NSWSC 189, [42].
521. Leader-Elliott (1997), above n 411, 149.
522. Ibid 150.
oppression are the most common motives when women kill their male partners.\textsuperscript{524} He points out that, in comparison, almost half of the men in the sample (98 out of 217) killed their partner ‘during separation or its aftermath’.\textsuperscript{525}

The VLRC study reveals a similar pattern: that men who kill in the context of intimate relationships are most likely to be motivated by jealousy or the desire to exercise control over their partner.\textsuperscript{526} Although there was a relatively small number of women in the VLRC study, the VLRC reported that their findings were consistent with other research which indicates that women who kill their intimate partners are likely to kill in response to violence by their partner and rarely kill as the result of sexual jealousy or the desire to control their partner.\textsuperscript{527} The VLRC findings are illustrated in Figure 4 below.

\textbf{Figure 4: Sexual intimacy homicides—motivation of male and female accused}\textsuperscript{528} 

\begin{figure}[h]
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\includegraphics[width=\textwidth]{figure4.png}
\caption{Sexual intimacy homicides—motivation of male and female accused\textsuperscript{528}}
\end{figure}

(i) Base: All homicide accused in the context of sexual intimacy (n=52).

(ii) Note: Co-accused in cases involving multiple offenders.

This graph should be read as follows: 33 male homicide accused, who killed in the context of sexual intimacy, killed women because they were jealous of them or wanted to control them.

*The one woman who killed in the context of men being jealous/controlling of women was one of three accused in the incident described in VLRC \textit{Defences to Homicide: Options Paper} (2003), \cite{2.40}. The three men who killed men in the context of control/other were helping wives kill their husbands. One woman who killed in the context of male sexual rivals was one of four accused involved in an incident in which a man killed his male sexual rival.

The VLRC reported that in approximately half of ‘sexual intimacy’ homicides there were allegations of prior violence committed by the defendant towards the victim. In 95.5 per cent of these incidents (21 out of 22 cases) the victim was a woman (and 20 of the 21 women killed were killed by men).\textsuperscript{529}

\begin{itemize}
\item \textsuperscript{524} Ibid 150.
\item \textsuperscript{525} Ibid n 2, referring to Wallace (1986), above n 522, 98–99.
\item \textsuperscript{526} Over three-quarters (78.6\%) of men who killed in the context of sexual intimacy (n=33/42): VLRC Homicide Options Paper (2003), above n 25, [2.53] (Graph 9). See further [8.10.54]–[8.10.91] for a discussion of this issue.
\item \textsuperscript{527} VLRC Homicide Options Paper (2003), above n 25, [2.52]–[2.53]. See also Coss (2006), above n 31, 139: ‘men kill in revenge, out of jealousy, for honour, as the climax in a chain of violence, for profit, even for sport; when women kill it is mostly as a form of self-preservation (or protection of children) in response to violence inflicted upon them.’
\item \textsuperscript{528} VLRC Homicide Options Paper (2003), above n 25, 29 (Graph 9).  
\item \textsuperscript{529} Ibid [2.56].
\end{itemize}
Another consideration in relation to intimate homicides is that in violent relationships, separation does not necessarily end the violence. A study by Alison Wallace demonstrates that in 46 per cent of the wife killings, the woman had either left or was in the process of leaving her husband when she was killed.530 Similarly, in a study by Jenny Mouzos of homicides in 1998–1999, she states that ‘women who attempt to terminate their relationship are exposed to a relatively high risk of homicide, with the period immediately after the estrangement associated with particularly high risk’.531

Sentencing of male and female killers

Table 2 and Figure 5 detail sentencing outcomes for manslaughter from 1998–99 to 2006–07, grouped by the defendant’s gender. Table 2 includes details of the number of defendants convicted of manslaughter over the time period, as well as the percentages of men compared to women. Figure 5 represents the differences in percentages for each gender graphically.

