

**SENTENCED HOMICIDES IN NEW SOUTH WALES  
1990 – 1993**

**A Legal and Sociological Study**

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## **Disclaimer**

The views expressed in this monograph are the views of the individual authors and do not represent any official views of the Judicial Commission of New South Wales, nor are they necessarily shared by the members of the staff of the Commission. Whilst all reasonable care has been taken in the preparation of this title, no liability is assumed for any errors or omissions.

## PREFACE

Many people regard the subject of homicide with horrified fascination. The apprehension, trial and sentencing of those who have killed is a conspicuous subject of interest to the community at large. Such cases are often portrayed as stories of ultimate deviance, horror and violence. However, regardless of the sometimes sensational facts, homicide cases raise some of the most fundamental and intractable questions in sentencing theory. Such issues must be resolved in practice by sentencing judges who apply great skill in the exercise of their discretion. Due to the public's apparent insatiable craving for retribution, often fueled by inaccurate or incomplete media reporting, the sentencing of homicide offenders is susceptible to sometimes ignorant and "knee-jerk" criticism. Indeed, the capacity of the criminal justice system to "do justice" is often incorrectly measured by public reaction to the outcome of high profile cases.

It is appropriate, then, that the present study analyses homicide from the perspective of sentencing outcomes and complements previous criminological research, which has typically focused on the incidence of violent deaths. In particular, this study distinguishes between the sentencing of those convicted of murder and manslaughter, analyses the use of partial defences and their impact on sentencing, and describes the features of specific types of homicides such as the killing of children and sexual partners.

This project has been the major research focus of the Judicial Commission for the last two years and is the largest research project ever undertaken within the Commission. Hugh Donnelly, the designated project officer and Stephen Cumines, the project co-ordinator, were principally responsible for the successful transition of the project from its inception to completion. They also undertook the arduous tasks of data analysis and writing of this monograph, with assistance and advice from the other members of the Division. Ania Wilczynski, a research consultant whose expertise is in the field of child homicide research, was responsible for Chapter IV. Each chapter is self contained and provides its own conclusions.

This report contributes to the continuing debate about the nature of homicide and the way in which courts deal with murder and manslaughter offenders. It will hopefully provide a firmer empirical basis for the consideration of issues of law reform. In addition, the development of a database of homicide sentencing cases will enable further monitoring of emerging sentencing patterns.

Donna Spears  
*Research Director*  
June 1995

# I INTRODUCTION

Homicide is the killing of one human being by another. The present study examines unlawful and culpable homicide where the offender has been successfully prosecuted and convicted of murder, manslaughter or infanticide. Offenders convicted of inchoate homicide offences (such as conspiracy to murder), accessorial liability for homicide, or attempts to murder were excluded on the basis that such offences do not have as an *actus reus* of killing a human being. The offence of culpable driving causing death has not been included because although this offence technically fits within the definition of homicide, the law has traditionally considered that offence as being less serious than manslaughter or murder. This is reflected by the fact that until very recently the maximum penalty for culpable driving causing death was imprisonment for five years compared to 25 years penal servitude for manslaughter and “life” for murder. Thus the present study concentrates on the most serious offences that result in the death of another human being. These comprise all substantive offences located under the “Homicide” heading of the *Crimes Act 1900* (NSW).

## Previous studies of homicide

Most studies of homicide have a predominantly sociological emphasis and methodology, regardless of whether they analyse general patterns of homicide,<sup>1</sup> or focus on discrete types such as stranger killings,<sup>2</sup> hate crimes,<sup>3</sup> homicide between adult sexual intimates,<sup>4</sup> multiple or serial killings<sup>5</sup> and child killings.<sup>6</sup> The landmark empirical investigation of homicide was conducted in Philadelphia in 1958 by Marvin Wolfgang.<sup>7</sup> He justified his sociological approach in the following terms<sup>8</sup> —

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- 1 H Strang, *Homicides in Australia 1990-1991*, 1992, Australian Institute of Criminology, Canberra. H Strang, *Homicides in Australia 1991-1992*, 1993, Australian Institute of Criminology, Canberra. P Gallagher and MT Nguyen da Huong, “Trends in Homicide 1968 to 1992” *Contemporary Issues in Crime and Justice* (1994) 21 *Crime and Justice Bulletin* 3.
  - 2 A Kapardis, “Stranger Homicides in Victoria January 1984 - December 1989” (1990) 23 *Australia and New Zealand Journal of Criminology* 241.
  - 3 S Tomsen, “Hatred, Murder and Male Honour: Gay Homicides and the ‘Homosexual Panic Defence’” (1994) 6 (2) *Criminology Australia* 2.
  - 4 PW Easteal, *Killing The Beloved*, (1993)(b), Australian Institute of Criminology, Canberra and PW Easteal, “Homicide Between Adult Sexual Intimates: A Research Agenda” (1993)(a) 26 *Australia and New Zealand Journal Of Criminology* 3.
  - 5 DM Gresswell and CR Hollin, “Multiple Murder” (1994) 34 *British Journal of Criminology* 1.
  - 6 A Wilczynski, “Images of Women Who Kill Their Infants: The Mad and the Bad” (1991) 2 (2) *Women and Criminal Justice* 71. A Wilczynski and A Morris, “Parents Who Kill Their Children” (1993) *Criminal Law Review* 31. A Wilczynski, *A Socio-Legal Study of Parents Who Kill Their Children in England and Wales*, 1993, Doctoral thesis in Criminology, University of Cambridge, England.

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“This research does seek to determine whether criminal homicide exhibits definite objective order, regularities, patterns and if so, what this concatenation of phenomena is. Although criminal homicide is largely an unplanned act of violence, it is assumed, nonetheless, that there are in the act discernible and empirical uniformities of specific social characteristics.”

This quest to identify and quantify the “uniformities of specific social characteristics” of homicide has spawned a rich international literature. All subsequent studies of homicide have, to a greater or lesser extent, drawn on Wolfgang’s data collection methodology, coding variables and statistical techniques.

Wolfgang identified four major sources of statistical data in relation to homicide: police records, coroners’ reports, court or judicial records and records of prison confinement. His decision, which has been adopted in many subsequent studies, was to utilise police records, as the “richness of descriptive detail and procedural proximity to the crime eliminate many defects and limitations of other statistical sources.”<sup>9</sup>

Notable Australian studies of homicide include —

*Homicides in Australia*<sup>10</sup> — An annual analysis of national patterns in police reports of homicide, by the Australian Institute of Criminology as part of a National Homicide Monitoring Program established following a recommendation by the National Committee on Violence.

*Homicide: The Social Reality*<sup>11</sup> — This was the first comprehensive homicide study undertaken in Australia which analysed general patterns of homicide and specific relationships between offenders and victims for the period 1968-1981. The study was updated in 1987.<sup>12</sup> Both the study and the update were consolidated into a brief publication in 1988<sup>13</sup> and in 1994 the study was again updated.<sup>14</sup>

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7 M Wolfgang, *Patterns in Criminal Homicide*, 1958, University of Pennsylvania Press, Philadelphia.

8 Ibid p 10.

9 Ibid p 12.

10 H Strang, *Homicides in Australia 1990-1991*, 1992, Australian Institute of Criminology, Canberra. H Strang, *Homicides in Australia 1991-1992*, 1993, Australian Institute of Criminology, Canberra.

11 A Wallace, *Homicide: The Social Reality*, 1986, New South Wales Bureau of Crime Statistics and Research, Sydney.

12 R Bonney, *Homicide 2*, 1987, New South Wales Bureau of Crime Statistics and Research, Sydney.

13 New South Wales Attorney General’s Department, “Homicide” Contemporary Issues in Crime and Justice (1988) 5 *Crime and Justice Bulletin* 1.

14 P Gallagher and MT Nguyen da Huong, “Trends in Homicide 1968 to 1992” Contemporary Issues in Crime and Justice (1994) 21 *Crime and Justice Bulletin* 3.

## INTRODUCTION

*Homicide* (Report No 40) — The Victorian Law Reform Commission's comprehensive legal analysis of homicide.<sup>15</sup>

*When Men Kill: Scenarios of Masculine Violence*<sup>16</sup> — A detailed qualitative study of cases by Kenneth Polk based on records held by the Victorian Office of the Coroner for the period 1985-1989. The data included all cases of unexpected, unnatural or violent deaths which — apart from suspected homicides — includes car and work accidents, deaths that occur under anaesthetic, and deaths in care or custody.<sup>17</sup>

A number of Australian studies include a discussion of the relationship between offender and victim in line with Wolfgang's dictum that "more so than in any other violation of conduct norms, the relationship the victim bears to the offender plays a role in explaining the reasons for such flagrant violation."<sup>18</sup> Notably, this approach was adopted by the New South Wales Bureau of Crime Statistics in their analysis of family, acquaintance and stranger homicides between 1968 and 1986,<sup>19</sup> and by Patricia Easteal in her study of homicide between adult sexual intimates.<sup>20</sup>

Polk has suggested that the relationship between offender and victim cannot provide a complete picture of homicide.<sup>21</sup> He has suggested that it is appropriate to re-examine homicide data and attempt to obtain more concise and meaningful groupings of homicides, which may include the relationship between the victim and the offender but also incorporate "what is it that has transpired to bring the victim and the offender to the point where lethal violence is employed."<sup>22</sup> Polk developed a number of categories in relation to male offenders<sup>23</sup> including —

- (1) homicide in the context of sexual intimacy (the desire to control a partner or kill a sexual rival);
- (2) confrontational homicide (honour contests, often involving male-to-male violence and the consumption of alcohol);

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15 Victoria Law Reform Commission Report No 40, *Homicide*, 1991, Melbourne; Appendix 6 details the Report's statistics and was published separately: Victoria Law Reform Commission, *Homicide Prosecutions Study*, (1991)(b), Melbourne.

16 K Polk, *When Men Kill: Scenarios of Masculine Violence*, 1994, Cambridge University Press, Melbourne.

17 Ibid p 12.

18 Wolfgang op cit p 203.

19 MT Nguyen da Huong and P Salmelainen, *Family, Acquaintance and Stranger Homicide in New South Wales*, 1992, New South Wales Bureau of Crime Statistics and Research, Sydney.

20 Easteal, 1993(b), op cit.

21 Polk, 1994, op cit p 20 and, more recently, K Polk, "Lethal Violence as a Form of Masculine Conflict Resolution" (1995) 28 *Australia and New Zealand Journal of Criminology* 93 at p 111.

22 Polk, 1994, op cit p 20.

23 For a complete discussion see ibid p 8-30.

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- (3) homicide originating in other crime (during robberies, etc); and
- (4) homicide as a means of conflict resolution (the use of violence amongst marginalised males).

The present study draws from all of the research in so far as it adopts many of its classifications, particularly in terms of identifying the relationship between offender and victim, and other key demographic factors.

### **A different perspective — using court records**

Past homicide studies have generally not distinguished between murder and manslaughter due to their principal concern with identifying the “social context” of all violent deaths.<sup>24</sup> In addition, information about the final outcome of a prosecuted case may not be readily identifiable from police records. In the present study, the investigation was confined to convicted and sentenced offenders, in order to emphasise the various approaches of the criminal justice system.

A major focus of this study is the identification and comparison of sentencing patterns. The study examined the records relating to all homicide offenders who were sentenced as principals between January 1990 and August 1993 in order to —

- (1) compare s 19 and s 19A murder sentences<sup>25</sup> to reveal the extent to which legislative reform has affected both the number of persons who have pleaded guilty and the severity of the sentences imposed;
- (2) identify, for the offence of manslaughter, the impact of legal categorisation (ie the distinction between voluntary and involuntary killing, or the use of partial defences) on the range of sentences imposed; and to
- (3) look at sentencing patterns for particular types of offenders, including child killers and offenders who killed sexual partners.

Limiting the investigation to cases of sentenced homicide enabled a thorough analysis of a small number of cases. A comprehensive picture of homicide then emerges from a comparison of the present study of court records for sentenced offenders with previous studies of police findings in relation to suspects.

There are, of course, limitations in both sources of data. As Wallace observed<sup>26</sup> —

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24 An exception to this is a recent Queensland study by the Research and Co-ordination Division, Criminal Justice Commission: Research Paper No 1, *Murder in Queensland*, 1994. The Victoria Law Reform Commission *Homicide* Report op cit also differentiated murder and manslaughter.

25 Section 19 of the *Crimes Act* imposed a mandatory life penalty for murder unless circumstances existed which significantly diminished the person’s culpability. It was repealed on 12 January 1990 and replaced by s 19A which introduced a discretionary sentencing regime for murder. For a more detailed discussion see Chapter VII Sentencing.

26 Wallace op cit p 27.

## INTRODUCTION

“The police position is not neutral. Their prosecution function results in only certain types of information being sought and this can result in professional exaggeration and premature conclusions regarding the suspect’s guilt in a homicide case. Felonious homicide is not determined by police charge but rather by what the court establishes as its verdict.”

It is arguable that court records also contain a similar bias, as they contain the evidence proffered in the Crown case. The elements of the offence, however, have been proved either by plea or trial beyond reasonable doubt. The normal course following a homicide is a police investigation, then a coronial inquest, followed by a committal hearing, followed by a trial and/or sentence and finally any subsequent appeal(s). By using court records, the present study gained access to information accumulated throughout the criminal justice process.

Court records document the legal path taken by each offender from arrest and committal, through indictment and arraignment, and ultimately to conviction for murder, manslaughter or infanticide. The fundamental distinction between murder and manslaughter can therefore be taken into account in an analysis of sentencing. In addition, sentencing can be analysed in relation to such legal intricacies as pleas accepted by the Crown to lesser charges, alternative jury verdicts, combinations of partial defences, and verdicts being altered on appeal.

As a result of using court records, this study does not include homicides where —

- (1) no offender has been identified and apprehended by police (unsolved cases);
- (2) an offender has died at any point prior to sentence (such as those who committed suicide, were killed in the course of apprehension, or died of natural causes);
- (3) an accused has been found not fit to stand trial or to have been insane;
- (4) in a vehicular homicide, the offender was found guilty of the offence of culpable driving causing death instead of manslaughter;
- (5) the homicide is dealt with by the legal system as non-criminal, such as deaths under the *Occupational, Health and Safety Act 1983* (NSW);
- (6) no accused persons were convicted; or
- (7) an acquittal or a new trial was ordered by an appellate court and, in the case of a new trial, the result had not been determined at the time of data collection.<sup>27</sup>

Owing to the exclusion of these types of cases, the present study does not purport to be a study of the social phenomenon of homicide in its entirety. It is, rather, a study of sentenced homicide offenders, which attempts to analyse the sentences imposed on those offenders in terms of the legal categorisation of the crimes committed, and also to compare those categories of offenders to the wider set of police suspects. In methodological terms, the strength of this project is that the data has been analysed on both a statistical and legal basis.

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27 There were 15 cases where a new trial was ordered.

## II DEFINITIONS AND METHODOLOGY

### Definitions

“Homicide” is a generic term meaning the killing of a human being by another whether intentionally or unintentionally. Blackstone defined unlawful homicide as the killing of a human creature of any age or sex without justification or excuse.<sup>1</sup> The *Crimes Act 1900* (NSW) defines homicide to be those offences contained in Part 3 of the Act. Murder and manslaughter are partly defined in s 18 of the Act —

#### **Murder and manslaughter defined**

18(1) (a) Murder shall be taken to have been committed where the act of the accused, or thing by him omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him, of a crime punishable by penal servitude for life or for 25 years.

(b) Every other punishable homicide shall be taken to be manslaughter.

(2) (a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.

(b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only, or in his own defence.

### Murder

There are several categories of murder —

- (1) where the accused intends to kill;
- (2) where the accused intends to inflict grievous bodily harm;
- (3) where the accused is recklessly indifferent to human life with the probable cause being death; and
- (4) where the act of the accused causing the death was done in an attempt to commit, or during or immediately after the commission of an offence punishable by penal servitude for life or 25 years (constructive murder or otherwise known as felony murder). Where the felony is armed robbery, the basis of a felony murder charge can be the attempt to commit that felony or simply the offence of armed robbery.<sup>2</sup>

Convictions for murder are rarely based on the felony murder rule alone.<sup>3</sup> More often than not, in cases where it is an issue, other categories of murder are usually established by the Crown.<sup>4</sup>

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1 Blackstone, *Commentaries*, 1830, 17th ed, Vol IV, p 200.

2 *R v Foster* (unrep, 9 Mar 1995, NSW CCA, per Hunt CJ at CL, Smart J and Levine J at 8).

3 A recent felony murder case was *R v Mills* (unrep, 3 Apr 1995, NSW CCA). See also *R v Vandine* [1970] 1 NSW 252. The Victorian case of *R v Butcher* [1986] VR 43 may be a genuine felony murder case although there is a doubt as to whether the jury concluded that the accused intended to kill or commit grievous bodily harm. *R v Butcher* was the only possible case

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### Manslaughter

The law divides manslaughter into two categories<sup>5</sup> — voluntary manslaughter and involuntary manslaughter.

*Voluntary manslaughter* is committed where the accused person intends to kill or inflict grievous bodily harm but the circumstances of the killing provide a partial excuse reducing murder to manslaughter. In New South Wales a partial excuse must either be provocation<sup>6</sup> or diminished responsibility<sup>7</sup> or both.

*Involuntary manslaughter* is committed either —

- (1) where death results from an unlawful and dangerous act which a reasonable person in the accused's position would have realised was exposing another to an appreciable risk of serious injury;<sup>8</sup> or
- (2) where death was caused by gross negligence where a duty was owed by the accused to the victim<sup>9</sup> in circumstances where there was a "high risk that death or grievous bodily harm would follow."<sup>10</sup>

## The Data Collection Process and Analysis

### Identifying the variables

The study covers all homicide offenders sentenced between January 1990 and August 1993.

The first step in this project was to identify variables to be collected. These were adopted from the Victorian Law Reform Commission study and Alison Wallace's study. Added to this selection were certain "legal" variables, particularly those in

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identified by the Victoria Law Reform Commission in its 1991 Homicide Report. In the present study there were only two cases.

- 4 For a judicial description of this phenomena see Barwick CJ's comments in *Ryan v The Queen* (1967) 121 CLR 205 at 219.
- 5 For an interesting discussion of the historical development of manslaughter see HA Snelling "Manslaughter by Unlawful Act" — Part I, 30 *Australian Law Journal* 382, and HA Snelling "Manslaughter by Unlawful Act" — Part II, 30 *Australian Law Journal*, 438. See also the majority judgment (Mason CJ, Toohey, Gaudron and McHugh JJ) of the High Court in *Wilson v The Queen* (1992) 174 CLR 313.
- 6 Section 23 *Crimes Act* 1900.
- 7 Section 23A *Crimes Act* 1900.
- 8 *Wilson v The Queen* (1992) 174 CLR at 333.
- 9 *R v Taktak* (1988) 14 NSWLR 226.
- 10 *Wilson v The Queen* (1992) 174 CLR 313 per Mason CJ, Toohey, Gaudron and McHugh JJ at 333. See also *Nydam v The Queen* [1977] VR 430 at 445 and J Saunders (ed) *Words and Phrases Legally Defined*, 1989, 3rd ed, Butterworths, Vol 3 at p 97-98.

## DEFINITIONS AND METHODOLOGY

relation to legal defences, procedural characteristics of cases and sentencing outcomes. Data was collected about the offender, the sentence, the victim and the offence. A copy of the data collection form used is contained in Appendix IV together with a list of variables collected.

### Methods used to count homicides

The data consisted of measures on 68 variables for 256 offenders and 242 victims. There were unequal numbers of offenders and victims —

- (1) one homicide was committed by seven offenders;
- (2) one was committed by five offenders;
- (3) five homicides were committed by three offenders;
- (4) twenty one were committed by two offenders;
- (5) seven homicides involved two victims;
- (6) two homicides involved three victims;
- (7) two homicides involved five victims; and
- (8) two homicides involved six victims.

Past studies have noted the difficulties of measuring patterns in homicide when a small minority of the cases involve multiple offenders and/or multiple victims. Those cases, if not accounted for, are capable of causing statistical distortions. Wallace attempted to overcome this problem by counting every victim as a distinct homicide.<sup>11</sup> The present study took a different approach, somewhat like the pairing system utilised by the Victoria Law Reform Commission.<sup>12</sup> By assigning codes to *both* offenders *and* victims, it was possible to analyse multiple homicides in terms of all the relationships involved. There were no cases where multiple offenders and multiple victims were killed in the one incident.

### Collecting the data

The data was collected from files held at the Supreme Court Registry and the Office of the Director of Public Prosecutions. Having two distinct data sources was valuable particularly where a file could not be located in one location. Homicide files were identified by a list of registry file numbers obtained from annual sentencing statistics. A homicide file typically contained most of the following documents —

- (1) police facts as set out by the Officer in Charge;
- (2) New South Wales Police Force Antecedent Report Form (P16);
- (3) psychological and/or psychiatric reports and in some cases pre-sentence reports; and
- (4) sentence remarks at first instance.

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11 Wallace, 1986, op cit p 28.

12 Victoria Law Reform Commission Report No 40, *Homicide Prosecution Study*, 1991(b), Melbourne, Appendix 6, p 3.

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Given that one of the principle aims of the study is to provide a view of homicide from the court's perspective, researchers extracted information from the *Sentence Remarks* of the judge. Where that document was not immediately available researchers relied upon Court of Criminal Appeal judgments contained on the Sentencing Information System.<sup>13</sup> If both those documents were not available (which was generally quite rare) information was obtained from other documents contained on the file as listed above. Police reports of the offence were utilised as a last resort. As a precautionary measure the records of the DPP library were also checked and the *Case Notes* prepared by the Public Defenders Office.

The data collection process was conducted over a period of five months. The extensive time frame was required due to the number of variables in the study. It was also necessary to read the sentence judgments closely to determine whether offenders were sentenced on the basis of a legal defence. Researchers were permitted to copy the *Sentence Remarks*. These were attached to each survey for future reference.

### Data input and analysis

After the data was collected a coding manual was created to represent the information contained in the survey in a numerical form for later statistical analysis. The coding manual is contained in Appendix V. Codes were then systematically assigned to the answers to the surveys. These codes were entered into four databases. The data entry component of the study also enabled researchers to check what were initially considered anomalous entries.

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13 The Sentencing Information System (SIS) is a computerised statistical and legal database designed to assist judicial officers in achieving consistency of approach in sentencing offenders. The system is also available to various criminal justice agencies who play an important role in the sentencing process.

### III

## THE OFFENDER AND THE VICTIM

Homicide, especially when the facts constitute murder, is one of the most serious outcomes that can arise from the interaction of two or more persons. To understand the sentencing of homicide offenders, it is essential to examine the factual context of this interaction including the characteristics of the persons involved, the nature of their relationship to each other, and the immediate circumstances in which the homicide took place (eg time, location, precipitating factors, instruments used).

The conviction and sentencing of homicide offenders takes place at the end of the criminal justice process: after the laying of charges, entering of pleas, and where necessary the conducting of trials. At each stage in this process, decisions are made by participants (defendant, Crown, jury, and judicial officers) which will have an impact on the conviction and sentencing outcomes.

The purpose of this chapter is to analyse the characteristics of offenders, victims and the factual context in which homicides typically occur. Where appropriate a distinction will be made between murder and manslaughter. The various legal and procedural decisions made by participants will also be examined by way of an illustration.

### Offender Characteristics

#### Overview

The present study covers 256 offenders sentenced for homicide — of whom 129 were convicted of murder and 127 of manslaughter. The typical offender was found to be a male (91.8%), aged between 15-34 (76.6%), born in Australia (73.4%), with prior convictions (65.4%). In addition, the offenders were often single (56.6%), unemployed (56.5%), and had a history of alcohol abuse (46.9%). Women who kill, however, differ significantly from this profile in a number of respects. They usually had no prior record (76.2%), were married or in a de facto relationship (66.7%), and were on average four years older than male homicide offenders.

When homicides are separated into murder and manslaughter, the sex imbalance is even more pronounced: women committed 13.5% of manslaughters, but less than 3% of murders. It will become evident from the analysis presented in this chapter that the circumstances in which women typically commit homicide differ markedly from those in which the majority of men commit homicides. In comparison to males, women rarely kill; when they do, the victim is more likely to be their current partner (spouse or de facto), and they are almost always convicted of manslaughter (eg in the context of previous violence or other abuse by the victim). These facts tend to explain the absence of prior convictions, and the fact that female homicide offenders, on average, were older and rather more likely to be in a married or de facto relationship than men.

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**Sex of Offenders** The homicide offenders whose cases were examined for this project consisted of 235 males (91.8%) and 21 females (8.2%). When the female offenders were separated by offence it was found that women committed 13.5% of manslaughters (17 cases), but only 2.4% of murders (3 cases). One female offender was convicted of infanticide. These gender ratios confirm the findings of a number of previous studies that homicidal violence is essentially male in character. Gallagher and Nguyen found that 86% of police suspects were male and 14% female.<sup>1</sup> At the national level, Strang found that males outnumbered females by a factor of nine.<sup>2</sup>

**Age of Offenders** Figure 1 shows that almost half (47.5%) of all homicide offenders were aged between 15 and 24 years at the time of arrest. Over three quarters (76.6%) were aged 34 years or less at the time of their arrest.<sup>3</sup> The most frequent age is 18 years (18 offenders) followed by 17 years (16 offenders). Gallagher and Nguyen found that 67% of suspects were aged between 15 and 34 years and that the 15-29 year age group consistently had the highest age specific suspect rate.<sup>4</sup> Strang also found that suspects are predominantly young: in the 1991-1992 figures, 18% were under the age of 20 and a further 38% were aged 20-29.<sup>5</sup>

In the present study, 75% of female offenders were aged less than 37 years and 75% of male offenders were aged less than 33 years. On average, female offenders were approximately four years older than male offenders. Likewise, 56.2% of murderers (who were virtually all males) were under the age of 25, while only 45% of persons convicted of manslaughter were under 25.

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1 P Gallagher and MT Nguyen da Huong, "Trends in Homicide 1968 to 1992" Contemporary Issues in Crime and Justice (1994) 21 *Crime and Justice Bulletin* 3.

2 This was found in both publications: H Strang, *Homicides in Australia 1990-1991*, 1992, Australian Institute of Criminology, Canberra, p 29. H Strang, *Homicides in Australia 1991-1992*, 1993, Australian Institute of Criminology, Canberra, p 29.

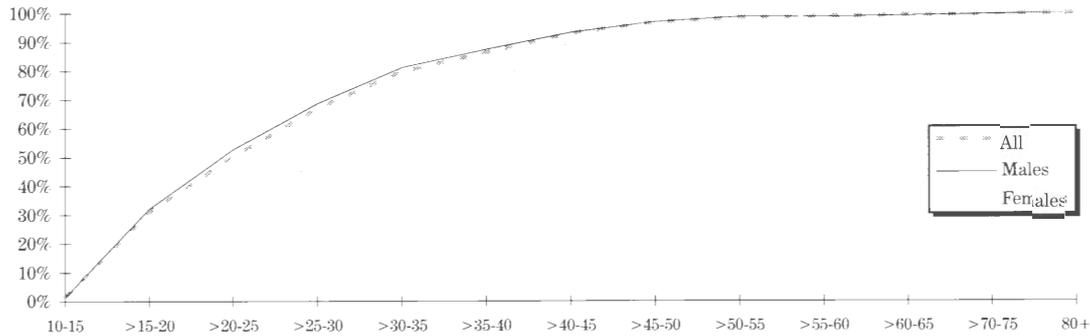
3 There was very little or no difference between the age calculated at time of arrest and age calculated at time of offence due to the fact that almost all homicide offenders were arrested shortly or within 12 months after the date of the offence. Further, there were fewer missing values in the arrest date field than in the offence date field.

4 Gallagher and Nguyen da. Huong, 1994, op cit p 2.

5 Strang, 1993, op cit p 29.

## THE OFFENDER AND THE VICTIM

Figure 1  
Age of Offenders<sup>†</sup>



<sup>†</sup>Frequency missing = 12

**Employment Status** The offenders were classified into one of the following groups — self employed, employee, unemployed, home duties/student, pensioner or institutionalised. In the discussion below, offenders who were not self employed, employees or unemployed are collectively referred to as “not in the workforce.”

At the time of the offence, just over half the offenders were unemployed (51.4%), about one third were employed/self employed (34.3%), and the remainder were not in the workforce (14.3%). The proportion of offenders who were unemployed was higher for murder (58.2%) than for manslaughter (44.2%), and the proportion of offenders who were not in the workforce was higher for manslaughter (21.7%) than for murder (7.4%).

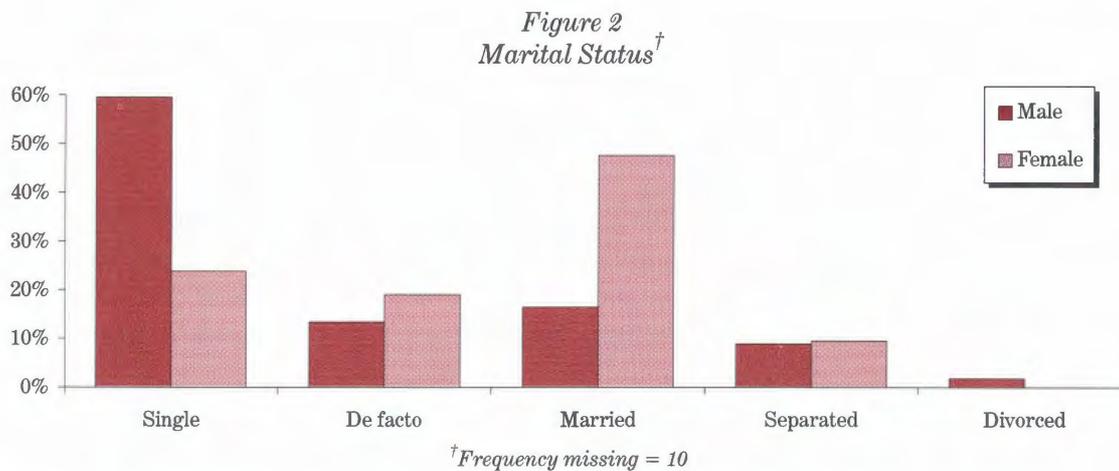
These findings do not exactly accord with prior studies, partly due to the different methods used to measure employment status. Wallace found that 36.7% of suspects were unemployed at the time of the offence. Similarly, the Victorian Law Reform Commission’s 1991 study found that, of the homicide offenders convicted in Victoria during the period 1981-1986, 37.2% were unemployed at the time of the offence and a further 22.7% were not in the paid work force: they were pensioners, retirees or students.<sup>6</sup> Strang, by contrast, found that 66% of offenders were unemployed; however the employment status at the time of offence was only known for two thirds of suspects. Further, suspects whose occupation was “home duties” were counted as unemployed.<sup>7</sup> The difference in the level of unemployment may be explained by the fact that the period covered by the present study (1990-1993) coincided with an economic recession when unemployment in New South Wales was particularly high.

6 Victoria Law Reform Commission Report No 40, *Homicide*, 1991, Melbourne; Appendix 6 details the Report’s statistics and was published separately: Victoria Law Reform Commission, *Homicide Prosecutions Study*, 1991(b), Melbourne. See p 10.

7 Strang, 1992, op cit p 30-31 and Strang, 1993, op cit p 31.

## SENTENCED HOMICIDES

**Marital Status** Overall, 56.5% of offenders were single, 32.9% were married or in de facto relationships and 10.5% were separated or divorced. There were no significant differences in these proportions when murder and manslaughter cases are separated. However, female and male offenders differ markedly in terms of marital status: the majority (66.7%) of female offenders were married or in a de facto relationship whereas only 29.8% of males were in similar relationships at the time of the offence.



These findings accord with past studies. Gallagher and Nguyen found that 60.5% of female suspects were married or in a de facto relationship whereas the figure for males was only 27.6%.<sup>8</sup> Strang found that 74% of women compared to 32% of men were, or had been, in a married or de facto relationship.<sup>9</sup> This significant difference in marital status is explained by the fact that women offenders typically kill their spouse or partner. This will be discussed further in the context of the offender's relationship to the victim.

**Ethnicity and Aboriginality** About a quarter of offenders in the present study (26.6%) were born overseas, with a higher proportion for manslaughter (30.2%) than for murder (22.9%).<sup>10</sup> Although sentencing judgments may sometimes include information on ethnic background, the ethnicity of offenders is particularly difficult to determine, and any findings should be treated with caution. In the present study the measurement of Aboriginality was made relatively straightforward as it is an explanatory factor considered at sentence.<sup>11</sup>

8 Gallagher and Nguyen da Huong, 1994, op cit p 3.

9 Strang, 1993, op cit p 29.

10 These figures are very similar to those in Wallace's study, where it was found that 27.9% of suspects were born overseas: A Wallace, *Homicide: The Social Reality*, 1986, New South Wales Bureau of Crime Statistics and Research, Sydney, p 41.

11 *R v Hickey* (unrep, 27 Sept 1994, NSW CCA, per Simpson J, with whom Finlay J agreed) approved. The first instance decision of *R v Fernando* (unrep, 13 Mar 1992, NSW Sup Ct, per Wood J). See also the High Court decision of *R v Neal* (1982) 149 CLR 305; 7 A Crim R 129,

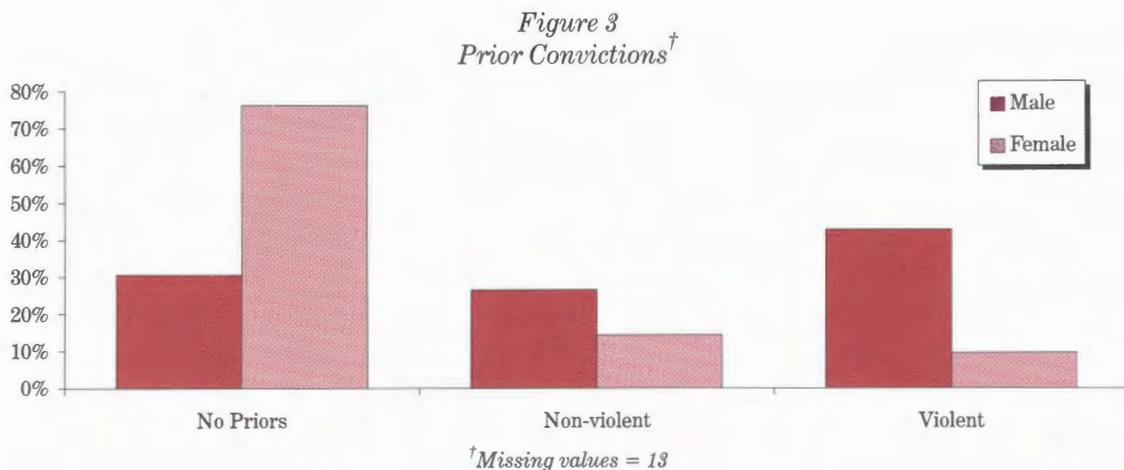
## THE OFFENDER AND THE VICTIM

Aboriginal people are over represented in the New South Wales criminal justice system: in this study, 14.3% of offenders were Aboriginal. Wallace found that 6.8% of suspects were Aboriginals, and Bonney's subsequent research found that Aboriginals constituted 7% of homicide offenders. Strang found that 12.6% of homicide suspects in New South Wales in 1990-1991 were Aboriginal,<sup>12</sup> and 5.7% in 1991-1992.<sup>13</sup>

**Prior Convictions** Rather than merely note the presence or absence of prior offences, it is important to determine whether such offences were violent or non-violent in nature. For the purposes of this study, the category "prior convictions for violent offences" covers both robbery offences contained in ss 94-98 of the *Crimes Act 1900*,<sup>14</sup> and "personal violence offences." The latter are defined in s 4 of the *Crimes Act* to include, inter alia, the offences of assault, sexual assault, wounding with intent and malicious wounding.

