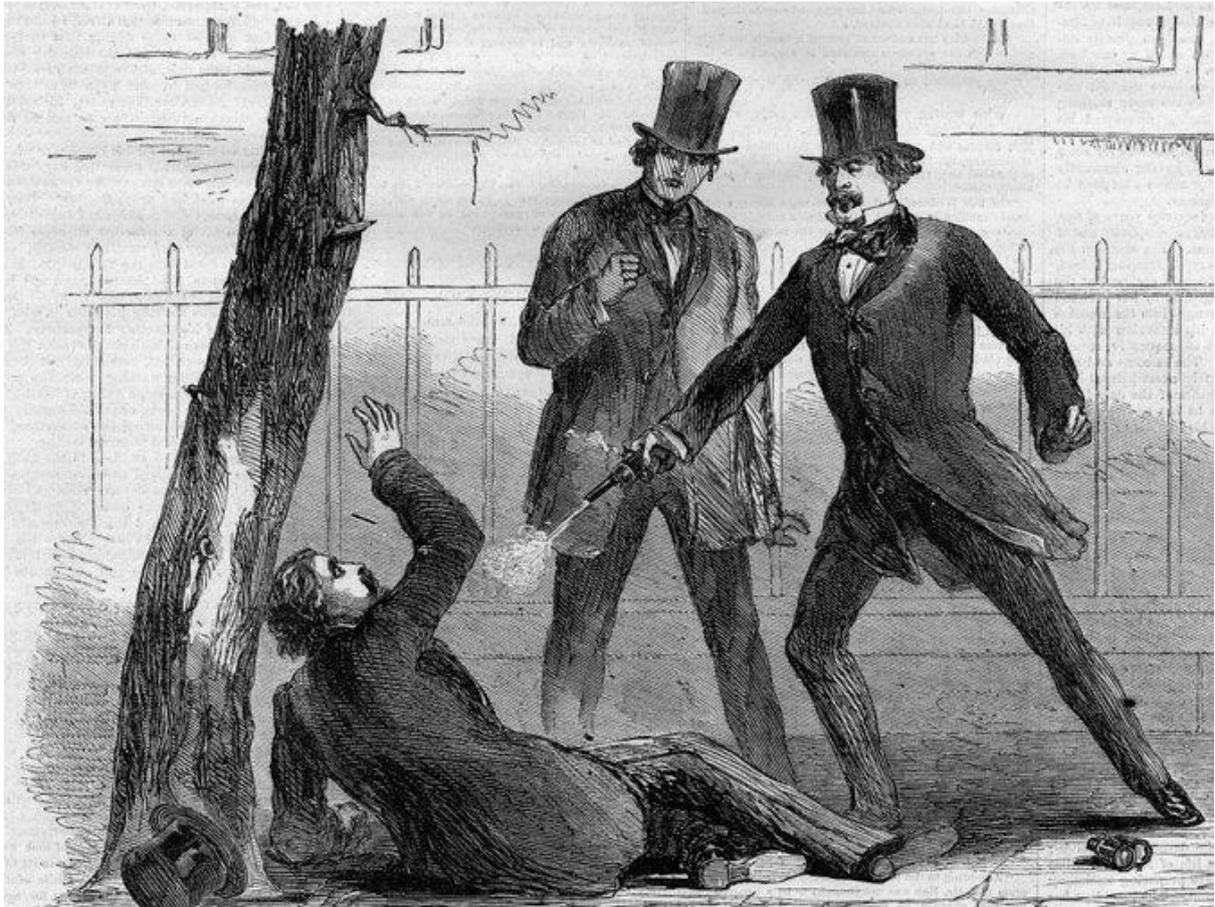


Background Research Paper

April 2018



South Australian Law Reform Institute

The Provoking Operation of Provocation: Stage 2

Homicide Sentencing: Background Research Paper

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the Adelaide University Law School.

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Acknowledgement and Disclaimer

This Paper deals with the law as of 31 March 2018 and may not necessarily represent the current law. This Paper should not be regarded as a complete and/or up to date statement of the relevant law. This study is based on the publicly available sentencing remarks in South Australia for murder and manslaughter for the period 2007 to 2017 kindly made available by the South Australian Director of Public Prosecutions. There were about 119 such cases of murder (83) or manslaughter (36) during this period. This study cannot be regarded as complete as it omitted cases where the sentencing remarks were suppressed and in several instances it is unclear on what basis the offender was convicted of manslaughter. Any queries in relation to this Paper should be directed to salri@adelaide.edu.au.



Government of South Australia
Attorney-General's Department



THE LAW SOCIETY
OF SOUTH AUSTRALIA

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Sentencing in Australia

The following discussion will first outline the legislative framework in each Australian jurisdiction for the judicial determination of murder sentences, and then examine the variety of parole regimes.¹ This is because the role of administrative boards and members of the executive government dealing with the release of prisoners on parole remains a vital, if often overlooked, feature of the sentencing regimes in the Australian States and Territories as they practically determine the *actual* custodial durations of most life sentences.² This discussion will also consider the availability of other partial defences to murder, such as diminished responsibility or excessive self-defence.³ A number of short case studies are included, setting out the length of sentence handed down (or the sentence agreed to via a plea) and the circumstances of the offence and offender. This is with a view to determine whether the present South Australian system is able to fairly and effectively respond to killings where an offender's culpability is reduced by the conduct of the deceased and/or where a mental illness, intellectual disability or cognitive impairment was a potential mitigating factor in the offending.⁴

As identified by the Model Criminal Code Officers Committee in the *Model Criminal Code Discussion Paper*, provocation is a factor that may impact upon the culpability

¹ See Don Weatherburn, Katrina Grech and Jessie Holmes, 'Why Does NSW Have a Higher Imprisonment Rate than Victoria?' (2010) 145 *Crime and Justice Bulletin* 1, 6.

² See Don Weatherburn, Katrina Grech and Jessie Holmes, 'Why Does NSW Have a Higher Imprisonment Rate than Victoria?' (2010) 145 *Crime and Justice Bulletin* 1, 6.

³ Andrew Hemming, 'Provocation: A Totally Flawed Defence That Has No Place In Australian Criminal Law Irrespective Of Sentencing Regime' (2010) 14 *University of Western Sydney Law Review* 1, 3-4.

⁴ SALRI uses and considers the phrases 'mental illness, cognitive impairment or intellectual disability' together in this Paper but accepts that the terminology in this area is different and there is no universal term, or indeed definition. Different terms may even overlap. See, for example, *Evidence Act 1929* (SA) s 4. 'In some cases, courts have conflated mental illness and intellectual disability and their role in the exercise of the sentencing discretion ... In our view, such matters are different and operate on the sentencing discretion and should be considered distinctly as particular categories although in the course of how they affect the exercise of sentencing discretion ... will be similar': Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 2014) 331 n 182.

of an offender, and it may also be appropriate (and arguably preferable) to consider such a factor in sentencing:⁵

In place of the partial defence of provocation, with all its doctrinal defects, the sentencing process offers a flexible means of accommodating differences in culpability between offenders. Some hot blooded killers are morally as culpable as the worst of murderers. Some are far less culpable. The differences can be reflected as they are at present, in the severity of the punishment.

Consequently, this research will seek to assess whether the current sentencing regime, in conjunction with the administrative processes for release on parole, is sufficiently flexible to properly reflect an offender's culpability and any genuine mitigating factors in sentence, and if not, would it be under any revised model.

Why Consideration of Mandatory Sentencing is Necessary

It is of the utmost importance to ensure that an offenders' conviction correctly reflects their legal culpability and moral blameworthiness.⁶ The present South Australian criminal law provides provocation as a partial defence to murder that — given all the requisite elements are made out — reduces a murder conviction to that of the lesser offence of manslaughter. An offender convicted of manslaughter on the basis of provocation will fall in the ambit of a more discretionary, rather than mandatory, sentencing regime.

In South Australia, sentencing judges have no discretion in determining the head sentence for murder, and very limited discretion in fixing a non-parole period that is below the 20-year statutory mandatory minimum. Accordingly, sentencing courts have very limited flexibility to fix a non-parole period to properly reflect the relative objective seriousness of the offence and subjective culpability of an offender. The conflict surrounding the mandatory sentence has been, and is centred on its apparent unfairness in some cases due to the multitude of circumstances in which murder

⁵ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Discussion Paper* (1998) 105.