These data show that sentencing outcomes for women convicted of manslaughter were generally less severe than the sentencing outcomes for men. For example, 93 per cent of men were sentenced to a period of imprisonment compared to 70 per cent of women. This could reflect the different circumstances in which men and women kill.532

Table 2: Persons sentenced for manslaughter by gender and sentence type, 1998–99 to 2006–07 (Victoria)533

<table>
<thead>
<tr>
<th>Sentence type</th>
<th>Men Number</th>
<th>Proportion</th>
<th>Women Number</th>
<th>Proportion</th>
<th>Total persons Number</th>
<th>Proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment</td>
<td>142</td>
<td>93%</td>
<td>16</td>
<td>70%</td>
<td>158</td>
<td>90%</td>
</tr>
<tr>
<td>Partially Suspended Sentence</td>
<td>2</td>
<td>1%</td>
<td>0</td>
<td>0%</td>
<td>2</td>
<td>1%</td>
</tr>
<tr>
<td>Wholly Suspended Sentence</td>
<td>4</td>
<td>3%</td>
<td>3</td>
<td>13%</td>
<td>7</td>
<td>4%</td>
</tr>
<tr>
<td>Hospital Security Order</td>
<td>1</td>
<td>1%</td>
<td>0</td>
<td>0%</td>
<td>1</td>
<td>1%</td>
</tr>
<tr>
<td>Youth Training Centre Order</td>
<td>2</td>
<td>1%</td>
<td>1</td>
<td>4%</td>
<td>3</td>
<td>2%</td>
</tr>
<tr>
<td>Community-based Order</td>
<td>1</td>
<td>1%</td>
<td>0</td>
<td>0%</td>
<td>1</td>
<td>1%</td>
</tr>
<tr>
<td>Adjourned Undertaking with Conviction</td>
<td>0</td>
<td>0%</td>
<td>3</td>
<td>13%</td>
<td>3</td>
<td>2%</td>
</tr>
<tr>
<td>Total Persons Sentenced</td>
<td>152</td>
<td>100%</td>
<td>23</td>
<td>100%</td>
<td>175</td>
<td>100%</td>
</tr>
</tbody>
</table>

530 Wallace (1986), above n 522, 99.
531 Mouzos (2000), above n 506, 38.
532 Caution should be exercised when interpreting percentages that are calculated from low numbers.
533 Source: Sentencing Advisory Council, unpublished data supplied by Court Services, Department of Justice (Vic). Figures may not add to 100 per cent due to rounding. ‘Manslaughter’ includes 20 people sentenced for provocation manslaughter and 155 people sentenced for other types of manslaughter.
Figure 5: The percentage of persons sentenced for manslaughter by sentence type and gender, 1998–99 to 2006–07 (Victoria)

Figure 6 shows average imprisonment terms and non-parole periods for men and women sentenced for manslaughter. This Figure demonstrates that men, on average, were given longer prison terms for manslaughter than were women (on average, 11 months longer). On average, men were also required to serve a greater proportion of their head sentence before being eligible for parole (65 per cent compared to 54 per cent).

Figure 6: The average imprisonment lengths and non-parole periods for manslaughter, 1998–99 to 2006–07, by gender (Victoria)
Appendix 4: Victorian Sentencing Practices

Past sentencing practices for manslaughter and murder

This appendix compares sentencing patterns for manslaughter and murder under the previous law in the period from 1998–99 to 2006–07. One hundred and seventy-five (175) people were sentenced for manslaughter in this period and 266 people were sentenced for murder.

For the purposes of this paper, the sentencing remarks for all 175 manslaughter cases in this period were reviewed and categorised according to the ‘type’ of manslaughter. Of the 175 cases, 20 people were sentenced for provocation manslaughter, and 155 were sentenced for other categories of manslaughter, including 140 people sentenced for unlawful and dangerous act (UDA) manslaughter and 11 people sentenced for negligent manslaughter.

Table 3 and Figure 7 detail sentencing outcomes for provocation manslaughter, ‘other’ manslaughter and murder from 1998–99 to 2006–07. Figure 7 compares the differences in percentages for the two types of manslaughter with murder.

These data show that sentencing outcomes for manslaughter were generally less severe than the sentencing outcomes for murder. For example, 85 per cent of people sentenced for provocation manslaughter and 91 per cent of people sentenced for ‘other’ manslaughter were sentenced to a period of imprisonment compared to 92 per cent of people sentenced for murder. There was a greater variety of sentencing outcomes for manslaughter compared to murder, and a number of those sentenced received non-custodial sentencing outcomes. For example, among those sentenced for manslaughter, seven people were sentenced to wholly suspended sentences, one to a community-based order and three to adjourned undertakings with conviction.