Consequently, offenders were categorised into three groups —

- (1) no prior convictions;
- (2) prior convictions for violent offences; or
- (3) non-violent prior convictions.



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*Juli* (1990) 50 A Crim R 31 and *Rogers and Murray* (1989) 44 A Crim R 301. Finally in the case of *E (A Child)* (1993) 66 A Crim R 14 the West Australian Court of Criminal Appeal discussed the mitigatory effect, if any, of Aboriginality in the context of attempted murder.

12 Strang, 1992, op cit p 33.

13 Strang, 1993, op cit p 31.

14 Robbery requires proof that it was the violence or the threat of violence by the offender which caused the victim to part with the property taken. *R v Foster* (unrep, 9 Mar 1995, per Hunt CJ at CL, Smart J and Levine J at p 8).

## SENTENCED HOMICIDES

Around one third (34.6%) of offenders had no prior record at the time of the offence. A total of 39.9% of offenders had previous convictions for violent offences and 25.5% had convictions for non-violent offences. Murderers were more likely to have a prior record of violent offences (44.9%) than offenders convicted of manslaughter (35.3%), and were less likely to have no prior record at all (28.8% compared to 39.3% of manslaughter offenders).

Female and male offenders differed markedly in relation to prior records. About three quarters (76.2%) of the female offenders had no prior record, compared to 30.6% of male offenders. As is evident from Figure 3, offenders with a prior violent record constitute the most common category of male offenders, yet the least common category of female offenders.

Previous studies have used varying methods to examine prior record, which may help to explain the following differences in the findings. Wallace found that only 16.6% of suspects had previous convictions for violent offences.<sup>15</sup> Men were more likely than women to have a violent prior record (19% compared to 2.8%).<sup>16</sup> Strang's findings are partly in accordance with the present study: approximately two thirds of suspects had a criminal record, and for more than half of these a violent offence had been recorded.<sup>17</sup> Yet in contrast to this study, Strang found that the majority of women with a prior record had convictions for violent offences.<sup>18</sup>

Thus it may be the case that male homicide offenders sentenced between 1990-1993 were more likely to have a violent prior record than was the case when Wallace undertook her study in 1981. However, it is also likely that the details of prior record available at the time of sentencing are more complete than at the time of initial police investigation. Consequently, studies which are based on preliminary information could be under reporting the incidence of prior offences.

**Alcohol and Drug Abuse** The data gathered in relation to alcohol or drug abuse should be treated with caution, since it does not gauge the extent or seriousness of the abuse. Furthermore, the information was obtained from sentence hearings at which mitigatory material is only required to be proved on the balance of probabilities.<sup>19</sup> According to this data, 46.9% of offenders had a history of alcohol abuse and 23% of offenders had a history of drug abuse. Murderers were more likely to have a history of alcohol abuse (54.1%) than offenders convicted of manslaughter (40.2%), and slightly more likely to have a history of drug abuse (26.6%, compared to 19.8% of manslaughter offenders).

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15 Wallace, 1986, op cit p 45.

16 Ibid.

17 Strang, 1992, op cit p 34.

18 Strang, 1993, op cit p 33-34.

19 *R v Pilley* (1991) 56 A Crim R 202 per Finlay J (with whom Handley JA and Allen J agreed) at 204.

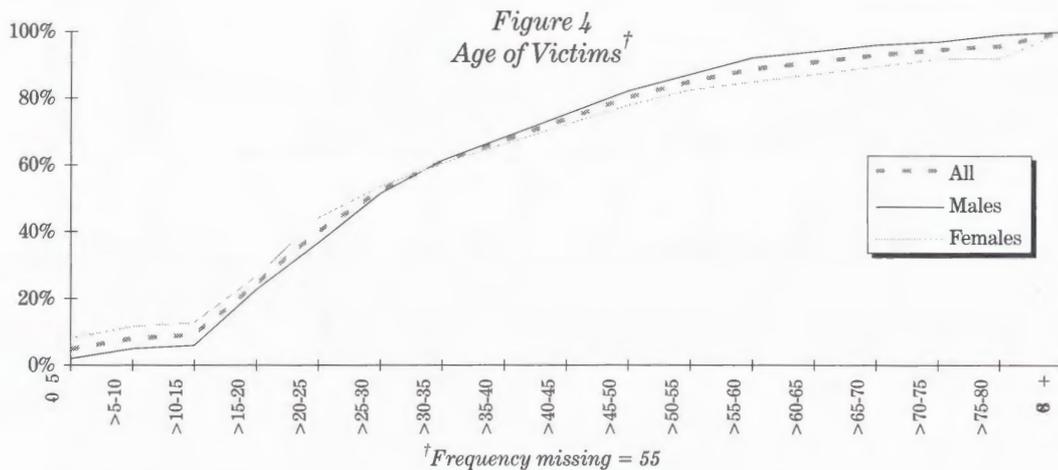
## THE OFFENDER AND THE VICTIM

### Victim Characteristics

**Overview** The present study covers 242 victims of homicide — of whom 127 were victims of murder and 114 victims of manslaughter and one infanticide. In a number of respects, the typical homicide victim had similar characteristics to the typical offender: a male (56.1%), aged between 15-35 (51.9%), who was a relative, friend, or acquaintance of the killer. It should be noted that there was far less information about victims in sentencing judgments and other material examined for this study (such as pre-sentence reports) than there was information about offenders.

**Sex of Victims** Slightly more victims of homicide were male (128 or 56.1%) than female (100 or 43.9%). When type of offence is taken into account, a slight majority of murder victims were women (51.2%), while nearly two thirds of manslaughter victims were men (65.4%). There were no major differences between male offenders and female offenders in relation to the sex of the victim (ie male and female offenders were both more likely to kill males), although exact proportions are difficult to calculate owing to a number of cases in which a single victim was killed by several offenders of both sexes, or in which several victims of both sexes were killed by the one offender. In addition, information about the sex of the victim was not available in 14 cases.

The above findings are similar to those of Gallagher and Nguyen's study which found that 63% of victims were males.<sup>20</sup> Given the different time periods used in the studies, it is not possible to draw any definite conclusions concerning the apparent slight increase in female victims.



**Age of Victims** Just over half (51.9%) of the victims were aged between 15-35. Few (9.1%) were aged less than 15. The remaining victims were fairly evenly distributed in the five year age bands over 35 years of age (see Figure 4). There was very little difference in age between victims of murder and victims of manslaughter.

20 Gallagher and Nguyen da Huong, 1994, op cit p 4.

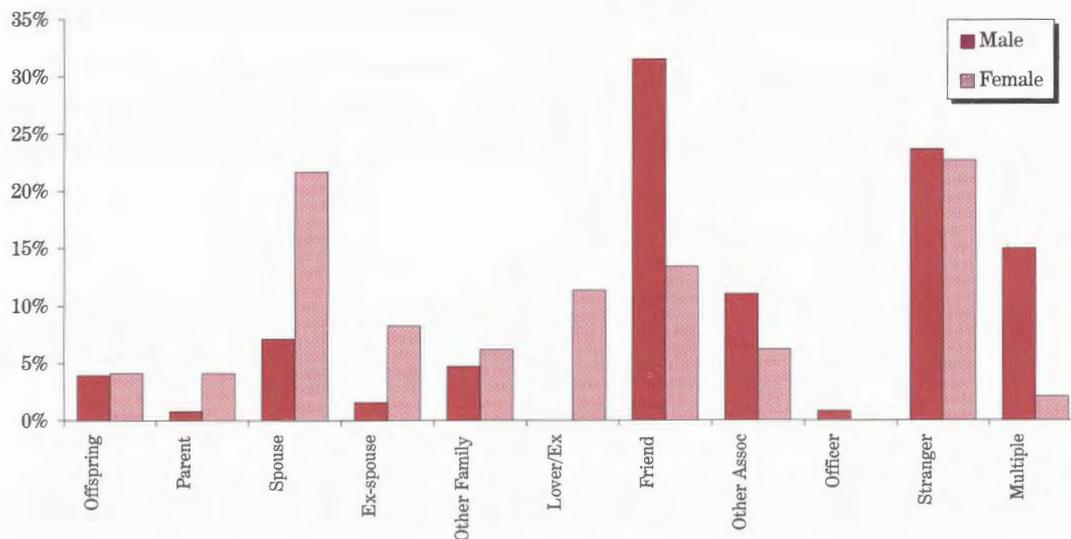
## SENTENCED HOMICIDES

It should be noted that the age of a number of victims (55) could not be ascertained from the files.

**Relationship of Victim to Offender** Past studies are unanimous in finding that the relationship between the suspect and victim is one of the most important explanatory factors in understanding homicide. Victims of homicide typically know their killer. This finding has generated a number of studies which analyse homicides occurring within a particular type of relationship, such as adult sexual intimates, child/parent, or strangers.<sup>21</sup>

In the present study, the offender's relationship to the victim was classified into one of the following categories: son/daughter, parent, spouse/co-habitant, former spouse/co-habitant, other family, lover or former lover, friend/acquaintance, other associate, police/prison officer, stranger and other. "Other associate" refers to formal relationships, and includes such people as baby sitters or school teachers.

Figure 5  
Victim Relationship<sup>†</sup>



<sup>†</sup>Frequency missing = 18

For women the high risk relationships are personal ones: their killers are likely to be their spouses, ex-spouses, or ex-lovers (41.2%). By contrast, the greatest risk for men comes from their friends or other associates (42.5%).

Gallagher and Nguyen found that women were most likely to be killed by a person in their family, whereas men were nearly twice as likely to be killed by acquaintances/friends than by family members.<sup>22</sup> They also found that 40.6% of

21 See discussion in the Chapter I Introduction.

22 Gallagher and Nguyen da Huong, 1994, op cit p 4.

## THE OFFENDER AND THE VICTIM

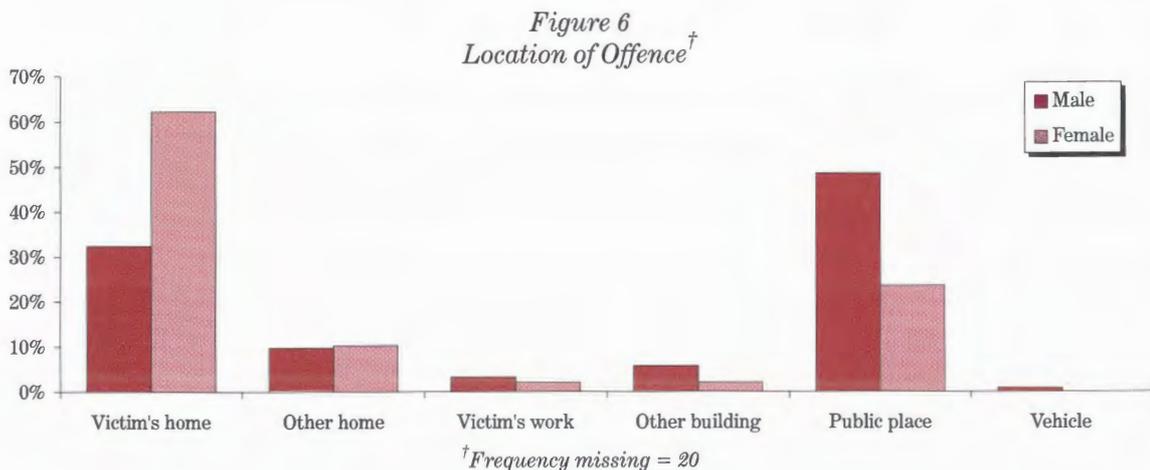
suspects and victims were members of the same family. In a further 38.3% of cases the suspect was a friend or an acquaintance of the victim, and in only 16.6% of cases were the suspect and victim strangers to each other.<sup>23</sup>

The present study found that female offenders were most likely to kill their spouses (38.1%); only one female offender killed her former spouse. Gallagher and Nguyen found that 52% of female suspects, compared to 18% of male suspects, killed their spouse.<sup>24</sup> Strang found in her 1990-1991 survey that 34% of female suspects and 19% of male suspects killed their spouse.<sup>25</sup> The corresponding figures in the 1991-1992 survey were 42% and 15% respectively.<sup>26</sup>

Manslaughter victims were more likely to be the spouse of the killer (20%) than was the case with murder victims (7.3%), and less likely to be a stranger (19% compared to 29.8% of murder victims).

### Offence Characteristics

**Location** The majority of homicides occurred either in the victim's home (45.5%) or outdoors in a public place (37.4%). The proportions were very similar for murders and manslaughters in this regard — 45.5% of manslaughters and 45.9% of murders took place in the victim's home, while 35.4% of manslaughters and 39.3% of murders occurred in a public place.



23 Ibid.

24 Ibid.

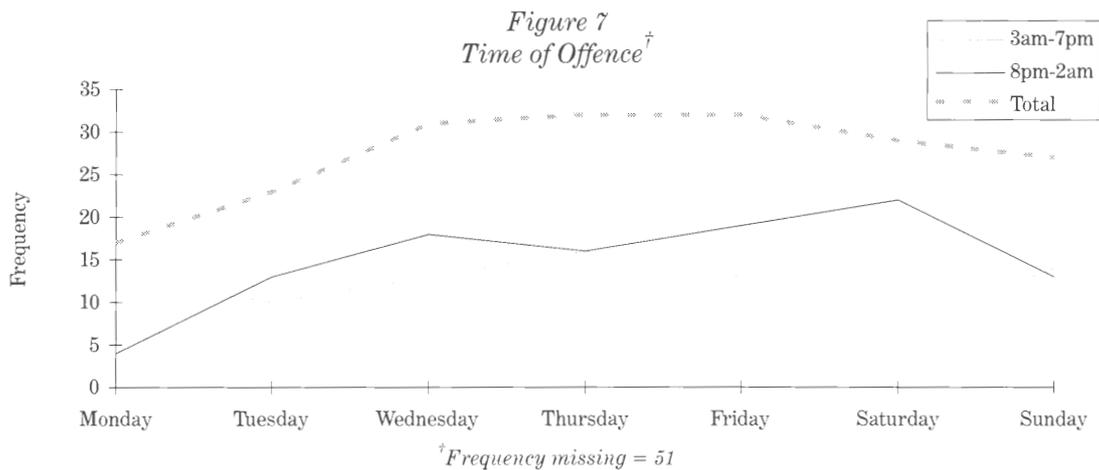
25 Strang, 1992, op cit p 37.

26 Strang, 1993, op cit p 36.

## SENTENCED HOMICIDES

Females were much more likely than males to be killed in their own home: 62.2% of women compared to 32.3% of men; and equally likely to be killed in another person's home (about 10% of both sexes). This finding confirms both Gallagher and Nguyen's and Strang's studies: that the home is the most common location for homicide.<sup>27</sup>

**Time and Day of the Week** More than half of all homicides (55%) occur at night between 8.00 pm and 3.00 am. For the purposes of this study, the data was broken up into two time periods — 8.00 pm to 2.59 am, and 3.00 am to 7.59 pm. Consequently, the time period referred to as “8.00 pm to 2.59 am Saturday” means Saturday night through to Sunday morning.



Homicides during the night (8.00 pm to 2.59 am) were more frequent at weekends, particularly on Saturday. Homicides which occurred during the rest of the day (3.00 am to 7.59 pm) did not vary much during the week except for a decrease on Saturdays. Strang found in both her studies that nearly half of all incidents occurred on Friday, Saturday or in the early hours of Sunday.<sup>28</sup> Gallagher and Nguyen found that homicides are more likely to occur on Saturday than any other day of the week and that there was a gradual increase in the days leading up to the weekend. Over one quarter (27.6%) of homicides reported in their study occurred between 8.00 pm and midnight.

**Method of Killing** The method of killing was divided into 10 categories: shooting, stabbing, bashing with feet or fists, battering with a blunt object, burning, gassing, poisoning, drowning, strangling, or by means of a vehicle. A number of these

27 Gallagher and Nguyen da Huong, 1994, op cit p 4, found that 48% of offences were committed in either the victims own home or a home shared by a victim and a suspect. Strang found in both her studies that over 60% of homicides occurred within residential premises, and more than 75% of these were in the victim's home. Strang, 1992, op cit p 13 and Strang, 1993, op cit p 10.

28 Strang, 1992, op cit p 13 and Strang, 1993, op cit p 10.

## THE OFFENDER AND THE VICTIM

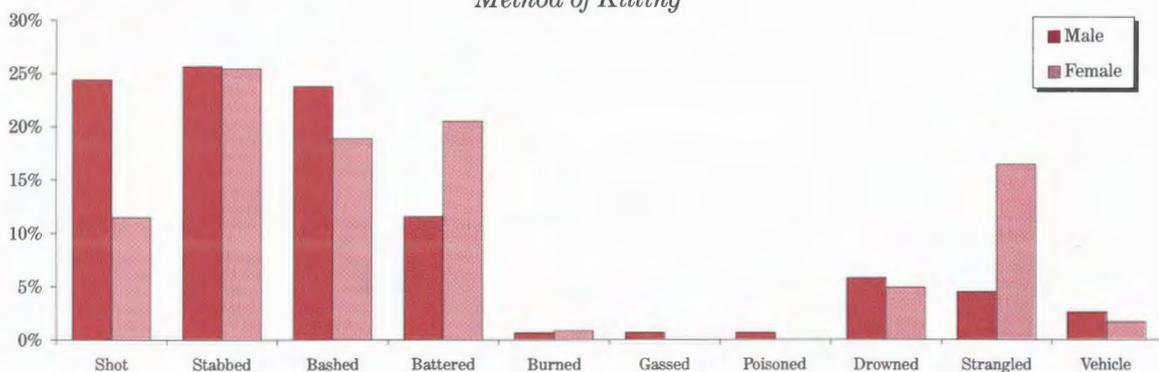
methods were frequently used in combination: for example, drowning and strangling were rarely the sole method used to kill a victim, and bashing and battering were used about half the time with some other method of killing. On the other hand, shooting and motor vehicles were almost always used on their own. The method of killing was unknown for 11 victims.

The most common methods of killing were —

- (1) stabbing, found in 30.7% of homicides, was the sole method in 22.5% of homicides, and was used with other methods (eg bashing with feet or fists) in a further 8.2% of homicides;
- (2) bashing with feet or fists (which includes kicking and punching) was used in 26.4% of homicides, but was the sole method of killing in only 14.3%;
- (3) shooting was used in 22.5% of killings, and was almost always the sole method used in these cases (22.1%);
- (4) battering with a blunt object (found in 18.6% of homicides) was the sole method used in about half of these cases (9.5% of homicides);
- (5) strangling (used in 11.7% of homicides) was the sole method used in 3.5% of cases.

**How victims were killed** While these proportions were largely the same for male and female victims, females were more likely than men to be killed by strangling (20.4% of female victims, but only 5.5% of males) or battering with a blunt object (25.5% of females, but 14.2% of males), and male victims were more likely than women to be shot (29.9% of males, compared to 14.3% of females).

Figure 8  
Method of Killing



Certain methods of killing were more frequent in cases of murder than in cases of manslaughter —

- (1) shooting was used in 28.2% of murders, but only 16.2% of manslaughters;
- (2) battering with a blunt object – 22.6% of murders, but 12.4% of manslaughters;
- (3) drowning – 9.7% of murders, but only 2.9% of manslaughters;
- (4) strangling – 14.5% of murders, but 7.6% of manslaughters.

## SENTENCED HOMICIDES

Bashing with feet or fists was more common in manslaughters (30.5%, compared to 23.4% of murders). Although not common, burning (5.7% of manslaughters, but only 0.8% of murders) and killing by means of a vehicle (manslaughter 4.8%, murder 0.8%) were much more likely to be manslaughter than murder.

**How offenders killed** There were marked differences in the methods used by male and female offenders. Nearly half of the female offenders (47.6%) stabbed their victims, compared to 29.6% of male offenders. Drowning (used by 10.3% of male offenders) was exclusively male, as were the three rarely used methods, burning, gassing and poisoning. Strangling was almost exclusively male (13.5% of male offenders, but only one female offender). Bashing with feet or fists and battering with a blunt object were used by a larger proportion of males (bashing 35%, battering 19.7%) than females (bashing 23.8%, battering 9.5%). Shooting, however, was used by a similar proportion of men (17%) and women (19.1%).

The percentage of shootings in the present study (22.5%) was less than that found by Gallagher and Nguyen, who concluded that<sup>29</sup> —

“The two most common methods used in homicides over the 1968 to 1992 period were shooting (33.6% of all victims) and stabbing (23%). The remainder (47.4%) were mainly due to bashing, strangling and other less common methods such as smothering and drowning.”

They did, however, find a significant increase in the incidence of stabbing over time.

In her 1991-1992 study, Strang found that stabbing with a sharp instrument was the most predominant method used (28%), compared to shooting (22%) and assault (21%).<sup>30</sup> The present study therefore confirms the findings of these two studies that knives or piercing instruments have in recent years been utilised more than any other type of weapon.

**Alcohol Consumption at Offence** The consumption of alcohol at the time of the offence was categorised as follows —

- (1) the offender drinking alone;
- (2) the victim drinking alone;
- (3) both offender and victim drinking; or
- (4) both offender and victim *not* drinking.

In 42.7% of homicides no alcohol was consumed by either the offender or the victim. Alcohol was consumed by the offender alone in 20.5% of cases and by the offender and victim together in 30.1% of homicides. Only in 6.7% of homicides was the victim alone consuming alcohol.

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29 Gallagher and Nguyen da Huong, 1994, op cit p 6.

30 Strang, 1993, op cit p 16.

## THE OFFENDER AND THE VICTIM

Similar findings have been established in other studies. Wallace found that both the suspect and the victim had been drinking in 27% of cases.<sup>31</sup> The Law Reform Commission of Victoria study found that 48% of offenders and 39% of victims had been consuming alcohol at the time of the offence.<sup>32</sup>

Recent studies have attempted to establish that excessive alcohol consumption contributes to criminal violence.<sup>33</sup> However, there are always examples of cases where the offender would have committed an offence whether or not they had consumed alcohol.

### Procedural Results

The following diagram illustrates the various pathways followed by offenders through the criminal justice process. In particular the flow chart shows that although the vast majority of offenders are indicted for murder, a significant proportion of those (41.9%) are ultimately convicted of manslaughter.

Of the 256 offenders in this study, 222 offenders were indicted for murder, while 34 offenders were indicted for manslaughter. Of those 34, 19 offenders pleaded guilty and 15 were tried and convicted.

Of the 222 offenders indicted for murder, 41 pleaded guilty to murder.

The remaining 181 offenders pleaded not guilty to murder.

In relation to 57 of those 181 offenders, a plea to a lesser charge (manslaughter in 56 instances and infanticide in one) was accepted by the Crown in full discharge of the murder indictment.

Of those 56 offenders who had a plea to manslaughter accepted in full discharge, 21 were sentenced on the basis of a partial defence.

One hundred and twenty four offenders proceeded to trial of which 88 were convicted of murder and 36 were convicted of manslaughter.

Overall, 129 offenders were sentenced for murder, 126 were sentenced for manslaughter and one infanticide.

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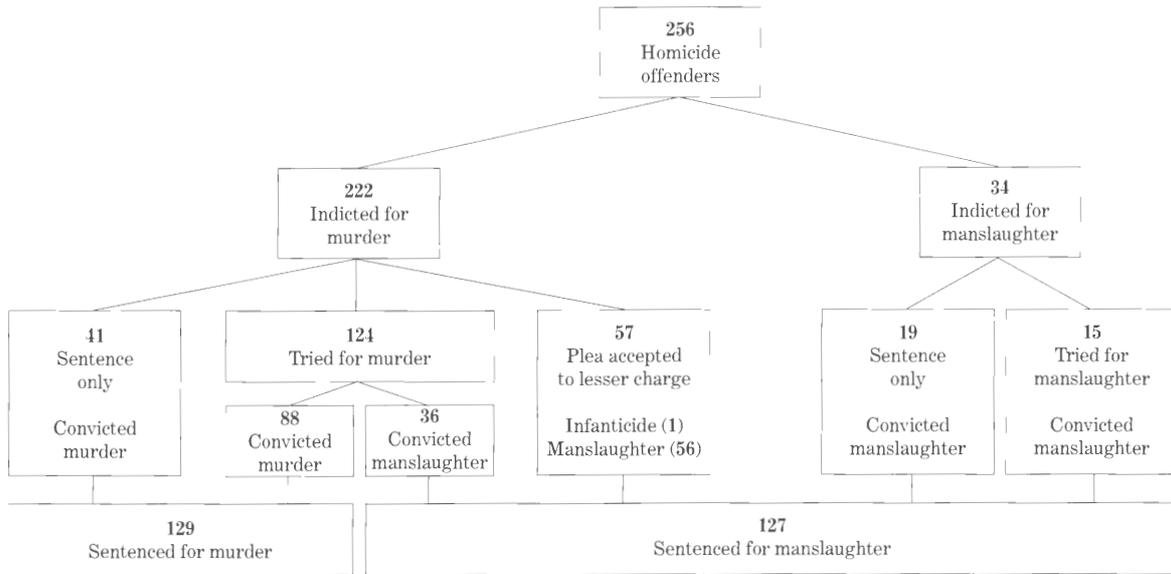
31 Wallace, 1986, op cit p 67.

32 Victoria Law Reform Commission Report No 40, *Homicide*, 1991, Melbourne, p 18.

33 J White and R Humeniuk, *Alcohol Misuse and Violence: Exploring the Relationship*, 1993, Department of Health, Housing, Local Government and Community Services, Queensland.

# SENTENCED HOMICIDES

Figure 9  
Procedural Outcomes for Homicide Offenders



## IV CHILD HOMICIDE

Child homicide evokes some of the most powerful taboos in our society. Twenty five of the 242 victims in the present study were less than 18 years old. These children were killed by 25 offenders in 24 cases: one offender killed two children, while one victim was killed by two offenders.

The following chapter is divided into two sections. The first outlines the characteristics of offenders, victims and offences, and identifies two distinct patterns of child killing. The second half of the chapter examines the response of the criminal justice system to child killers, an aspect of child homicide rarely examined in the Australian literature.<sup>1</sup> In fact there is little Australian research data available on child homicide generally,<sup>2</sup> and only a handful of studies have been conducted in New South Wales.<sup>3</sup>

### Offender characteristics

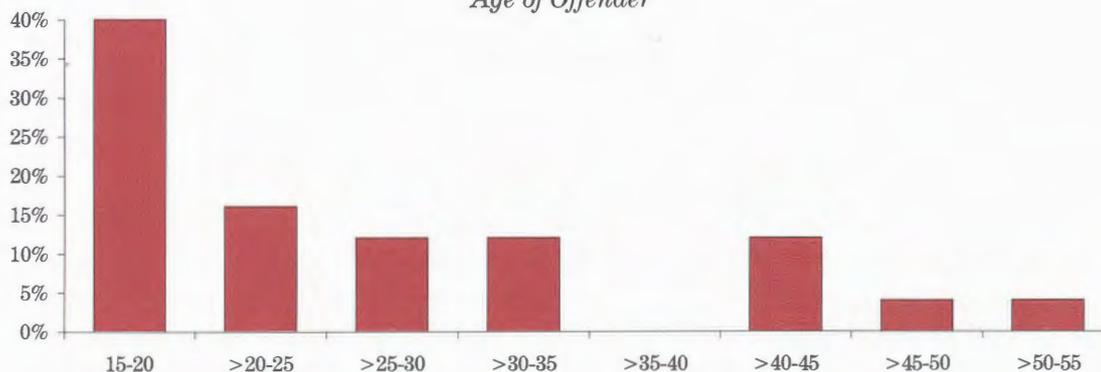
*Sex* The vast majority of offenders were male (84%). Other Australian studies have varied in their findings. Some have found a marked dominance of male offenders,<sup>4</sup> whilst others have found a slight majority of female offenders.<sup>5</sup> Studies

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- 1 JM Baker, *You Can't Let Your Children Cry: Filicide in Victoria 1978-1988*, 1991, Master of Arts Thesis, University of Melbourne.  
RG Lansdowne, *Child Killing and the Offence of Infanticide: The Development of the Offence and its Operation in New South Wales 1976-1980*, 1987, Masters of Laws Thesis, University of New South Wales, Kensington.  
RG Lansdowne, "Infanticide: Psychiatrists in the Plea Bargaining Process" (1990) 16 (1) *Monash University Law Review* 41.  
H Strang, "Child Abuse Homicides in Australia: Incidence, Circumstances, Prevention and Control" in D Chappell and S Egger (eds) *Australian Violence: Contemporary Perspectives II*, 1995, Australian Institute of Criminology, Canberra.
  - 2 Strang op cit; Baker op cit; J Nixon, J Pearn, I Wilkey and G Petrie, "Social Class and Violent Child Death: An Analysis of Fatal Non-accidental Injury, Murder, and Fatal Child Neglect" (1981) 5 *Child Abuse and Neglect* 111.  
KL Armstrong and D Wood, "Can Infant Death from Child Abuse be Prevented?" (1991) 155 *Medical Journal of Australia* 593.  
C Alder and K Polk, *Gender, Age and Non-Parental Murder*, Paper presented at the Australian and New Zealand Society of Criminology Conference, University of New South Wales, Kensington, 27-30 September 1994.
  - 3 S de Silva and RK Oates, "Child Homicide — The Extreme of Child Abuse" (1993) 158 *Medical Journal of Australia* 300; A Wallace, *Homicide: The Social Reality*, 1986, New South Wales Bureau of Crime Statistics and Research, Sydney; Lansdowne, 1987, op cit; Lansdowne, 1990, op cit.
  - 4 Strang op cit p 77.
  - 5 Wallace op cit p 114; de Silva and Oates op cit p 300; Baker op cit p 63.

## SENTENCED HOMICIDES

conducted in other countries have also found mixed results concerning whether children are more likely to be killed by men<sup>6</sup> or women.<sup>7</sup>

Figure 10  
Age of Offender



*Age* Child killers tend to be predominantly young in age.<sup>8</sup> The present study supported these findings in that the majority (80%) of offenders were 35 years of age or less, and half of these offenders were between 15 and 20 years of age.

*Education* Previous studies have reported that child killers are typically of low education.<sup>9</sup> The majority of offenders (22 or 88%) had either undertaken or completed secondary school; the remainder were either enrolled in trade courses, or had completed their trade qualifications.

*Employment status* Almost half (12) the offenders were in paid employment at the time of the offence. The remainder were unemployed (8) or engaged in home duties or study (4); for one offender the employment status was unknown. Previous studies of child killers have found that a high proportion are not in paid employment.<sup>10</sup>

*Marital status* Just over half the offenders (14, or 56%) were single and had never been married. Less than a third (28%) were married. The remainder were living in de facto relationships (8%), or were separated (4%) or divorced (4%). The proportion of offenders without partners found in the present study is somewhat higher than is usually found in other Australian studies of child killers.<sup>11</sup> This is

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6 P Schloesser, J Pierpont and J Poertner, "Active Surveillance of Child Abuse Fatalities" (1992) 16 *Child Abuse and Neglect* 3.

7 A Wilczynski, *A Socio-Legal Study of Parents Who Kill Their Children in England and Wales*, 1993, Doctoral thesis in Criminology, University of Cambridge, England.

8 Strang op cit p 77.

9 Wilczynski op cit p 61; Schloesser et al, op cit p 6.

10 Baker op cit p 70.

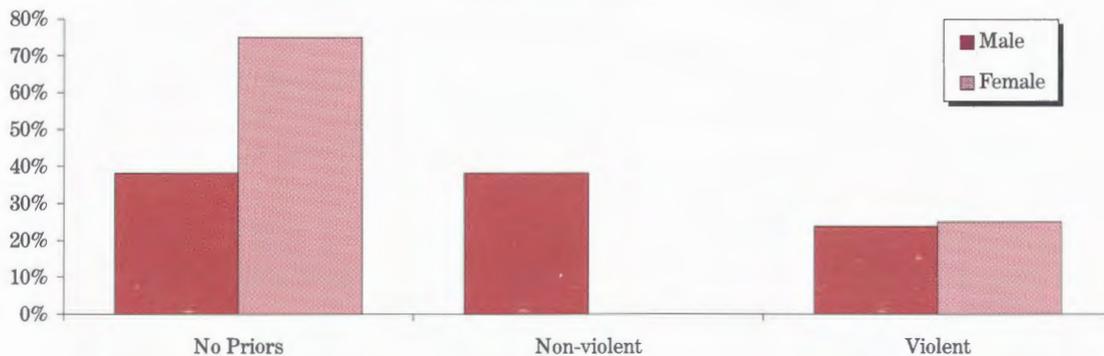
## CHILD HOMICIDE

likely to reflect the higher proportion of non-filicidal killings, since these types of killings typically involve young single men.

*Ethnicity* The majority of the offenders in the present study (80%) were born in Australia; this included one Aboriginal person. Of the five offenders born overseas, two were from Asia and three were from the United Kingdom or Europe. These findings are comparable to those of Wallace.<sup>12</sup> She found that 77% of the child homicide offenders were born in Australia, and that migrants were not over represented. However, Wallace found that Aboriginals were greatly over represented as offenders, relative to their numbers in the general population.

*Criminal convictions* Previous research has reported that child killers often have previous criminal convictions.<sup>13</sup> This was found for 14 (56%) of the offenders. The male offenders were fairly evenly spread over the three prior conviction categories: eight had no priors, eight had non-violent priors, and five had violent priors. Only one of the four female offenders had any previous criminal convictions: this was for a personal violence offence.

Figure 11  
Prior Convictions



*Alcohol and drug use* Previous studies of child homicide have reported that substance abuse is often involved.<sup>14</sup> In the present study, alcohol had been consumed by either the offender (five cases), the victim (one case), or both (four cases). Forty per cent of offenders were known to have a history of alcohol abuse. The use of drugs was much less common than alcohol. Two offenders (8%) were

11 Baker op cit p 68.

12 Wallace op cit p 115.

13 Ibid p 115; A Goetting, "When Parents Kill Their Young Children: Detroit 1982-1986" (1988) 3 (4) *Journal of Family Violence* 339 at p 342.

14 LKH Somander and LM Rammer, "Intra and Extrafamilial Child Homicide in Sweden 1971-1980" (1991) 15 *Child Abuse and Neglect* 45 at p 48.

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under the influence of cannabis at the time of the killing; one of these also had a history of drug use. Another two offenders had used drugs on previous occasions. Only one victim was under the influence of drugs (heroin) at the time of the killing.