⁶ Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence* (Palgrave Macmillan, 1st ed, 2014) 85; *Zecevic v DPP* (Vic) (1987) 162 CLR 645, 662; *R v Hill* [1986] 1 SCR 313, 323; *R v Campbell* (1977) 38 CCC 2d 6, 15.

occurs.⁷ However, it is worth noting that the judiciary is, for virtually all other offences, deemed competent to use its discretion to arrive at suitable and proportionate sentence.⁸

Many commentators have argued that the partial defence of provocation should have no place in Australian criminal law irrespective of the sentencing regime.⁹ For example, as advanced by Dr Kate Fitz-Gibbon, murder is a ‘fitting’ conviction,¹⁰ as the ‘loss of control’ under which an accused kills is not a complete and literal loss of control, and in the absence of any mental or cognitive impairment, the criminal law should reflect modern societal expectations that people must control their urge to lethally retaliate.¹¹ It is maintained that there exists no convincing reason, whether moral or legal, to afford those who kill in the heat of passion an excuse.¹² It is argued that killing someone in response to provocation, no matter how severe, is never the response of an ordinary person and no distinction should be drawn between provoked and unprovoked killings.¹³ In other words, while extreme anger may partially *explain* a person’s fatal act, this does not mean that it should be partially *excused*.¹⁴

⁷ Tenney Cotton, ‘The Mandatory Life Sentence for Murder: Is It Time for Discretion?’ (2008) 72 *Journal of Criminal Law* 288, 297.

⁸ Tenney Cotton, ‘The Mandatory Life Sentence for Murder: Is It Time for Discretion?’ (2008) 72 *Journal of Criminal Law* 288, 297.

⁹ See, for example, Andrew Hemming, ‘Provocation: A Totally Flawed Defence That Has No Place in Australian Criminal Law Irrespective Of Sentencing Regime’ (2010) 14 *University of Western Sydney Law Review* 1, 26. Every major review of the partial defence of provocation, with the exception of the New South Wales Law Reform Commission Report of 1997, has concluded that provocation is flawed and unacceptable in a modern society: New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* (Report 83, 1997) 2.2.

¹⁰ Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence* (Palgrave Macmillan, 1st ed, 2014) 163.

¹¹ Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) 56. See also Director of Public Prosecutions Tasmania, *Annual Report 2000-2001* (2001) 6.

¹² Evidence to the Select Committee on the Partial Defence of Provocation, Parliament of New South Wales, 29 August 2012, 46 (Lloyd Babb); Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*.

¹³ New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* Report No 83 (1997) 2.2; Kate Fitz-Gibbon, Submission No 18 to New South Wales Legislative Council Select Committee on the Partial Defence of Provocation, *The*

Notwithstanding this, law reform agencies across the country (and indeed overseas) have considered the primary obstacle to the abolition of the partial defence of provocation is the existence of a mandatory life sentence for murder.¹⁵ Mandatory sentencing has been recognised as a ‘disproportionate and blunt instrument’.¹⁶ There may well be a need to increase flexibility when it comes to imposing sentences for murder where exceptional or extraordinary circumstances apply, if provocation were to be abolished as a partial defence to murder in South Australia.¹⁷

If the partial defence were abolished, this is accompanied by the risk that offenders facing a murder charge who might have previously sought to rely on provocation could be subject to a sentencing regime that is insufficiently flexible to take into account the mitigating circumstances of the offence.¹⁸ In the context of current social norms, this concern pertains particularly to offenders subject to prolonged family violence who — in exceptional cases — kill and who are unable to make out other defences like self-defence or excessive self-defence.¹⁹ Women who kill in this situation (noting the wide variety of circumstances this could have occurred in) may

Partial Defence Of Provocation, 23 April 2013, 4. See also Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003 (Judy Jackson).

¹⁴ Graeme Coss, ‘Provocative Reforms: A Comparative Critique’ (2006) 30 *Criminal Law Journal* 138, 55.

¹⁵ Law Reform Commission (Western Australia), *Review of the Law of Homicide: Final Report* (2007) 222, Recommendation 29; English Law Commission, *Partial Defences to Murder – Final Report* (2004) 1.6. See also Andrew Hemming, ‘Provocation: A Totally Flawed Defence That Has No Place In Australian Criminal Law Irrespective Of Sentencing Regime’ (2010) 14 *University of Western Sydney Law Review* 1, 20, 26, 43; Graeme Coss, ‘Provocative Reform: A Comparative Critique’ (2006) 30 *Criminal Law Journal* 138, 138, 144.

¹⁶ Law Commission, *Partial Defences to Murder*, Report No. 290 (2004) [2.5].

¹⁷ New Zealand Law Commission, *Battered Defendants: Victims Of Domestic Violence Who Offend*, Preliminary Paper No 41 (2000) [142]; Isabel Grant, ‘Rethinking the Sentencing Regime for Murder’ (2001) 39 *Osgoode Hall Law Journal* 655, 656.

¹⁸ Felicity Stewart and Arie Freiberg, ‘Provocation in Sentencing: A Culpability-Based Framework’ (2008) 19 *Current Issues in Criminal Justice* 283, 287.

¹⁹ Kate Fitz-Gibbon, ‘NSW Parliamentary Inquiry Recommends Partial Reform To Provocation Law’, *The Conversation* (online), 24 April 2013 <<https://theconversation.com/nsw-parliamentary-inquiry-recommends-partial-reform-to-provocation-law-11958>>.

not be legitimately acting in self-defence,²⁰ and therefore the appropriate offence is murder not manslaughter. In this situation the circumstances of prolonged family violence should be taken into account in sentencing.²¹ It is worth flagging that there is judicial recognition of the potential overlap between provocation and self-defence in the context of domestic violence, with Mason J observing in *Van Den Hoek v The Queen* (1986) 161 CLR 158, [14]:

No doubt it is true to say that primarily anger is a feature of provocation and fear a feature of self-defence. But it is too much to say that fear caused by an act of provocation cannot give rise to a defence of provocation.²²

This concern secondly relates to those offenders who have a mental illness, cognitive impairment or intellectual disability who fall short of making out the mental impairment defence (the insanity defence at common law),²³ and finally those offenders who kill under exceptional and extreme provocative circumstances.

It is critical to clarify here that ‘exceptional and extreme’ provocative circumstances should exclude instances where jealous, possessive or abusive partners kill their spouse upon revelations of sexual infidelity, separation or ‘disobedience’.²⁴ Provocation should only be considered as a mitigating factor in genuine cases where provocation serves a legitimate role to reduce an offender’s culpability. Such a case is often said to be presented as the graphic English case of *DPP v Camplin* (1978) AC 705. In *Camplin*, the accused was a fifteen year old boy who killed a man by hitting

²⁰ Otherwise such an accused could likely have access to the complete defence of self-defence or excessive self-defence in South Australia (and thus have no need to rely on provocation). See, for example, *R v Lavalee* [1990] 1 SCR 852.

²¹ Select Committee on the Partial Defence of Provocation, New South Wales Legislative Council, *The Partial Defence Of Provocation* (2013) [5.51].

²² Cited with approval in *Va v The Queen* [2011] VSCA 426, [34].

²³ It is significant that mental illness, cognitive impairment or intellectual disability are accepted potential (though not automatic) mitigating factors for all other offences. See *R v Verdins* (2007) 169 A Crim R 581; *R v McIntosh* (2008) 191 A Crim R 37; *Muldock v The Queen* (2011) 244 CLR 85. It appears harsh and anomalous that they are incapable of amounting to ‘special reasons’ under s 32 A of the *Criminal Law (Sentencing) Act 1988* (SA) (or s 48 of the *Sentencing Act 2017* (SA)) once it comes into effect) to allow a court to depart from the usual mandatory minimum non-parole period of 20 years for murder.