Caution should be exercised when interpreting the sentencing range for provocation manslaughter due to the low numbers of persons sentenced. Although only 17 persons were sentenced to an immediate term of imprisonment for provocation manslaughter, an additional three persons received wholly suspended sentences for provocation manslaughter. One man (aged 54 at the time of sentence) and two women (aged 32 and 51 respectively at the time of sentence) were sentenced to a wholly suspended sentence for provocation manslaughter from 1998–99 to 2006–07. Each of them was sentenced to a period of three years’ imprisonment wholly suspended for three years. See R v Stavreski (2004) 145 A Crim R 44 (VSC); R v Tran [2005] VSC 220 (Unreported, Kaye J, 24 June 2005); R v Denney [2000] VSC 323 (Unreported, Coldrey J, 4 August 2000). In the period from 1998–99 to 2006–07, 20 people were convicted of provocation manslaughter, 155 were convicted of ‘other’ categories of manslaughter (including 140 people convicted of unlawful and dangerous act manslaughter) and 266 people were convicted of murder. However, for a number of those convicted of murder or unlawful and dangerous act manslaughter; provocation had been raised as a partial defence in their trial. Under the new law it is possible that offenders convicted of murder, defensive homicide and other categories of manslaughter (such as UDA manslaughter) will raise provocation as a mitigating factor in their sentencing hearing.
Table 3: Persons sentenced for provocation manslaughter, ‘other’ manslaughter and murder by sentence type 1998–99 to 2006–07 (Victoria)

<table>
<thead>
<tr>
<th>Sentence type</th>
<th>Provocation Manslaughter</th>
<th>Other Manslaughter</th>
<th>Murder</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Proportion</td>
<td>Number</td>
</tr>
<tr>
<td>Imprisonment</td>
<td>17</td>
<td>85%</td>
<td>141</td>
</tr>
<tr>
<td>Partially Suspended Sentence</td>
<td>0</td>
<td>0%</td>
<td>2</td>
</tr>
<tr>
<td>Wholly Suspended Sentence</td>
<td>3</td>
<td>15%</td>
<td>4</td>
</tr>
<tr>
<td>Hospital Security Order</td>
<td>0</td>
<td>0%</td>
<td>1</td>
</tr>
<tr>
<td>Youth Training Centre</td>
<td>0</td>
<td>0%</td>
<td>3</td>
</tr>
<tr>
<td>Custodial Supervision Order</td>
<td>0</td>
<td>0%</td>
<td>0</td>
</tr>
<tr>
<td>Community-based order</td>
<td>0</td>
<td>0%</td>
<td>1</td>
</tr>
<tr>
<td>Adjourned Undertaking with Conviction</td>
<td>0</td>
<td>0%</td>
<td>3</td>
</tr>
<tr>
<td>Total Persons Sentenced</td>
<td>20</td>
<td>100%</td>
<td>155</td>
</tr>
</tbody>
</table>

Figure 7: The percentage of persons sentenced for provocation manslaughter, ‘other’ manslaughter and murder by sentence type 1998–99 to 2006–07 (Victoria)

Source: Sentencing Advisory Council, unpublished data supplied by Court Services, Department of Justice (Vic). Figures may not add to 100 per cent due to rounding.
Past *imprisonment* sentences for manslaughter and murder

Between 1998–99 and 2006–07, 158 people received immediate imprisonment sentences for manslaughter and 246 people received immediate imprisonment sentences for murder.

Figure 8 provides a breakdown of the range of imprisonment lengths for murder and provocation and UDA manslaughter sentences from 1998–99 to 2006–07. It shows that in this period, the range of sentence lengths for provocation manslaughter was slightly narrower than that for ‘other’ manslaughter (ranging from four to 15 years for provocation manslaughter compared to between three years and 15 years for ‘other’ manslaughter).

Figure 8 also demonstrates that the sentencing range for murder is much higher than for manslaughter. Only 25 percent of prison sentences for murder were shorter than 17 years. By contrast, 75 percent of the prison sentences for manslaughter were shorter than eight years.