*Psychiatric history* Only three offenders (12%) had a previous history of mental disorder. This proportion is much lower than in previous studies.<sup>15</sup> However, it is likely that child killers with a history of mental disorder are disproportionately represented amongst those who commit suicide after the offence, or those who are not prosecuted for the offence. It should also be noted that there was evidence that some of the offenders, whilst not classified as mentally ill, appeared to suffer from psychological or emotional problems.

*Relationship to victim* Children are most frequently killed by those whom they know, particularly immediate family members.<sup>16</sup> In the present study, eight children were killed by a parent, eight were killed by friends or acquaintances, but only four were killed by strangers. The remaining five victims were killed by an ex-boyfriend, a step brother, a neighbour, a boyfriend of the child's mother, and a baby sitter. A number of relationships could be described collectively as "quasi-parental" for example, baby sitters who regularly care for a child (as was the case in this study), and de facto partners of biological parents. Thus in the present study, ten (40%) of the child killings were by parents or quasi parents. These killings are known as "filicides."

Although filicide was the most common category of child killing, the proportion of parents or quasi parents found here was markedly lower than has been found in previous Australian studies. For example, Wallace<sup>17</sup> found that 85.2% of the children in her study were victims of filicide. One possible reason for this difference is that the present study focuses on sentenced homicides. It may be that filicide offenders are less likely than other child killers to be ultimately sentenced for a homicide offence.

### Victim characteristics

*Sex* More than half the victims in the present study were female (60%). This contrasts with previous Australian research, which has found either a predominance of male victims,<sup>18</sup> or a similar proportion of male and female victims.<sup>19</sup> Again the

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15 Wallace op cit p 115.

16 Strang op cit p 75.

17 Wallace op cit p 112.

18 de Silva and Oates op cit p 300.

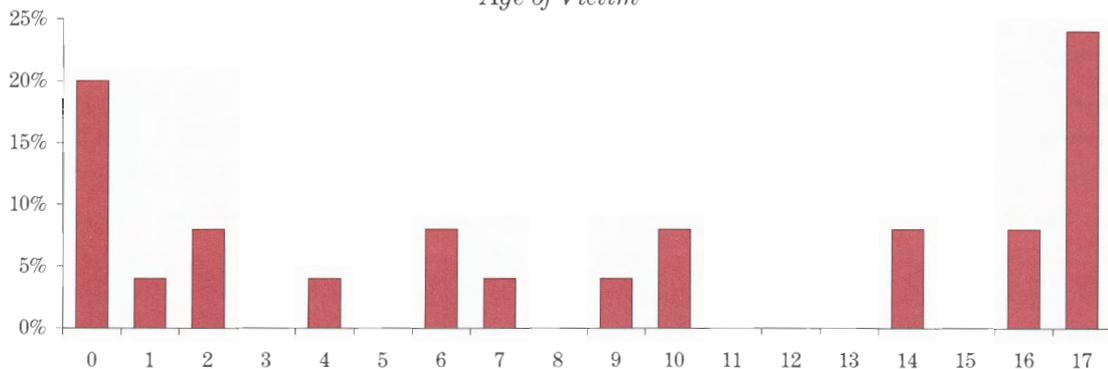
19 H Strang, *Patterns and Characteristics of Child Homicide*, Paper presented at the Australian and New Zealand Society of Criminology Conference, University of New South Wales, Kensington, 27-30 September 1994.

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different finding may reflect the nature of the present study, since killings of older children by non-family members frequently involve female victims.

*Age* The victims ranged in age from three days to 17 years. Two age peaks were apparent: the most common ages of victims were less than one year old (24%) and more than 17 years old (24%). Even within the under one age group, the very youngest children were most at risk: of the five children under one, four were less than four months old. This finding is consistent with previous research.<sup>20</sup>

Figure 12  
Age of Victim



The disparate age peaks found in the present study are similar to those found in a number of American studies.<sup>21</sup> This study also supports earlier findings that the relationship between offender and victim varies as a function of the victim's age: teenagers are predominantly killed by acquaintances.<sup>22</sup>

However the present study has fewer children in the younger age groups and more in the older age groups than previous Australian research.<sup>23</sup> This somewhat different age distribution may reflect the type of cases examined: the killing of younger children (particularly by parents) may well be less likely to result in conviction than the killing of older children by non-family members.

### Offence characteristics

*Location* Given that children are often killed by family members, it is not surprising that many cases of child killing occur in the home.<sup>24</sup> Almost half the offences occurred in either the victim's home (eight cases, or 32%) or another

20 Wilczynski op cit p 69.

21 MJ Blaser, "Epidemiologic Characteristics of Child Homicides in Atlanta: 1970-1980" (1983-1985) 12 *Pediatrician* 63 at p 65.

22 Ibid p 65.

23 Baker op cit p 65.

24 RA Weisheit, "When Mothers Kill Their Children" (1986) 23 *The Social Science Journal* 439 at

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person's home (four cases, or 16%). A large proportion of the victims were also killed in a public place (ten cases, or 40%). The remaining offences took place at the victim's place of work or study, or in another building.

*Method of killing* The children were killed by a variety of methods. As noted in other studies,<sup>25</sup> the most common method is bashing with fists or feet: ten victims were injured in this way. Other methods used were battering with an axe or heavy object (five victims), drowning (five victims), stabbing or slashing (four victims), shooting (four victims), strangling or smothering (four victims), and burning (one victim). These figures reflect the use of multiple methods, and therefore add up to more than 25 (ie) the number of children killed).

*Method of discovery* Contrary to popular perception, the police only rarely discover crimes themselves.<sup>26</sup> In almost half the cases the child's body was discovered by the offender (four victims) or their family (seven victims). Four bodies were discovered by passers by, and another four were found by the police. One victim was discovered by a friend. It should be noted that in two cases this information was unavailable.

### Patterns of child killing

While the data above provides a useful overview of the offender, victim and offence in child homicides, these figures mask distinct types of child killings. The circumstances of child killings vary considerably with the child's relationship to the offender, their age and sex. Two distinct patterns of child killing emerged in this study: filicide and non-familial killings. These findings are consistent with previous research.<sup>27</sup> The one remaining case was a fratricide: a boy killed his baby step sister.

*Filicide* Nine of the ten filicide victims were aged seven or less, and six were under three years old. Filicide victims were usually manually assaulted (70%) in the home (80%).

These cases featured the child's annoying behaviour, the stresses of child care, family or marital problems, and mental disorder in the parent. The most common precipitating factor was "child abuse": 50% of the filicide cases involved a sudden and impulsive act precipitated by the victim's behaviour (for example, crying or being ill or disobedient). In two cases the mother's mental disorder was the major precipitating factor. One woman who jumped out of a hospital window with her

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p 444.

25 Wallace op cit p 112.

26 B Mitchell, "The Role of the Public in Criminal Detection" (1984) *Criminal Law Review* 459.

27 PM Crittenden and SE Craig, "Developmental Trends in the Nature of Child Homicide" (1990) 5 (2) *Journal of Interpersonal Violence* 202.  
RA Silverman and LW Kennedy, *Deadly Deeds: Murder in Canada*, 1993, Nelson, Scarborough, Ontario; Alder and Polk op cit.

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three day old child was suffering from puerperal psychosis. Two other filicide victims were killed in the context of family or domestic problems.

None of the filicide victims were killed in the context of sexual assault. This confirms the findings of other studies: that children killed by parents or parent substitutes have rarely been sexually abused,<sup>28</sup> although it should be borne in mind that evidence of this type of abuse is particularly difficult to detect. However, there was evidence that three of the filicide victims had been subjected to physical abuse before the fatal assault.

*Non-familial child killings* The victims of friends, acquaintances or strangers were usually teenagers: six of the 14 victims were 17 years old, and a further three were aged between 14 and 16. In contrast to filicide, the victims in this category were usually killed with a weapon (such as a gun, heavy object, or knife) or drowned. Only two were manually assaulted. These killings were also more likely than filicides to occur in places other than the home, such as a public place.

Another striking feature is that all the offenders in this category were male. As Alder and Polk<sup>29</sup> point out, "a large proportion of the non-family child homicides are youthful variants of adult masculine themes of violence." Polk<sup>30</sup> identified four main contexts in which male homicide occurs: control over a female sexual partner, the confrontational honour contest, taking exceptional risks in the course of another crime, and disputes which arise and cannot be resolved by legitimate means. All of these were represented among the cases in this study. One 16 year old girl was killed by her jealous ex-boyfriend in a scenario described by Alder and Polk<sup>31</sup> as "the ultimate device of control over the behaviour of his female sexual partner."

Unlike filicides, in which the sex of the victim appeared to have little relevance in precipitating the crime, the circumstances of non-familial killings varied markedly with the sex of the victim. Previous studies have found that sexual assault is a common motive for non-filicidal child killings.<sup>32</sup> In the present study, six of the seven female victims of this type of homicide were killed in the context of sexual assault. The victims were either killed because they had resisted the sexual assault, or the offender wished to silence them to prevent discovery of the assault. They were usually killed by male friends or acquaintances. It is worth noting that only one of these cases conformed to the classic "stranger-danger" stereotype of child

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28 J Jason and ND Andereck "Fatal Child Abuse in Georgia: The Epidemiology of Severe Physical Child Abuse" (1983) 7 *Child Abuse and Neglect* 1 at pp 2 and 7.

29 Alder and Polk op cit p 4.

30 K Polk, *When Men Kill: Scenarios of Masculine Violence*, 1994, Cambridge University Press, Melbourne, p 13.

31 Alder and Polk op cit.

32 Somander and Rammer op cit p 52.

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killing. The other female victim within this non-familial category of child killing was a girl killed by her ex-boyfriend following the ending of their relationship.

However non-familial killings of male youths occurred in very different circumstances. These boys died in the context of fights with their peers, or because of underworld or political killings. The most common scenario was a 17 year old boy killed during the course of a drunken altercation with a boy of similar age. Three boys died in this way. These cases involved stereotypically “macho” behaviour in situations in which the victim and/or offender had been drinking alcohol. In two cases it was known that the victim, as well as the offender, had displayed aggressive or provocative behaviour. These cases are typical of Polk’s confrontational homicides, where the offender’s “honour” has been disparaged.

One killing of a teenage boy was committed in revenge by an underworld associate; this falls into Polk’s category of disputes which arise and cannot be resolved by legitimate means. Another killing of an older boy was politically motivated.

*Killings by family members other than parents or carers* The killings of children by family members other than parents or carers has similarities with both the “filicidal” and “non-familial” patterns of homicide. In the present study there was only one case, which was closely analogous to filicidal child killings: a teenage boy killed both his baby step sister and mother in the context of a situation of severe domestic tension.

### **Child killers and the criminal justice system**

**Charges, pleas and convictions** As cases moved through the criminal justice system, the proportion of murder cases decreased: see Table 1. Whilst 23 (92%) of the child killers were originally charged with murder, only 15 (60%) were actually convicted of this charge. In one case, the DPP indictment was for manslaughter, although the original charge was for murder. Four cases involved pleas to lesser charges. Another three cases involved jury trials: offenders pleaded not guilty to murder, and were found by juries to be not guilty of murder, but guilty of manslaughter.

Of the 22 offenders indicted for murder, six pleaded guilty. As mentioned above, four offenders pleaded guilty to lesser charges: pleas of guilty to manslaughter were accepted by the prosecution in three cases, and a plea of guilty to infanticide was accepted in one case, in full satisfaction of the indictment. Thus only 12 offenders stood trial for, and were convicted of, murder.

Of the three offenders indicted for manslaughter, two pleaded not guilty.

In total, less than half of the offenders pleaded guilty to an offence without going to trial (44%): four offenders pleaded guilty to manslaughter, six to murder, and one to infanticide. The proportion of offenders pleading not guilty was higher within the filicide sub group (70%). This is consistent with previous studies of filicide.<sup>33</sup>

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*Table 1*  
*Charge, Indictment and Conviction of Principal Offence*

	Murder	Manslaughter	Infanticide	Total
Original charge	23	2	0	25
DPP indictment	22	3	0	25
Conviction	15	9	1	25

The findings of the present study suggests that non-familial child killers are much more likely to be convicted of murder than filicidal offenders. Whilst 13 of the 15 non-familial offenders were convicted of murder (including all six of the men who killed in the context of sexual assault), only one of the nine filicide offenders was convicted of murder. (It should be noted that two of the non-familial offenders jointly killed one victim, while one of the filicide offenders killed both her children). The low incidence of murder convictions for filicide is consistent with previous studies. For example, Lansdowne<sup>34</sup> found that none of the filicide offenders in her New South Wales study who were charged with murder were actually convicted of murder. A study of English filicide found that only 8.3% of those charged with murder were so convicted.<sup>35</sup> The one offender who killed in the context of a non-parental family relationship was convicted of murder.

*Manslaughter* All but one of the offenders charged with (but not convicted of) murder were convicted of manslaughter; one woman was convicted of infanticide. Those offenders convicted of manslaughter had usually manually assaulted their victims. These were typically "child abuse" cases in which the victim had been battered by the offender in a fit of temper, and the offender expressed a belief that they had not meant to seriously harm the child.

*Infanticide* Infanticide is an offence applicable only to a woman who kills her child under the age of 12 months when the balance of her mind is disturbed as a result of child birth or lactation: s 23A *Crimes Act*. The legislation has been subject to criticism, and various law reform bodies have examined whether to abolish or retain the legislation, or retain it in an amended form.<sup>36</sup> The infanticide legislation is based on the concept of puerperal psychosis, the most severe form of mental disorder associated with child birth. Like any other form of psychosis, puerperal psychosis can involve delusions and hallucinations. It is thought to be primarily caused by hormonal changes at child birth.<sup>37</sup>

33 Wilczynski op cit p 101.

34 Lansdowne, 1987, op cit p 187.

35 Wilczynski op cit p 109.

36 Criminal Law Revision Committee Report 14, *Offences Against the Person*, 1980, London, p 46-47; Victorian Law Reform Commission Report No 40, *Homicide Prosecutions Study*, 1991, Melbourne, Appendix 6; New South Wales Law Reform Commission Discussion Paper 31, *Provocation, Diminished Responsibility and Infanticide*, 1993, Sydney.

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There was only one conviction for infanticide in the present study. There was unanimous evidence from four psychiatrists that the woman was suffering from a post partum paranoid psychosis. There was no history of mental disorder before the birth, or family history of psychiatric disorder. She was given a recognizance to be of good behaviour under s 556A of the *Crimes Act*. The judge noted that —

“None of the doctors has any fear that she has a continuing mental condition and it is perfectly plain that her criminality in this incident is entirely explained by the unfortunate post partum psychotic illness she suffered. As a consequence, it would be inappropriate for her to be punished by the law for what has occurred.”

However, women who kill their children only very rarely suffer from puerperal psychosis.<sup>38</sup> It is now accepted that the medical principles on which the infanticide legislation is based are outdated, and that social, personality and psychological factors are more important than mental illness and hormonal factors in causing women to kill their children.<sup>39</sup> Research in England<sup>40</sup> and Hong Kong<sup>41</sup> has found that only around half the women convicted of homicide would have satisfied the definition of diminished responsibility. However, Lansdowne<sup>42</sup> found that in all of the New South Wales cases dealt with as infanticide, in her study, the psychiatrist also felt that diminished responsibility was satisfied. Research from several jurisdictions has shown that women convicted of infanticide virtually always receive non-custodial or psychiatric sentences.<sup>43</sup>

The likelihood of an infanticide plea producing a non-custodial sentence is in contrast to the sentence given to the only other woman in the present study who killed her child aged under 12 months. This woman manually assaulted her one month old daughter. She had also severely abused the child on previous occasions. She pleaded not guilty to murder, but during the trial her plea of guilty to manslaughter on the grounds of an unlawful and dangerous act was accepted. Psychiatric evidence that she was suffering from some degree of depression at the time of the killing, although not “post natal depression,” was accepted by the court. It was also accepted by the court that the offender has personality problems (a

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37 IF Brockington, C Martin, GW Brown, G Goldberg and F Margison, “Stress and Puerperal Psychosis” (1990) 157 *British Journal of Psychiatry* 331.

38 PT d’Orban, “Women Who Kill Their Children” (1979) 134 *British Journal of Psychiatry* 562. Wilczynski op cit p 57.

39 Department of Health and Social Security, *Report of the Committee on Mentally Abnormal Offenders*, (The Butler Report), 1975, HMSO, London, p 249; Criminal Law Revision Committee Report 14, *Offences Against the Person*, 1980, London p 46; d’Orban op cit.

40 Wilczynski op cit p 187-188; d’Orban op cit.

41 PTK Cheung, “Maternal Filicide in Hong Kong 1971-1985” (1986) 26 (3) *Medicine, Science and the Law* 185.

42 Lansdowne, 1987, op cit p 24-25, 29.

43 Lansdowne, 1990, op cit p 59; Baker op cit p 121; Wilczynski op cit p 183.

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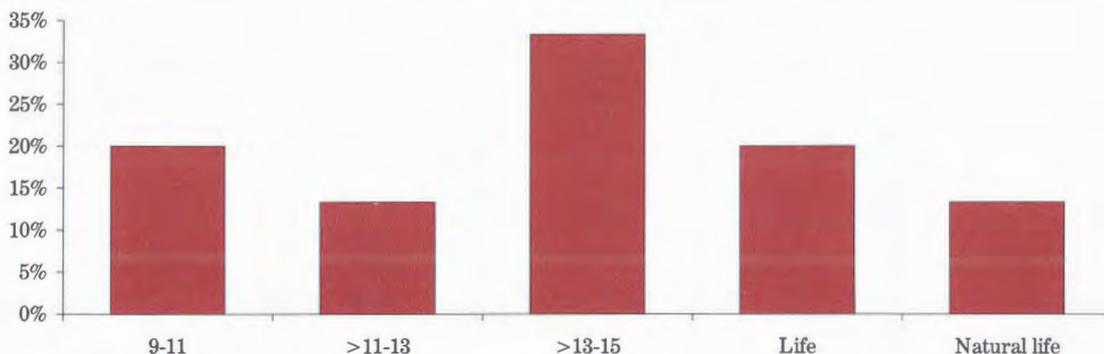
vulnerable self concept, lack of self confidence and a markedly dependent personality) and that she would need psychiatric assistance when released from custody. She was sentenced to a minimum term of four years and nine months with an additional term of one year and nine months. Her appeal against sentence was dismissed. It was specifically pointed out that she was to be sentenced on the basis that the case was one of manslaughter and not infanticide. It is not apparent from the court file why infanticide was not considered in this case. However the offender was portrayed in a very negative fashion; she had previously abused the child, was suffering from a less severe psychiatric disorder and had attempted to blame her husband for the injuries. Nonetheless the dramatically different sentences illustrate the very powerful impact which an infanticide plea has on sentencing. Previous research has noted the sharp dichotomy perceived between “bad” and “mad” filicidal women.<sup>44</sup>

*Additional charges* Six offenders were charged with either murder, manslaughter or infanticide. Five of these offenders were convicted of those charges, comprising either sexual or violent crimes.

### Sentencing

The sentences imposed on the child killers in the present study comprised two three-year good behaviour bonds, 18 determinate terms of imprisonment, and five sentences of life imprisonment. Of those imprisoned, 15 offenders were convicted of murder and eight offenders were convicted of manslaughter.

Figure 13  
*Murder — Minimum Terms*

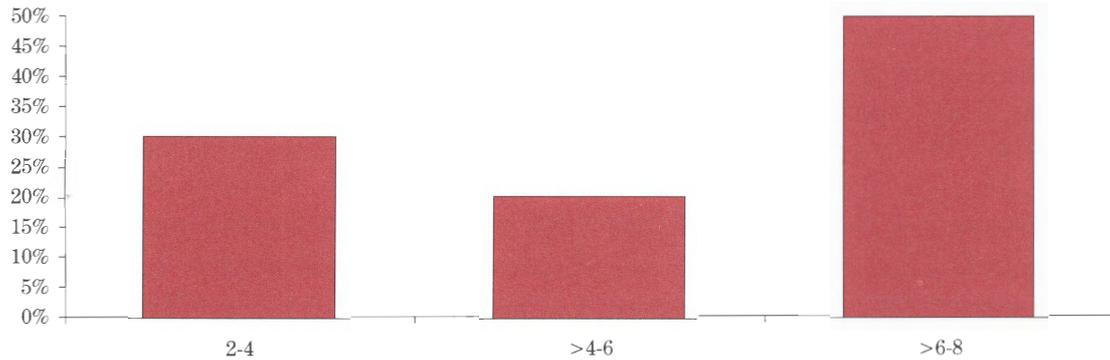


The sentences for murder ranged from a minimum term of nine years to natural life. Ten of the 15 offenders received minimum sentences of 14 years or longer. The additional terms (excluding the five life sentences) ranged from five years to nine years, with five sentences being for six years or more.

44 Wilczynski op cit, 1991, 1993; A Wilczynski, “Images of Women Who Kill Their Infants: The Mad and the Bad” (1991) 2 *Women and Criminal Justice* 71.

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Figure 14  
*Manslaughter — Minimum Terms*



By contrast, the offenders imprisoned for manslaughter all received minimum sentences of eight years or less; six of these eight offenders received minimum terms of five years or less. The additional terms ranged from one year through to six years, with four of the eight receiving sentences of 18 months or less. Thus a minimum sentence of eight years appears to be the “demarcation” line between murder and manslaughter.

A factor which had a dramatic impact on the sentence received was the relationship between the victim and offender. Non-familial killers received much harsher sentences than filicidal killers. Of the non-familial killers, all of whom were men, the minimum sentences for murder ranged from nine years to natural life, with ten offenders receiving minimum sentences of 14 years or more, including three life and two natural life sentences. This group included all those who killed in the context of sexual assault. The additional terms for those convicted of murder (excluding those with life sentences) ranged from three years seven months to nine years. The two non-familial offenders convicted of manslaughter received quite divergent sentences: a s 558 recognizance and a minimum sentence of seven years with an additional term of six years.

The sentencing pattern for filicide offenders was very different. The one filicide offender convicted of murder received a term of ten years and six months, with an additional term of six years and six months. The minimum terms for the seven offenders convicted of manslaughter ranged from two to eight years, but five received sentences of four years or less. The four female offenders in the present study were all filicidal killers: one was convicted of infanticide and received a s 556A recognizance, and three were convicted of manslaughter and received minimum sentences between three years and six years.

The one offender who killed in the context of a non-parental family relationship received a minimum term of 13 years, and an additional term of seven years. It should be noted that this offender had also killed an adult member of his family, and that the sentence reflects the particular gravity of this crime.

### Sentencing factors cited

Most of the sentencing factors cited in the cases were general factors applicable to all cases of homicide, such as remorse, a guilty plea, youth of the offender, evidence of psychiatric disorder, previous convictions and the severity of the assault.

However, there were some factors which appeared to be particularly relevant to cases of child killing. Filicides, especially, present judges with complex and competing sentencing principles. Important considerations include the breach of a parent's responsibility, as against the pressures of parenthood and the fact that parents are more likely to punish themselves emotionally for causing the death of their own child.

*The abuse of a child's trust and vulnerability* The abuse of a child's vulnerability and dependence, particularly by those in a parental role, is an aggravating factor explicitly cited by judges in a number of the cases. In *R v Vaughan*, the Court of Criminal Appeal drew attention to the duties parents owe to their children, and the seriousness of assaults on their children —

“... it must be recorded that the parents of children have an obligation to their children, when they are little, to take care of them and not to ignore them and the courts, whilst recognising that frustration and anger can often arise in a parent because of a child crying or engaging in otherwise normal conduct for a child, cannot be seen to be encouraging violent physical assaults on little children, and, indeed, must seek to deter such action. ... The courts have always regarded assaults by parents upon little children resulting in death, as grave and serious cases of manslaughter.”

The court also emphasised the vulnerability of the victim by describing her as the “helpless child.”

*The closeness of the relationship* A close familial relationship with the victim can also aggravate the crime from a sentencing point of view. In the case of the offender who shot his mother and step sister, the sentencing judge said —

“The sheer horror which such a double killing must engender in any person of normal intelligence and morality must surely be magnified in the highest degree by the consideration that the victims were the killer's own mother and step sister.”

However, there may also be a recognition that an offender who kills his or her own child will suffer greater grief and guilt than one who kills a child with whom they do not have such an intimate relationship. For example in *Dinnerville* the judge told the defendant that he felt the killing would “remain with you as a very heavy cloud over you for the rest of your life” and was satisfied the man had already punished himself and would continue to do so.

*Mitigating circumstances* Filicide cases were more likely than non-familial killings to have numerous mitigating factors present. Filicides were usually unpremeditated manual assaults, which occurred in a fit of temper due to some annoying aspect of the child's behaviour. The offender was often under various

## SENTENCED HOMICIDES

pressures, such as caring for a distressed or sick child, or having financial problems. In several cases there were psychiatric factors of some relevance (even though they were usually not used as the basis for diminished responsibility). These factors included low intelligence, brain damage, emotional stress and depression. The offender usually expressed remorse and was of previous good character with few or no prior convictions.

In addition, it is clear that cases occurring in the context of sexual assault (all non-familial killings) were regarded with particular severity: they were most likely to result in murder convictions and the longest sentences. Not only did these cases involve attempted or completed sexual assault, but there were also a number of other aggravating factors present, such as extreme violence, numerous injuries and multiple methods of attack. The offenders also often denied the killing for some time and tended to show little remorse.

*Prior abuse of the child* Abuse of the child before the fatal assault was regarded as another aggravating factor in sentencing. This practice has been noted in several other studies of child killing.<sup>45</sup>

*Persecution in custody* Another sentencing factor particularly relevant to cases of child killing is the likely persecution of such offenders by other prisoners. Judges are well aware that —

“prisoners convicted of serious offences on children are the subject of brutal attacks from other prisoners if they are not kept under protection and, indeed, sometimes when they are kept in such custody. The Court of Appeal has made it plain that this is a matter which must be given due weight by a sentencing judge in imposing a sentence in a case like this.”<sup>46</sup>

Nonetheless, the judge in that case imposed a sentence of natural life.

### Conclusion

The typical child killer found in the present study is a young, poorly educated man. The two age peaks of child homicide identified (very young infants and older teenage children) are associated with two very different types of killings. The former usually involves killings by family members in the context of child abuse and family stress, whilst the latter tends to involve non-familial offenders who kill in situations not unlike adult killings, such as sexual assaults of female victims and confrontational fights amongst young men.

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45 DA Thomas, *Principles of Sentencing*, 1979, Heinemann, London, p 79-81; Lansdowne, 1987, op cit p 243, 262-281.

46 Newman J, NSW Sup Ct, Criminal Division, in the case of *Garforth*.

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The two types of killing also tend to attract very different responses from the criminal justice system. Filicidal offenders are much less likely to be convicted of murder than non-familial killers, and tend to receive significantly lighter sentences. Although courts emphasise the seriousness with which they regard the abuse of trust and vulnerability in filicidal killings by those who are supposed to protect the child, the sentencing patterns of child killers reflect the fact that filicides are usually sentenced for manslaughter and not murder, and consequently receive lower sentences.

## V KILLING SEXUAL PARTNERS

### Introduction

This chapter analyses 56 homicides in the study which occurred between sexual partners, focusing upon the apparent causes or precipitating factors in this type of killing. For the purposes of this chapter, homicides were divided into three groups according to the primary relationship between offender and victim: sexual partners (22% of cases), other family members (7% of cases), and all other relationships (“non-intimates,” 71% of cases). The definition of “sexual partners” denotes the existence at one time of an intimate relationship between offender and victim, and refers to current or former spouses, de facto partners and lovers. The chapter will also compare sexual partners or “intimate’s” homicides with “non-intimate” homicides. By comparing the “sexual partner” cases with the “non-intimate” cases, it will become apparent that the gender of the offender is critical in developing an understanding of the dynamics of sexual partner killings. Women tend to kill their sexual partners in response to sustained physical and emotional abuse by the victim, while men tend to kill their partners as a desperate method of asserting control over their victim.

### Past studies and the difficulty of comparison

Any comparison between this study and other homicide studies must be treated with caution, since different researchers have used overlapping definitions and categories such as “domestic,” “adult sexual intimates,” “intimates,” “family” and “acquaintances” when examining the role of sexual relationships in homicide. For example Nguyen and Salmelainen<sup>1</sup> included non-cohabiting sexual partners in their “acquaintance” category, but cohabiting sexual partners were included in their “family” category. Another study included children, spouses and cohabitants in its “domestic” category.<sup>2</sup> Easteal<sup>3</sup> has also noted that it is not made clear in many studies whether de facto partners are included in definitions of “spouse.”

A further difficulty with comparing various studies and reports is that the data source utilised may influence conclusions. The number of sexual partner cases reported in the present study — representing only successfully prosecuted homicides — is unrepresentative of the actual frequency of this type of homicide. Offenders who kill their sexual partner often commit suicide before they are

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- 1 MT Nguyen da Huong and P Salmelainen, *Family, Acquaintance and Stranger Homicide in New South Wales*, 1992, New South Wales Bureau of Crime Statistics and Research, Sydney, p 3.
  - 2 Victoria Law Reform Commission Report No 40, *Homicide*, 1991, Melbourne.
  - 3 PW Easteal, “Homicide Between Adult Sexual Intimates: A Research Agenda” (1993)(a) 26 *Australia and New Zealand Journal of Criminology* 3.

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apprehended. One study found that 20% of male offenders who killed their sexual partner committed suicide following the offence.<sup>4</sup> Wallace's analysis of homicides where the offender committed suicide revealed that 46.3% of victims were the spouses or de facto partners of the offender, and a further 11.6% were their lovers or sexual rivals.<sup>5</sup> International research has indicated that this figure may be even higher.<sup>6</sup> A study of homicides in Victoria between 1984 and 1988 found that 57 of 63 homicides reported to police where the suspect had committed suicide were "domestic" homicides.<sup>7</sup>

### **Comparing homicides by sexual partners with homicides by non-intimates**

Easteal<sup>8</sup> has noted that previous homicide studies, which analysed "marital" homicides in isolation, have failed to make meaningful comparisons or differentiations between marital homicides and other types of homicides. The present study, however, has chosen specific legal and situational variables with which to compare homicides between sexual partners and homicides between non-intimates. This process aims to identify the distinguishing features of homicides where sexual partners are killed.

### **Characteristics of offenders and victims**

**Sex of offenders** An analysis of the sex of offenders reveals that a disproportionate number of women killed sexual partners rather than non-intimates. In the present study there were 235 male offenders and 21 female offenders. Of the 56 offenders who killed their sexual partners, 47 were male, and nine were female. Thus 20% of male and 43% of female homicide offenders in this study killed their sexual partners. Of the 182 offenders who killed non-intimates, 174 were male, and eight were female. Thus 74% of male and 38% of female homicide offenders killed non-intimates. It was found that female offenders are more likely than male offenders to kill other family members (19% of female offenders, compared to 6% of male offenders).

**Sex of victims** Females constituted over three quarters (82.1%) of the victims of sexual partner homicides and 28.1% of the victims of non-intimate homicides. This finding confirms that women are far more likely to be killed by their current or former sexual partner than by any other person. The converse is true for male offenders, who are more likely to be killed by a friend, associate or stranger than by

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4 K Polk, *When Men Kill: Scenarios of Masculine Violence*, 1994, Cambridge University Press, Melbourne, p 44.

5 A Wallace, *Homicide: The Social Reality*, 1986, New South Wales Bureau of Crime Statistics and Research, Sydney, p 164.

6 Easteal, 1993(a), op cit p 11-12.

7 Victoria Law Reform Commission, op cit p 3.

8 Easteal, 1993(a), op cit p 10.

## KILLING SEXUAL PARTNERS

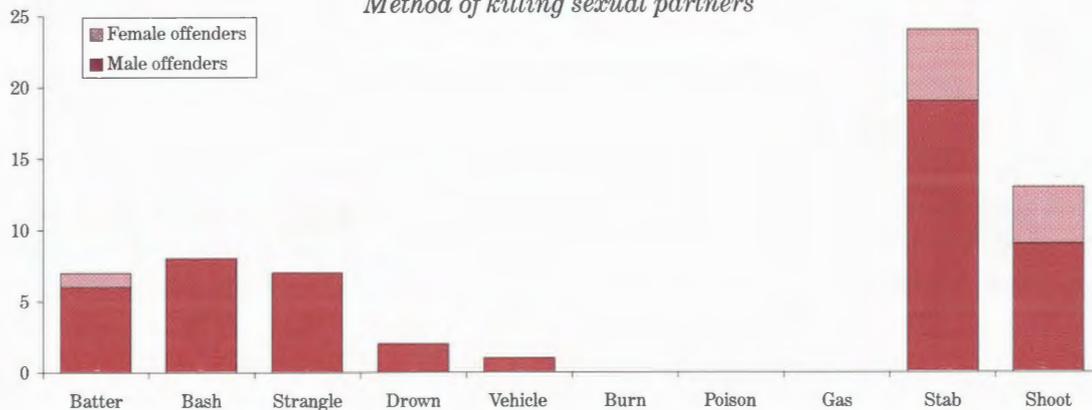
their current or former sexual partner. One case within the group of sexual partner homicides involved male homosexual partners.

**Marital and employment status** Of those who killed their sexual partners, 37% were married, 18% were separated, 24% were single, 18% were in de facto relationships, and 3% were divorced. Of those who killed non-intimates, 12% were married, 68% were single, 12% were in de facto relationships, and 2% were divorced. Comparisons between those who killed sexual partners and those who killed non-intimates revealed no significant differences between the groups in terms of employment status. Slightly more non-intimate offenders were unemployed: 55.5% compared to 43.4% of those who killed their sexual partners.

**Location of offence and alcohol consumption** Sixty eight per cent of the victims of sexual partner killings, compared to only 30% of the victims of non-intimate killings, were killed in their own home. Slightly more non-intimate homicide offences involved the consumption of alcohol by at least one party: 58% compared to 51%.

**Method of killing** Female offenders who killed their sexual partners were most likely to use stabbing (55.6% of cases involved stabbing) or shooting (44.4%). Only one case involved battering with a heavy object. None of these women bashed, strangled, burned, poisoned, drowned, gassed or used a vehicle to kill their victims. Women who killed non-intimates, by contrast, did not use shooting or battering. They used bashing (50%), stabbing (37.5%), strangling (12.5%) or a vehicle (12.5%) to kill their victims. It should be noted that the percentages here reflect the use in some cases of multiple methods of killing.