²⁴ See, for example, *R v Singh* [2012] NSWSC 637.

him over the head with a pan. Provocation was raised, as it was alleged that the killing occurred under a loss of control, as the deceased had raped him and then laughed at him, at which point the offender had lost his control and struck the deceased. The House of Lords ultimately substituted the original conviction of murder with a verdict of manslaughter, on the basis of provocation. Another ‘extreme’ case could include a situation like that in *R v Butler* [2012] NSWSC 1227.²⁵ Here the accused was a female prostitute who had been sexually abused as a child. In a later sexual encounter with a male client she had never met before, the defendant was spoken to about child sex and was shown a video depicting child sexual abuse. It was accepted in this case that the defendant had lost self-control as a result of her past experiences and she ultimately killed the victim, once he expressed his fetishes. As suggested by Hemming there should be ‘very tight boundaries placed around an “exceptional circumstance” of extreme provocation’, such that to qualify as an extreme provocation it should be defined to exclude an insult or gesture, non-violent sexual advances and excessive or disproportionate responses to the provocation of the deceased.²⁶

A solution to the situations in such graphic cases as *Camplin* and *Butler* may be the consideration of such genuine mitigating features (whether this is provocative conduct from the deceased and/or an offender’s mental illness, cognitive impairment or intellectual disability) at the sentencing stage as ‘[u]nlike the substantive criminal law, sentencing is a flexible process’ that allows for issues affecting culpability be considered alongside other relevant sentencing factors.²⁷ An example of this ‘flexibility’ is if mental illness, cognitive impairment or intellectual disability (insufficient to establish the mental impairment defence) leads to the conclusion that the offender’s moral culpability should be reduced, this factor can be balanced against other considerations, such as the need to take into account the protection of the community. For example, mitigation arising from provocative conduct in the context

²⁵ [2012] NSWSC 1227.

²⁶ Andrew Hemming, ‘Provocation: A Totally Flawed Defence That Has No Place In Australian Criminal Law Irrespective Of Sentencing Regime’ (2010) 14 *University of Western Sydney Law Review* 1, 26.

²⁷ Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) [1.27]; Law Reform Commission (Western Australia), *Review of the Law of Homicide: Final Report* (2007) 309.

of a domestic relationship can be balanced against the need to deter domestic violence. In contrast, partial defences are rather inflexible, with the New Zealand Law Commission noting in its 2001 Report that, given the wide range of issues affecting culpability for murder, partial defences are incapable of catering for every factor that may conceivably call for leniency,²⁸ and ‘... inevitably create a fairly arbitrary patchwork which then has to be stretched out of shape to catch “deserving” cases’.²⁹

There are two broad ways of introducing flexibility in sentencing for murder: full sentencing discretion with a maximum penalty of life imprisonment;³⁰ or limited discretion with a presumptive sentence of life imprisonment (like that in Western Australia and New Zealand which will be discussed further below). If this were introduced, the labelling of ‘murder’ may remain contentious, as these defendants would still be labelled ‘murderers’, but they would no longer be liable to the most severe penalty as under the present law.³¹

Sentencing Regimes in Australia

Australia has nine sentencing jurisdictions — eight States and Territories plus a federal system. However, as most sentencing occurs at the State level,³² this will be the focus of this research.

In terms of harm and culpability, murder offences are generally considered to be the

²⁸ The New Zealand Law Commission observed that partial defences are ‘incapable of reflecting the full range of mitigating circumstances’: New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No 73 (2001) [148].

²⁹ New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No 73 (2001) [145]. See also Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) [1.26].

³⁰ Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No 304 (2006) [1.1], [2.150]. The English Law Commission was effectively precluded from considering such an option because its terms of reference required it to ‘take into account the continuing existence of the mandatory sentence for murder’.

³¹ Tenney Cotton, ‘The Mandatory Life Sentence for Murder: Is It Time for Discretion?’ (2008) 72 *Journal of Criminal Law* 288, 296.

³² Arie Freiberg, ‘Australia: Exercising Discretion in Sentencing Policy and Practice’ (2010) 22 *Federal Sentencing Reporter* 204, 204.

most grave and heinous of all crimes.³³ Therefore, in accordance with the perceived community expectations as to the appropriate level of punishment, in all Australian jurisdictions ‘life imprisonment’ is either the mandatory or maximum head sentence to be imposed following a conviction for murder. Specifically, in Queensland, South Australia, the Northern Territory and Western Australia, ‘life imprisonment’ is the *mandatory* sentence for murder. In New South Wales, Victoria, Tasmania and the Australian Capital Territory, discretionary sentencing for murder exists as ‘life imprisonment’ is the *maximum* available sentence for murder.

The ‘mandatory’ nature of the sentence of life imprisonment in Queensland, South Australia and the Northern Territory means that a head sentence of life imprisonment *must* be imposed. These four jurisdictions also impose a mandatory non-parole period for such offenders, ranging from 10 years in Western Australia,³⁴ followed by 15 years in Queensland and up to 20 years in South Australia³⁵ and the Northern Territory.³⁶ The main difference between South Australia and the Northern Territory is that the imposition of a 20 year non-parole period in South Australia is for an offence on the ‘*lower end*’ of objective seriousness, whereas in the Northern Territory this mandatory sentence applies to an offence in the ‘*middle of the range*’ of objective seriousness (see Appendix 1, 2 & 3 below).

In the ACT, Tasmania, New South Wales, and Victoria, life imprisonment is the ‘maximum’ sentence following a conviction for murder. In these jurisdictions the non-parole period set by a court is discretionary, however in Victoria the average non-parole period for murder is 10 years,³⁷ and similarly in New South Wales 10 years

³³ John Anderson ‘The Label of Life Imprisonment in Australia: A Principled Or Populist Approach To An Ultimate Sentence’ (2012) 35(3) *University of New South Wales Law Journal* 747, 754.

³⁴ *Criminal Code* (WA) s 279(4); *Sentencing Act* 1995 (WA) s 90. See also Appendix 4 and 5 below.

³⁵ *Criminal Law Consolidation Act 1935* (SA) s 11; *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(ab).

³⁶ *Criminal Code* 1983 (NT) s 157(1); *Sentencing Act 1995* (NT) s 53A(6). See Appendix 3 below.

³⁷ *Crimes Act* 1958 (Vic) s 3: See Appendix 10 below. Between 1997-1998 and 2001-2002, a majority of people convicted of murder in Victoria received a total effective sentence for murder in the range of 15-20 years with a non-parole period of 10 years or more. Then,

non-parole is a standard non-parole guideline.³⁸ The common sentencing feature for States with full sentencing discretion like Victoria and Tasmania (which have also all abolished the partial defence of provocation)³⁹ is the provision for a life sentence is only imposed in very grave cases.⁴⁰ However long finite sentences are still routinely given.⁴¹

It is worth noting that, even in jurisdictions with indefinite detention regimes, it can be argued there is always some prospect of release for every life sentence prisoner, by executive exercise of the prerogative of mercy.⁴² However, the chances of such an exercise are extremely remote for most prisoners,⁴³ and consequently this Paper will not consider the effect of the prerogative of mercy on sentencing for murder.⁴⁴

Despite all jurisdictions using the term ‘life imprisonment’ to describe a sentence for

between 2003-2004 and 2007-2008, the average sentence for murder ranged between 18 years and 20 years 5 months. Of the 117 people convicted of murder, two people received a sentence of less than 14 years imprisonment: Sentencing Advisory Council, *Sentencing Trends in the Higher Courts of Victoria, Murder 2003-04 to 2007-08*, cited in Victorian Department of Justice, *Review of the Offence of Defensive Homicide*, Discussion Paper (August 2010) 47, [197].

³⁸ Andrew Hemming, ‘Provocation: A Totally Flawed Defence That Has No Place In Australian Criminal Law Irrespective Of Sentencing Regime’ (2010) 14 *University of Western Sydney Law Review* 1, 25. The High Court has recently held that standard non-parole periods are not presumptive and courts must ‘take into account the full range of factors in determining the appropriate sentence for the offence’: *Muldrock v The Queen* (2011) 244 CLR 120, 132.

³⁹ *Criminal Code Amendment (Abolition of Defence of Provocation) Act* 2003 (Tas); *Crimes (Homicide) Act* 2005 (Vic).

⁴⁰ See Andrew Hemming, ‘Provocation: A Totally Flawed Defence That Has No Place In Australian Criminal Law Irrespective Of Sentencing Regime’ (2010) 14 *University of Western Sydney Law Review* 1.