Figure 8: The maximum, minimum, 25th and 75th percentiles, median and average lengths of imprisonment for provocation manslaughter, ‘other’ manslaughter, total manslaughter and murder, 1998–99 to 2006–07 (Victoria)

Note: the description of average imprisonment lengths excludes offenders sentenced to life imprisonment. This is because the qualitative life sentence cannot be used to calculate an average.

536 Sentencing Advisory Council, unpublished data supplied by Court Services, Department of Justice (Vic). ‘Total manslaughter’ includes 17 people sentenced to immediate imprisonment for provocation manslaughter, 128 people sentenced to immediate imprisonment for unlawful and dangerous act manslaughter and 13 people sentenced to immediate imprisonment for other categories of manslaughter. Categories of manslaughter were determined by reference to the judge’s sentencing remarks in each case. The median length of imprisonment for people sentenced for provocation manslaughter was eight years.
Figure 9 compares the imprisonment sentencing ranges for provocation manslaughter and ‘other’ manslaughter with those for murder in the period 1998–99 to 2006–07. For manslaughter, imprisonment terms ranged from three years to 15 years. The median imprisonment sentence was seven years.

For murder, imprisonment terms ranged from ten years to life imprisonment. The median imprisonment sentence length was 19 years.

537 The lowest imprisonment term involved two 22 year-old women sentenced to 3 years’ imprisonment (with a 6 month and a 1 year non-parole period, respectively), one 24 year-old man sentenced to 3 years’ imprisonment (with a 4 month non-parole period) and one 37 year-old man sentenced to 3 years’ imprisonment (with a two year non-parole period).
Figure 10 compares the non-parole periods for people sentenced for provocation manslaughter, other categories of manslaughter and murder between 1998–99 and 2006–07, and the length of the non-parole periods that were fixed. Between 1998–99 and 2006–07, the court set a non-parole period for all people sentenced to imprisonment for manslaughter. For manslaughter, non-parole periods ranged from one day to 12 years, with a median of four years.\textsuperscript{538} For murder, non-parole periods ranged from eight years to 35 years, with a median of 14 years and six months. There were also five people who did not receive a non-parole period for murder.

Figure 10: Persons sentenced to imprisonment for provocation manslaughter, ‘other’ manslaughter and murder by length of non-parole period, 1998–99 to 2006–07 (Victoria)

A 42 year-old woman sentenced in 2000–01 to 4 years’ imprisonment received a one day non-parole period due to exceptional considerations. A 26 year-old man sentenced to 15 years’ imprisonment received a non-parole period of 12 years.
While Figure 9 and Figure 10 above present the lengths of the total effective sentences and non-parole periods for provocation manslaughter, ‘other’ manslaughter and murder, separately, Figure 1 (see fold-out facing page 124) combines the two methods of describing sentence lengths in the one diagram. This Figure shows the total effective sentence and non-parole periods for provocation manslaughter, ‘other’ manslaughter and murder for each individual person.

The centre of each ‘bubble’ on the chart represents a combination of the length of the imprisonment term and non-parole period for each offence category, while the size of the bubble reflects the number of people who received that particular combination.539

As shown, the most common combination of total effective sentence and non-parole period for provocation manslaughter was eight years with a six year non-parole period (three people).540 Total effective sentence lengths for provocation manslaughter ranged from four years with a two year non-parole period, to 15 years’ imprisonment with a non-parole period of 13 years.

The most common combination of total effective sentence length and non-parole period for ‘other’ manslaughter was five years with a three year non-parole period (16 people).541 Total effective sentence lengths ranged from three years with a non-parole period of four months, to 15 years’ imprisonment with a non-parole period of 12 years.

By contrast, the most common combination of total effective sentence and non-parole period for murder was 18 years with a 14 year non-parole period (21 people).542 Total effective sentence lengths ranged from ten years’ imprisonment with a non-parole period of seven years, to life imprisonment with no non-parole period.

539 Sentence lengths that are longer than one year are rounded to the nearest year of imprisonment, while sentence lengths of less than one year are grouped into the ‘<1 year’ category.
540 As represented by the largest grey ‘bubble’ on the chart.
541 As represented by the largest white ‘bubble’ on the chart.
542 As represented by the largest black ‘bubble’ on the chart.
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