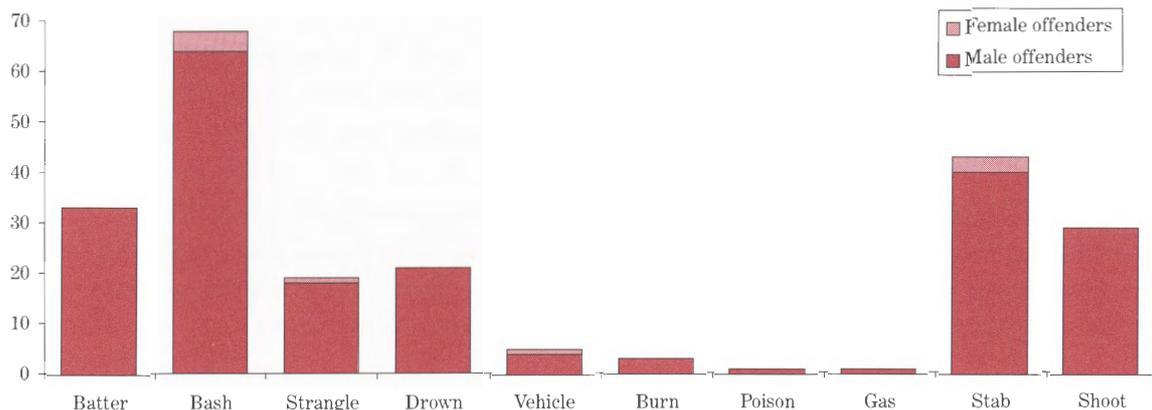
*Figure 15  
Method of killing sexual partners*



Of the men who killed their sexual partners, stabbing (40.4%), shooting (19.1%), bashing (17%), strangling (14.9%) and battering (12.8%) were the most common methods. Drowning and the use of a vehicle were less frequent. Of the men who killed non-intimates, bashing (36.8%), stabbing (22.9%), battering (18.9%), shooting (16.7%), drowning (21.1%) and strangling (10.3%) were the most common methods used. The use of a vehicle, burning, gassing or poisoning were less common.

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Figure 16  
Method of killing non-intimates



Therefore offenders, who killed their sexual partners were more likely to use stabbing or shooting than those who killed non-intimates, and non-intimate offenders were more likely than sexual partner offenders to use bashing as a method of killing. The likelihood of the use of other methods, such as battering or strangling, depended on the sex of the offender.

### The factual context of sexual partner killings

**Past studies** Past studies have sought to explain the causes of homicides between sexual partners.<sup>9</sup> Following her study of Victorian and New South Wales homicides between sexual partners, Easteal<sup>10</sup> concluded that —

“... there is no one simple cause and effect formula to be found. On the contrary, not only do most of these cases appear to represent the climax of numerous factors intermingling but they also show that those factors vary somewhat depending upon gender, ethnicity and age.”

Easteal stated however that any conclusions drawn from her study can only be regarded as *preliminary* due to both the small size of the data set and the short time frame in which it was collected. Easteal found that the majority of male perpetrated killings were preceded by histories of physical violence, exemplified in “ownership-type” jealousy.<sup>11</sup> Easteal claimed mentally ill offenders also conformed to the “male ‘ownership’ violence motif”<sup>12</sup> and that intoxication operated in some

9 Wallace op cit; W Bacon and RG Lansdowne, “Women Who Kill Husbands: The Battered Wife on Trial” in C O’Donnell and J Craney (eds) *Family Violence in Australia*, 1982, Longman and Cheshire Pty Ltd, Sydney, p 67-94. PW Easteal, *Killing The Beloved*, 1993(b), Australian Institute of Criminology, Canberra, p 91. Polk op cit.

10 Easteal, 1993(b), op cit p 91.

11 Ibid.

## KILLING SEXUAL PARTNERS

cases as a catalyst for the violence. She also found that almost all female perpetrated homicides were a reaction against their victimisation.<sup>13</sup>

Polk<sup>14</sup> also found that male homicidal violence in the context of sexual intimacy is characterised by themes of jealousy and control —

“The overriding theme that runs through these killings is masculine control, where women become viewed as possessions of men, and the violence reflects single steps taken by males either to assert their domination over ‘their’ women, or to repel males who they feel are attempting to take control of their sexual partner.”

### **Precipitating factors**

Determining who or what precipitated a crime is not an easy exercise, since it inevitably involves the subjective interpretation of the researchers. The successful use of partial defences (provocation and/or diminished responsibility), however, is one indication, and has the force of a jury, judge and in some cases Crown acceptance.

**Female offenders** All nine women who killed their sexual partners in the present study were convicted of manslaughter. Six of those convictions involved provocation and/or diminished responsibility: four women pleaded guilty and two women were found guilty by a jury on the basis of at least one of the partial defences. In five of nine cases provocation was established on the basis that the male victim had caused the offender to lose self control. Two of these five cases also involved diminished responsibility, the abnormality of mind being caused by severe depression in both cases. Four of these five cases also involved physical abuse and/or threats by the victim immediately prior to the offence.

The sentences imposed in these five female provocation cases ranged from recognizances to lengthy terms of imprisonment: a four year s 558 recognizance, a seven year s 558 recognizance, a three year sentence of periodic detention, a full term of eight years, and a full term of ten years and six months. In one of the nine cases diminished responsibility was accepted as a partial defence. In that case the Crown conceded at the trial that the victim’s conduct was “provocative,” and that the offender had lost self control at the time of the killing. That woman received a full term of 12 years.

Chapter VII analyses the inherent difficulties involved in sentencing offenders convicted of manslaughter on the basis of the defence of provocation. The courts regard the presence of an intent to kill or inflict grievous bodily harm as being more

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12 Ibid p 91.

13 Ibid p 92.

14 Polk op cit p 56.

## SENTENCED HOMICIDES

serious than cases where an offender commits an unlawful and dangerous act or is criminally negligent. The circumstances which constitute provocation, however, may be so extreme as to significantly reduce the objective seriousness of the offence. This was certainly the case with the women mentioned above who received recognizances or periodic detention. Historically the defence of provocation was not available to women who had been subjected to prolonged violence, but killed without “immediate” provocation. The law in New South Wales was altered in 1982 to allow such circumstances to fall within a concept of “cumulative” provocation with the abolition of the common law requirement of a triggering event.

Three of the nine women were convicted of manslaughter on the basis of committing an unlawful and dangerous act. These three cases involved similar circumstances: the women had all suffered physical abuse (two had been repeatedly sexually assaulted by their partners) over a long period of time, were involved in a physical dispute precipitated by the victim immediately prior to the offence, and used a weapon to attempt to deter their partner from further abuse. The sentences in these three cases were a full term of three years and four months, five years, and seven years respectively.

By examining the circumstances surrounding the offence, and the nature of the “provocation” relied upon to make out a partial defence, most of the women who killed their sexual partners had been the victims of repeatedly violent behaviour, and the other two had been subjected to extreme emotional abuse and threats. In short, eight of the nine female offenders were faced with physical abuse, threats or taunting immediately prior to committing the offence.

**Male offenders** Although, as stated, it is difficult to determine precipitating factors, the cases of male offenders who killed their sexual partners do reveal that a recent separation, or a partner threatening to leave the relationship, is a relatively common theme. In 14 of the 47 male cases (26%) the offender killed his intimate as a consequence of separation or the fear of separation. This accords with the findings of other researchers<sup>15</sup> —

“It is commonly the threat of separation, and the feelings of jealousy aroused by such a separation, that prompts the violence.”<sup>16</sup>

Although this chapter only analyses offenders who killed their sexual partners, a further nine male offenders from the “non-intimate” group killed a sexual rival — the new male partner of the offender’s (ex)wife, de facto partner or girlfriend.

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15 Ibid p 28. See also Wallace op cit p 108; Bacon and Lansdowne, 1982, op cit p 67-94.

16 Polk op cit p 28.

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Unlike the female offenders in this category, the 47 males who killed their sexual partners were *rarely* able to establish provocation: the defence was accepted on only five occasions (10%). One of the five offenders also established diminished responsibility as a partial defence in addition to provocation. The provocative conduct in these five cases did not disclose the same pattern of prolonged physical or emotional abuse typical of the female provocation cases.

Two cases involved violence by the female victim: the first case involved a female partner who had previously hit and scratched the offender during fights, and on this occasion hit him in the head following an argument. The second case was a domestic argument that lasted a number of hours. The female victim told the offender to move out, and struck him on the head with a baseball bat. The first offender, who also established diminished responsibility, received a full term of four years after a successful Crown Appeal on sentence.<sup>17</sup> The second offender received a full term of six years.

The three remaining cases appeared to be provoked by jealousy. Two cases involved relationships that had already broken down: in both of these cases the woman had left the offender and had begun a relationship with another man. The third of these cases involved a man who was jealous of his male partner's promiscuity and feared imminent separation. The full terms of the sentences imposed in these three cases were ten years and six months, eight years, and seven years and six months.

Efforts to control the activities of (generally female) partners through the use of violence can be partly understood as a response to subjective, cultural beliefs about the appropriate behaviour of sexual partners. Whilst provocation<sup>18</sup> cannot be conceived in terms of particular categories because each case turns on its own peculiar facts, some commentators<sup>19</sup> have questioned the appropriateness of allowing the defence in cases where males find their spouses/lovers in an act of infidelity,<sup>20</sup> or alternatively, their spouse/lover reveals for the first time that they wish to end the relationship and admit instances of prior infidelity. While the High Court's reliance upon an ordinary person test for provocation has drawn criticism from a number of commentators,<sup>21</sup> there has been some interesting recent decisions

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17 Specific sentencing principles apply to Crown Appeals. The Court of Criminal Appeal has held that since a Crown Appeal involves the possibility of an increased sentence ("double jeopardy") a lower sentence than would have originally been appropriate is called for: *R v Moffit* (1990) 20 NSWLR 114.

18 The law of provocation is discussed in greater detail in Chapter IV.

19 See New South Wales Law Reform Commission, 1993, op cit p 34.

20 See for example the early cases of *R v Mawgridge* (1707) 84 ER 1107; *R v Gauthier* (1943) 29 Cr App Rep 113; The Court at 118-119; *Moffa v R* (1977) 138 CLR 601; *Gardner* (1989) 42 A Crim R 279.

21 See for example the discussion and criticism of the objective test in the minority judgment of McHugh J in *Masciantonio v The Queen* (unrep, 14 June 1995, High Ct). See also the views expressed in New South Wales Law Reform Commission Discussion Paper 31, 1993, op cit at

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on the issue of infidelity which indicate clear changes in attitudes and morality than that displayed in the very early English case of *Mawgridge*.<sup>22</sup> In the recent case of *Arrowsmith v The Queen*<sup>23</sup> the Full Federal Court held that —

“In Australia in the 1990s it would be entirely out of line of that standard [the ordinary person standard] if the mere telling of a partner that a relationship is over, whether accompanied or not by an admission of infidelity, were taken as potentially sufficient to induce an ordinary person to so lose control as to deliberately or recklessly inflict fatal violence upon the other.”

The court followed the recent Queensland authority of *The Queen v Blake*<sup>24</sup> and held that the trial judge was correct in withdrawing provocation from the jury upon the basis that the “ordinary person” would not have lost self control in the circumstances. The two decisions referred to above can also be compared to the New South Wales case of *R v Vassiliev*<sup>25</sup> where a similar line was taken.<sup>26</sup>

In short, the issue of infidelity will continue to arise in the context of provocation and ultimately be decided by the application of the “ordinary person” test to the particular facts.<sup>27</sup> In the present study there were only three cases provoked by jealousy or sexual taunts which indicates that type of provocation case is empirically quite rare. This is also taking into consideration the nine cases where male offenders killed a new male lover.

**Homicide within the context of a violent relationship** As mentioned above, seven of the nine women who killed their sexual partners were responding to a history of victimisation by their male partners. None of these women had any prior record. Wallace found that in at least 70% of cases where a woman had killed her husband, there was evidence of prior physical abuse by the husband.<sup>28</sup> Bacon and Lansdowne<sup>29</sup> likewise found that 14 of 16 women who killed their sexual partners

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p 43-45.

22 *R v Mawgridge* op cit.

23 *Arrowsmith v The Queen* (unrep, 24 Dec 1994, Fed Ct, per Black CJ, Gallop and Mathews JJ at 13-15).

24 *The Queen v Blake* (unrep, 31 Mar 1994, Qld CCA).

25 *R v Vassilev* (1967) 68 SR NSW 74.

26 Ibid. The majority (Sugerman JA and Begg J) applied the case of *R v Tsigos* [1964-65] NSW 1607. See also *R v Baraghith* (1991) 54 A Crim R 240 where, quite differently, the defence of provocation was left to the jury but rejected.

27 For a discussion of some of the practical difficulties in the application of the existing test see P Berman, “Provocation: Difficulties in the Application of the Subjective Test” (1995) 2 (1) *Criminal Law News* 7.

28 Wallace op cit p 97.

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had been subject to previous assaults. Polk found similar evidence for eight of the 12 female offenders in his study.<sup>30</sup>

It was not possible for researchers to identify whether there was a history of domestic violence by men against their sexual partners partly due the reliance upon sentence judgments and the files audited. There were also other reasons for this. Domestic violence is significantly under reported. The official figures of Local Court Apprehended Violence Orders only reflect part of the true picture.<sup>31</sup> As the High Court has recognised that sentencing proceedings are adversarial.<sup>32</sup> At sentence aggravating factors, such as, for example, a history of violence, must be proved by the Crown beyond reasonable doubt<sup>33</sup> and defence Counsel invariably aim at getting the lightest possible sentence.<sup>34</sup> A history of violence may be difficult to prove because of the death of the victim. Even where an Apprehended Violence Order exists it is not necessarily used against the offender at sentence. An Apprehended Violence Order, while imposed as a consequence of fear of a future threat, is a quasi-civil remedy. Unless the offender commits an offence by breaching the order it does not appear as part of the person's prior record.

Seventeen (39.5%) of the men who killed their sexual partners had previous convictions for personal violence offences as defined in s 4 of the *Crimes Act*. It was not possible to tell from this data who had been the victim of such violence.

Research suggests, however, that there is a high likelihood that where a male offender kills his sexual partner, the act which caused her death was not the first act of violence by the offender against the victim. Wallace<sup>35</sup> found that at least 48% of cases in which males killed their spouses included evidence of a history of domestic violence. Polk<sup>36</sup> found that 23 of the 58 cases in his study where males killed their sexual partners showed evidence of the victim having previously

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29 Bacon and Lansdowne, 1982, op cit. See Polk op cit p 146.

30 Polk op cit p 146.

31 Julie Stubbs, "Domestic Violence in New South Wales" (1995) 8 *Judicial Officers Bulletin* 1 at p 3.

32 *Pantorno v the Queen* (1989) 63 ALJR 317 per Mason CJ and Brennan J at 320.

33 *R v Pilley* (1991) 56 A Crim R 202.

34 See J Martin, "A Balanced Performance on Sentence — Some Comments on the Modern Role of Defence Counsel in the Sentencing Process" (1991-1992) 15-16 *Criminal Law Journal* 261. This article contains an interesting discussion of the obligations of defence counsel at sentence and the Victorian Court of Criminal Appeal case of *R v Rumpf* [1988] VR 466. See also EL Greenspan, "The Role Of The Defence Lawyer in Sentencing" in BA Grosman (ed) *New Directions in Sentencing*, 1988, Butterworths, Toronto, p 265. Defence counsel's aim for a light sentence is subject to the High Courts decision in *Ginarrelli v Wrath* (1988) 62 ALJR 611 particularly the comments of Mason CJ at 613. The Australian Law Reform Commission recommended formal regulation of the sentencing procedure. See Report No 44, *Sentencing*, 1988, Australian Government Publishing Service, Canberra, Ch 6.

35 Wallace op cit p 97.

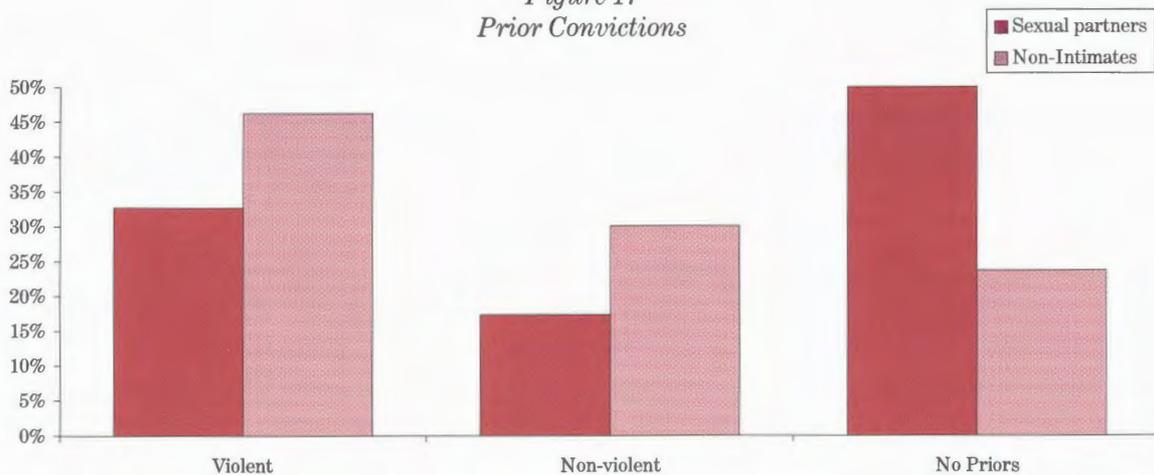
## SENTENCED HOMICIDES

contacted someone in the criminal justice system (a magistrate, police officer or lawyer) about their male partner's violence towards them. Many of the cases of males killing sexual partners in that study were in the context of recent or threatened separation, and the reason for the woman leaving was often prior physical violence.<sup>37</sup>

### Prior record

The figure below illustrates that intimate and non-intimate offenders differ markedly with respect to their prior record. Half the offenders who killed their sexual partners had no prior record, compared to less than a quarter (23.7%) of the offenders who killed non-intimates. Almost half of the non-intimate offenders (46.2%) had a history of violent offences, compared to less than a third (32.6%) of the sexual partner offenders.

Figure 17  
Prior Convictions



These figures may be further broken down by the sex of offender. All of the nine women who killed their sexual partners had no prior record, compared to only 17 (39.5%) of the 47 men. The number of men in this group with previous convictions for offences of violence also places sexual partner offenders within the middle of the three groups in terms of serious prior record: 35.1% of men who killed "other family" and 44.8% of men who killed "non-intimates" had previous convictions for violent offences. Although the number of female offenders is small, comparison between the sex groups shows that in all categories, female offenders are less likely to have previous convictions for violence, and more likely to have no prior record, than male offenders.

36 Polk op cit p 39.

37 Ibid p 36.

## KILLING SEXUAL PARTNERS

### Murder or manslaughter

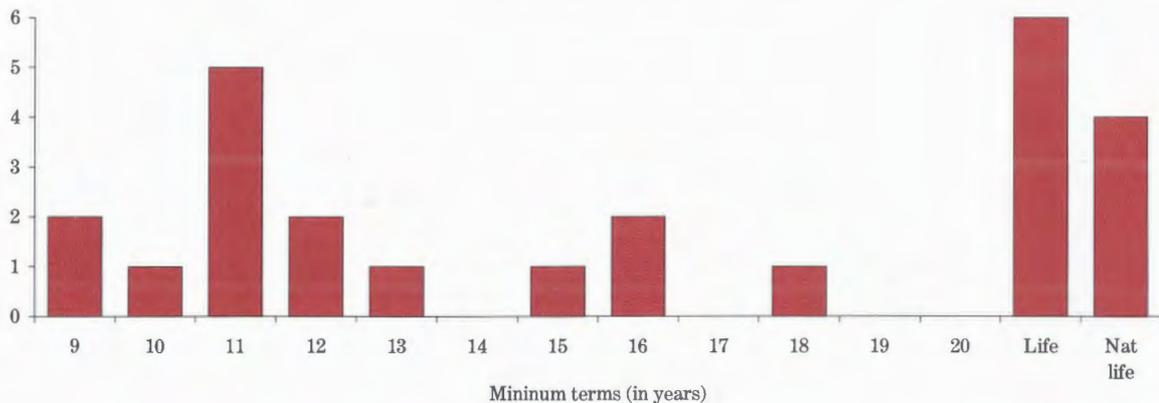
More than half (55.4%) of the offenders who killed their sexual partners were convicted of manslaughter, compared to 42.4% of the offenders who killed “non-intimates.” This discrepancy is partly explained by the high incidence of accepted partial defences amongst female sexual partner offenders, who were all convicted of manslaughter. However an examination of the conviction outcomes for male offenders reveals that offenders in the “non-intimate” category were still less likely to be convicted of manslaughter (41.4%) than those who killed their sexual partners (46.8%) or other family members (57.9%).

### Sentencing outcome

**Penalty type** In all categories of offence, women were less likely than men to receive a full time custodial sentence. There was little difference between men who killed their sexual partners and men who killed non-intimates in terms of the sentencing outcome: 95.7% of sexual partner offenders and 95.7% of non-intimate offenders received full time imprisonment. However women who killed their sexual partners were less likely than those who killed non-intimates to be sentenced to full time imprisonment: 66.7% and 87.5% respectively. This may be related to the fact that none of the women who killed their sexual partners were convicted of murder, none of these women had any prior record, and seven of the nine women had been subjected to some form of ongoing violence.

Figure 18 depicts the length of minimum terms for those convicted of murder of their sexual partners. None of the women who killed their sexual partners were convicted of murder.

*Figure 18*  
*Sentences for murder of sexual partners*



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Figure 19 depicts the length of minimum terms for those convicted of murder of non-intimates. In the murder category, 12% of those who killed their sexual partners, compared to 22.7% of those who killed non-intimates, received a minimum term of 11 years or less. Forty per cent of those who killed sexual partners received a life or natural life sentence, compared to only 27.8% of those who killed non-intimates.

*Figure 19*  
*Sentences for murder of non-intimates*

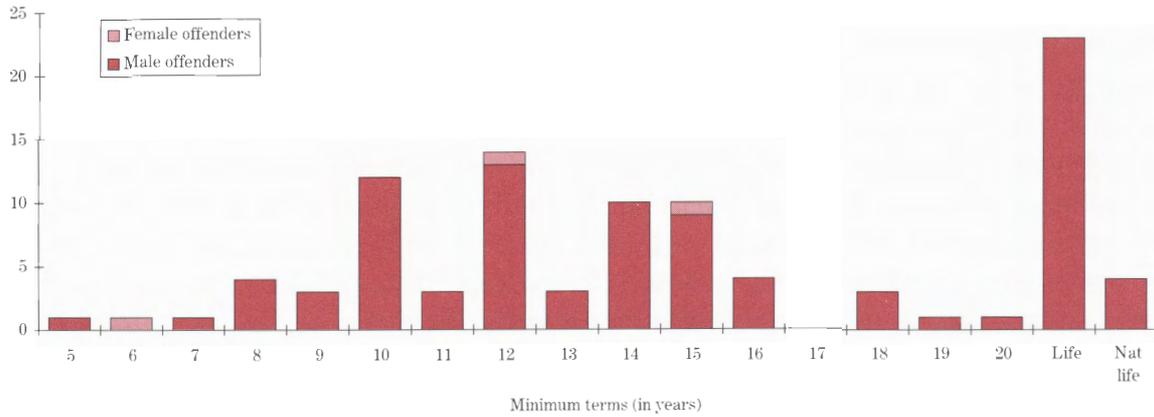


Figure 20 depicts the length of minimum terms for those convicted of manslaughter of their sexual partners.

*Figure 20*  
*Sentences for manslaughter of sexual partners*

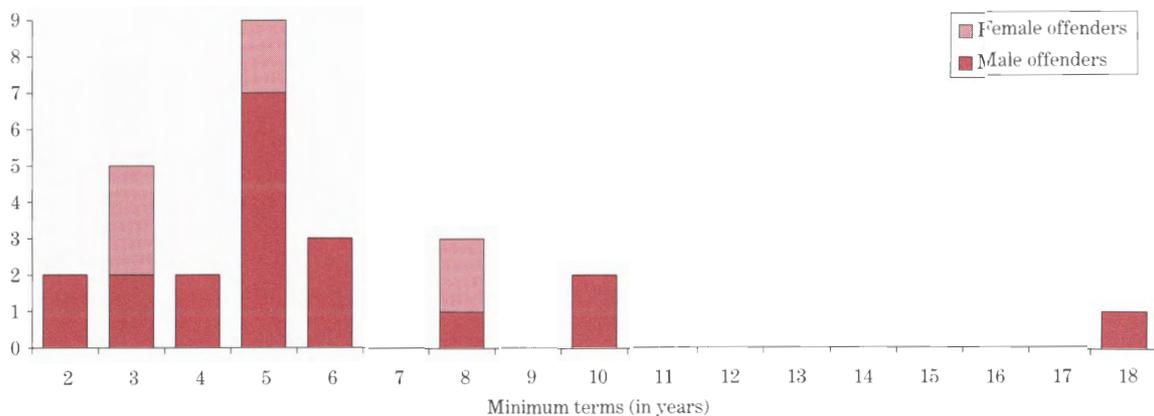
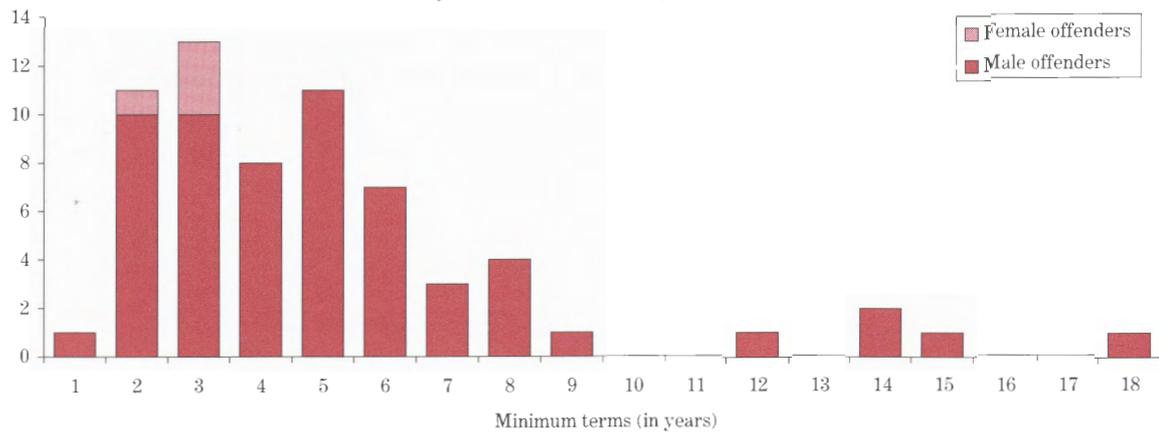


Figure 21 depicts the length of minimum terms for those convicted of manslaughter of non-intimates. Of those convicted of manslaughter, 26% of sexual partner offenders received a minimum term of three years or less. The corresponding figure for offenders who killed non-intimates was 39%. A total of 22.2% of those who killed their sexual partners received a minimum term of eight years or more, compared to 15.6% of those who killed non-intimates.

## KILLING SEXUAL PARTNERS

Figure 21  
Sentences for manslaughter of non-intimates



A collective analysis of the graphs reveal that for those sentenced to imprisonment, (regardless of whether they are convicted of murder or manslaughter), the average minimum term is slightly *higher* for an offender who kills their sexual partner than for an offender who kills a non-intimate. Very little can be concluded from this. The sentence outcome of any particular case is determined by the facts and the legal issues discussed in greater detail in Chapter VII.

### Conclusion

By comparing sexual partner killings against non-intimate killings we can see that gender is a significant factor in explaining the context of sexual partner homicide. Women are far more likely to be killed by their current or former sexual partner than by any other person. Women are also more likely to kill a sexual partner than a non-intimate. The converse is true for male offenders, who are more likely to kill or be killed by a friend, associate or stranger than their current or former sexual partner.

Domestic violence plays a part in sexual partner homicides, regardless of the sex of the offender. Women generally kill their sexual partners in response to previous victimisation: almost all women in this group had been the victims of repeatedly violent behaviour. The circumstances in which they kill differs from other types of homicide.

In 14 of the 47 cases involving male offenders (26%) the offender killed his intimate as a consequence of separation or the fear of separation. In those cases men tended to kill their sexual partners out of a desire to regain control over the relationship. The present study was unable to establish conclusively that the act causing death was one in a series of acts of violence against the victim.

Regardless of gender, those who kill non-intimates are more likely to receive a full time custodial sentence than those who kill their sexual partners. Offenders in the “non-intimate” category were also more likely to be convicted of murder than those who killed their sexual partners or other family members. Yet for those sentenced

## SENTENCED HOMICIDES

to imprisonment (whether they were convicted of murder or manslaughter), the average minimum term was slightly higher for an offender who killed their sexual partner than for an offender who killed a non-intimate. Little can be made of that fact in light of the complexity of sentencing. Women who kill are more likely to receive a non-custodial sentence than men who kill.

## VI PROVOCATION AND DIMINISHED RESPONSIBILITY

### Introduction

Provocation and diminished responsibility are partial defences which, if successful, operate to reduce murder to manslaughter. The homicide data in this study includes offenders sentenced for both murder and manslaughter. It contains all cases where such defences were “run,” whether successfully (resulting in a manslaughter conviction) or not (resulting in a murder conviction),<sup>1</sup> and also all cases where pleas to manslaughter were accepted on the basis of either or both defences.

There is a perception by some legal commentators that these defences operate unfairly, and by others that provocation is merely an anachronism. Consequently, there have been calls for reform or abolition. Many of the issues of this debate are contained in a recent New South Wales Law Reform Commission Discussion Paper.<sup>2</sup> It is significant that there has been no substantial empirical investigation of partial defences in New South Wales. However one recent study, part of a wider national project, has suggested that partial defences are allowed to be used in a “somewhat random and indiscriminate manner.”<sup>3</sup>

The purpose of this chapter is to examine those cases in this study where diminished responsibility and/or provocation were raised as issues by offenders during the criminal prosecution process. Appendices A(i), A(ii), B(i), B(ii) and C also provide further details of the cases. The sentencing implications of these matters will be dealt with in Chapter VII.

### Definitions and qualifications

In all homicide cases where there is *prima facie* evidence of an intention to kill or inflict grievous bodily harm, it is the practice of the Crown to present an indictment for murder.

A partial defence can be formally raised at two distinct points in the criminal process —

- (1) at indictment for murder — by the entering of a plea of guilty to manslaughter on the basis of a partial defence that will be accepted by the Crown in full discharge of an indictment for murder; or
- (2) at trial — by the running of a partial defence.

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1 The only cases that would not be included in this data are cases where, due to other factors (for instance the Crown failing to prove an element of murder or the defence a successful alibi defence), an acquittal was entered.

2 New South Wales Law Reform Commission Discussion Paper 31, *Provocation, Diminished Responsibility and Infanticide*, 1993, Sydney.

3 PW Easteal, *Killing The Beloved*, 1993(b), Australian Institute of Criminology, Canberra, p 175.

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Where a plea entered to manslaughter on the basis of a partial defence is rejected by the Crown, the offender may proceed to trial.

Consequently, there are two methods by which an offender can be sentenced for manslaughter on the basis of a partial defence —

- (1) by verdict (either by jury or judge alone);<sup>4</sup> or
- (2) by accepting a plea of guilty to manslaughter on the basis of a partial defence in full discharge of an indictment for murder.

In the context of provocation, the High Court held in *Kolalich v DPP*<sup>5</sup> that whilst provocation is an issue that may properly be considered by the prosecuting authorities in deciding whether to indict an accused person for murder or manslaughter, unless a case can be characterised as “exceptional” the issue of provocation is best left for the determination of a jury.<sup>6</sup>

It should also be noted that a sentencing judge has a residual discretion under s 394A of the *Crimes Act* to refuse to accept a plea of guilty offered and accepted by the Crown if the judge is not satisfied that the acceptance by the Crown of the lesser charge is appropriate in light of all the evidence.<sup>7</sup>

The determination of whether a partial defence was raised was based on a reading of the *Sentence Remarks* made by the sentencing judge or, if that document was not available, the appeal judgment by the Court of Criminal Appeal. In the absence of these documents (approximately 5% of cases), psychological and/or psychiatric reports and pre-sentence reports were then examined.<sup>8</sup> There may have been some cases where the accused relied upon provocation but the trial judge refused to leave the defence to the jury because the evidentiary onus had not been met. A defence would not have been identified if the sentencing judge did not refer to it in the *Sentence Remarks* and if, where there was an appeal, the Court of Criminal Appeal in its judgment also omitted any reference to that defence. Such a scenario is unlikely because, under both s 19 and s 19A, sentencing judges are required to consider all facts which affected the offender’s culpability, including evidence arising from a failed partial defence. The *Sentence Remarks* should indicate the fact that the offender had unsuccessfully relied upon a particular defence.

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4 See s 32 *Criminal Procedure Act*. An example of such a determination in the context of provocation is *R v Alexander* (unrep, 21 Oct 1994, NSW Sup Ct, per Hunt CJ at CL).

5 *Kolalich v DPP* (1991) 173 CLR 222.

6 *Ibid* at 225.

7 *R v Maxwell* (unrep, 2 Aug 1994, per Gleeson CJ, with whom Hunt CJ at CL and Badgery-Parker J agreed, at 11).

8 The present study relied primarily upon sentence judgments.

## PROVOCATION AND DIMINISHED RESPONSIBILITY

For the purposes of this exercise, offenders have been categorised as falling into the following partial defence groups —

*Provocation* This includes all cases where provocation was the sole defence and three cases where provocation and self defence were run together, the latter being unsuccessful.

*Diminished responsibility* This includes all cases where this defence was the sole defence and two cases where the Court of Criminal Appeal substituted a verdict of manslaughter in lieu of a jury verdict of murder.

*Diminished responsibility and provocation* The combination defence — this includes all cases where both partial defences were relied upon.

The rationale for separating the combination defence is based on the assumption that each of the above defence categories are unique and therefore should be considered separately. This point was alluded to by Wood J in *R v Morabito*<sup>9</sup> when he indicated that it is inappropriate to compare provocation cases with cases where both the defence of provocation and diminished responsibility have been accepted by the sentencing judge. For this reason, the combination defence is referred to as a distinct partial defence.

### Overview

A total of 62 offenders (24.2% of all offenders in the study) raised a partial defence(s) during the course of criminal proceedings — 21 offenders did so by way of a plea to the lesser charge and the other 41 offenders proceeded to trial.<sup>10</sup> Of the 41 offenders who ran a partial defence at trial, 21 were convicted of murder, and 20 were convicted of manslaughter on the basis of one, or in some cases both, partial defences.

Therefore, of the 256 offenders in the study, 41 offenders were sentenced to manslaughter on the basis of a partial defence.

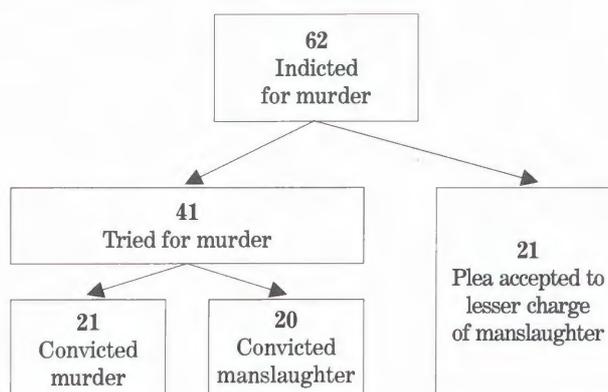
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9 *R v Morabito* (1992) 62 A Crim R 82 per Wood J (with whom Hunt CJ at CL and Sharpe J agreed) at 86.

10 Since in some cases the Crown refused to accept a plea to the lesser charge and the offender proceeded to trial, the ultimate trial outcome has been used to determine whether they were sentenced on the basis of a partial defence. This was done to avoid double counting.