⁴¹ Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report* Report No 97 (2007) 317.

⁴² *Crimes (Sentencing Procedure) Act* (NSW) s 102; *Sentencing Act 1991* (Vic) ss 106–107; *Corrective Services Act 2006* (Qld) s 346; *Sentencing Act 1995* (WA) ss 96(3), 137, 142; *Corrections Act 1997* (Tas) s 89; *Sentencing Act 1997* (Tas) s 97; *Sentencing Act 1995* (NT) s 115(1); *Crimes (Sentence Administration) Act 2005* (ACT) s 314A.

⁴³ *R v Harris* (2000) 50 NSWLR 409, 429 [125] (Woods CJ).

⁴⁴ John Anderson ‘The Label of Life Imprisonment in Australia: A Principled Or Populist Approach To An Ultimate Sentence’ (2012) 35(3) *University of New South Wales Law Journal* 747, 766.

murder,⁴⁵ the length of time a ‘life sentence’ constitutes varies across jurisdiction and does not necessarily describe a fixed ‘whole of life’ sentence, despite what the name suggests.⁴⁶ In practice, in all jurisdictions (except New South Wales) the sentencing judge is able to set a non-parole period, and after this period the prisoner is eligible to apply for parole. It is clear that the overwhelming majority of life sentence prisoners still have a *prospect* of release from imprisonment through this administrative mechanism of parole.⁴⁷ The relevant Parole Board of the State or Territory determines the *actual* custodial durations of most life sentences once the offender has served the non-parole period, rather than being determined by the court.⁴⁸ Thus, a sentence for life imprisonment across Australia can encompass release after a determinate non-parole period of incarceration of only 10 years, or up to the term of an offender's entire remaining natural life.⁴⁹

In Australia, each State and Territory has its own board responsible for the release and return to prison of parolees. Generally, parole is where an offender is able to complete their sentence in the community after serving a minimum term or non-parole period of their sentence in incarceration.⁵⁰ In the past, imprisonment for 12 to 15 years has been held to be 'an adequate level of punishment ... for a person sentenced to life

⁴⁵ *Crimes (Sentencing Procedure) Act* (NSW) s 102; *Sentencing Act 1991* (Vic) ss 106–107; *Corrective Services Act 2006* (Qld) s 346; *Sentencing Act 1995* (WA) ss 96(3), 137, 142; *Corrections Act 1997* (Tas) s 89; *Sentencing Act 1997* (Tas) s 97; *Sentencing Act 1995* (NT) s 115(1); *Crimes (Sentence Administration) Act 2005* (ACT) s 314A.

⁴⁶ Notably, scholars like Anderson have attributed Parliament’s use of this term as a response to perceived public concerns about 'law and order' and a popular demand for tougher sentences generally, irrespective of the realities of criminality and incidents of offending: John Anderson ‘The Label of Life Imprisonment in Australia: A Principled Or Populist Approach To An Ultimate Sentence’ (2012) 35(3) *University of New South Wales Law Journal* 747, 748.

⁴⁷ Arie Freiberg and David Biles, *The Meaning of 'Life': A Study of Life Sentences in Australia* (Australian Institute of Criminology, 1975) 54-57.

⁴⁸ *Ibid*; John Anderson ‘The Label of Life Imprisonment in Australia: A Principled Or Populist Approach To An Ultimate Sentence’ (2012) 35(3) *University of New South Wales Law Journal* 747, 747. The Australian Bureau of Statistics and the Australian Institute of Criminology do not keep records relating to the number of prisoners currently serving life without the possibility of parole.

⁴⁹ John Anderson ‘The Label of Life Imprisonment in Australia: A Principled Or Populist Approach To An Ultimate Sentence’ (2012) 35(3) *University of New South Wales Law Journal* 747.

⁵⁰ Rachel Simpson, *Parole: An Overview* (NSW Parliamentary Library Research Service, 1999)

imprisonment' after which offenders have generally been released on license or on parole.⁵¹ Parole is granted as a privilege, rather than as a right, usually accompanied by strict conditions for parolees, such as residence, attendance at counselling sessions, monitoring by electronic devices and varying levels of supervision.⁵² Only prisoners who accept the conditions of parole fixed by the Parole Board will be released.⁵³ A parolee is still under sentence, and if he or she does not abide by the parole conditions, the Board can cancel parole and have the parolee returned to prison.⁵⁴

Despite the criticism and controversy following such highly publicised incidents involving offenders on parole, such as the brutal murder of Jill Meagher by Adrian Bayley in Victoria in 2012,⁵⁵ there has been limited literature available on Parole Board decision-making. This may be due, in part, to the scarcity of information resulting from the widespread reluctance of Australian Parole Boards to publicly release the reasons for their decisions.⁵⁶ Accordingly, this research is limited by the fact that detailed information about the range of minimum terms imposed and the actual time served in custody for offenders convicted of murder was difficult to access.⁵⁷

Further, the existing body of literature examining Parole Board decision-making has returned conflicting findings with respect to the factors that significantly impact

⁵¹ Ivan Potas, 'Life Imprisonment in Australia' (1989) 19 *Trends and Issues in Crime and Criminal Justice* 1, 1-5; Kate Warner, *Sentencing in Tasmania* (Federation Press, 2nd ed, 2002) 297; Jason Keane and Patrizia Poletti, *Sentenced Homicides in New South Wales 1994-2001* (Judicial Commission of New South Wales, 2004) 22-23.

⁵² Natalie Gately et al 'The Prisoners Review Board of Western Australia: What Do the Public Know about Parole' (2017) 28 *Current Issues Criminal Justice* 293, 294.

⁵³ *Correctional Services Act 1982* (SA) s 68(4).

⁵⁴ Sentencing Advisory Council, *Parole* (30 August 2017) Sentencing Advisory Council <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/parole>>.

⁵⁵ See, for example, Aisha Dow, 'Murder of Jill Meagher was "preventable", Victorian Coroner finds', *The Age* (online), 27 May 2016 <<http://www.theage.com.au/victoria/murder-of-jill-meagher-was-preventable-victorian-coroner-finds-20160527-gp5y0w.html>>. See further Ian Callinan, *Review of the Parole System in Victoria* (July 2013).

⁵⁶ Shannon Buglar, 'The Focal Concerns of Parole Board Decision-Making: A Thematic Analysis' (2016) 27 *Current Issues in Criminal Justice* 285, 286.

⁵⁷ Except for the Prisoners Review Board of Western Australia who publish on its website 'all decisions to release offenders on parole, as well as all decisions to cancel parole'.

parole decisions and the weight that is attributed to those factors by Parole Boards. In the only Australian study conducted to date, parole release decisions made by the Adult Parole Board in Victoria for 146 violent male offenders were examined.⁵⁸ It is useful to note that the study found the four variables which significantly predicted the parole release decision were: the number of aggressive disciplinary incidents recorded during the offender's period of imprisonment; the offender's score on the Violence Risk Scale; the Community Corrections Officer's recommendation as to the offender's suitability for parole and whether the offender had secured post-release accommodation.⁵⁹ Further research would be needed to confirm whether these findings are also applicable to Parole Board decision-making in other Australian jurisdictions.⁶⁰

Generally, the relevant legislation or internal guidelines sets out a series of factors or items that the parole authority must consider when making their decisions, and in five of the jurisdictions examined, the parole board or authority must apply a specified test or paramount principle.⁶¹ Specifically, in New South Wales and the Australian Capital Territory, the Boards must be satisfied that release on parole is in 'the public interest';⁶² and in South Australia and Western Australia the Boards must treat 'the safety of the community' as the 'paramount consideration' or 'highest priority'.⁶³ Finally in Queensland, the Board must regard community safety as the paramount consideration and must consider whether there is 'an unacceptable risk to the community if the offender is released to parole and whether the risk to the community

⁵⁸ Jessica Mooney and Michael Daffern, 'Elucidating the Factors that Influence Parole Decision-Making and Violent Offenders' Performance on Parole' (2014) 21(3) *Psychiatry, Psychology and Law* 385.

⁵⁹ Jessica Mooney and Michael Daffern, 'Elucidating the Factors that Influence Parole Decision-Making and Violent Offenders' Performance on Parole' (2014) 21(3) *Psychiatry, Psychology and Law* 385, 440.

⁶⁰ Shannon Buglar, 'The Focal Concerns of Parole Board Decision-Making: A Thematic Analysis' (2016) 27 *Current Issues in Criminal Justice* 285, 286.

⁶¹ See Table 3 for a comparison of the schemes in 11 relevant adult parole systems.

⁶² *Crimes (Administration of Sentences) Act 1999* (NSW) s 135; *Crimes (Sentence Administration) Act 2005* (ACT) s 120.

⁶³ *Correctional Services Act 1982* (SA) s 67(3a); *Sentence Administration Act 2003* (WA) s 5B.

would be greater if the offender does not spend a period of time on parole'.⁶⁴ For a comparative overview of all factors considered by the relevant Parole authority in each jurisdiction, see 'Table 3: Comparison of Australian Adult Parole Regimes' (below).

The lack of easily accessible and accurate information about sentencing practices and parole board decision-making is somewhat detrimental to public confidence in the criminal justice system. It is important to ensure that the public understands the judicial sentencing process for murder as well as the operation of administrative parole boards for release of life sentence offenders.⁶⁵ Publicly available information should include the sentencing remarks and reasons for decision; sentences imposed; up-to-date statistical information about the range of sentences imposed over time; the range of minimum terms set when life imprisonment is given and the periods actually served by prisoners in custody.⁶⁶

⁶⁴ Queensland Corrective Services, *Ministerial Guidelines to the Queensland Parole Board* (Queensland Corrective Services, 2011) <http://www.correctiveservices.qld.gov.au/About_Us/Community_Corrections_Board/ministerial_guidelines_to_the_parole_board_aug2011.pdf> at 4 October 2011, [1.3]. The guidelines are issued under the *Corrective Services Act 2006* (Qld) s 227.

⁶⁵ John Anderson 'The Label of Life Imprisonment in Australia: A Principled Or Populist Approach To An Ultimate Sentence' (2012) 35(3) *University of New South Wales Law Journal* 747, 762.

⁶⁶ Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Report No 97 (2007) 318.

Table 1: Comparison of Sentencing Legislation in Australia⁶⁷

Jurisdiction	Sentence	Non-Parole Period	Partial Defences Available to Murder Charge
Western Australia	Life imprisonment (mandatory)	Mandatory 10 years ⁶⁸	None
Northern Territory	Life imprisonment (mandatory)	Mandatory 20 years ⁶⁹	Diminished Responsibility Provocation
Queensland	Life imprisonment (mandatory)	Mandatory 15 years ⁷⁰	Provocation Diminished Responsibility Killing in an abusive domestic relationship
South Australia	Life imprisonment (mandatory)	Mandatory 20 years ⁷¹	Provocation Excessive Self-Defence
Victoria	Life imprisonment (maximum)	Discretionary (but average of 10 years) ⁷²	None
New South Wales	Life imprisonment (maximum)	Discretionary (but sentencing guideline of 10 years) ⁷³	Provocation Diminished Responsibility Excessive Self-Defence
Tasmania	Life imprisonment (maximum)	Discretionary ⁷⁴	None
Australian Capital Territory	Life imprisonment (maximum)	Discretionary ⁷⁵	Diminished Responsibility Provocation

⁶⁷ See also Andrew Hemming, 'Provocation: A Totally Flawed Defence That Has No Place In Australian Criminal Law Irrespective Of Sentencing Regime' (2010) 14 *University of Western Sydney Law Review* 1, 22. This table does not include the partial defence of infanticide.

⁶⁸ *Criminal Code 1913* (WA) s 279(4); *Sentencing Act 1995* (WA) s 90. See also Appendix 4 and 5 below.

⁶⁹ *Criminal Code 1983* (NT) s 157(1); *Sentencing Act 1995* (NT) s 53A(6) See also Appendix 3 below.

⁷⁰ *Corrective Services Act 2006* (Qld) s 181; *Criminal Code 1899* (Qld) s 305(1).

⁷¹ *Criminal Law Consolidation Act 1935* (SA) s 11; *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(ab). See also Appendix 1 below.

⁷² *Crimes Act 1958* (Vic) s 3. See also Appendix 10 below. Between 1997-1998 to 2001-2002, a majority of people convicted of murder in Victoria received a total effective sentence for murder in the range of 15-20 years with a non-parole period of 10 years or more. Then, between 2003-2004 and 2007-2008, the average sentence for murder ranged between 18 years and 20 years 5 months. Of the 117 people convicted of murder, two people received a sentence of less than 14 years imprisonment: Sentencing Advisory Council, *Sentencing Trends in the Higher Courts of Victoria, Murder 2003-04 to 2007-08*, cited in Victorian Department of Justice, *Review of the Offence of Defensive Homicide*, Discussion Paper (August 2010) 47, [197].

⁷³ *Crimes Act 1900* (NSW) s 19A; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21(1). See also Appendix 15 below.

⁷⁴ *Criminal Code* (Tas) s 158; *Sentencing Act 1997* (Tas) s 17. See also Appendix 12 and 13 below.

⁷⁵ *Crimes Act 1900* (ACT) s 12; *Crimes (Sentencing) Act 2005* (ACT) s 10. See also Appendix 16 below.

Overview of the Sentencing Legislation in Australia

South Australia

In South Australia, the mandatory sentence for murder is life imprisonment. Since 2007, when the *Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act 2007* came into effect,⁷⁶ sentencing judges have been usually required to set mandatory minimum non-parole periods for murder at 20 years.⁷⁷ Only after the expiration of this non-parole period, can an offender make an application to the South Australian Parole Board in order to be released.

This can be compared with the penalty for manslaughter, which carries a *maximum* of life imprisonment (but in practice the sentence imposed is often far less) and a *mandatory* non-parole period of four fifths of the head sentence.⁷⁸

In the Second Reading Speech for the introduction of the South Australian statutory scheme, the then Attorney-General, the Hon Michael Atkinson, stated that the introduction of these minimum periods would continue the Labor Government's victim-focused approach to law and order, to 'bring[] victims to the forefront of criminal justice policy and combat[] those who would threaten society and individual members of the public.'⁷⁹

As identified by Doyle CJ in *R v A, D* (2011) 109 SASR 197 'the mandatory period is not just a number',⁸⁰ and sets a non-parole period that is appropriate 'for an offence at the *lower* end of the range of objective seriousness'.⁸¹ Put simply, this requires a court to consider both the objective and subjective circumstances of the offence at hand,

⁷⁶ Patrick Leader-Elliott, 'Clarifying The Incomprehensible: South Australia's Mandatory Minimum Non-Parole Period Scheme' (2012) 36(4) *Criminal Law Journal* 216.

⁷⁷ *Criminal Law (Sentencing) Act 1988* (SA) s 32A(5). See also Appendix 5 below. The validity of this regime was upheld in *R v Ironside* [2009] SASC 151.

⁷⁸ *Criminal Law (Sentencing) Act 1988* (SA) s 32A.

⁷⁹ South Australia, *Parliamentary Debates*, House of Assembly, 8 February 2007, 1744. See also South Australia, *Parliamentary Debates*, Legislative Council, 3 May 2007, 89 (Mr Holloway).

⁸⁰ *R v A, D* (2011) 109 SASR 197.