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*Figure 22  
Overview of Partial Defences*



The frequency of reliance on partial defences in this study (24%) is not entirely consistent with the findings of a Victorian Homicide study which found provocation alone was an issue in approximately 23% of cases between 1981-1986.<sup>11</sup> The defence of diminished responsibility is not available in that State.

Diminished responsibility was relied upon more often than provocation (14.1% and 7.8% respectively). However, the acceptance rate for diminished responsibility was lower than the acceptance rate for the provocation (61.1% and 70% respectively), while the combination defence had the highest acceptance rate (83.3%).

Table 2 illustrates the outcomes of partial defences in the study.

*Table 2*

	Manslaughter Outcome	Murder Outcome	Total
Provocation	14	6	20
Diminished Responsibility	22	14	36
Provocation & Diminished Responsibility	5	1	6
<b>Total</b>	<b>41</b>	<b>21</b>	<b>62</b>

For male offenders, the acceptance rate for diminished responsibility and provocation were almost equal (60.6% and 60% respectively). For female offenders, the corresponding acceptance rates were 66.7% and 100% respectively. When a combination defence was relied upon, males had an acceptance rate of 66.6% and females 100%.

11 Victoria Law Reform Commission Report No 40, *Homicide Prosecutions Study*, 1991(b), Melbourne, Appendix 6, (published separately), p 75.

## PROVOCATION AND DIMINISHED RESPONSIBILITY

*Table 3*

	Males		Females		Total
	Manslaughter Outcome	Murder Outcome	Manslaughter Outcome	Murder Outcome	
Provocation	9	6	5	0	20
Diminished Responsibility	20	13	2	1	36
Provocation & Diminished Responsibility	2	1	3	0	6
<b>Total</b>	<b>31</b>	<b>20</b>	<b>10</b>	<b>1</b>	<b>62</b>

### Partial Defences at Trial

The following table indicates the outcomes of the 41 trials where a partial defence(s) was run —

*Table 4*

	Manslaughter Outcome	Murder Outcome	Total
Provocation	7	6	13
Diminished Responsibility	11	14	25
Provocation & Diminished Responsibility	2	1	3
<b>Total</b>	<b>20</b>	<b>21</b>	<b>41</b>

Of the 41 offenders who ran a partial defence at trial, 21 were convicted of murder, and 20 were convicted of manslaughter on the basis of one or in some cases both partial defences.

*Table 5*

	Males		Females		Total
	Manslaughter Outcome	Murder Outcome	Manslaughter Outcome	Murder Outcome	
Provocation	4	6	3	0	13
Diminished Responsibility	9	13	2	1	25
Provocation & Diminished Responsibility	2	1	0	0	3
<b>Total</b>	<b>15</b>	<b>20</b>	<b>5</b>	<b>1</b>	<b>41</b>

At trial four of the ten males had provocation accepted and all three females had the defence accepted. At trial nine of the 22 males had diminished responsibility accepted and two of the three females had the defence accepted. At trial two of the three males had provocation and diminished responsibility accepted.

## SENTENCED HOMICIDES

### Provocation

In New South Wales, the law of provocation is governed by s 23 of the *Crimes Act*.<sup>12</sup> Section 23(1) provides that a defendant who is guilty of murder can have their liability reduced to manslaughter if the killing occurred in circumstances of provocation. The accused is not put to proof: once evidence of provocation is raised, the onus shifts to the Crown to eliminate any reasonable possibility that the accused was not acting under provocation.<sup>13</sup> That is, the Crown must prove every element of the charge of murder beyond reasonable doubt.<sup>14</sup> In borderline cases, once provocation is raised by the defence, it is open for a jury to entertain a reasonable doubt as to whether the Crown has negated provocation, although it would be unreasonable to find that provocation in fact existed and was sufficient.<sup>15</sup>

Provocation consists of conduct on the part of a deceased person towards or affecting the accused which induces or causes a loss of self control on the part of the accused.<sup>16</sup> The act of the accused must be done with an intent to kill or inflict grievous bodily harm, resulting from a loss of self control caused by the deceased, which could have induced an ordinary person in the position of the accused to have lost self control, and to have formed an intention to kill or inflict grievous bodily harm.<sup>17</sup> The Crown will exclude provocation if it establishes any of the following —

- (1) that the act of the accused which caused the death of the deceased did not result from a loss of self control;
- (2) if it establishes that the loss of self control was not induced or caused by conduct on the part of the deceased or of some other person attributable to him or her,<sup>18</sup> or;

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12 *Parker v The Queen* (1964) 111 CLR 610 per Windeyer J at 660 and *Kolalich v DPP* (1991) 173 CLR 222.

13 Section 23 (4) *Crimes Act*.

14 *Thomas v The Queen* (1960) 102 CLR 584 at 602-603; *R v Packett* (1937) 58 CLR at 213-214 per Dixon J applying *Woolmington v DPP* [1935] AC 462 at 481-482.

15 *R v Packett* op cit per Dixon J at 213-214.

16 A leading New South Wales case on the existing law of provocation is *Chhay v R* (1994) 72 A Crim R 1 particularly the judgment of Gleeson CJ.

17 *Stingel v The Queen* (1990) 171 CLR 312 at 329. See also the majority judgment of the High Court in the more recent case of *Masciantonio v The Queen* (unrep, 14 Jun, 1995, High Ct). The New South Wales Court of Criminal Appeal held in *R v Baraghith* (1991) 54 A Crim R 240 that the test for provocation was that stated in *Stingel*. Special leave to appeal to the High Court was refused in *Baraghith*. See also *Chhay v R* op cit per Gleeson CJ at 8. For a discussion and criticism of the objective test see the minority judgment of McHugh J in *Masciantonio v The Queen* (unrep, 14 Jun 1995, High Ct). Finally, P Berman also discusses the test in a recent article entitled "Provocation: Difficulties in the Application of the Subjective Test" (1995) 2 (1) *Criminal Law News* 7.

18 *R v Tumanako* (1992) 64 A Crim R 149 per Badgery-Parker J at 155.

## PROVOCATION AND DIMINISHED RESPONSIBILITY

- (3) if it establishes that the conduct of the deceased was not such that it could have induced or caused an ordinary person in the position of the accused to have so lost their self control as to have formed an intention to kill or inflict grievous bodily harm on the deceased.

The trial judge has a discretion as to whether or not to the issue of provocation should be left to the jury. For provocation to become an issue at trial an evidentiary requirement must first be met.<sup>19</sup> Provocation will not be left to the jury unless there has been produced from all the evidence a credible narrative of events, or a realistic hypothesis which suggests that there is reasonable evidence that a jury could rely upon to accept the defence.<sup>20</sup> Where there is reasonable evidence of provocation, that defence must be left to the jury even if it has not been raised by the defence and even though the accused has not given evidence of actual loss of self control.<sup>21</sup>

New South Wales is one of the few jurisdictions to have reformed the defence to accommodate women victims of domestic violence<sup>22</sup> by removing the requirement that the death of the deceased must have arisen from sudden passion involving a loss of self control.<sup>23</sup> In this type of case a jury is now entitled to consider the conduct of the deceased toward or affecting the accused over a considerable period and also to have regard to the cumulative effect of that conduct.<sup>24</sup>

It should be noted that even if both the defence and Crown have agreed that the accused intended to kill or inflict grievous harm but the actions were committed in circumstances of provocation, the sentencing judge is not bound by that agreement<sup>25</sup> and is entitled to find that the plea is founded upon another basis. For example, a sentencing judge may find that the accused in fact did not have the requisite intent to kill, or inflict grievous bodily harm, but rather the actions of the accused in the circumstances amounted to an unlawful and dangerous act.<sup>26</sup>

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19 Ibid at 154.

20 Ibid. *R v Marshall* (unrep, 17 Jul 1990, NSW CCA) and *R v Peisley* (1990) 54 A Crim R 42 per Wood J at 51. See also *Lee Chun-Chuen v The Queen* (1963) AC 220 at 232 and *Arrowsmith v The Queen* (unrep, 24 Dec 1994, Fed Ct, per Black CJ, Gallop and Mathews JJ at pp 13-15).

21 *Parker v The Queen* (1964) 111 CLR 685 at 681-682; *Lee Chun-Chuen v The Queen* (1963) AC 220 at 232. See also *R v Pavia* (unrep, 9 Dec 1994, NSW CCA).

22 For articles on this subject see S Yeo "Resolving Gender Bias in Criminal Defences" (1993) 19 (1) *Monash University Law Review* 104; J Greene "A Provocation Defence for Battered Women who Kill?" (1989) 12 *Adelaide Law Review* 145; E Sheehy, J Stubbs and J Tolmie, "Defending Battered Women on Trial: The Battered Women's Syndrome and its Limitations" (1992) 16 *Criminal Law Journal* 369.

23 See s 23(3)(b).

24 *Chhay v R* op cit per Gleeson CJ at p 13-14; *R v Alexander* (unrep, 21 Oct 1994, NSW Sup Ct, per Hunt CJ at CL at 2).

25 *R v Malveso* (1989) 168 CLR 227 at 233; *Altham* (1992) 62 A Crim R 126 per Hunt CJ at CL at 127 and *Chow* (1992) 63 A Crim R 316 per Kirby P at 327.

26 See for example *R v Bogunovich* (1985) 16 A Crim R 456 per Maxwell J at 462 where His

## SENTENCED HOMICIDES

**Prior studies of the use of the provocation defence** The most recent study in this area analysed a combination of New South Wales and Victorian homicides focusing upon domestic killings.<sup>27</sup> This study looked at only a handful of provocation cases in the domestic context; see p 161-166. The Victorian Law Reform Commission has also commissioned numerous reports on the use of the provocation defence and has analysed in detail provocation-manslaughter cases between the period 1981-1987.<sup>28</sup>

**The factual context in provocation** As indicated above, 14 of the 20 offenders who raised provocation were either convicted of or pleaded guilty to manslaughter. Of those 14 offenders, there were nine males and five females. Each offender killed one victim.

Table 6  
*Relationship between sex of offender and sex of victim*

	Male offenders	Female offenders	Total
Male victim	6	5	11
Female victim	3	0	3
<b>Total</b>	9	5	14

Every female offender in this category killed a male victim.

*Relationship of offender to victim* In all but two of these cases, the offender was known to the victim. All female offenders killed male victims who were known to them. In six of the 14 cases (42.9%), the offender was married to the victim. There were three wife and three husband offenders. All female victims were wives of male offenders. In one case, a male offender was described as the male victim's de facto lover. Of the remaining cases, four offenders were described as a friend of the victim and one case as an acquaintance. Four of the five female offenders and one of the male offenders had previously been subjected to at least one sexual assault perpetrated by the victim.

These general findings are consistent with the Victorian Law Reform Commission study where provocation cases mainly involved offenders who knew their victims intimately, or at least in the context of a friendship.<sup>29</sup> These findings are similar to the Victorian Law Reform Commission's findings that women are more likely to

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Honour found the death was caused by an unlawful and dangerous act when the Crown had accepted a plea of guilty to manslaughter on the basis of provocation.

27 Easteal, 1993(b), op cit.

28 Victoria Law Reform Commission Report No 40, *Homicide Prosecutions Study*, 1991(b), Melbourne.

29 Ibid.

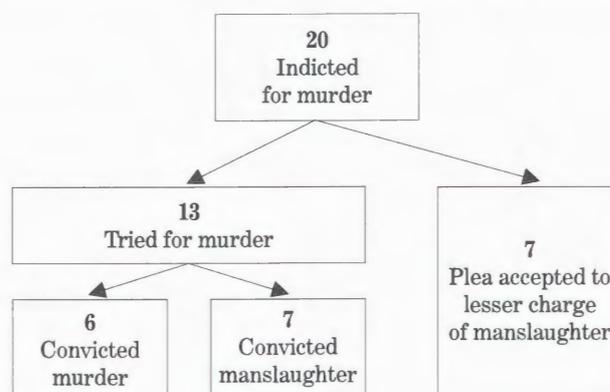
## PROVOCATION AND DIMINISHED RESPONSIBILITY

have the provocation defence accepted than men.<sup>30</sup> That Commission also found that men are far more likely to be victims in provocation cases than women<sup>31</sup> and overall that there was no evidence that the defence operates in a gender biased fashion.<sup>32</sup>

Given the high number of male victims killed in the provocation cases, (85%) the data of this study lends little support to the proposition that men use the provocation defence when they kill their female partners or ex-partners in a jealous rage.<sup>33</sup>

*Method of killing* In eight of the 14 cases, the offender stabbed the victim. The remaining cases involved three bashings, one involving the use of a gun and one the use of a car. In *R v Underhill*,<sup>34</sup> the Court of Criminal Appeal stated that those who use knives when perpetrating criminal offences should expect to receive a significant punishment since the knife is held in universal abhorrence by the community. The predominance of the use of knives and fists, in contrast to guns, may reflect an absence of pre-meditation common in manslaughter cases.

Figure 23  
Provocation only: the path to a manslaughter outcome



Twenty offenders pleaded not guilty to murder on the basis of a provocation only claim. Of those 20, seven offenders entered pleas of guilty to manslaughter upon the basis of provocation which were accepted by the Crown in full satisfaction of a

30 Ibid p 80.

31 Victoria Law Reform Commission Report No 40, *Homicide Prosecutions Study*, 1991(b), Melbourne, p 76.

32 Ibid.

33 See comments expressed in the New South Wales Law Reform Commission Discussion Paper 31, 1993, op cit at p 53.

34 *R v Underhill* (unrep, 9 May 1986, NSW CCA, per Street CJ). This aspect of the case was cited with approval in *R v Rothapfel* (unrep, 4 Aug 1992, NSW Sup Ct, per Studdert J at 12).

## SENTENCED HOMICIDES

murder indictment. Five of those offenders were male, and two were female. In these seven cases (50% of those ultimately sentenced on the basis of provocation), the Crown, by accepting a plea to a lesser charge, removed consideration of the issue of provocation from the jury. In *Kolalich v DPP*,<sup>35</sup> the High Court observed that it is only in “exceptional” cases that this is an appropriate course. Of the 13 offenders who went to trial with a provocation defence, seven offenders received manslaughter verdicts. The other six (36.1%) were convicted of murder. Of the seven offenders who received manslaughter convictions after trial, four were male and three were female.

The jury verdict outcomes in this study do not support any assertion that juries routinely accept provocation defences by males who have killed females.<sup>36</sup> There was only one such verdict. In the other case where there was a female victim, the Crown accepted a guilty plea to manslaughter in circumstances which were described by the psychiatrist for the Crown and the sentencing judge as “extreme provocation.”

### Diminished Responsibility

The partial defence of diminished responsibility is defined under s 23A of the *Crimes Act 1900* (NSW), as follows —

**23A (1)** Where, on the trial of a person for murder, it appears that at the time of the acts or omissions causing the death charged the person was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for the acts or omissions, he shall not be convicted of murder.

The defence must be proved by the defendant on the balance of probabilities.<sup>37</sup> The jury has a duty to consider medical evidence and cannot reject unanimous medical evidence in the absence of other evidence displacing it or throwing doubt upon it.<sup>38</sup> A number of conditions have been recognised as amounting to an abnormality of mind including schizophrenia, epilepsy, depression (reactive and endogenous) personality disorders and psychopathy.<sup>39</sup>

It should also be noted that the sentencing judge has a residual discretion under s 394A of the *Crimes Act* to refuse to accept a plea of guilty offered and accepted by the Crown if the judge is not satisfied that the acceptance by the Crown of the lesser charge is appropriate in light of all the evidence.<sup>40</sup> In *R v Maxwell*<sup>41</sup> both the

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35 *Kolalich v DPP* (1991) 173 CLR 222.

36 See comments by the Victoria Law Reform Commission Report No 40, *Homicide*, op cit at p 76-77.

37 *R v Tumanako* (1992) 64 A Crim R 149 per Badgery-Parker J at 159.

38 *R v Taylor* (1978) 22 ALR 599.

39 See New South Wales Law Reform Commission Discussion Paper 31, 1993, op cit p 82.

40 *R v Maxwell* (unrep, 2 Aug 1994, NSW CCA, per Gleeson CJ, with whom Hunt CJ at CL and

Crown and defence agreed that the accused suffered from diminished responsibility at the time of the offence however the trial judge formed powerful reservations during sentencing proceedings for manslaughter and rejected the plea. The Court of Criminal Appeal held that the judge was entitled to reject the plea, and that the Crown can withdraw its acceptance of the plea even after it has already been accepted.<sup>42</sup>

**Causes and forms of abnormalities** Traditionally the law has distinguished between the cause of an abnormality of mind and its diagnostic form. In more recent times, the significance of this dichotomy of cause and effect has lessened. The question of what amounts to a legitimate cause was considered by the Court of Criminal Appeal in *R v Purdy*<sup>43</sup> which followed the English case of *R v Byrne*<sup>44</sup> and held that in order to satisfy the requirements of s 23A(1) it must be shown that the abnormality of mind is of an aetiological kind contained in the section, that is, the abnormality must arise from a condition of arrested or retarded development of mind or any inherent causes or be induced by disease or injury. In *Purdy*<sup>45</sup> Glass JA observed that disabling passions of an ephemeral kind are not to count. These categorisations were adopted in *R v Jones*.<sup>46</sup> The first and third of these three generalised categories are considered to be readily identifiable using medical evidence. However, the concept of “inherent causes” has been the subject of further judicial consideration.

In *R v McGarvie*<sup>47</sup> the Court of Criminal Appeal defined the word “inherent” to mean something of a permanent attribute. The court held that the abnormality of mind must be a permanent condition and it is irrelevant whether it is due to inherited or environmental causes.<sup>48</sup> In *R v Tumanako*<sup>49</sup> the court broadened the scope of “inherent causes” by allowing defendants the option to simply prove an “inherent abnormality of mind” which (by its nature) must be permanent or enduring. It was held that in some cases to establish that an abnormality of mind exists by way of a rigorous analysis of cause and effect may be inappropriate and unscientific.<sup>50</sup> Such cases were considered to include personality disorders which

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Badgery-Parker J agreed, at 11).

41 Ibid.

42 Ibid per Gleeson CJ at 12-13.

43 *R v Purdy* [1982] 2 NSWLR 964.

44 *R v Byrne* [1960] 2 QB 396.

45 *R v Purdy* op cit at 966.

46 *R v Jones* (1986) 22 A Crim R 42 per Street CJ at 44.

47 *R v McGarvie* [1986] 5 NSWLR 270.

48 Ibid at 271-272.

49 *R v Tumanako* (1992) 64 A Crim R 149.

## SENTENCED HOMICIDES

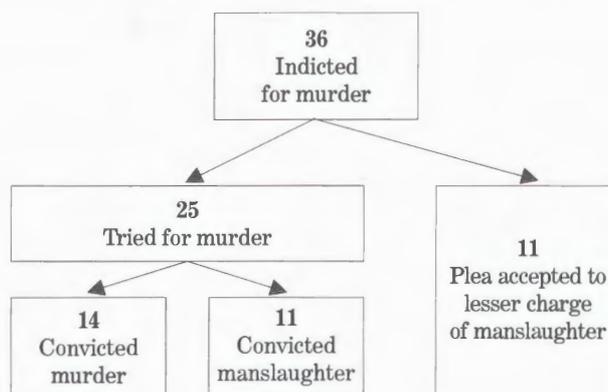
are identifiable as abnormalities of mind, the causes of which are said to be immaterial.

It has been suggested that this defence is used in a random and indiscriminate manner. As indicated above, there were 22 offenders who ran diminished responsibility and were either convicted of, or pleaded guilty to, manslaughter on the basis of that defence. Both the cause and diagnostic form of the abnormality of mind of those 22 offenders were analysed. The *Sentence Remarks* and psychiatric reports were used to classify these offenders within the three generalised causal categories contained in s 23A(1). The majority of offenders in this study fall within the “inherent causes” category (17 offenders), the remainder were contained in the “disease or injury” category (four offenders) and “arrested or retarded development” category (one offender).

The study also analysed the form of the abnormality of mind. Where this was in dispute the study relied upon the conclusion reached in the sentence judgment. The results showed a clear pattern. Offenders were diagnosed as having major or severe depression (six offenders), some form of schizophrenia (six offenders), brain damage (consisting of frontal lobe, and organic, two offenders), and personality disorders (two offenders). Other diagnosed conditions were a dissociative disorder, post traumatic stress syndrome, paranoid psychosis, transient psychosis and amnestic syndrome. The remaining offender’s condition was unable to be identified due to lack of information.

Two of the 22 offenders were female (9%) and 20 were male (91%). When the form of mental abnormality was analysed in terms of the sex of the offender, both female offenders were diagnosed as suffering from major or severe depression. The most common diagnosed condition for males was a form of schizophrenia (six offenders) followed by major or severe depression (four offenders). The remainder suffered from one of the other conditions cited above.

*Figure 24*  
*Diminished responsibility only: the path to a manslaughter outcome*



50 Ibid per Gleeson CJ at 152 endorsing Badgery-Parker J’s comments at 162.

## PROVOCATION AND DIMINISHED RESPONSIBILITY

Thirty six offenders pleaded not guilty to murder on the basis of a diminished responsibility. Of those 36, 11 offenders entered pleas of guilty to manslaughter upon the basis of diminished responsibility which were accepted by the Crown in full satisfaction of the murder indictment. Eleven of those offenders were male, and none were female.

Of the 25 offenders who proceeded to trial with a diminished responsibility defence only, 11 offenders (44%) received manslaughter verdicts. Nine of those offenders were male and two were female.

The other 14 offenders (56%) were convicted of murder. One offender proceeded to trial relying on diminished responsibility, but after receiving an unfavourable psychiatric report, abandoned the defence and pleaded guilty to murder.

There were only five trials by judge alone in the study and all involved the defence of diminished responsibility. In four of those five trials, the offender was convicted of manslaughter on the basis of diminished responsibility.

The appropriateness of judges to determine whether an offender is suffering an abnormality of mind has been questioned. For instance, Finlay J, in a judge alone trial, commented that diminished responsibility is an issue which is most suited to be answered by a jury of 12 selected at random.<sup>51</sup> However, the issue of diminished responsibility at trial is not always clear cut. In *R v Turner*, Gleeson CJ noted the difficulties of an accused relying upon diminished responsibility at trial<sup>52</sup>—

“The present case provides a good example of one of the difficulties involved in arguing diminished responsibility at a trial before a jury, rather than in the course of sentencing proceedings. Not only is such a defence sometimes inconsistent with the principal defence being argued, but also, as in the present case, it may depend upon material which could be extremely prejudicial to an accused.”

### **The combined defence of provocation and diminished responsibility**

There were six offenders who argued the combined defence of provocation and diminished responsibility. In five of the six cases, the offender was sentenced for manslaughter on the basis of the combined defence. There were some notable similarities between the offenders. The most distinguishing feature of these offenders were that they were amongst the most tragic in the study.

The infrequency of the reliance of the combined defence (either successful or unsuccessful) suggests that it is not the practice amongst defence counsel to plead both defences together, despite the fact that the defences may operate to “reinforce each other”<sup>53</sup> and permit evidence to be led which would not normally be

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51 *R v O'Bree* (unrep, 16 Jul 1992, NSW Sup Ct at 14).

52 *R v Turner* (unrep, 4 Mar 1994, NSW CCA, per Gleeson CJ at 4).

## SENTENCED HOMICIDES

admissible.<sup>54</sup> The cases do however support the view of Mackay, that the “issues of loss of self control, abnormality of mind and substantial impairment of mental responsibility become entangled and difficult to neatly separate.”<sup>55</sup>

**Factual context** As indicated above, there were five offenders who were sentenced for manslaughter on the basis of the combined defence. Three offenders were female and two male. The female offenders all killed males; two of whom were spouses and the other a son in law. The male offenders killed one female (who was a spouse) and one male who was a distant acquaintance. All except one of the cases were killings that occurred in the home of the victim. It was accepted by the sentencing judge in three of the cases that the accused (two female and one male) had been subjected to sexual assault and common assault perpetrated by the victim at some time prior to the killing. All perpetrators of these assaults were male. All offenders used some form of weapon: a knife was used in three cases, a hammer in one and a gun in another.

In relation to the three female offenders, the provocative conduct of the deceased was described as serious or extreme. In the two cases involving male offenders, the provocative conduct was described as extreme in the case where there had been prior sexual assault(s) by a male and as “slight” where the conduct arose in the course of a domestic argument. All female offenders were suffering from severe depression at the time of the killing. One male was suffering from post traumatic stress syndrome and the other had temporary brain damage caused by a blow to the head.

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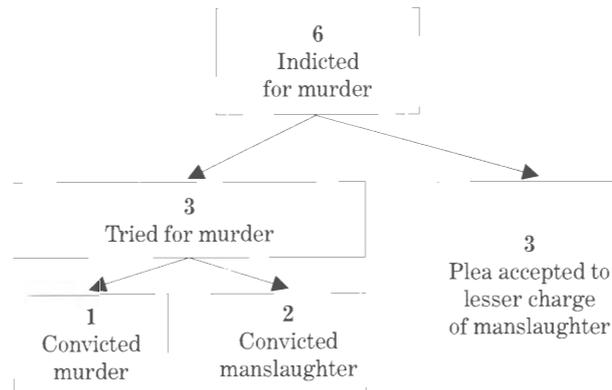
53 J Hunter and J Bargaen, “Diminished Responsibility: Abnormal Minds, Abnormal Murderers and What the Doctor Said” in S Yeo (ed) *Partial Excuses to Murder*, 1991, quoted in the New South Wales Law Reform Commission Discussion Paper 31, *Provocation, Diminished Responsibility and Infanticide*, 1993, at p 50.

54 New South Wales Law Reform Commission, 1993, op cit p 50.

55 R Mackay “Pleading Provocation and Diminished Responsibility Together” [1988] *Criminal Law Review* 411 at 419 cited in New South Wales Law Reform Commission Discussion Paper 31, 1993, op cit p 50.

## PROVOCATION AND DIMINISHED RESPONSIBILITY

Figure 25  
The combined provocation and diminished responsibility claim:  
the path to a manslaughter outcome



Six offenders pleaded not guilty to murder on the basis of the combined defence. Of those six, three offenders entered pleas of guilty to manslaughter upon the basis of the combined defence which were accepted by the Crown in full satisfaction of the murder indictment. All of those offenders were female. Of the two offenders who proceeded to trial with a combined provocation and diminished responsibility defence, two offenders received manslaughter verdicts. Both of those offenders were male. The third male offender was convicted of murder.

In *R v Low*<sup>56</sup> the Court of Criminal Appeal held that where both provocation and diminished responsibility have been raised in evidence, trial judges should adopt the practice of telling the jury that they will be asked the basis of their verdict.

In three of the five cases, the Crown accepted a plea of guilty upon the basis of both defences in full discharge of an indictment for murder. In this study, it appears that in tragic cases involving extreme domestic circumstances, the Crown accepted a plea to the lesser charge on the basis of the combined defence. The remaining two cases were decided by jury verdict.<sup>57</sup>

56 *R v Low* (1991) 57 A Crim R 8 per Lee CJ at CL (with whom McInerney and Sharpe JJ agreed) at 16 following Stephen J in *Veen v The Queen (No 1)* (1979) 143 CLR 458 at 465.

57 In one of those cases, the Court of Criminal Appeal was highly critical of the directions given by the trial judge to the jury concerning how the two defences were to be assessed. Despite this criticism the Court of Criminal Appeal did not interfere with the verdict.

## VII SENTENCING HOMICIDE OFFENDERS

### Introduction

“... sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.”<sup>1</sup>

The approach that sentencing judges take in determining an appropriate sentence for murder and manslaughter is the same as that taken in relation to other offences.<sup>2</sup> In *R v Dodd*<sup>3</sup> the New South Wales Court of Criminal Appeal acknowledged that, when fixing an appropriate sentence, a judge should have regard to the objective gravity of the offence as without such an assessment, the other factors requiring consideration cannot be given their proper place.<sup>4</sup> The court in *R v Dodd* followed the majority judgment of the High Court of Australia in *Veen v The Queen (No 2)* which held, inter alia, that each crime has its own objective gravity meriting a sentence proportionate to that gravity.

Sentencing judges view the taking of human life with the utmost seriousness. In *R v Hill*, the former Chief Justice Sir Laurence Street stated<sup>5</sup> —

“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 corresponding grave measure of criminal justice being meted out to the guilty party.”

More recently, three members of the High Court of Australia observed that “one principle which stands higher than all others in the criminal law is the sanctity of human life.”<sup>6</sup> The fact that all murderers in this study received a custodial sentence

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1 *Veen v The Queen (No 2)* (1988) 164 CLR 465 per Mason CJ, Brennan, Dawson and Toohey JJ at 476.

2 This of course was not always the case with murder. The amendments to the punishment for murder are discussed below.

3 *R v Dodd* (1991) 57 A Crim R 349.

4 Ibid at 354. See also the earlier case of *R v Camilleri* (unrep, 8 Feb 1990, NSW CCA, per Allen J) with whom the other members of the court agreed.

5 *R v Hill* (1981) 3 A Crim R 397 at 402. See also comments of the Chief Justice in *R v Whiting* (unrep, 27 Sept 1979, NSW CCA at 5).

of at least eight years duration is eloquent testimony to the seriousness with which the courts view the intentional taking of human life.

### Part 1

#### ANALYSIS OF MURDER SENTENCES

##### A recent history of legislative reform

In the last 40 years there has been three major amendments to the penalty for murder contained in the following amending acts: *Crimes (Amendment) Act 1955*, *Crimes (Homicide) Amendment Act 1982* and the *Crimes (Life Sentences) Act 1989*.

At common law murder was a felony punishable by death. In New South Wales, with the enactment of the *Crimes Act 1900*, the penalty for murder was prescribed as death pursuant to s 19 of that Act. The Governor was granted power to commute or mitigate such sentence pursuant to ss 459 and 460 of that Act. Section 19 was amended in 1955: *Crimes (Amendment) Act 1955*. The death penalty was abolished and a mandatory penalty of penal servitude for life was substituted. The amendment also expressly excluded the operation of s 442 and thus precluded the sentencing court from imposing any sentence other than penal servitude for life.

In 1982, following much public debate, the New South Wales legislature enacted the *Crimes (Homicide) Amendment Act*. Whilst the mandatory life sentence for murder was maintained, the amending Act provided a limited discretion to impose a lesser penalty where “... it appears to the Judge that the person’s culpability is significantly diminished by mitigating circumstances.” In the absence of such a finding of “mitigating circumstances,” a sentencer was required to impose a sentence of penal servitude for life.

As a part of a set of sentencing reforms which commenced with the introduction of the *Sentencing Act 1989*, a new s 19A (contained in the *Crimes (Life Sentences) Act 1989*) was inserted into the *Crimes Act* on 12 January 1990, replacing the old s 19. It reads —

##### **Punishment for murder**

**19A** (1) A person who commits the crime of murder is liable to penal servitude for life.

(2) A person sentenced to penal servitude for life for the crime of murder is to serve that sentence for the term of the person’s natural life.

(3) Nothing in this section affects the operation of section 442 (which authorises the passing of a lesser sentence than penal servitude for life).

(4) The section applies to murder committed before or after the commencement of this section.

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6 *Wilson v The Queen* (1992) 174 CLR 313 per Brennan, Deane and Dawson JJ at 341.

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(5) However, this section does not apply where committal proceedings (or proceedings by way of ex officio indictment) for the murder were instituted against the convicted person before the commencement of this section. In such a case, section 19 as in force before that commencement continues to apply.

(6) Nothing in this section affects the prerogative of mercy.

As s 19A(2) states “life” now means the term of the person’s natural life. To avoid disturbing sentencing relativities between the old and new regime, those offenders who had been sentenced under the old s 19 regime were entitled under the amending Act to apply to the Supreme Court for a re-determination of their sentences after the expiration of eight years of its duration.<sup>7</sup>

The murder cases in the study fall under the two latter sentencing regimes — the old s 19 (now repealed) and the new s 19A.

### Arguments about reform

The mandatory life sentence that existed prior to the current regime was supported because it emphasised the gravity of murder as a crime, had an arguably greater deterrent effect than a determinate sentence, and offered greater protection to the public than determinate sentences by releasing dangerous offenders at the “right” time.<sup>8</sup> It was also suggested that if judges were given a complete sentencing discretion then excessive sentences would be imposed.<sup>9</sup> Greg Woods in an article written in 1983 asserted that the advantage of s 19 lay in the fact that it allowed a discretion downwards in penalty, and did not entitle a judge to fix a penalty of extreme length in excess of the “real” likely period of incarceration.<sup>10</sup>

On the other hand, the mandatory life sentence was criticised because it precluded judges from reflecting different levels of culpability in the sentence ultimately imposed.<sup>11</sup> The mandatory penalty was also said to destroy any incentive to plead guilty and in fact was said to discourage guilty pleas.<sup>12</sup> Under s 19, judges were unable to take into consideration evidence of remorse or any subjective features of the offender unless they directly related to the person’s conduct at the time of the offence.

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7 See s 13A *Sentencing Act* 1989.

8 See, for example, the views expressed in Victoria Law Reform Commission Report No 1, *The Law of Homicide in Victoria: The Sentence for Murder*, 1985, p 6.

9 See the views of Professor Glanville Williams quoted in GD Woods in “The Sanctity of Murder: Reforming the Homicide Penalty in New South Wales” (1983) 57 *Australian Law Journal* 161.

10 Woods op cit p 163.

11 Victoria Law Reform Commission, 1985, op cit.

12 *R v Bell* [1985] 2 NSWLR 466 per Street CJ at 467-468.

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There was also criticism of the way in which the so called life sentence was enforced. In their study of murder convictions in New South Wales, Biles and Freiberg found that a “life” sentence on average involved incarceration for 14 years.<sup>13</sup> When introducing the *Crimes (Life Sentences) Act 1989* which contained s 19A, the then Attorney General Mr Dowd stated —

“This measure will remove the farce whereby a prisoner is sentenced to life imprisonment, but as everyone is aware, is released after perhaps 12 to 15 years.”

Under s 19 sentencing discretion was effectively removed from judges and placed in the hands of the Executive.<sup>14</sup> This was a cause of some concern<sup>15</sup> because of the lack of safeguards such as due process and publicity of proceedings.<sup>16</sup> The High Court of Australia recently affirmed the principle that the punishment of offenders involves an exercise of judicial power.<sup>17</sup> However, it is clear that parliament can prescribe any penalty as it thinks fit and thereby deny the courts sentencing discretion without offending the doctrine of separation of powers,<sup>18</sup> that is, such an action is not an improper exercise of judicial power by the Legislature.<sup>19</sup>

The following discussion will analyse and then compare the sentencing patterns under the two regimes.

### The section 19 murders

Thirty six of 129 offenders convicted of murder in this study were sentenced under s 19. All offenders received a custodial sentence. Twenty nine received a mandatory sentence of life. There were only seven cases (19.4%) where a sentencing judge found “mitigating circumstances” and then applied the s 19(5) proviso to impose a lesser penalty.

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13 A Freiberg and D Biles, *The Meaning of “Life”: A Study of Life Sentences in Australia*, 1975, Australian Institute of Criminology, Canberra.