⁸¹ *R v A, D* (2011) 109 SASR 197, 204 (emphasis added).

and then compare this with a hypothetical offence that would be considered in the lower range of seriousness, having regard to only objective considerations.⁸²

Despite the fact that comparing a real offence (with both objective and subjective considerations) to a hypothetical matter (with only objective considerations) is a ‘complicated process’,⁸³ there still exists some scope for the overall severity of the punishment to be ‘inflated or deflated’.⁸⁴ That is, judges are able to fix a non-parole period that is *longer* than the mandatory minimum if, after this comparison, it is concluded that the offence is *not* at the ‘lower end’ of the range of murder offences, namely where the offence is particularly serious. A judge may also fix a non-parole period that is *less* than the mandatory minimum, but this is only where ‘special reasons’ exist. These ‘special reasons’ are only those factors set out in s 32A(3) of *Criminal Law (Sentencing) Act 1988* (SA), namely if the victim’s conduct or condition substantially mitigated the offender’s conduct, if the offender pleaded guilty or cooperated with the authorities (see Appendix 2 below). Other accepted common law mitigating factors such as mental illness or intellectual disability cannot justify a lower penalty under this strict regime.⁸⁵ As observed by Doyle CJ, Duggan, Anderson and White JJ in *R v A* (2011) 208 A Crim R 578 this ‘is a departure from established principles’ of sentencing,⁸⁶ and ‘[the court] cannot identify any good reason for sentencing in this fashion. But that is Parliament’s choice’.⁸⁷

It is significant that, if the partial defence of provocation is abolished, the conduct of the victim may become an even more significant issue to consider at the time of sentence under s 32A(3) of *Criminal Law (Sentencing) Act 1988* (or s 48 of the *Sentencing Act 2017* (SA) once it comes into effect). This could give rise to its own

⁸² *R v A, D* (2011) 109 SASR 197, 205 [38].

⁸³ See, for example, *R v A, D* (2011) 109 SASR 197, 205 [43]; *R v Narayan* [2011] SASCF 61, [44].

⁸⁴ Andrew von Hirsch, ‘Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale’ (1983) 74 *Journal of Criminal Law and Criminology* 209, 213.

⁸⁵ *R v A* (2011) 109 SASR 197; Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Lawbook Co, 2015, 2nd ed) [200.2180].

⁸⁶ *R v A* (2011) 109 SASR 197, [40].

⁸⁷ See *R v A* (2011) 109 SASR 197, [43].

difficulties, with respect to victim blaming and the discriminatory aspects of the partial defence of provocation could emerge again at the sentencing stage. As observed by Stewart and Freiberg:

If the underlying purposes of the proponents of abolition are to be achieved, it is imperative that the problems and flaws of the pre-existing law not be transferred from the substantive criminal law into the law of sentencing.⁸⁸

However, even if this were considered in sentencing, not all conduct that provoked an offender was considered legally 'provocative' for the purposes of the partial defence and nor will it be for sentencing purposes.⁸⁹ Further, as observed in 2015 by Blue J in *R v McCarthy* in sentencing:

Mitigation of the offender's conduct does not mean the offender's conduct is justified, excused or lawful, but rather the blameworthiness is less than otherwise because of the causative effect of that conduct on the commission of the crime.⁹⁰

Although the flexibility of this regime will be considered through a number of case studies below, it is significant that it is difficult to assess the operation of the 'special reasons' provision in s 32A(3) of the *Criminal Law (Sentencing) Act 1988* (or s 48 of the *Sentencing Act 2017* (SA) once it comes into effect). The complexity of this provision is conspicuous. As one learned author asserts, its 'utter incomprehensibility as a matter of logic, law and, most importantly, justice'.⁹¹

Ultimately, this has been described as the 'toughest sentencing regime in Australia for murder',⁹² because '20 years is a high non-parole period for an offence of murder "at

⁸⁸ Felicity Stewart and Arie Freiberg, 'Provocation in Sentencing: A Culpability-Based Framework' (2008) 19 *Current Issues in Criminal Justice* 283, 284; Felicity Stewart and Arie Freiberg, *Provocation in Sentencing* (Victorian Sentencing Advisory Council, 2009) [1.1.4].

⁸⁹ Felicity Stewart and Arie Freiberg, 'Provocation in Sentencing: a Culpability-Based Framework' (2008) 19 *Current Issues in Criminal Justice* 283, 289.

⁹⁰ *R v McCarthy*, Unreported, Supreme Court of South Australia, Adelaide, 3 February 2015, [6].

⁹¹ Patrick Leader-Elliott, 'Clarifying The Incomprehensible: South Australia's Mandatory Minimum Non-Parole Period Scheme' (2012) 36(4) *Criminal Law Journal* 216.

⁹² Andrew Hemming, 'Provocation: A Totally Flawed Defence That Has No Place In Australian Criminal Law Irrespective Of Sentencing Regime' (2010) 14 *University of Western Sydney Law Review* 1.

the lower end of the range of objective seriousness”⁹³. This scheme also affords only very limited discretion to judges in sentencing, and as recognised by Doyle CJ:

Although the court fixes such non-parole period as it thinks fit, it fixes the non-parole period that is fit in light of the comparison that must be made. The *court does not exercise a discretion at large*.⁹⁴

In addition to the case studies below, the NSW case of *R v Wetherall* [2006] NSWSC 486 also provide a useful example as to how a sentencing regime such as South Australia is limited in its capacity to fairly and effectively respond to exceptional mitigating circumstances. In *Wetherall*, the offender stabbed her de facto partner after discovering that he had sexually abused her daughter. The offender herself had been repeatedly sexually abused as a child by various family members. At the age of 14 she was sexually assaulted by an uncle who resided with her family and she became pregnant; the child was subsequently adopted. A relationship commenced between the offender and the victim when she was 16 years old. During this relationship the offender suffered several miscarriages and after believing that she would not be able to have any more children she agreed to take over the care of her sister’s newborn baby. It was this child that the offender believed had been sexually assaulted by the victim.

The offender was charged with murder but pleaded guilty to manslaughter on the basis of diminished responsibility. She was sentenced to three years imprisonment with a non-parole period of 18 months. The sentencing judge remarking that the offender:

...is entitled to a very considerable degree of leniency principally to be derived from her plea of guilty; her previous good character; her admirable employment record; the circumstance that, because of the impairment of her mental processes at the time of the offence, the element of general deterrence has diminished significance; the fact that, due to sexual abuse, she was deprived of a normal childhood; and her deep remorse;

⁹³ *R v A, D* (2011) 109 SASR 197, 204 (Doyle CJ).

⁹⁴ *Ibid* (emphasis added).

my conclusion that she is unlikely to reoffend; and the desirability that her children should have their mother returned to them.⁹⁵

In South Australia, if this offender was convicted of murder, she could well have been liable to mandatory minimum of life imprisonment and a 20 years minimum non-parole period for murder if the partial defence of provocation was not available to her. Notably, sentencing judges in South Australia have generally declined to account for mental illness, cognitive impairment or intellectual disability that falls short of the defence of mental impairment as a ‘special reason’ sufficient to reduce the mandatory non-parole period for murder.⁹⁶ Consequently in sentencing, if the defendant was unable to establish the conduct of the deceased in this case constituted a ‘special reason’ for the purposes of s 32A(3) of the *Criminal Law (Sentencing) Act 1988*,⁹⁷ she would likely be subject to the 20 year mandatory non-parole period.

After the determinate non-parole period has been served, the offender is able to apply to the Parole Board for release. In summary, when determining an application for the release of a prisoner the Board takes into account the matters listed in s 67(4) of the *Correctional Services Act 1982* (SA) including any relevant sentencing remarks; likelihood of the prisoner complying with the conditions; the circumstances and gravity of the offence; impact on the victim; behaviour of the prisoner while in prison and any reports tendered to the Board, and any other matters that the Board thinks are relevant. The paramount consideration however must be the safety of the community.⁹⁸ For a comparative table of the parole considerations across the country, see Table 3 below.

If parole is granted pursuant to s 68 of the *Correctional Services Act 1982* (SA), all parolees who are released but are serving life imprisonment are subject to the following conditions: that they do not commit any offence; that they do not possess an

⁹⁵ *R v Wetherall* [2006] NSWSC 486, [65].

⁹⁶ See, for example, *R v A, D*; *R v Barry Walter Coleman*. See further below.

⁹⁷ See, for example, Victoria (*Crimes Act 1958* (Vic) s 3); Tasmania (*Criminal Code* (Tas) s 158), New South Wales (*Crimes Act 1990* (NSW) ss 19A(3), 442) or the ACT (*Crimes Act* (ACT) ss 12(2), 442).