14 New South Wales Parliamentary Debates, *Hansard*, 1989, No 31, 30 Nov 1989 at p 14054.

15 See the views of the Victorian Court of Criminal Appeal in *R v Schultz* [1976] VR 325 at 330.

16 DA Thomas, “Developments in Sentencing” (1974) *Criminal Law Journal* 685 at p 691.

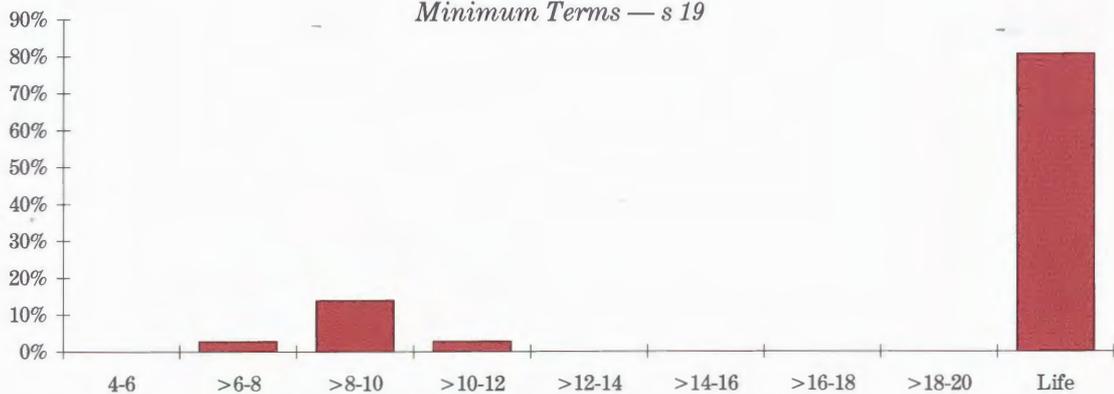
17 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 69 ALJR 191. Mason CJ, Brennan and Toohey JJ stated at 197 “it has always been accepted that the punishment of criminal offences ... are inalienable exercises of judicial power: *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175 per Isaacs J. The validity of that proposition rests ... on the principle that the process of the trial results in a binding and authoritative judicial determination which ascertains the rights of the parties: *R v Davison* (1954) 90 CLR 353 at 368-370 per Dixon CJ and McTiernan J.”

18 *Palling v Corfield* (1970) 123 CLR 52 per Barwick CJ at 58-59.

19 *Ibid.*

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Figure 26  
Minimum Terms — s 19



Those offenders received minimum terms ranging from eight years to 12 years with full terms ranging from ten years to 16 years. Only one offender (3% of all s 19 cases in the study) pleaded guilty. In that case, the defence case was described as “hopeless.”

The absence of s 19 guilty pleas in the s 19 data of this study provides further support for the general hypothesis that persons charged with murder under s 19 rarely pleaded guilty. Instead they relied upon the possibility, however remote, that the jury would return a lesser verdict of manslaughter so that they could obtain a sentence for manslaughter where the subjective features of the case could be taken into account in the determination of that sentence.

### The section 19A murders

In his second reading speech introducing the *Crimes (Life Sentences) Act 1989*, the then Attorney General, Mr Dowd, made clear the implications of the amending Act<sup>20</sup> —

“Judges will have a full sentencing discretion as to what sentence is appropriate to be imposed ... Given the varied nature of the offence, judges should be able to mark specific blameworthiness of the offender by the sentence. The amendment ensures that this necessary and vital discretion will now be available.”

The introduction of s 19A introduced a new sentencing regime for murder. The data below represents sentences for offenders in the study who were sentenced under s 19A and incorporates any variations made to those sentences by the Court of Criminal Appeal.

There were 93 offenders sentenced under s 19A in this study. All offenders received a custodial sentence. Six offenders (6.5%) received sentences of “natural life.” The remaining offenders received determinate sentences, as follows —

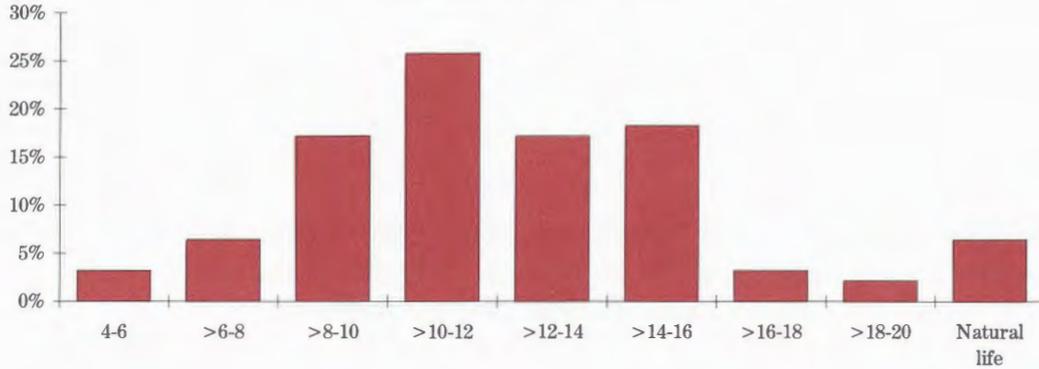
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20 New South Wales Parliamentary Debates, *Hansard*, 1989, No 31, 30 Nov 1989 at p 14053.

## SENTENCED HOMICIDES

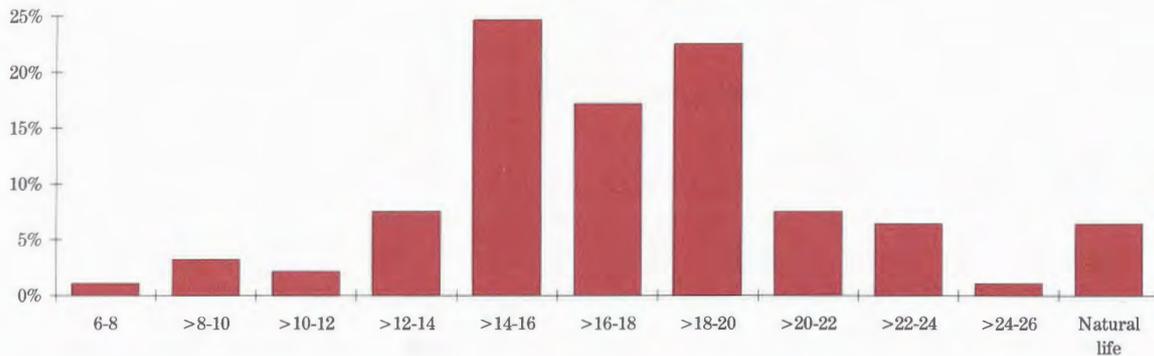
- (1) Forty offenders (43%) received a minimum term greater than eight years but not exceeding 12 years;
- (2) Thirty three offenders (35.5%) received a minimum term greater than 12 years but not exceeding 16 years.

*Figure 27*  
*Minimum Terms — s 19A*



The average, (ie) mid point of the range, of minimum terms imposed under s 19A was 12 years, and around half of the minimum terms fell within a range of ten to 15 years.

*Figure 28*  
*Full Terms — s 19A*



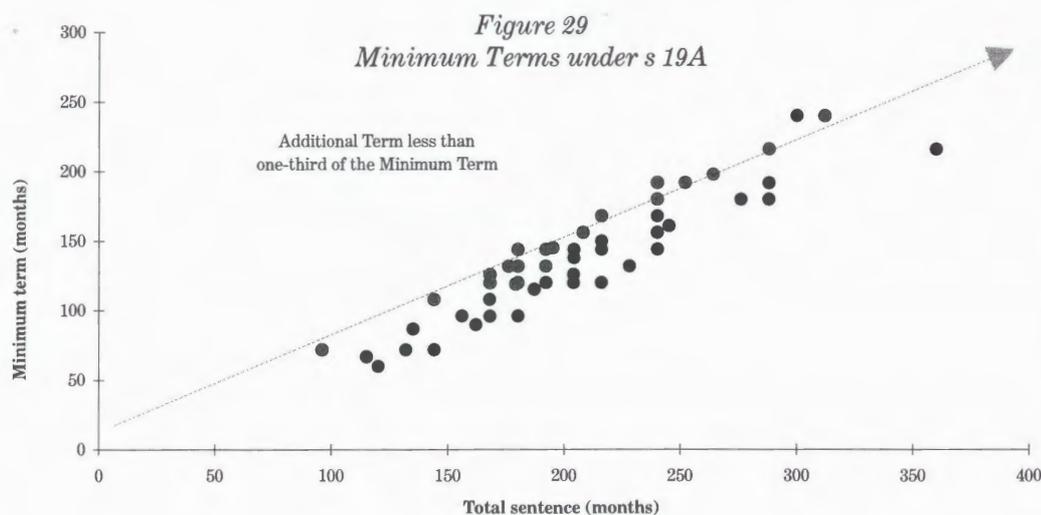
The majority (60 offenders or 64.5%) received a full term greater than 14 and up to 20 years and 14 offenders (15.1%) received a full term greater than 20 up to 26 years.

In summary the typical sentence for murder under s 19A might be described as a minimum term of 12 years and an additional term of six years, making a total sentence of 18 years.

## SENTENCING HOMICIDE OFFENDERS

### Special circumstances

Figure 29 shows minimum terms imposed under s 19A typically depart from the one third formula of s 5 of the *Sentencing Act*. On average, where special circumstances were found, the minimum term was reduced by two years.



### Appellate Review of the Custodial Sentencing Range

The Court of Criminal Appeal has made a number of observations concerning the sentencing range for s 19A. In *R v McDonald*, Carruthers J (with whom Smart and Hunter JJ agreed) stated<sup>21</sup> —

“This court has, however, had the benefit of a very extensive, careful and detailed examination of the numerous cases which have been dealt with at first instance and at the appellate level insofar as sentences under s 19A of the *Crimes Act* are concerned. There is no doubt in my view that a tariff is now developing insofar as s 19A sentences are concerned and this material provides much assistance for this court ... Indeed, the statistics available to the court indicate that so far something like ninety cases have been dealt with under s 19A. In a number of cases, the case which has been treated as a benchmark, is the sentence of Wood J in the matter of *Webster* [NSW CCA 15 July 1991 per Gleeson CJ, Lee CJ at CL and Allen J]. That is a case which involved the murder of a young girl following an attempted rape. Wood J imposed an overall sentence of 20 years, made up of a minimum term of 14 years and an additional term of six years.”

The identification of the range of sentences that had developed under s 19A was made possible using data contained on the Sentencing Information System (SIS) and published in a Judicial Commission publication.<sup>22</sup> The aim of the SIS is to assist

21 *R v McDonald* (unrep, 18 Aug 1994, NSW CCA at 7-8).

22 See “Sentencing Homicide: The Effect of Legislative Changes to the Penalty for Murder”

## SENTENCED HOMICIDES

the courts in achieving consistency in approach to sentencing.<sup>23</sup> In *R v McDonald*, the Judicial Commission's SIS was used to provide to the Court of Criminal Appeal a graph containing the results of every s 19A sentence imposed. Equipped with this information, the court was able to identify the sentencing pattern that had emerged since the introduction of s 19A.

### **Are murders classified into legal categories for the purpose of sentencing?**

The Court of Criminal Appeal has affirmed the proposition that murder resulting from an intention to do grievous bodily harm is not as objectively serious as a specific intention to kill. In *R v Lowe* Grove J stated<sup>24</sup> —

“He [Newman J] proceeded to sentence on the basis that the intent harboured by the applicant at the time of the offence was to do grievous bodily harm, a circumstance which his Honour understandably treated as of lesser seriousness than a specific intention to kill.”

While a sentencing judge may distinguish between an intention to kill and an intention to do grievous bodily harm, the Court of Criminal Appeal in *R v Ainsworth*<sup>25</sup> ruled out the possibility of, prima facie, treating reckless indifference to human life as being less culpable than other types of murders created under s 18 of the *Crimes Act*. The Chief Justice indicated that<sup>26</sup> —

“As the Victorian Court of Criminal Appeal pointed out in *R v Aiton* (1993) 68 A Crim R 578 at 597-598, whilst each case has to be considered on its own facts, there is no prima facie presumption that murder resulting from reckless indifference to human life is less culpable than murder involving one of the other categories of malice referred to in the statutory definition of murder.”

Similarly in *R v Mill*<sup>27</sup> counsel for the appellant argued that cases of felony murder involved a lower level of culpability than cases of murder involving an intention to kill and therefore should receive a “lower level of sentence” than applies to intentional killing. Again the Chief Justice rejected the proposition<sup>28</sup> —

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(1994) 7 *Sentencing Trends* 1. The court in *McDonald* referred, at p 10, to that publication's analysis of the frequency with which sentencing judges find special circumstances, under s 5(2) of the *Sentencing Act*, for offenders sentenced under s 19A.

23 See for example *Lowe v The Queen* (1984) 154 CLR 606 per Mason CJ at 610 and *R v Ellis* (1993) 68 A Crim R 449 per Hunt CJ at CL at 461.

24 *R v Lowe* (unrep, 19 Feb 1992, NSW CCA, per Grove J, with whom Gleeson CJ and Clarke JA agreed, at 3-4). See also the first instance judgment of Campbell J in *R v Jacky* (unrep, 10 Jun 1993, NSW Sup Ct at 5) where the offender was sentenced upon the basis of provocation and it was found that he formed an intent to do grievous bodily harm rather than an intent to kill.

25 *R v Ainsworth* (unrep, 6 Dec 1994, NSW CCA, per Gleeson CJ, with whom Carruthers and Bruce JJ agreed, at 21).

26 Id.

27 *R v Mill* (unrep, 3 Apr 1995, NSW CCA, per Gleeson CJ, with whom Cole JA and Sperling J agreed, at 4).

“I would reject that premise. Indeed, it would be difficult to select a better case than the present for the purpose of demonstrating its falsity. This was a case where a young man with an appalling history of criminal offending used a loaded gun in an armed robbery. He came to close quarters with the surprised victim. As is highly likely to occur in such circumstances the weapon discharged.”

In terms of objective seriousness, the only significant distinction drawn between types of murder is between cases involving an intention to kill from those involving an intention to cause grievous bodily harm. The creation of a statutory hierarchy of categories of murder has been resisted by reformers in the past, based partly on the reasons suggested by the Chief Justice in *R v Ainsworth* and *R v Mill*. In 1974, the Victorian Law Reform Commissioner responded to the suggestion that degrees of murder should be created similar to some American States in the following terms<sup>29</sup> —

“Any classification of degrees of murder based on relative heinousness must necessarily be extremely unsatisfactory and productive of anomalies. In particular the first degree will inevitably omit many murders which it ought to include, and will inevitably include many murders for which the penalty for first degree murder would seem wholly inappropriate.”

Given that no discernible difference is made between the various types of murder created under s 18, it was decided that it was not fruitful to analyse sentencing outcomes based on those categories.

### **Factual approaches to murder**

The classification of murders into general factual situations has received judicial support in South Australia and to a lesser extent in New South Wales. In the South Australian case of *R v Armstrong*<sup>30</sup> Zelling J classified murders into three general classes: murders in a domestic context, murders with some degree of pre-meditation (robberies etc) and murders by contract killers or terrorists.<sup>31</sup>

In the context of the 1982 New South Wales reforms, Chief Justice Street singled out domestic murders strongly affected by emotional tensions as being cases where the mandatory penalty operated oppressively.<sup>32</sup> His Honour argued that the level of culpability for domestic murders relative to pre-meditated killings or contract

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28 Ibid.

29 Victoria Law Reform Commissioner Report No 1, *Law of Murder*, 1974, Melbourne, p 7.

30 *R v Armstrong* (1982) 29 SASR 196 at 198.

31 Id.

32 See G Woods and JS Andrews, “Homicide Law Reform in New South Wales” Paper presented at the Criminal Injustice System Conference, 28 February 1981, Sydney, p 2-3. The same view was expressed by the *Report of the New South Wales Task Force on Domestic Violence*, 1981, New South Wales Premier’s Department, p 70.

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killings, ought to be judged as being at the lower end of the culpability scale for murder.

There are problems with the classification system referred to by Zelling J in *R v Armstrong*. The first is that the category of “domestic” is too broad. The category “domestic” includes the vast majority of murder cases rendering the classification of only limited utility. Secondly, within this “domestic” category, the degree of criminality ranges widely and some domestic murders involve high levels of pre-mediation.<sup>33</sup>

Despite these limitations, in the present study 25 cases could be classified in the category of robbery/contract killings. This corroborates the findings of a Victorian survey conducted between 1975-1982 which found that 70% of murders occurred in a domestic context.<sup>34</sup> Judges clearly find it instructive to compare sentence outcomes in cases which have similar features. In *R v McDonald*<sup>35</sup> the Court of Criminal Appeal compared and contrasted the facts and sentences in two other cases, *R v Webster* and *R v Hungerford* to obtain guidance as to the appropriate sentence in that case and also noted that on several previous occasions sentencing judges had referred to the decision of *R v Webster*.<sup>36</sup>

The worst category cases (which may attract the natural life penalty) discussed below were compared to each other very closely to assist in the calculation of the degree of criminality.<sup>37</sup> In *Veen v The Queen (No 2)*, the majority of the High Court of Australia noted that application of the similar fact approach to “worst category” cases does not mean that a lesser penalty must be imposed if it is possible to envisage a worse case, as “ingenuity can always conjure up a case of greater heinousness.”<sup>38</sup>

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33 See for example *R v Herring* (unrep, 3 Oct 1991, NSW Sup Ct, per Slattery J) and *R v Corrigan* (unrep, 15 Apr 1993, NSW Sup Ct, per Finlay J).

34 Victoria Law Reform Commission Report No 1, *The Law of Homicide in Victoria: The Sentence for Murder*, 1985, p 42. See also the Appendix contained in that study.

35 *R v McDonald* (unrep, 18 Aug 1994, NSW CCA at 7-8 ).

36 The present study found *R v Webster* (unrep, 15 Jul 1991, NSW CCA) to be referred to in *R v Hunter* (unrep, 7 Jul 1992, NSW CCA); *R v Lowe* (unrep, 19 Feb 1992, NSW CCA); *R v Zidansek* (unrep, 31 Aug 1992, NSW CCA); *R v Townsend and Cooper* (unrep, 14 Feb 1995, NSW CCA).

37 See the comments of Badgery-Parker J, with whom Carruthers and Finlay JJ agreed, in *R v Twala* (unrep, 4 Nov 1994, NSW CCA at 7). See also, for example, the sentence judgment of Newman J in *R v Garforth* (unrep, 19 Jul 1993, NSW Sup Ct). Also referred to by Justice Newman in his judgment of *R v Baker* (unrep, 6 Aug 1993, NSW Sup Ct).

38 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 478. See also Hunt CJ at CL in *R v Hawkins* (unrep, 15 Apr 1993, NSW CCA).

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In the Court of Criminal Appeal case of *R v Twala*, Badgery-Parker J compared six worst category cases (which attracted the natural life penalty) very closely to assist in the calculation of the degree of criminality and concluded that —

“No direct comparison of one case with another is fruitful but an examination of comparable sentences such as I have made is of assistance in indicating the general range which the court has regarded as appropriate for offences of relationship murder.”<sup>39</sup>

The results of the analysis undertaken on relationship murder are contained in Chapter VI.

### Aggravating factors

There are a number of identifiable factual characteristics of murder cases (also applicable to other offences) which increase the objective seriousness of any particular case. Such aggravating factors include —

- (1) a high degree of pre-meditation;<sup>40</sup>
- (2) where the offence was committed in company;<sup>41</sup>
- (3) where, at the time of the killing, the offender committed other violent offences such as sexual assault<sup>42</sup> or robbery;<sup>43</sup>
- (4) multiple victims, the victim is a child<sup>44</sup> or part of another particularly vulnerable group such as the elderly,<sup>45</sup> taxi drivers,<sup>46</sup> or police<sup>47</sup>; and
- (5) where the victim suffers a slow and/or painful death<sup>48</sup> is abducted,<sup>49</sup> degraded or humiliated.<sup>50</sup>

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39 Badgery-Parker J, with whom Carruthers and Finlay JJ agreed, in *R v Twala* (unrep, 4 Nov 1994, NSW CCA at 7).

40 *R v Hunter* (unrep, 7 Jul 1992, NSW CCA, per Carruthers J, with whom Gleeson CJ and Smart J agreed, at 7). On the issue of pre-meditation generally see Wood J (Hunt CJ at CL and Sharpe J agreeing) in *R v Morabito* (1992) 62 A Crim R 82 at 86. See particularly the comments of Finlay J in *R v Corrigan* (unrep, 15 Apr 1993, NSW Sup Ct at 8).

41 *R v McDonald*.

42 *R v Garforth*.

43 *R v McDonald*.

44 *R v Garforth*.

45 *R v Glover* (unrep, 29 Nov 1991, NSW Sup Ct, per Wood J at 7).

46 *R v McDonald*. See also *R v Hitchins* (1983) 9 A Crim R 238 at 266.

47 *R v Smith* (1982) 7 A Crim R 253 per Street CJ at 261.

48 *R v Von Einem* (1985) 16 A Crim R 319 per King CJ at 331.

49 *Ibid*.

50 *R v Webster*.

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In relation to (3), the issue of whether a sentencing judge is entitled to treat other offences not charged as aggravating features of a murder was considered in the recent appeal of *R v Garforth*.<sup>51</sup> It was submitted by Counsel for Garforth that the sentencing judge erred in treating the abduction and sexual assault of the victim as aggravating circumstances of the murder. That submission was rejected as<sup>52</sup> —

“Sometimes the aggravating features of a homicide are themselves separate offences (such as abduction ) and sometimes they are not. It would be paradoxical if the only circumstances that could be taken into account in sentencing for homicide are those which are not serious enough to be separate crimes, those that are serious enough to be to be separate crimes to be disregarded ... In our view it would be an affront to common sense to say that the abduction and sexual assault of this victim must be disregarded in evaluating the seriousness of the homicide. His Honour was right to take these matters into account in deciding whether this case attracted the maximum penalty.”

Whilst it is possible to identify “serious” factual features of murder cases, categorising cases based solely on these characteristics does not assist greatly in attempting to understand sentencing outcomes. Each case is determined on its own facts and these (aggravating) factual characteristics form only part of a court’s reasoning. For that reason murder cases were not separated according to the above aggravating factors.

It is however, possible to state that cases receiving very severe sentences or those which attracted the new life sentence were characterised by the presence of a combination of these aggravating factors.

### **Worst category cases attracting natural life**

It is a general principle of sentencing that the maximum penalty is reserved for cases characterised as falling within the worst category of offence and offender.<sup>53</sup> When the Attorney General introduced the amending legislation he explained the purpose of having a maximum penalty of natural life was<sup>54</sup> —

“... [to] give effect to what is currently only a judicial recommendation that an offender is never to be released. Such a recommendation, although a strong guideline for the executive decision makers, is not necessarily binding.”

The natural life sentence has been the subject of academic criticism. Hunt CJ at CL has observed<sup>55</sup> —

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51 *R v Garforth*.

52 *R v Garforth* at 6.

53 *Ibbs v The Queen* (1987) 163 CLR 447 at 451-452 applied and followed in *R v Twala* op cit per Badgery-Parker J, with whom Carruthers and Finlay JJ agreed, at 2.

54 New South Wales Parliamentary Debates, *Hansard*, No 31, 30 Nov 1989 at p 14052-14053.

55 *R v Petroff* (unrep, 12 Nov 1991, NSW Sup Ct). See also the comments of Wood J in *R v*

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“The indeterminate nature of a life sentence has long been the subject of criticism by penologists ... Such a sentence deprives a prisoner of any fixed goal to aim for, it robs him of any incentive and it is personally destructive of his morale. The life sentence imposes intolerable burdens upon most prisoners because of their incarceration for an indeterminate period, and the result of that imposition has been increased difficulty in their management by prison authorities.”

The Court of Criminal Appeal in *R v Garforth* acknowledged the force of these sentiments, but then continued —

“That is why life imprisonment is to be imposed in the worst type of case. Nevertheless there are cases in which such a severe punishment fits the crime. This is one.”

What then is the test used to identify a worst category case? In *R v Twala*<sup>56</sup> the Court of Criminal Appeal held that it must be possible to point both to particular features which are of very great heinousness and to the absence of any facts mitigating the seriousness of the crime. In that case, a husband had killed his estranged wife in a particularly gruesome and violent manner. However, the court quashed a natural life sentence on the basis of, inter alia, the offender’s mental state at the time of the killing. The court indicated that preventative detention is no part of sentencing law and concern that an offender upon release may represent a danger to the community cannot justify the imposition of a sentence which is disproportionate to the objective seriousness of the crime.<sup>57</sup> However if the offender is a danger to the community, that may be taken into account in determining what weight may be given to subjective considerations.<sup>58</sup>

There were six worst category cases in the study. In each case, the aggravating factors were regarded as particularly appalling. Two murders followed upon the brutal sexual assault of child victims. As Hunt CJ at CL in *R v Trotter*<sup>59</sup> remarked —

“... society rightly takes a grave and a concerned view in relation to those who prey upon defenceless children in order to subject them to sexual interference and then to violent death.”

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McCafferty (unrep, 15 Oct 1991, NSW Sup Ct) where Justice Wood stated, at 22, that it was important to pay full regard to the legislative preference for determinate sentences. For criticism at the political level see New South Wales Parliamentary Debates, *Hansard*, No 32, 7 Dec 1989 at p 14535-14542, per the Honourable IM MacDonald.

56 *R v Twala* per Badgery-Parker J, with whom Carruthers and Finlay agreed, at 2.

57 *R v Twala* at 8.

58 *Ibid.* The court applied *Veen v The Queen (No 2)* (1988) 164 CLR 465 and *R v Garforth* (unrep, 23 May 1994, NSW CCA at 11-12).

59 *R v Trotter* (unrep, 10 Aug 1993, NSW Sup Ct, per Ct Hunt CJ at CL). See also *R v Lett* (unrep, 27 Mar 1995, per Hunt CJ at CL at 8).

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In two cases there were at least three victims, and in the fifth case the offender had two previous convictions for murder. The last case was a cold blooded, highly premeditated drowning undertaken for financial gain without any mitigating factors.

In each case, the sentencing judge indicated that the offender was a real risk to the community and was likely to re-offend in the same manner.

### Rejected Defences

With the introduction of the discretionary sentencing regime for murder and the abolition of the mandatory life sentence, a sentencing judge is able to consider the factual context of a murder when determining sentence. However, there are some constraints on a judge in finding facts at sentence after a jury verdict. In *Kingswell v The Queen*<sup>60</sup> the High Court indicated —

“If there is a trial by jury the ordinary incidents of such a trial will apply; the Judge will continue to exercise his traditional functions, and, for the purpose of imposing a sentence within the limits fixed by the law will form his view of the facts, provided, that that view is not in conflict with the verdict of the jury.”

After verdict, the sentencing judge’s task is to determine the facts, based on an independent assessment of the evidence, consistent with the establishment of the essential legal ingredients of the offence and the jury’s verdict.<sup>61</sup>

In the case of a rejected provocation defence, the extent of mitigation will depend on the facts of the case. As Lee CJ at CL indicated<sup>62</sup> —

“The rejection of these [defences] does not necessarily mean that the accused cannot get the benefit, as a mitigating factor, at least to some extent, of the factual basis upon which they rested. If the sentencing judge is satisfied from the credible evidence in the case that there was a degree of provocation, he may take it into account as a mitigating factor. But every case must be judged according to its own circumstances and the question for the court in every case will be whether on the evidence the factor being put forward as a mitigating factor has a relevant connection with the crime in its full sense as I have explained earlier.”

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60 *Kingswell v The Queen* (1985) 159 CLR 264 per Gibbs CJ, Wilson J, and Dawson J at 276 quoted by Finlay J in *R v Pilley* (1991) 56 A Crim R 202 at 204.

61 *R v Turner* (unrep, 4 Mar 1994, NSW CCA, per Gleeson CJ, with whom Finlay and Abadee JJ agreed, at 9). There are numerous other authorities: *R v Mill* (1985) 17 A Crim R 411 at 416; *R v Pilley* applying *R v Martin* (1981) 2 NSWLR 640. *R v Martin* was also applied in *R v Herring* (unrep, 2 Dec 1994, NSW CCA, per Loveday AJ, with whom Newman J agreed, at 9).

62 *R v Bell* (1985) 2 NSWLR 466 at 485.

For example in *R v Chapple*,<sup>63</sup> where the offender unsuccessfully relied upon the defence of provocation, Hunt CJ at CL (with whom Mahoney JA and Allen J agreed) was not sympathetic to the offender's plight because he was clearly the aggressor in the fatal altercation.<sup>64</sup>

When the defence of diminished responsibility has been rejected, a sentencing judge is entitled to consider the psychiatric evidence adduced at trial on sentence.<sup>65</sup> In *R v Turner* the Court of Criminal Appeal also indicated that the sentencing judge should take into account the extent of diminution<sup>66</sup> —

“He [Newman J] did not quantify, by reference to any formula of words, the extent of the diminution. Not being concerned with the application of s 23A of the *Crimes Act*, he did not have to address in terms, the issue of whether the diminution was substantial. On the other hand, the sentence which his Honour imposed is a good indication of his view as to the extent of the diminution. He observed that it was significantly less than that it would otherwise have been if he had not accepted the psychiatric evidence.”

This issue was again considered by the Court of Criminal Appeal in *R v Twala*.<sup>67</sup> Badgery-Parker J indicated that whilst the offender had failed to establish a psychiatric disease to which the killing might be attributed, he was entitled to have the court “look closely” at his distressed state before and at the time of the killing.<sup>68</sup> The sentencing judge had erred in failing to consider the offender's mental state which was “very relevant” in determining an appropriate sentence and in the circumstances afforded some mitigation of his criminality.<sup>69</sup>

### Subjective Or Mitigating Factors

As a general rule, given the objective seriousness of murder, the mitigatory effect of subjective features of an offender do not have as significant an impact on the ultimate penalty imposed as they have for other offences in the criminal calendar. This reflects the application of the approach referred to in *R v Dodd*.<sup>70</sup> There is an array of subjective factors that a sentencing judge is entitled to consider on sentence. Some of the key considerations are youth, (low) intellectual capacity,<sup>71</sup>

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63 *R v Chapple* (unrep, 14 Sep 1993, NSW CCA, per Hunt CJ at CL at 9).

64 *Ibid.*

65 *R v Turner* per Gleeson CJ, with whom Finlay and Abadee JJ agreed, at 11.

66 *Ibid.*

67 *R v Twala* (unrep, 4 Nov 1994, NSW CCA).

68 *R v Twala* per Badgery-Parker J, with whom Carruthers and Finlay JJ agreed, at 10-11.

69 *Id.*

70 *R v Dodd* (1991) 57 A Crim R 349 at 354.

71 *R v Bassett* (unrep, 2 Nov 1994, NSW CCA, per Priestley JA, with whom Gleeson CJ and Bruce J agreed, at 2).

## SENTENCED HOMICIDES

prior offences<sup>72</sup> (ranging from serious priors to no priors), plea (ranging from an early plea of guilty attracting a utilitarian discount to no admission at all), remorse (ranging from no remorse to substantial), the hardship likely to be suffered by the offender in protective custody,<sup>73</sup> or hardship suffered by others related to the offender<sup>74</sup> and finally, whether the offender has assisted the authorities.<sup>75</sup> Evidence which shows that the offender's conduct was, to a very large extent, influenced by the ingestion of alcohol or drugs is a circumstance which is considered to explain homicidal conduct, but not to excuse it.<sup>76</sup>

**Guilty plea** At common law in New South Wales it has been accepted for some time that a plea of guilty is usually a mitigating factor on sentence upon the basis that it is indicative of remorse, repentance or contrition.<sup>77</sup> Credit is given to those offenders who spare witnesses from the necessity to give evidence.<sup>78</sup> The degree of leniency varies according to a number of factors such as whether contrition is in fact demonstrated,<sup>79</sup> whether the matter is difficult to prove or unknown to authorities,<sup>80</sup> whether the offence is of a gravely serious nature<sup>81</sup> and finally the degree of inevitability of a conviction.<sup>82</sup> The mere fact that an accused has pleaded guilty manifests co-operation in the administration of justice by saving court time and cost and therefore will be a factor which goes towards mitigation of sentence.<sup>83</sup> The latter administrative consideration had its genesis in the South Australian case of *R v Shannon*.<sup>84</sup>

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72 *Veen v The Queen (No 2)* (1988) 164 CLR 465.

73 *R v Gilchrist* (unrep, 23 Aug 1993, NSW CCA, per Clarke JA).

74 *R v Niga* (unrep, 13 Apr 1994, NSW CA, per Kirby P, with whom Gleeson CJ and Ireland J agreed, at 8). The New South Wales Court of Criminal Appeal applied in *R v Tiki* (unrep, 24 Aug 1994, NSW CCA). See also *R v Boyle* (1987) 34 A Crim R 202 at 204-206; *R v Mitchell* [1974] VR 625 at 631; *R v T* (unrep, 15 Mar 1990, NSW CCA).

75 *R v Cartwright* (1989) 17 NSWLR 243.

76 *R v Turner* (unrep, 4 Mar 1994, NSW CCA at 9). *R v Ainsworth* (unrep, 6 Dec 1994, NSW CCA, per Gleeson CJ at 20). See also *R v Leslie* (unrep, 10 Mar 1995, NSW CCA, per Grove J at 4, of his own judgment, and Abadee J at 4 of his own judgment).

77 *R v Holder and Johnston* (1983) 13 A Crim R 375 at 387. See also *R v Heard and Summers* (1987) 11 NSWLR 46 per Lee J.

78 *R v Nicholls and Busby* (unrep, 21 Sept 1978, NSW CCA, per Moffitt P).

79 *R v Heard and Summers* (1987) 11 NSWLR 46 per Lee J.

80 *R v Ellis* (1986) 6 NSWLR 603 at 604.

81 *R v Brodie* (unrep, 27 Jun 1986, NSW CCA).

82 *R v Hurst* (unrep, 4 Sept 1982, NSW CCA).

83 Section 439 *Crimes Act* 1900; *R v Winchester* (1992) 58 A Crim R 345 per Hunt CJ at CL at 350.

84 *R v Shannon* (1980) 21 SASR 442.

## SENTENCING HOMICIDE OFFENDERS

In contrast to the one offender in the study who pleaded guilty under s 19, under s 19A more than a third of the offenders pleaded guilty. Only one of the six offenders sentenced to penal servitude for life ((ie) natural life) pleaded guilty.

An analysis of the data indicates that there was *no* clear difference in the distribution of sentences for guilty and not guilty pleas. For both groups of offenders, the average term of penal servitude was 18 years. The fact that there is little difference between both groups demonstrates that a plea of guilty does not automatically attract a lesser sentence for an offender possibly due to the serious nature of the offence. That result accords with the proposition in *R v Dodd* that in determining an appropriate sentence, sentencing judges must consider the objective seriousness of the offence with subjective considerations, such as a plea of guilty, being necessarily subsidiary.

**Youth and prior record** Of the array of subjective considerations, youth and prior record are factors which are capable of being classified objectively, that is, into fixed categories of age and violent priors. This is in contrast with, for example, some other subjective considerations such as (low) intellectual capacity which turn on the peculiar features of the case and require a subjective interpretation of the facts.

More than half of the murder offenders in this study, (70%) were under the age of 33 years at arrest. In dealing with young offenders, the courts have held that the prospect of rehabilitation is a significant consideration.<sup>85</sup> Despite the commission of serious adult offences, the youth of an offender can operate to form the basis of a finding of “special circumstances” under the *Sentencing Act*, allowing the sentencing judge to vary the relationship between the minimum and additional term.

The prior record of an offender also had in some cases a significant effect on the sentence outcome. Offenders with serious prior records containing violent offences had that consideration operate against them.

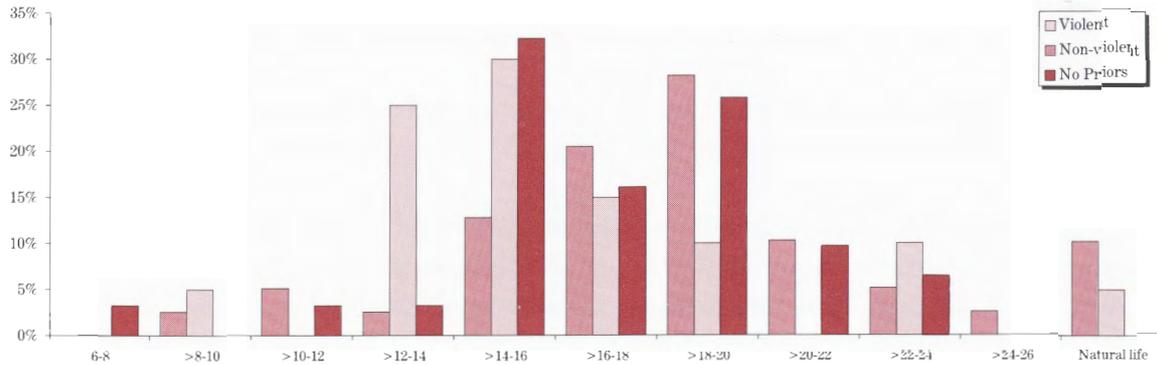
Fifty six per cent of offenders who had a violent criminal record received a full term of 18 years or more, four of which received a natural life sentence. That is, the sentences for these offenders clearly fell at the upper end of the sentencing range. The corresponding figure for offenders with non-violent priors was 41%. Significantly only 25% of offenders with no prior record received a sentence 18 years or more.

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85 *R v Webster* (unrep, 15 Jul 1991, NSW CCA); *R v Townsend* (unrep, 14 Feb 1995, NSW CCA, per Hunt CJ at CL, Simpson and Bruce JJ agreeing, at 8); *GDP* (1991) 53 A Crim R 1; *R v Howard, Mihailovic, Morgan and J* (1992) 29 NSWLR 242; *R v Craig* (unrep, 14 Apr 1993, NSW Sup Ct, per Abadee J); *R v Wade* (unrep, 5 Sept 1986, NSW Sup Ct, per Wood J); *R v Moore* (unrep, 5 Aug 1993, NSW Sup Ct, per Wood J).

## SENTENCED HOMICIDES

Figure 30  
Priors — Full Terms s 19A



### Murder Appeals

The cases which were appealed were divided into the following four categories —

- (1) conviction only;
- (2) severity of sentence only;
- (3) conviction and severity of sentence; and
- (4) Crown appeals (leniency).

It should be noted at this point that the study *excluded* 15 cases where the Court of Criminal Appeal ordered a new trial *or* the defendant was acquitted. By the time of data finalisation, there were 73 appeals lodged in the 129 murder cases included in this study. There were 15 (20.5%) appeals against conviction, 24 (or 32.9%) sentence only appeals and 34 (or 46.6%) appeals against conviction and sentence. At the time of writing 61 appeals had been decided. Only 13.1% of appeals were successful (or eight in 61).

These figures suggest that a stable tariff has developed under s 19A and as a consequence it is difficult for defence Counsel to show errors of law in the exercise of sentencing discretion.

Part 2

ANALYSIS OF MANSLAUGHTER SENTENCES

Introduction

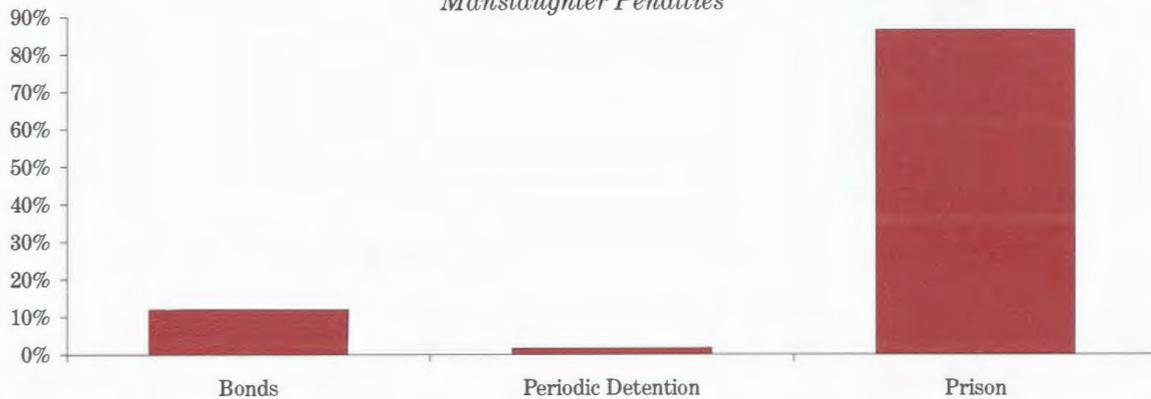
“Of course, not every case of manslaughter is of the same gravity. As Lord Salmon pointed out in *Newbury* ([1977] AC at 507) cases of manslaughter vary infinitely in this respect. That is the utility of the offence. It enables the law to express forcefully its regard for human life, at the same time allowing the particular circumstances to be reflected in the penalty imposed.”<sup>1</sup>

Manslaughter is a protean crime that attracts a wide range of sentences. In an early Court of Criminal Appeal decision, Street CJ observed that<sup>2</sup> —

“There is no offence in which the permissible degrees of punishment cover so wide a range, and none perhaps in which the exercise of so large a discretion is called for in determining the appropriate penalty.”

This view was reiterated in *R v Hill* and subsequent Court of Criminal Appeal decisions.<sup>3</sup> The disparate nature of manslaughter sentences is well illustrated in the present study in which there were 126 manslaughter offenders who received sentences ranging from bonds to full time penal servitude. The majority (88.1%) of offenders received custodial sentences. Two offenders were sentenced to penal servitude to be served by way of periodic detention. The remainder of offenders (11.9%) received non-custodial sentences.

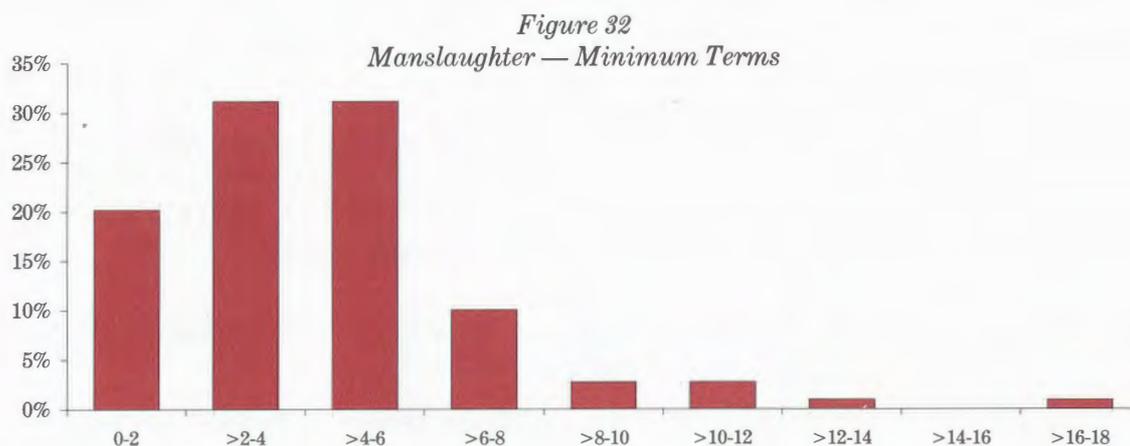
Figure 31  
Manslaughter Penalties



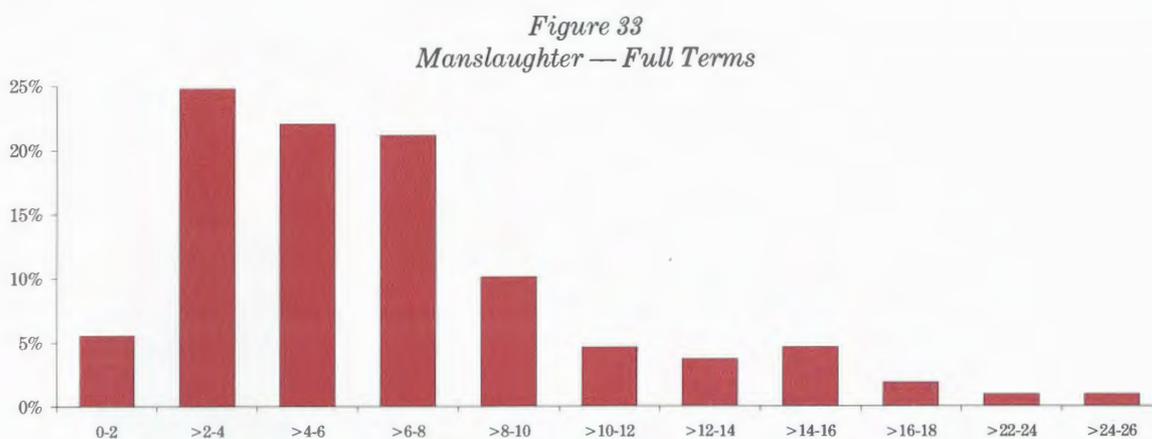
1 *Wilson v The Queen* (1992) 174 CLR 313 per Brennan, Deane and Dawson JJ at 342.  
 2 *R v Withers* (1925) 25 SR (NSW) 382 per Street CJ, James and Campbell JJ concurring, at 389.  
 3 *R v Hill* (1981) 3 A Crim R 397; *Schelberger* (unrep, 2 Jun 1988, NSW CCA); *Wise* (unrep, 15 Apr 1989, NSW CCA) and *Troja* (unrep, 16 Jul 1991, NSW CCA).

## SENTENCED HOMICIDES

Of those 109 offenders who received a full time custodial sentence, most received a minimum term of less than eight years. There were no fixed term sentences imposed.



The average (median) full term sentence imposed was 63 months (slightly over five years). Sentences typically ranged from 42 months to eight years. Only 29 offenders were sentenced to penal servitude for eight years or more. However, two of these cases involved penalties of 24 and 25 years.



### The use of statistics and classifications

Traditionally New South Wales appellate courts have regarded sentencing statistics in manslaughter cases as being of little assistance.<sup>4</sup> On one occasion, the court also expressed doubts about the reliability of such statistics, as they were “clouded by the presence of diminished responsibility.”<sup>5</sup> However, in the more recent case of

4 See Yeldam J in *Schelberger and R v Morabito* (1992) 62 A Crim R 82 per Wood J, with whom Hunt CJ at CL and Sharpe J agreed, at 86; cf *R v Foulstone* (unrep, 18 Jul 1990, NSW CCA, per Finlay J, with whom Wood J and Hunt J agreed, at 9). Finlay J commented that “general sentencing patterns can be looked at and sometimes they can be of assistance.”

## SENTENCING HOMICIDE OFFENDERS

*R v Alexander*<sup>6</sup> the Chief Justice described a provocation-manslaughter sentencing survey annexed to the first instance judgment as being “instructive.”

In other jurisdictions attempts have been made to overcome the difficulty of comparing manslaughter cases by recognising distinct legal categories of manslaughter and the factual context in which they occur. The Victorian Court of Criminal Appeal accepted that proposition in *R v Papazisis and Bird*.<sup>7</sup>

“... there is not and never has been anything like a single tariff for the offence of manslaughter although within distinct categories of manslaughter and varying patterns of factual situations may be identified.”

*Papazisis and Bird* was recently cited with approval by the Full Federal Court in *The Queen v Kolosovs*.<sup>8</sup> It has not been applied in New South Wales. The Court of Criminal Appeal has, however, recognised what are described as “tragic” cases. The former Chief Justice Sir Laurence Street stated in *R v Hill*<sup>9</sup> —

“The courts over the decades have gradually manifested a willingness to recognise the factual contexts which provide some basis for understanding the human tragedies that can lead to the taking of a human life.”

The court has also, in accordance with the principles expressed in *R v Dodd*,<sup>10</sup> made a clear delineation between the objective seriousness of *voluntary* manslaughter and *involuntary* manslaughter.<sup>11</sup> Voluntary manslaughter cases are those where the defence of provocation or diminished responsibility (or both) is accepted either by plea or by verdict. Both defences apply where the elements of murder have been established (including an intent to kill or an intent to do grievous bodily harm where required) by the Crown, but the circumstances of the offence warrant grounds for either provocation or diminished responsibility (or both). The presence of either an intent to kill, or an intent to cause grievous bodily harm increases the objective seriousness of the offence and it is upon this basis that sentencing judges have traditionally viewed voluntary manslaughter with more seriousness than involuntary manslaughter.

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5 *R v Morabito* (1992) 62 A Crim R 82.

6 *R v Alexander* (unrep, 24 Feb 1995, NSW CCA, per Gleeson CJ, with whom Meagher JA and Grove J agreed, at 6).

7 *R v Papazisis and Bird* (1991) 51 A Crim R 242 per Young CJ, Brooking and Marks JJ at 245.

8 *The Queen v Kolosovs* (1995) 75 A Crim R 265 per Black CJ, Gallop and Mathews JJ at 7.

9 *R v Hill* (1981) 3 A Crim R 397 per Street CJ at 402.

10 See the discussion contained in the introduction to the chapter and *R v Dodd* (1991) 57 A Crim R 349 at 354.

11 For a more detailed description of the difference between these two types of manslaughter refer to the definition of homicide contained in Chapter I.

## SENTENCED HOMICIDES

Discussion will first focus upon the methods used by sentencing judges in determining the objective seriousness of voluntary manslaughter cases. Analysis will then turn to involuntary manslaughter. The category of “tragic” manslaughter cases where non-custodial penalties are often imposed will also be considered.

### Provocation-manslaughter

There is an inherent difficulty in sentencing offenders convicted of manslaughter upon the basis of provocation. Provocation cases involve circumstances where the accused has lost self control and intended to kill or inflict grievous bodily harm on the deceased. Hunt CJ at CL has described the presence of these two factors as creating a tension not easily resolved, especially where there are powerful subjective factors.<sup>12</sup> In *R v Whalen*<sup>13</sup> the Court of Criminal Appeal reiterated that a finding of provocation is of limited benefit in sentencing —

“The law does no more than to recognise that provocation can overcome a person’s self control and result in that person killing another and in that circumstance it allows the crime to be seen as manslaughter not murder.”

The court has since endorsed the view that provocation-manslaughter cases stand well above the lower limit of culpability for the crime of manslaughter.<sup>14</sup> Even in tragic cases the courts have emphasised the seriousness of provocation-manslaughter. This point was made by Hunt CJ at CL in *R v Alexander*<sup>15</sup> —

“The provocation offered by the deceased does not provide any justification or exculpation for his action in killing her. The existence of that provocation reduces what would otherwise have been murder, because of the intention with which the act was done, but the prisoner remains guilty of manslaughter and he must be punished for that crime. And I repeat, provocation manslaughter involves not only a loss of self control but also an intention to kill or to inflict grievous bodily harm.”

The Court of Criminal Appeal has stated that when assessing the objective seriousness of a provocation-manslaughter case it is proper for a sentencing judge to take into account the circumstances that immediately preceded the killing, and in particular the degree of loss of self control involved.<sup>16</sup> After reading the sentence

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12 *R v Alexander* (unrep, 21 Oct 1994, NSW Sup Ct, per Hunt CJ at CL at 4) citing with approval a passage from Street CJ in *R v Hill* (1981) 3 A Crim R 397 at 402.

13 *R v Whalen* (unrep, 5 Apr 1991, NSW CCA, per Lee CJ at CL, with whom Carruthers and Sharpe JJ agreed, at 7). The above passage from *R v Whalen* was also cited with approval by the court in *R v Morabito* (1992) 62 A Crim R 82. See also *R v Withers* (1925) 25 SR (NSW) 382 per Street CJ, James and Campbell JJ concurring, at 389.

14 *R v Pavia* (unrep, 9 Dec 1994, NSW CCA at 33).

15 *R v Alexander* (unrep, 21 Oct 1994, NSW Sup Ct, per Hunt CJ at CL). See also comments by Hunt CJ at CL in *R v Roberts* (unrep, 31 Aug 1989, NSW Sup Ct) quoted with approval by Newman J in *R v Woolsey* (unrep, 19 Aug 1993, NSW Sup Ct at 12).

16 *R v Morabito* (1992) 62 A Crim R 82 per Wood J, with whom Hunt CJ at CL and Sharpe J

judgments of the provocation-manslaughter cases in the present study,<sup>17</sup> a number of inter State decisions,<sup>18</sup> and an academic study,<sup>19</sup> Hunt CJ at CL in the case of *R v Alexander*<sup>20</sup> concluded that there are three particular matters which have been taken into consideration in assessing the objective gravity of provocation in any given case —

- “(1) The degree of provocation offered (or, alternatively the extent of the loss of self control suffered), which when great has the tendency of reducing the objective gravity of the offence, (eg *R v Morabito* (1992) 62 A Crim R 83 at 86);
- (2) The time between the provocation (whether isolated or cumulative in its effect) and the loss of self control, which when short also has the tendency of reducing the objective gravity of the offence (ibid at p 86); and
- (3) The degree of violence or aggression displayed by the prisoner, which when excessive has the tendency of increasing the objective gravity of the offence: (*R v Kinmond* at 414, 417).”

The decision in *Alexander* was appealed by the Crown on the ground of leniency of sentence.<sup>21</sup> The Court of Criminal Appeal dismissed the appeal.<sup>22</sup> The case<sup>23</sup> gives a clear indication of the current permissible range open to a sentencing judge when the provocation in question is extreme. The courts examine closely the degree of provocation in a particular case as part of the process of determining the objective gravity of the offence.

Provocative conduct can range from a most trivial act where the accused persons' response may be described as almost murder, to a very serious act where the response may be described as almost self defence.<sup>24</sup> In the present study there were 14 cases

agreed, at 86. In *R v Whalen* (unrep, 5 Apr 1991, NSW CCA, per Lee CJ at CL, with whom Carruthers and Sharpe JJ agreed). Lee CJ at CL stated at 7 “In fixing a sentence, the degree of provocation must necessarily be taken into account along with other subjective features to which I have referred.”

17 The Judicial Commission of New South Wales supplied His Honour with, inter alia, first instance and appeal judgments where they existed.

18 *R v Kinmond* (1982) 5 A Crim R 413; *R v Pellizzeri* (1982) 8 Crim R 31; *R v Campbell* (1984) 12 A Crim R 272; *R v Lupoi* (1984) 15 A Crim R 183; *R v Collingburn* (1985) 18 A Crim R 294; *R v Wicks* (1989) 44 A Crim R 147.

19 AJ Ashworth, “Sentencing in Provocation Cases” (1975) *Crim LJ* 553.

20 *R v Alexander* (unrep, 21 Oct 1994, NSW Sup Ct, per Hunt CJ at CL at 4-5). See also *R v Gilham* (unrep, 7 Apr 1995, NSW Sup Ct, per Abadee J). At sentence His Honour (at 11-14) addressed the three matters referred to by Hunt CJ at CL.

21 The Crown argued that while the judgment of the Chief Judge at Common Law did not contain any manifest errors, the sentence imposed (particularly the minimum term of two and a half years of a six year full term) was an affront to the community's standards of morality. The Crown relied upon the case of *R v Geddes* (1936) 36 SR NSW 554 per Jordan CJ at 554.

22 *R v Alexander* (unrep, 24 Feb 1995, NSW CCA).

23 *R v Alexander*.

## SENTENCED HOMICIDES

where provocation was the only accepted defence. Notwithstanding subjective mitigating features taken into account at sentence, the cases in the study reveal that when the degree of provocation was "slight" or "thin," sentences imposed tended to fall at the upper end of the sentencing range for manslaughter. When the provocation was severe or serious the opposite tended to be the case.

All but one of the offenders received a full-time custodial sentence. Full term custodial sentences ranged from one year and four months to ten years and six months. Minimum terms ranged from four months to eight years. There were five appeals to the Court of Criminal Appeal on the ground of severity of sentence and only one was successful. Complete sentencing details of the cases are contained in Appendix A (ii).

The final determination of a sentence in a provocation case turns on the interaction of several factors according to the ordinary sentencing considerations.<sup>25</sup> It is not fruitful to superficially analyse the sentence outcomes of the cases without reference to the peculiar subjective and objective considerations (the latter of which as shown earlier can vary significantly) in each particular case.

Ashworth has claimed that, at least in the English context, there is a reluctance to apply the "full force" of the law in provocation cases<sup>26</sup> —

"...provocation cases raise more complicated sentencing problems than others ... the declared principles are often felt to be inappropriate to particular cases."

This comment perhaps underscores the fact that accused persons convicted of provocation-manslaughter often have powerful subjective characteristics which tend to militate against the objective seriousness of the offence. In nine of the 14 cases in this study the sentencing judge in question stated that he/she did not consider that the offender was a threat to society, and further that specific deterrence was not relevant in the circumstances due to the fact that the offender was unlikely to re-offend.

The cases also reveal that prior record was also an important subjective consideration. Of the 14 cases, eight of the offenders did not have any form of prior record and two had only minor prior records. The remaining four offenders had criminal histories which included personal violence offences.<sup>27</sup> Predictably the sentences for offenders with violent criminal records fell at the upper end of the range of sentences for manslaughter. Another important indicator of subjective

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24 See for example AJ Ashworth, "Sentencing in Provocation Cases" (1975) *Crim LJ* 553 at p 555.

25 *R v Dodd* (1991) 57 A Crim R 349 at 354.

26 Ashworth op cit p 562.

27 See the definition of "personal violence offence" contained in the definition section of the *Crimes Act*.

## SENTENCING HOMICIDE OFFENDERS

mitigating factors is a finding of special circumstances under s 5(2) of the *Sentencing Act*. Special circumstances were found in half of the cases.

### Sexually intimate provocation-manslaughter cases

There were seven sexually intimate provocation cases<sup>28</sup> which occurred in a domestic context. Three cases involved males who killed female partners, three cases involved females killing male partners and one case involved a male partner killing his male partner. All female offenders established cumulative provocation. These cases are analysed in more detail in Chapter V and it is not necessary to elaborate on their factual context here. It is, however, worth noting Hunt CJ at CL's comment in the first instance decision of *R v Alexander* concerning cumulative provocation. His Honour observed from the cases he reviewed that the courts still consider the time between the provocation (whether isolated or cumulative in its effect) and the loss of self control. He commented that when this period is short it has the tendency of reducing the objective gravity of the offence. This, His Honour observed, appears to have remained the case despite the change in the law of provocation in 1982 abolishing the requirement of a triggering event. His Honour commented that it was important that the courts recognise cumulative provocation<sup>29</sup> —

“The courts must of course recognise that a long course of conduct by the deceased may often be far more provocative than an isolated incident, as indeed was recognised at common law (*Parker v The Queen* (1964) 111 CLR 665 at 669).”

**Where a jury finds provocation** Where there is some reasonable evidence of provocation it must be left to the jury, even though it has not been raised by the defence and the accused has not given evidence of actual loss of self control.<sup>30</sup>

The approach that a sentencing judge should take where a jury accepts the defence in the above circumstances was considered by the Court of Criminal Appeal in *R v Pavia*.<sup>31</sup> The court held that the sentencing judge had erred in failing to sentence the accused upon the basis that the jury found provocation despite the fact that the appellant did not raise provocation himself.<sup>32</sup> Subsequently the accused was entitled to be sentenced on the basis of provocation which in the circumstances mitigated the objective seriousness of the offence.

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28 A sexual intimate includes spouse/cohabitant, former spouse/cohabitant and lover/ former lover.

29 *R v Alexander* (unrep, 21 Oct 1994, NSW Sup Ct, per Hunt CJ at CL at 4-5).

30 *Parker v The Queen* (1964) 111 CLR 685 at 681-682; *Lee Chun-Chuen v The Queen* (1963) AC 220 at 232.

31 *R v Pavia* (unrep, 9 Dec 1994, NSW CCA).

32 *Ibid* at 29.

### Diminished responsibility

An offender sentenced on the basis of diminished responsibility, will also be dealt with on the basis that he or she had intended to kill, or to do grievous bodily harm at the time of the offence, but that he or she was suffering an abnormality of the mind which substantially impaired his or her judgment. Again, the presence of an intent to kill or to do grievous bodily harm theoretically increases the objective seriousness of the offence.

*Veen v The Queen (No 2)*<sup>33</sup> remains the leading case in relation to sentencing offenders suffering from a mental abnormality. The majority of the court affirmed the principle that a mental abnormality which exonerates an offender from conviction for murder is regarded as a mitigating circumstance, affecting the appropriate level of punishment.<sup>34</sup> However, the majority also held that in fixing an appropriate sentence a judge is entitled to “attach great weight” to the protection of society.<sup>35</sup> The High Court attempted to reconcile the problem of sentencing offenders suffering from a mental abnormality with the principal of proportionality expounded in earlier cases —

“... a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter. These effects may balance out, but consideration of the danger to society cannot lead to the imposition of a more severe penalty than would have been imposed if the offender had not been suffering from a mental abnormality.” [at p 477]

Much of the debate which followed the *Veen v The Queen (No 2)* case focused upon the concept of dangerousness.<sup>36</sup> That issue was later considered by the High Court of Australia in *R v Bugmy*<sup>37</sup> where the court held that whilst the sentencing judge was entitled to consider the likelihood that the offender would re-offend, a sentence with a minimum term of 18 years was “beyond even speculation.” The difficulty of applying the decision in *Veen (No 2)* in practice was addressed by the Victorian Law Reform Commission which concluded<sup>38</sup> —

“The concept of diminished responsibility only has value if it is used to mitigate the severity of punishment otherwise thought appropriate. However, to sentence a mentally abnormal dangerous recidivist offender to a period of detention less than the norm would lead to the paradox that the more dangerous

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33 *Veen v The Queen (No 2)* at 476.

34 *Ibid.*

35 *Ibid* at 477.

36 R Fox, “The Killings of Bobby Veen” (1988) 12 *Crim L J* 339.

37 *R v Bugmy* (1990) 169 CLR 525, the majority judgment beginning at 537.

38 Victoria Law Reform Commission Report No 34, *Mental Malfunction*, 1991, Melbourne, p 52.

## SENTENCING HOMICIDE OFFENDERS

and disordered the defendant, the shorter the sentence has to be. The principle of proportionality, endorsed by the High Court in *Veen (No 1)* and *Veen (No 2)* means that an offender with diminished responsibility must get a lower sentence than a more culpable offender, even though the former may be dangerous, due to his or her reduced level of mental malfunctioning.”

The Court of Criminal Appeal has stated a number of times that when an offender suffers from a mental disorder or abnormality, general deterrence is accorded less weight than usual as a factor in sentencing because such an offender is not an appropriate medium for making an example of to others.<sup>39</sup> That position, however, should be compared with what the court held in *R v Low*,<sup>40</sup> where Lee CJ at CL stated —

“... it is quite wrong to take a view that merely because there is an element of diminished responsibility, which substantially impairs a person’s judgment, that that is the end of the matter and that a light sentence must inevitably follow.”

Cases in which diminished responsibility is accepted are undoubtedly among the most difficult for judges to determine an appropriate sentence. This is partly due to the fact that some mental abnormalities are not curable. Moreover, the behaviour of offenders who are convicted on the basis of diminished responsibility is sometimes very difficult to predict. For example in *Veen v The Queen (No 1)*<sup>41</sup> the High Court upheld an appeal against severity of sentence following a conviction of manslaughter on the basis of diminished responsibility. The offender was later released on licence pursuant to the now repealed s 463 of the *Crimes Act*, and killed another person in a similar manner.

The difficulty of fixing an appropriate sentence has been expressed by the Court of Criminal Appeal on a number of occasions. In *R v Ulgun*,<sup>42</sup> Enderby J (with whom Loveday J agreed) likened the judge’s task of sentencing an offender suffering from paranoid schizophrenia as “attempting to reconcile the irreconcilable.” In the later case of *R v Falconetti*<sup>43</sup> the court described the task of sentencing an offender who had been convicted on the basis of diminished responsibility as a “sensitive and difficult task,” especially in light of the principles of the High Court in *Veen v The Queen (No 2)*. In *Falconetti* the court approved the approach by the sentencing judge of finding special circumstances under s 5(2) of the *Sentencing Act 1989*,

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39 *R v Keceski* (unrep, 10 Aug 1993, NSW CCA, per Finlay J at 9); *Chayna* (unrep, 8 Jun 1993, NSW CCA at 3); and *R v Scognamiglio* (1991) 56 A Crim R 81.

40 *R v Low* (1991) 57 A Crim R 8 per Lee CJ at CL, with whom McInerney and Sharpe JJ agreed, at 19.

41 *Veen v The Queen (No 1)* (1979) 143 CLR 458 and *Veen v The Queen (No 2)* (1988) 164 CLR 465.

42 *R v Ulgun* (unrep, 5 Mar 1991, NSW CCA).

43 *R v Falconetti* (unrep, 24 Mar 1992, NSW CCA).

## SENTENCED HOMICIDES

thereby imposing a substantial additional term to allow prison medical authorities a large area of discretion as to when the prisoner should be released.<sup>44</sup>

It is difficult to draw any definite conclusions concerning sentence outcomes for diminished responsibility cases despite the fact that mental abnormalities seem to be based on a small set of diagnostic conditions.<sup>45</sup> However it is possible to state that the following two factors have had a significant influence on sentence outcomes in past cases —

- (1) the objective seriousness of the offence<sup>46</sup> taking into account the presence of either an intent to kill or to do grievous bodily harm and the mitigation afforded as a result of the mental abnormality;
- (2) the protection of the community<sup>47</sup> which is assessed partly by reference to the nature and seriousness of the abnormality.<sup>48</sup>

In the present study there were 22 cases where diminished responsibility “alone” was accepted. These cases include two first instance murder cases which were appealed on the grounds of conviction and severity of sentence. Both resulted in substituted verdicts of manslaughter on the basis of diminished responsibility. Excluding those two cases, there were nine appeals to the Court of Criminal Appeal, on the ground of severity of sentence. One of those appeals was successful.

After taking into consideration appeal variations, all diminished responsibility alone offenders received a full time custodial sentence. Details of these sentences imposed is contained in Appendix B (i) and (ii). It is interesting to compare the overall sentencing range against manslaughter generally. The average (median) sentence for manslaughter for the period 1990-1993 (which is the same data period of the present study) was slightly over five years. Twenty nine of those offenders (23%) received a full term custodial sentence of eight years or more. In contrast over *half* of offenders sentenced upon the basis of diminished responsibility (72% or 16 cases) received a full term of eight years or more. This suggests that in many cases where diminished responsibility is accepted, sentences fall at the upper end of the sentencing range for manslaughter.

Where the defence was accepted, a finding of special circumstances was made in the majority of custodial cases: 16 of 23 cases. In those custodial cases, full terms ranged from four years to 25 years. Minimum terms ranged from 17 months to 18 years. The range of additional terms was from two years to 11 years six months.

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44 Ibid at 3.

45 See Chapter VI for an analysis of causes and forms of mental abnormalities.

46 *Barnett* (unrep, 16 Feb 1994, NSW CCA) and *Evers* (unrep, 16 Jun 1993, NSW CCA).

47 *Veen v The Queen (No 2)* at 476; *Fryer* (unrep, 17 Mar 1992, NSW CCA); *Evers* (unrep, 16 June 1993, NSW CCA).

48 *R v Ulgun* (unrep, 5 Mar 1991, NSW CCA) and *Chayna* (unrep, 8 Jun 1993, NSW CCA at 3).

### Provocation and diminished responsibility — the combination defence

There were only five cases where a combination defence was accepted. The courts have accepted that the presence of *both* defences at the time of killing mitigates the objective seriousness of the offence. Lee CJ at CL alluded to this in *R v Low*<sup>49</sup> —

“Had the element of diminished responsibility not been present at all and had the matter gone forward on the footing that the verdict was a verdict of manslaughter on the ground of provocation, it would be my view that such a sentence would need to be greatly increased.”

In assessing the objective gravity of these types of cases it was apparent in the *Sentence Remarks* that sentencing judges place significant emphasis upon the fact that at the time of the offence the offender had not only lost self control but was also suffering from an abnormality of mind which diminished his/her mental responsibility. In four of the five cases, the recognition of limited culpability was also combined with powerful subjective mitigatory material. None of the offenders, for example, had any form of prior record. In one of the cases in the study, the sentencing judge expressed the futility of punishing the accused<sup>50</sup> —

“A sentence can only have a deterrent effect to the community at large where it can appreciate that there is a real degree of culpability on the part of the offender. Where his or her actions approach the morally innocent then little is demonstrated to the community by way of deterrence in the imposition of sentence.”

Sentences for cases where both the defences of diminished responsibility and provocation are accepted fall at the lower end of the range for manslaughter. Two such offenders received a s 558 recognisance, one was sentenced to periodic detention, one a full term of four years (which was imposed after a Crown Appeal), and one a full term of six years two months. Appendix C details the first instance sentencing results.

### Involuntary manslaughter

In *Wilson v The Queen*<sup>51</sup> the High Court stated that there were two categories of involuntary manslaughter at common law: manslaughter by an unlawful and dangerous act carrying with it an appreciable risk of injury, and manslaughter by criminal negligence. The Court of Criminal Appeal in *R v Stevens*<sup>52</sup> affirmed the significance of an absence of any intention to kill or inflict serious bodily harm in assessing the objective seriousness of involuntary manslaughter. The court held

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49 *R v Low* (1991) 57 A Crim R 8 per Lee CJ at CL, with whom McInerney and Sharpe JJ agreed, at 19.

50 *R v Gardner* (unrep, 27 Mar 1992, NSW Sup Ct, per Wood J at 10).

51 *Wilson v The Queen* (1992) 174 CLR 313 the majority at 333.

52 *R v Stevens* (unrep, 15 Aug 1993, NSW CCA, per James J, with whom Sheller JA and Campbell J agreed, at 9-10).

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that even though the crime was serious the sentence imposed at first instance exceeded the upper limit of the range of sentences. In *R v Cameron*<sup>53</sup> the court affirmed the view of the trial judge that the degree of seriousness for the crime of manslaughter by criminal negligence was to be in the lower end of the range for manslaughter.

The High Court in *Wilson v The Queen*<sup>54</sup> rejected the proposition that the two categories should be replaced by one because there are differences between the categories<sup>55</sup> —

“In the case of manslaughter by criminal negligence it is unnecessary to prove that the accused’s act was unlawful (*Andrews v DPP* [1937] AC 576). And the test of dangerous are different. An appreciable risk of serious injury is required in the case of manslaughter by unlawful and dangerous act. For manslaughter by criminal negligence, the test is ‘a high risk that death or grievous bodily harm would follow’ (*Nydam v The Queen* [1977] VR 430 at p 455).”