⁹⁸ *Correctional Services Act 1982* (SA) s 67(3a).

any firearm or ammunition; that they submit to gunshot residue testing as reasonably required and that they be under the supervision of a community corrections officer and obey the officer's reasonable directions. Those released on parole serving life imprisonment may also be subject to additional conditions for up to one year that they reside at particular premises,⁹⁹ and undertake particular activities and programs as set by the Parole Board.¹⁰⁰ Although the Parole Board may discharge a person completely if it sees fit, it *cannot* discharge a person subject to a life sentence unless the Board is satisfied that the prisoner has satisfactorily cooperated in the investigation of the offence (whether the cooperation occurred before or after the prisoner was sentenced to imprisonment).¹⁰¹ Further, breach of any of these conditions results in automatic cancellation of parole,¹⁰² and the person is liable to serve the remaining balance of their sentence.¹⁰³

Northern Territory

Similar to South Australia, in the Northern Territory life imprisonment and a 20 year mandatory minimum non-parole applies upon conviction of the crime of murder (see Appendix 3 below).¹⁰⁴ However, this is for an offence in the 'middle of the range of objective seriousness' (rather than the 'lower end' of objective seriousness in the South Australian scheme).

Alternatively, a sentencing judge can decline to set a non-parole period¹⁰⁵ where the offender's culpability is 'so extreme the community interest in retribution,

⁹⁹ *Correctional Services Act 1982* (SA) s 68(1)(b)(i)(A).

¹⁰⁰ *Correctional Services Act 1982* (SA) s 68(1)(b)(i)(B).

¹⁰¹ *Correctional Services Act 1982* (SA) s 72(1).

¹⁰² *Correctional Services Act 1982* (SA) s 68(2a).

¹⁰³ See *Correctional Services Act 1982* (SA) s 75.

¹⁰⁴ *Criminal Code 1983* (NT) s 157(1); *Sentencing Act 1995* (NT) s 53A(1). Notably, this is increased to 25 years if any of the circumstances in s 53A(3) apply: *Sentencing Act 1995* (NT) s 53A(1)(b).

¹⁰⁵ Under the *Sentencing Act 1995* (NT), there is a statutory presumption that when a court imposes a sentence of imprisonment of life or for a period of greater than 12 months it should impose a non-parole period: *Sentencing Act 1995* (NT) s 53(1)(a)-(b).

punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole'.¹⁰⁶ The statutory criteria governing the decision to decline to set a non-parole period including consideration of the nature of the offence, the offender's past history or the circumstances of a particular case make setting a non-parole period inappropriate.¹⁰⁷

If a non-parole period for murder is set, then the sentencing judge can only hand down a non-parole period below 20 years where 'exceptional circumstances' apply.¹⁰⁸ These 'exceptional circumstances' are codified in s 53A(7) of the *Sentencing Act 1995* (NT) and the sentencing judge must not have regard to any other factors. For there to be exceptional circumstances sufficient to justify fixing a shorter non-parole period the court must be satisfied that the offender is otherwise a person of good character and is unlikely to re-offend;¹⁰⁹ or the victim's conduct, or conduct and condition, substantially mitigates the conduct of the offender.¹¹⁰

Upon the expiry of this non-parole period, an offender serving life imprisonment for murder can apply for parole. Notably, of the six applications for parole from those sentenced to life imprisonment, none were successful in 2015.¹¹¹ In considering an application, the Parole Board of the Northern Territory must have regard to the principle that the public interest is of primary importance. In doing so, the Board must accord substantial weight to the protection of the community as the paramount consideration, the likely effect of a prisoner's release on the victim's family; and if the prisoner is Aboriginal or a Torres Strait Islander, the likely effect of the prisoner's release on the prisoner's community.¹¹²

¹⁰⁶ *Sentencing Act 1995* (NT) s 53A(5).

¹⁰⁷ *Sentencing Act 1995* (NT) s 53(1)(a)-(b). See, for example, *Serra v The Queen* [2004] NTCCA 3.

¹⁰⁸ *Sentencing Act 1995* (NT) s 53A(6).

¹⁰⁹ *Sentencing Act 1995* (NT) s 53A(7)(a).

¹¹⁰ *Sentencing Act 1995* (NT) s 53A(7)(b).

¹¹¹ Parole Board of the Northern Territory, *Annual Report 2015*, 24.

¹¹² *Parole of Prisoners Act 1971* (NT) ss 3GB, 5.

The Board must also give reasons for any decision or direction of the Board on a matter concerning a prisoner who is serving a term of imprisonment for murder and those reasons must be included in the record of its proceedings.¹¹³

Western Australia

Western Australia also imposes a 'mandatory' life sentence upon a person convicted of murder, and provocation as a partial defence to murder was repealed in 2008.¹¹⁴ Section 279(4) of the *Criminal Code 1913* (WA) provides that a person who is guilty of murder *must* be sentenced to life imprisonment, unless the sentence would clearly be unjust given the circumstances of the offence and the offender and the person is unlikely to be a threat to the safety of the community when released (see Appendix 4 below).¹¹⁵

If a life sentence is handed down pursuant to s 90(1) of the *Sentencing Act 1995* (WA), the court must either set a minimum non-parole period of at least 10 years or order that the offender must never be released (see Appendix 5 below).¹¹⁶ The latter must only be made 'if it is necessary to do so in order to meet the community's interest in punishment and deterrence'.¹¹⁷ If set, once the non-parole period has been served an offender may be considered for release on parole by the Governor, following a report from the Prisoners Review Board.¹¹⁸

In practice, this 'mandatory' sentencing scheme operates as a 'presumption' of a life sentence. It was introduced following the Western Australia Law Reform

¹¹³ *Parole of Prisoners Act 1971* (NT) s 3GB(4); Parole Board of the Northern Territory, *Annual Report 2015*, 16.

¹¹⁴ *Criminal Code Act 1913* (WA) s 279(4).

¹¹⁵ *Criminal Code Act 1913* (WA) s 279(4). See *Western Australia v Silich* [2011] WASCA 135, [86]; Andrew Hemming, 'Provocation: a Totally Flawed Defence That Has No Place In Australian Criminal Law Irrespective Of Sentencing Regime' (2010) 14 *University of Western Sydney Law Review* 1, 43

¹¹⁶ *Sentencing Act 1995* (WA) s 90(1) (see also Appendix 5 below); Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Lawbook Co, 2015, 2nd ed) [200.2200].

¹¹⁷ *Sentencing Act 1995* (WA) s 90(3)-(4) (see also Appendix 5 below).

¹¹⁸ *Sentence Administration Act 2003* (WA) s 25(1).

Commission's *Review of the Law of Homicide*.¹¹⁹ The Commission noted that provoked killings are not uniform in either intent or degree of moral culpability,¹²⁰ and recommended that provocation as a partial defence to homicide should be abolished and it be considered only as a sentencing factor. The Commission's recommendations included that the partial defence to murder of provocation be repealed, but only if the mandatory penalty of life imprisonment for murder was replaced with a presumptive sentence of life imprisonment.¹²¹ Further, the Commission found that the previous sentencing regime — under which the most lenient penalty available for 'wilful murder' was life imprisonment with a minimum non-parole period of 15 years — had insufficient flexibility to fairly take into account differences in culpability.¹²² For example, the Commission observed that in the absence of discretion, an intentional killing committed in a state of extreme anger following the discovery that the deceased had sexually abused a close relative would attract life imprisonment with a minimum term of at least 15 years.¹²³

Commentators have since expressed support for this presumptive sentence of life imprisonment model,¹²⁴ as it 'recognize[s] the unique seriousness of murder on the one hand, and yet allow[s] for flexibility on the other'.¹²⁵ For example, Rathus argued that majority of murders ordinarily attract life imprisonment, but this model is able to

¹¹⁹ See Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Report No 97 (2007).

¹²⁰ Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Report No 97 (2007) 219.

¹²¹ Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Report No 97 (2007) 222 (Recommendation 29).

¹²² Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Report No 97 (2007) 217-23. See also the discussion in Select Committee on the Partial Defence of Provocation, New South Wales Legislative Council, *The Partial Defence Of Provocation* (2013) [3.24]-[3.26]

¹²³ Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Report No 97 (2007) 310.

¹²⁴ See, for example, Isabel Grant, 'Rethinking the Sentencing Regime for Murder' (2001) 39 *Osgoode Hall Law Journal* 655, 697.