Nevertheless the Court of Criminal Appeal has stated that the two categories are not mutually exclusive as certain acts which satisfy the elements in one category can easily be placed in the other. In *R v Pullman*,<sup>56</sup> Hunt CJ at CL observed that there are many acts which would fit within both categories and cited the example of a person threatening someone with a loaded gun intending to frighten another.<sup>57</sup> On appeal in *R v Stevens*, it was submitted by Counsel for Stevens that the first instance judge erred by not indicating whether he was sentencing the offender on the basis of an unlawful and dangerous act or criminal negligence.<sup>58</sup> James J observed<sup>59</sup> —

“... it would not appear to me to really matter whether the applicants conduct should be classified as amounting to an unlawful and dangerous act or as criminal negligence. Indeed, in my opinion, his conduct would readily fit within both these categories of manslaughter.”

The ease with which it is possible to classify an act within both categories has obvious implications in sentencing. The cases discussed do not support the proposition that one category is treated as more serious than another. Further, the

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53 *R v Cameron* (unrep, 27 Sept 1994, NSW CCA, per Finlay J, with whom Abadee and Simpson JJ agreed, at 16).

54 *Wilson v The Queen* (1992) 174 CLR 313.

55 *Id* the majority at 333.

56 *R v Pullman* (1991-1992) 58 A Crim R 222 per Hunt CJ, with whom Campbell and Newman JJ agreed, at 227.

57 *Ibid*.

58 *R v Stevens* (unrep, 15 Aug 1993, NSW CCA at 6).

59 *Ibid* per James J, with whom Sheller JA and Campbell J agreed, at 7.

significance of whether a distinction should be drawn in a practical sense is an academic one, since convictions of manslaughter by criminal negligence alone are quite rare.

### **Should manslaughter be classified into factual categories for the purpose of comparative sentencing?**

The following statement of Yeldam J in *Schelberger*<sup>60</sup> has been cited by the Court of Criminal Appeal on a number of occasions<sup>61</sup> —

“The crime of manslaughter is one which has so many facets and which, in its nature, is so wide and extensive that little, if any, assistance is to be gained from a consideration of what on other occasions and in other circumstances and on another accused person, was a proper sentence to impose.”

In *R v Elliott*<sup>62</sup> Newman J pointed out that even within manslaughter cases involving motor vehicles the degree of criminality can vary extraordinarily. In *R v Troja* Kirby P (with whom Grove and Newman JJ agreed) endorsed the observation of the first instance sentencing judge, (Wood J), that the sentence which is appropriate to each case of manslaughter depends ultimately upon its own special circumstances.<sup>63</sup>

**Tragic cases** However as the former Chief Justice stated in *R v Hill*<sup>64</sup> the courts have over the years recognised “tragic” factual contexts. The word “tragic” is often an indication that the victim had previously subjected the offender to a period of physical and/or mental abuse. Sometimes tragic cases simply involved young offenders.

The Court of Criminal Appeal in *R v Dodd* refused to rule out the possibility that in certain cases a sentence of periodic detention would be appropriate.<sup>65</sup> The leading manslaughter case on whether a court should impose a non-custodial sentence is *R v Bogunovich*.<sup>66</sup> Maxwell J concluded, after reviewing several first instance

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60 *Schelberger* (unrep, 2 Jun 1988, NSW CCA).

61 *R v Wise* (unrep, 14 Apr 1989, NSW CCA, per Campbell J, with whom Gleeson CJ and Lee CJ at CL agreed, at 1). The case was cited with approval in *R v Troja* (unrep, 16 Jul 1991, NSW CCA, per Kirby P, with whom Newman and Grove JJ agreed, at 10). *Schelberger* was also cited with approval in *R v Foulstone* (unrep, 18 Jul 1990, NSW CCA, per Finlay J, with whom Hunt and Wood JJ agreed, at 8); *R v Elliott* (unrep, 14 Feb 1991, NSW CCA, per Newman J, with whom Campbell and Hunt JJ, agreed, at 5).

62 *R v Elliott* (unrep, 14 Feb 1991, NSW CCA, per Newman J, with whom Campbell and Hunt JJ, agreed, at 5).

63 *R v Troja* at 10.

64 *R v Hill* at 402.

65 *R v Dodd* at 354.

66 *R v Bogunovich* (1985) 16 A Crim R 456. See also the recent case of *R v Gilham* (unrep, 7 Apr 1995, NSW Sup Ct, per Abadee J). His Honour imposed a s 558 recognisance for a period of

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decisions, that it is only in the most exceptional circumstances that a court will impose a non-custodial penalty. After adopting Herron CJ's test in *Cuthbert* of asking: "what would be the view of the average right minded citizen in Sydney?" Maxwell J found that the case before him was an exceptional case.<sup>67</sup> His Honour also observed of domestic violence that it is sometimes impossible for the general community to have any knowledge of what happens within the four walls of a matrimonial home.

In *R v Hill*,<sup>68</sup> Street CJ emphasised that any humanitarian tendency exhibited by the courts in tragic manslaughter cases must be attended by the utmost caution,<sup>69</sup> because of the objective seriousness of manslaughter, coupled with a policy of not encouraging victims to resort to "self help." The most lucid statement of this policy is contained in *R v Whiting*<sup>70</sup> —

"It has always been the policy of the criminal law to emphasise that a victimised person cannot be permitted ... to take the law into his or her own hands by killing the aggressor ... It is necessary to ensure that there be an adequate element of deterrence for the community at large against crimes such as the present case."

The Chief Justice reiterated similar sentiments in *R v Chhay*.<sup>71</sup>

Within the category of "tragic" the courts have maintained the difference between voluntary manslaughter and involuntary manslaughter. The voluntary manslaughter cases are typically characterised by the presence of provocation illustrated by the cases of *R v Hill*, *R v Whalen*,<sup>72</sup> *R v B*,<sup>73</sup> and *R v Gilham*,<sup>74</sup> and less frequently by diminished responsibility.<sup>75</sup> The provocation manslaughter cases in the study have been discussed previously.

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five years. The case was described as being "most unusual and tragic" at 22.

67 Ibid at 462.

68 *R v Hill* (1981) 3 A Crim R 397.

69 *R v Hill* (1981) 3 A Crim R 397 per Street CJ at 402.

70 *Whiting* (unrep, 27 Sept 1979, NSW CCA, per Street CJ, with whom the other members of the court agreed, at 6).

71 *R v Chhay* (1994) 73 A Crim R 1 per Gleeson CJ at 9.

72 *R v Whalen* (unrep, 5 Apr 1991, NSW CCA).

73 *R v B* (unrep, 9 Dec 1994, NSW Sup Ct, per Finlay J).

74 *R v Gilham* (unrep, 7 Apr 1995, NSW Sup Ct, per Abadee J).

75 *R v Troja*.

## SENTENCING HOMICIDE OFFENDERS

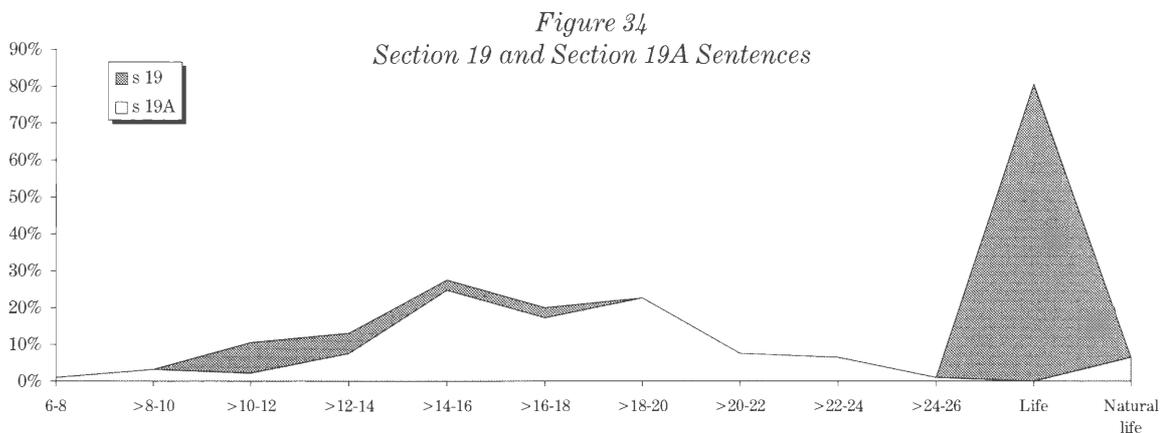
Tragic involuntary manslaughter cases where a non-custodial penalty was imposed involved very young offenders in five of the 14 non-custodial cases. There is not space to describe these cases in detail. The factual contexts of these cases can be briefly described as follows —

- (1) A 16 year old male offender set fire to a milk bar on instructions of the owner. Unbeknown to the offender a person was sleeping in the top floor of the building.
- (2) A 17 year old offender had a fist fight with a friend. Both went home and the friend was found dead in his bed in the early hours of the morning.
- (3) An 18 year old offender had a fist fight with a friend. The victim was clearly winning the fight until the offender grabbed a knife from a nearby table in the spur of the moment and stabbed him.
- (4) After consuming a quantity of alcohol an 18 year old male offender and a friend trespassed an establishment containing, inter alia, a helicopter. The offender managed to start and fly the helicopter. However it crashed killing his friend and co-pilot.
- (5) An 18 year old male offender was shooting kangaroos with his friends. He pointed the gun at the victim “as a joke.” The gun discharged hitting the victim in the eye.

One of the cases where a non-custodial penalty was imposed was a domestic case as described above by Maxwell J in *R v Bogunovich*. In that case a 64 year old male, suffering from severe depression, smothered his terminally ill wife.

### Conclusion

Figure 34 illustrates the stark difference between sentence outcomes for murder under the old and new regime in the present study.



The granting of judicial discretion for sentencing for murder has enabled judges to take a more flexible approach and has allowed considerations of degrees of culpability to be considered at sentence. This is despite the fact that the law generally does not draw prima facie distinctions between the categories of murder. The shift from a mandatory penalty for murder to a discretionary regime has been

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welcomed by proponents who argue that each case must be determined on its own facts.

Manslaughter is, as the former Chief Justice stated in *R v Hill*, a protean crime. While clear distinctions are drawn between voluntary and involuntary manslaughter, the courts in New South Wales have been reluctant to compare the facts of one case with another. Sentence outcomes for manslaughter, as the foregoing discussion shows, are best explained via settled sentencing principles applied on a case by case basis. Manslaughter, more than any other crime, illustrates the inherent difficulty of reconciling the many purposes of punishment.

## APPENDIX A

### (i) *The Factual Context of Provocation*

Case	Sex of victim	Defendant's relationship to victim	The factual context giving rise to the acceptance of provocation	Method
1	Male	Best friend	Victim had an affair with D's wife. D killed when drunk, and much larger, victim entered family home.	Stabbing
2	Male	Friend	D was an accessory. Victim insulted D calling her a slut and her son a dog.	Bashing
3	Male	Acquaintance	After two arguments victim robbed D's home and threatened D's defacto.	Stabbing
4	Male	Stranger	D alleged he awoke in a vacant lot to find the victim performing oral sex.	Bashing
5	Male	Friend	D sexually assaulted victim. D locked herself in the victim's car and ran over him three times.	Car
6	Male	Stranger	D saw the victim drag a woman from a club. Victim confronted D alleging interference.	Stabbing
7	Male	Friend	Victim accused D of thieving and abused him on racial grounds.	Stabbing
8	Female	Spouse	After a domestic argument lasting a number of hours the victim struck D with a bat.	Bashed with a bat
9	Male	Spouse	Victim struck D, abused her, locked her in a cupboard and threatened to kill her.	Stabbed and chopped
10	Female	Spouse	In presence of D, the victim requested sex with D's cousin whilst D and the victim's child videoed.	Strangled with VHS cord
11	Male	Lover	Victim taunted D of sexual exploits and threatened to leave him.	Stabbed
12	Female	Spouse	D and victim had separated. D found love letter written by the victim to a third party.	Shot
13	Male	Wife	Victim had a history of violence toward his family. D organised to kill the victim with her lover.	Stabbed
14	Male	Wife	History of mental and physical abuse by victim.	Stabbed

## SENTENCED HOMICIDES

### (ii) Provocation Sentences and Appeal Results

Case	Sex of defendant	Defence	Verdict	Original minimum (years)	Original additional (years)	Special circumstances s 5(2)	Full term (years)	Appeal
1	M	Provocation & self defence	Crown	4 mth	1	Yes	1 yr 4 mth	No
2	F	Provocation	Jury	1½	1½	Yes	3½	No
3	M	Provocation	Jury	2¼	¾	No	3	No
4	M	Provocation & self defence	Crown	2½	2½	Yes	5	No
5	F	Provocation	Jury	2½	3½	Yes	6	Yes <sup>†</sup>
6	M	Provocation & self defence	Jury	3	1	No	4	Conviction & Severity – dismissed
7	M	Provocation	Jury	4½	1½	No	6	No
8	M	Provocation	Crown	5	1	No	6	No
9	F	Provocation	Crown	5	3	Yes	8	Severity – dismissed
10	M	Provocation	Crown	5½	2	Yes	7½	No
11	M	Provocation	Crown	5	3	Yes	8	No
12	M	Provocation	Jury	8	2½	No	10½	Severity – dismissed
13	F	Provocation	Jury	8	2½	No	10½	Severity – dismissed
14	F	Provocation	Crown	s 558 <sup>‡</sup>	—	—	—	—

<sup>†</sup>Appeal allowed new minimum term, 1½ years and new additional term of 2½ years imposed.

<sup>‡</sup>Section 558 Recognizance to be of good behaviour for a period of 4 years

## APPENDIX B

### (i) Diminished Responsibility

#### Diagnostic Conditions and First Instance Sentence Results

Case	Sex of defendant	Defence	Diagnostic condition	Offender's relationship to victim	Sex of victim	Original minimum (years)	Original additional (years)
1	M	Diminished responsibility	Dissociative disorder	Other associate	F	1 yr 5 mth	2 yr 7 mth
2	M	Diminished responsibility	Paranoid psychosis	Friend	M	1½	4½
3	M	Diminished responsibility	Personality disorder reducing capacity to control aggression	Son	M	2½	2½
4	M	Diminished responsibility	Organic schizophrenia brain damage	Brother	F	3	2
5	M	Diminished responsibility	Severe depression	Husband	F	4	1
6	M	Diminished responsibility	Amnestic syndrome caused by brain damage	Cohabitant	F	5	3
7	M	Diminished responsibility	Organic brain damage	Friend	M	5	7
8	M	Diminished responsibility	Manic depressive psychosis	Spouse	F	5	10
9	M	Diminished responsibility	Paranoid schizophrenia	Acquaintance	M	5½	11½
10	M	Diminished responsibility	Not available	Other associate	M	6	2
11	M	Diminished responsibility	Chronic schizophrenia	Brother-in-law	M	7½	2½
12	M	Diminished responsibility	Severe schizophrenia	Stranger	M	7½	9½

## SENTENCED HOMICIDES

Case	Sex of defendant	Defence	Diagnostic condition	Offender's relationship to victim	Sex of victim	Original minimum (years)	Original additional (years)
13	F	Diminished responsibility	Severe depressive illness	Spouse	M	8	4
14	M	Diminished responsibility	Not clear — severe personality disorder	Friend	M	9	5
15	M	Diminished responsibility	Frontal lobe brain damage	Parent	M	10	2
16	M	Diminished responsibility	Paranoid schizophrenia	Lover	F	10	3 yr 4 mth
17	M	Diminished responsibility	Depressive illness	Former Lover	F	10	3 yr 4 mth
18	F	Diminished responsibility	Major depressive illness	Mother	F(2)	10	6
19	M	Diminished responsibility	IQ 62, had serious mental and personality problems	Stranger	M	14	10
20	M	Diminished responsibility	Paranoid schizophrenia	Acquaintance	M	15	5
21	M	Diminished responsibility	Transient psychosis	Multiple	Mult	18	7
22	M	Diminished responsibility	Major depressive illness	Spouse	F	s558 <sup>†</sup>	—

<sup>†</sup>Recognizance, 3 years

## APPENDIX B

### (ii) *Diminished Responsibility*

#### *Sentencing Recommendations at First Instance and Appeal Results*

Case	Sentencing recommendations	Verdict	Appeal
1	Psychotherapy	Jury	No
2	None, but mention made of a prior successful drug rehabilitation program	Jury	No
3	Counselling	Judge	No
4	None	Crown	No
5	Continued psychiatric and psychological treatment	Crown	No
6	Judgment not copied	Crown	No
7	Continuing medical treatment & supervision	Crown	No
8	Medical counselling and assistance	Crown	No
9	Continued psychiatric treatment and counselling	Crown	Severity — dismissed
10	Judgment not available	Jury	No
11	Medical support and supervision required	Crown	Yes, dismissed summarily
12	Continued counselling	Jury	Severity — dismissed
13	None	Jury	Severity — dismissed
14	Conviction judgment only copied — high likelihood of further treatment	Judge	Yes, filed out of time
15	None, however offender initially convicted of murder	Jury	Yes — conviction appeal CCA substituted verdict <sup>†</sup>
16	Continuing medical treatment and supervision	Crown	No
17	None stated	Judge	Severity — dismissed
18	Offender initially convicted of murder — judge recommended psychiatric assessment	Jury	Yes — conviction appeal CCA substituted verdict <sup>‡</sup>
19	CCA judgment only available no mention of first instance recommendations	Crown	Severity — dismissed
20	Continued psychiatric treatment and counselling	Crown	Severity — upheld <sup>§</sup>
21	Long period of supervision necessary	Judge	Severity — dismissed
22	Judgment not copied	Crown	No

<sup>†</sup>Convicted of manslaughter: New minimum, 8 years; New additional, 2 years

<sup>‡</sup>Convicted of manslaughter: New minimum, 6 years; New additional, 6 years

<sup>§</sup>New minimum, 12 years; New additional, 4 years

## APPENDIX C

### *Diminished Responsibility and Provocation*

Case	Sex of defendant	Defence	Diagnostic condition	Sex of victim	Verdict	Original minimum (years)	Original additional (years)	Appeal
1	F	Diminished responsibility & provocation	Severe depression	M	Crown	2	2	No
2	F	Diminished responsibility & provocation	Severe depression	M	Crown	3 <sup>†</sup>	—	No
3	M	Diminished responsibility & provocation	Post traumatic stress syndrome	M	Jury	3½	2 yr 8 mth	No
4	M	Diminished responsibility & provocation	Temporary brain damage	F	Jury	s 558 <sup>‡</sup>	—	Crown leniency <sup>§</sup>
5	F	Diminished responsibility & provocation	Depressive illness	M	Crown	s 558*	—	No

<sup>†</sup>Periodic Detention

<sup>‡</sup>Recognizance, 3 years

<sup>§</sup>Crown appeal allowed: New minimum, 2 years; New additional, 2 years

\*Recognizance, 7 years

## APPENDIX D

Information was collected in four separate databases as follows —

Database	Variables Collected
Offenders	<p><i>Personal Details</i> Birthdate; Birthplace; Postcode; Sex; Ethnicity; Marital status; Education; Employment status</p> <p><i>Case Details</i> File no; Accused no; Arrest date; Relationship to victim; Priors; s 404 admissions; Child killer</p> <p><i>Charges</i> Charge principal offence; Charge counts principal offence; Charge other offences; Charge counts other offences</p> <p><i>Indictments</i> Indictment principal offence; Indictment counts principal offence; Indictment other offences; Indictment counts other offences</p> <p><i>Results</i> Result principal offence; Result counts principle offence; Result other offences; Result counts other offences</p> <p><i>Plea/Verdict</i> Verdict; Plea accepted to a lesser charge; Bail; Custodial history; Plea; Legal aid; Legal defence(s); Fitness to plead in issue</p> <p><i>Factors</i> Mental disability; History of alcoholism; History of drug abuse; Alcohol present at time of offence; Drugs present at time of offence;</p>
Sentences	<p>File no; Accused no; s 19 &amp; s 19A; Penalty type; Minimum/additional term; Fixed term for other offences; Original sentencing recommendations; Appeal grounds/results/recommendations; Appeal minimum term/additional term</p>
Victims	<p>File no; Victim no; Accused no; Birthdate; Sex; Postcode; Education; Occupation; Drugs; Relationship to offender</p>
Offences	<p>File no; Victim no; Accused no; Offence date/time; Location of offence; Postcode; Precipitating factors; Method of killing; Method of discovery of body</p>

## SENTENCED HOMICIDES

### Homicide Survey

#### Offender

Number of offenders (complete one question for each offender)	
Surname	First Name
Address	Postcode
CNI No	Sup Ct File No
CCA File No	
DOB	Country of birth/Nationality
Age at offence	Sex <input type="checkbox"/> Male <input type="checkbox"/> Female
Date of offence	Date of arrest
Ethnicity (inc Aborig)	Marital status
<i>Bail</i> Unconditional <input type="checkbox"/> Conditional, securities <input type="checkbox"/> Unknown conditions <input type="checkbox"/> Bail not met <input type="checkbox"/> Gaol <input type="checkbox"/> Shelter <input type="checkbox"/>	Custodial history from apprehension
<i>Plea</i> Guilty <input type="checkbox"/> Not guilty <input type="checkbox"/> No plea <input type="checkbox"/> Not applicable <input type="checkbox"/> Unknown <input type="checkbox"/>	Legal Aid <input type="checkbox"/> Yes <input type="checkbox"/> No
Legal Defences	
Fitness to plead at issue <input type="checkbox"/> Yes <input type="checkbox"/> No	
Previous mental disorder <input type="checkbox"/> Yes <input type="checkbox"/> No <i>If yes, state details</i>	
<i>Under influence of alcohol</i> Offender alone <input type="checkbox"/> By victim alone <input type="checkbox"/> By offender and victim <input type="checkbox"/> No alcohol consumed by either party <input type="checkbox"/>	Intoxication admitted or contested <i>If contested, state grounds</i>
History of alcohol abuse (offender) <input type="checkbox"/> Y <input type="checkbox"/> N	

**APPENDIX D**

<p><i>Education</i></p> <p>Primary <input type="checkbox"/></p> <p>Secondary <input type="checkbox"/></p> <p>Trade <input type="checkbox"/></p> <p>Tertiary <input type="checkbox"/></p> <p>Other <input type="checkbox"/></p> <p>_____</p> <p>_____</p> <p>_____</p>	<p>Under influence of drugs <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><i>If yes, state drug type</i></p> <p>Cannabis <input type="checkbox"/></p> <p>Heroin <input type="checkbox"/></p> <p>Hallucinogens (LSD) <input type="checkbox"/></p> <p>Amphetamines (stimulants) <input type="checkbox"/></p> <p>Sedatives <input type="checkbox"/></p> <p>Cocaine <input type="checkbox"/></p> <p>State other, quantity (grams) _____</p> <p>_____</p> <p>History of drug abuse <input type="checkbox"/> Y <input type="checkbox"/> N</p>
<p><i>Relationship to victim</i></p> <p>Son/daughter <input type="checkbox"/></p> <p>Parent <input type="checkbox"/></p> <p>(Former) spouse/cohabitant <input type="checkbox"/></p> <p>Other family <input type="checkbox"/></p> <p>(Former) lover <input type="checkbox"/></p> <p>Friend/acquaintance <input type="checkbox"/></p> <p>Other associate <input type="checkbox"/></p> <p>Police/prison officer <input type="checkbox"/></p> <p>Stranger <input type="checkbox"/></p> <p>Other <input type="checkbox"/></p>	<p><i>Employment status</i></p> <p>Self employed <input type="checkbox"/></p> <p>Employee <input type="checkbox"/></p> <p>Unemployed <input type="checkbox"/></p> <p>Home duties/student <input type="checkbox"/></p> <p>Other (eg) Pensioner <input type="checkbox"/></p> <p>Institutionalised <input type="checkbox"/></p> <p>Unknown <input type="checkbox"/></p>
<p>Priors <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><i>If yes, state priors (details and attach P16)</i></p> <p>_____</p>	
<p>Family situation (state antecedent and current details)</p> <p>_____</p>	
<p>s 404 confessions/admissions at trial</p>	
<p>Procedural result</p> <p>_____</p>	

## SENTENCED HOMICIDES

### Offence

Date of offence	Weekday and time
Original charges (section no)	
DPP Indictment	
Result (include plea bargaining)	
Describe location of crime	
Officer in charge	
<i>State, Suburb/Town</i> Central (Sydney) <input type="checkbox"/> West (Sydney) <input type="checkbox"/> East (Sydney) <input type="checkbox"/> South (Sydney) <input type="checkbox"/> North (Sydney) <input type="checkbox"/> Inner West (Sydney) <input type="checkbox"/> South West (Sydney) <input type="checkbox"/> Gosford/Wyong (Sydney) <input type="checkbox"/> Country <input type="checkbox"/>  If country, state region _____ _____	<i>Precipitating factors</i> About drugs <input type="checkbox"/> Child abuse <input type="checkbox"/> Revenge <input type="checkbox"/> Over money <input type="checkbox"/> Sexual assault <input type="checkbox"/> Mental disorder <input type="checkbox"/> Robbery <input type="checkbox"/> Other altercation <input type="checkbox"/> Drunken altercation <input type="checkbox"/> Family/domestic <input type="checkbox"/> Desertion <input type="checkbox"/> State other _____ _____
<i>Weapon used</i> Gun <input type="checkbox"/> Knife or piercing instrument <input type="checkbox"/> Manual means — (bashing/strangling) <input type="checkbox"/> Axe/hammer or heavy object <input type="checkbox"/> Other <input type="checkbox"/>	<i>Method of killing</i> Shot <input type="checkbox"/> Stabbed/slashed <input type="checkbox"/> Bashed with fists/feet <input type="checkbox"/> Battered with axe or heavy object <input type="checkbox"/> Burned/gassed/poisoned/drowned <input type="checkbox"/> Strangled/smothered <input type="checkbox"/> Multiple methods (2 or more of above) <input type="checkbox"/>
Method of discovery of body (accused, passerby, friend)	
Issues raised at trial (mens rea, identification)	

## APPENDIX D

### Sentence

Offender	Date of commencement of committal ___/___/___ Place —			
Original sentence	<table style="width: 100%; border: none;"> <tr> <td style="width: 30%; border: none;">Minimum Additional</td> <td style="width: 40%; border: none;"></td> <td style="width: 30%; border: none; text-align: right;">Total</td> </tr> </table>	Minimum Additional		Total
Minimum Additional		Total		
Sentence for other offence(s)				
Special circumstances applicable <input type="checkbox"/> Yes <input type="checkbox"/> No				
Sentencing remarks				
Sentencing recommendations				
Appeal result —				
Did offender appeal against conviction <input type="checkbox"/> Yes <input type="checkbox"/> No				
Grounds _____ _____				
Did offender seek leave to appeal on the grounds of severity of sentence? <input type="checkbox"/> Yes <input type="checkbox"/> No				
Did Crown appeal against inadequacy of sentence <input type="checkbox"/>				
Sentencing remarks by CCA				
Sentencing recommendations				



## APPENDIX E

### PROSECUTED HOMICIDES IN NEW SOUTH WALES

#### Coding Manual

The data for the study was collected using a survey containing the following categories —

- (a) Offender characteristics
- (b) Offence
- (c) Sentence
- (d) Victim

#### Offender Characteristics

- (a) Registry file number and accused number
  - (b)(i) Date of birth — dd/mm/yy
  - (ii) Suburb of residence (postcode)
  - (c)(i) Country of birth — A/State country
  - (ii) Ethnicity — A =Anglosaxon all other cases ethnicity is stated
  - (d) Sex — M/F
  - (e) Date of arrest — dd/mm/yy
  - (f) Marital status 1-5
    - (1) Single (never married)
    - (2) De facto
    - (3) Married
    - (4) Married but separated
    - (5) Divorced
  - (g) Original charges
- Principal offence and counts
- |                   |   |
|-------------------|---|
| Murder (79)       | C |
| Manslaughter (78) | C |
| Infanticide (215) | C |
- Other offences and counts
- |                              |   |
|------------------------------|---|
| (1) Sexual offences          | C |
| (2) Other violent crimes     | C |
| (3) Other non-violent crimes | C |

## SENTENCED HOMICIDES

### (h) DPP Indictment

#### Principal offence and counts

Murder (79)	C
Manslaughter (78)	C
Infanticide (215)	C

#### Other offences and counts 1-3

(1) Sexual offences	C
(2) Other violent crimes	C
(3) Other non-violent crimes	C

### (i) Result

#### Principal offence and counts

Murder (79)	C
Manslaughter (78)	C
Infanticide (215)	C

#### Other offences and counts 1-3

(1) Sexual offences	C
(2) Other violent crimes	C
(3) Other non-violent crimes	C

### (j) Bail 1-6 as per questionnaire

### (k) Custodial history from apprehension 1-3

- (1) Bail refused (always in gaol)
- (2) Mixed (varied)
- (3) Total bail (always out)

### (l) Plea 1-5 as per questionnaire

### (m) Legal Aid — Y/N

### (n) Legal defences 1-10

- (1) No trial (sentence only)
- (2) No defence
- (3) Provocation
- (4) Self defence
- (5) Diminished responsibility
- (6) Provocation and self defence
- (7) Self defence and diminished responsibility
- (8) Provocation and diminished responsibility
- (9) Provocation, self defence and diminished responsibility
- (10) Intoxication

### (o) Fitness to Plead — Y/N

## APPENDIX E

- (p) Procedural result
  - (1) Sentence only
  - (2) Trial by jury
  - (3) Trial by judge
  
- (q) Plea accepted to lesser charges — Y/N
  
- (r) Previous mental disorder — Y/N
  
- (s)(i) Under influence of alcohol
  - (1) Offender alone
  - (2) By victim alone
  - (3) By offender and victim
  - (4) No alcohol consumed by either party
- (ii) History of alcohol abuse (offender) — Y/N
- (iii) Intoxication
  - (1) Admitted
  - (2) Contested
  - (3) Not relevant
  
- (t) Education
  - (1) Primary
  - (2) Secondary
  - (3) Trade
  - (4) Tertiary
  - (5) Other
  
- (u)(i) Under influence of drugs 1-8
  - (1) Cannabis
  - (2) Heroin
  - (3) Hallucinogens (LSD)
  - (4) Amphetamines (stimulants)
  - (5) Sedatives
  - (6) Cocaine
  - (7) Other
  - (8) None
- (ii) History of drug abuse — Y/N

## SENTENCED HOMICIDES

(v) Offender's relationship to victim 1-11

- (1) Son/daughter
- (2) Parent
- (3) Spouse/cohabitant *or*
- (4) Former spouse/cohabitant
- (5) Other family
- (6) Lover or former lover
- (7) Friend/acquaintance
- (8) Other associate
- (9) Police/prison officer
- (10) Stranger
- (11) Other

*Note* spouse/cohabitant and former spouse/cohabitant will be separated as discrete groups the former as 3 and latter as 4.

Relationship is classified as "multiple" in instances where the offender has killed more than one victim. Note also that "other associate" includes babysitters and boyfriends of mothers.

(w) Employment Status

- (1) Self employed
- (2) Employee
- (3) Unemployed
- (4) Home duties/student
- (5) Other (eg) Pensioner
- (6) Institutionalised
- (7) Unknown

(x) Priors as per questionnaire

- N (no)  
P (violent priors against the person)  
O (other non-violent priors)

Characterised using the *Crimes Act* definition of "personal violence offence" as a Guideline.

(y) s 404 *Crimes Act* confessions/admissions

- (1) Y
- (2) N
- (3) No trial

## APPENDIX E

### Offence

- (a) Registry file number and offence number to correspond to victim number
- (b) Date of offence — dd/mm/yy
- (c) Time — hh:mm
- (d) Location of crime 1-7
  - (1) Victim's home
  - (2) Other home
  - (3) Victim's place of work or study
  - (4) Other building
  - (5) Private vehicle
  - (6) Public place (public vehicle, street or mall, park or open bushland)
  - (7) Other
- (e) Suburb/town, postcode
- (f) Precipitating factors
  - (1) About drugs
  - (2) Child abuse
  - (3) Revenge
  - (4) Over money
  - (5) Sexual assault
  - (6) Mental disorder
  - (7) Robbery
  - (8) Other altercation
  - (9) Drunken altercation
  - (10) Family/domestic
  - (11) Desertion
  - (12) Other
  - (13) Gay bashing
  - (14) Derelict bashing
- (g) Method of killing (weighted as follows)
  - Shot (1)
  - Stabbed/slashed (2)
  - Bashed with fists/feet (4)
  - Battered with axe or heavy object (8)
  - Burned (16)
  - Gassed (32)
  - Poisoned (64)
  - Drowned (128)
  - Strangled/smothered (256)
  - Vehicular incident (512)

## SENTENCED HOMICIDES

- (h) Method of discovery of body 1-7
  - (1) Accused
  - (2) Passerby
  - (3) Police
  - (4) Friend
  - (5) Family
  - (6) Neighbour
  - (7) Other

### Sentence

- (a) Registry file number and offender number which will correspond to sentence information
- (b) (1) s 19 (2) s 19A (3) Not applicable
- (c) Original sentence
  - Minimum (mm) (months)
  - Additional (mm) (months)
  - s 556A Additional (mm)
  - s 558 Additional (mm)
  - L (life)
  - NL (natural life)
  - Minimum Additional Periodic Detention
  - Griffiths Bond Additional
- (d) Sentence for other offences
  - Aggregate other offences (not homicide) mm (months)
- (e) Sentencing recommendations 1-9
  - (1) Child detention
  - (2) Strict protection
  - (3) Counselling
  - (4) Psychiatric assessment
  - (5) Never to be released
  - (6) Time to be served in low security prison
  - (7) Other
  - (8) None
  - (9) Multiple
- (f) Appeal
  - (1) C (Conviction)
  - (2) S (Severity)
  - (3) C & S (Conviction & Severity)
  - (4) L (Crown Appeal re leniency)

## APPENDIX E

- (g) Appeal result
  - (1) Upheld
  - (2) Dismissed
  - (3) Abandoned
  - (4) No appeal
  - (5) Appeal dismissed by CCA but High Court refused to grant special leave
  - (6) High Court dismissed appeal
  - (7) High Court allowed appeal
  
- (h) New sentence — Minimum (mm), Additional (mm)

### Victim

- (a) Registry file number: victim number will correspond to offence number
  
- (b) Age — straight integer
  
- (c) Sex — M/F
  
- (d) Place of residence, postcode
  
- (d) Occupation
  - Known/not known
  
- (f) Education
  - (1) Primary
  - (2) Secondary
  - (3) Trade
  - (4) Tertiary
  - (5) Other
  
- (g) Under influence of drugs 1-8
  - (1) Cannabis
  - (2) Heroin
  - (3) Hallucinogens (LSD)
  - (4) Amphetamines (stimulants)
  - (5) Sedatives
  - (6) Cocaine
  - (7) Other
  - (8) None
  
- (h) Victim's relationship to offender will be coded as per offender question

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