¹²⁵ Isabel Grant, 'Rethinking the Sentencing Regime for Murder' (2001) 39 *Osgoode Hall Law Journal* 655, 697.

fairly respond to exceptional circumstances that call for the imposition of a lesser sentence, such as instances where a woman kills a systemically abusive partner.¹²⁶

Notably, this ‘presumptive’ model is similar to the scheme New Zealand. In that jurisdiction, there is a ‘strong presumption in favour of life imprisonment for murder’ unless,¹²⁷ given the circumstances of the offence and the offender, such a sentence would be ‘manifestly unjust’ in which case the court may depart from a life sentence (see Appendix 6).¹²⁸ The New Zealand Parliament has made it clear that this presumption will only be displaced in the case of mercy killings and cases ‘where there is evidence of prolonged and severe abuse’.¹²⁹ However, the New Zealand Court of Appeal has recently observed that there may be cases where the ‘mental or intellectual impairment of the offender may be so mitigating of moral culpability that, absent issues of future risk to public safety, it would be manifestly unjust to impose a sentence of life imprisonment’.¹³⁰ However, there is yet to be any case law recognising an intellectual disability or cognitive impairment as sufficient to make a life sentence ‘manifestly unjust’ and displace the presumption.

In Western Australia, if a sentence of life imprisonment is handed down then only the Governor may decide whether to grant parole pursuant to s 25 of the *Sentencing Act 1995 (WA)* after a report from the Prisoners Review Board.¹³¹ In granting parole, factors such as concerns for the victim, prisoner behaviour, risks of recidivism, and

¹²⁶ Z Ratus, ‘There Was Something Different About Him That Day: The Criminal Justice System’s Response To Women Who Kill Their Partners’ (Brisbane: Women’s Legal Service, 2002) 26.

¹²⁷ New Zealand, *Parliamentary Debates*, 14 August 2001, 594, 10910 (P Goff, Minister of Justice).

¹²⁸ *Crimes Act 1961 (NZ)* s 172; *Sentencing Act 2002 (NZ)* s 102 (see Appendix 6 below); John Anderson ‘The Label of Life Imprisonment in Australia: A Principled or Populist Approach To An Ultimate Sentence’ (2012) 35(3) *University of New South Wales Law Journal* 747, 764.

¹²⁹ New Zealand, *Parliamentary Debates*, 14 August 2001, 594, 10910 (P Goff).

¹³⁰ *R v O’Brien* (Unreported, Court of Appeal, CA 107/03, 16 October 2003) [36].

¹³¹ *Sentence Administration Act 2003 (WA)* s 25(1).

participation in treatment programs while incarcerated are considered,¹³² with the overarching consideration being related to community safety.¹³³

Queensland

In Queensland, under s 181 of the *Corrective Services Act 2006* (Qld) a minimum non-parole period of 15 years applies to offenders sentenced to life imprisonment (including for murder which carries a mandatory life sentence in Queensland). A minimum non-parole period of 20 years applies for murder in some circumstances,¹³⁴ such as where the offender is being sentenced on more than one conviction of murder, or the person has on a previous occasion been sentenced for another offence of murder (see Appendix 7 and 9 below).¹³⁵ The sentencing judge has no discretion to fix a lower non-parole period, and therefore this scheme is not as reactive to the relative objective seriousness of the offence and subjective culpability of the offender as the discretionary regimes.¹³⁶

Provocation is still available as a partial defence to murder in Queensland under s 304 of the *Criminal Code Act 1899* (Qld). The onus of proof however is reversed, such that the legal onus is placed on the defendant to prove on the balance of probabilities that the partial defence is established.¹³⁷ Additionally, the Queensland provision expressly excludes provocation from being available in response (save in an ‘exceptional’ case)¹³⁸ to a non-violent homosexual advance (commonly referred to as the ‘gay panic’ defence), or in response to a partner leaving a relationship (see Appendix 8 below).

¹³² See, for example, *Sentence Administration Act 2003* (WA) s 5A.

¹³³ *Sentence Administration Act 2003* (WA) s 5B.

¹³⁴ Where an offender is sentenced for murder and *Criminal Code Act 1899* (Qld) s 305(2) applies.

¹³⁵ *Criminal Code Act 1899* (Qld) s 305, *Corrective Services Act 2006* (Qld) s 181(2)(c).

¹³⁶ *Criminal Code Act 1899* (Qld) s 305(2). See also Appendix 9 below.

¹³⁷ *Criminal Code Act 1899* (Qld) s 304(7). See also Appendix 9 below.

¹³⁸ Just what is an ‘exceptional’ case from a non-exceptional case in this context is unclear.

An offender who has served their non-parole period can apply to the Queensland Parole Board to be released from prison.¹³⁹ Section 200 of the *Corrective Services Act 2006* sets conditions for parole orders. An offender with a life sentence who is granted parole will remain on parole with conditions for the rest of his or her life.¹⁴⁰

Like the other jurisdictions, this means that the actual custodial durations of most life sentences are determined by the Parole Board once the prisoner has served the minimum of 15 years imprisonment. The overarching consideration in parole decision-making is community safety, and as such ss 98 and 99 of the *Corrective Services Act 2006* (Qld) provide that the Queensland Parole Board must only grant a prisoner conditional release if satisfied the release does not pose an unacceptable risk to the community and the prisoner has been of ‘good conduct’. In determining whether the prisoner’s release poses an unacceptable risk to the community the matters the Chief Executive may consider include: any sentencing remarks; the prisoner’s previous criminal history; how likely they are to break the law again; if there are any other reasons that may increase the risk the of the prisoner to the community; the prisoner’s cooperation with the authorities in helping to convict others and good behaviour while in prison; any medical, psychological, behavioural or risk assessment reports; any submissions made to the Board by an eligible person on the Victims Register and whether the prisoner has access to supports or services that may reduce the risk of the prisoner to the community.¹⁴¹ In deciding whether the prisoner has been of ‘good conduct’,¹⁴² the Chief Executive must consider whether the prisoner: has complied with all requirements to which the prisoner was subject; has undergone separate confinement for a major breach of discipline or has participated in programs recommended by the Chief Executive to the best of the prisoner’s ability.¹⁴³

¹³⁹ *Corrective Services Act 2006* (Qld) s 181. See also Appendix 7 below.

¹⁴⁰ Queensland Sentencing Advisory Council, *Maximum Sentences* (15 February 2017) <<http://www.sentencingcouncil.qld.gov.au/about-sentencing/maximum-sentences>>.

¹⁴¹ *Corrective Services Act 2006* (Qld) s 99.

¹⁴² *Corrective Services Act 2006* (Qld) s 100.

¹⁴³ *Corrective Services Act 2006* (Qld) s 100.

Victoria

In Victoria, life imprisonment remains the maximum sentence for murder.¹⁴⁴ The sentencing judge also retains discretion in relation to determining an appropriate non-parole period. Notably, if the judge does sentence an offender to life imprisonment, then a non-parole period must be set unless it is considered inappropriate having regard to ‘the nature of the offence or the past history of the offender’.¹⁴⁵

Section 5(2) of the *Sentencing Act 1991* sets out the factors that must be taken into account when sentencing an adult in Victoria.

Two of the sentencing factors include the gravity of the offence and the culpability of the offender. The gravity of an offence refers to the degree of harm caused or risked by the offender’s act or omission.¹⁴⁶ Although the statutory maximum penalty is but one of the many factors to which the judge must consider, but it is particularly ‘important’ as it is ‘first among the matters to which a court sentencing an offender must have regard’.¹⁴⁷ Culpability reflects the extent to which an offender should be held accountable for his or her actions by assessing the offender’s intention, awareness and motivation in committing the crime.¹⁴⁸

Other factors include: the standard sentencing practices; the nature and gravity of the offence; whether the crime was motivated by hatred or prejudice; the impact of the offence on any victim of the offence; the personal circumstances of any victim of the offence; any injury, loss, or damage resulting directly from the offence; whether the

¹⁴⁴ *Crimes Act 1958* (Vic) s 3. Manslaughter carries a maximum penalty of 20 years’ imprisonment.

¹⁴⁵ *Sentencing Act 1991* (Vic) s 11(1); Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2nd ed, 1999) 758; *R v Denyer* [1995] 1 VR 186.

¹⁴⁶ Andrew von Hirsch, ‘Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and their Rationale’ (1983) 74 (1) *Journal of Criminal Law & Criminology* 209, 214.

¹⁴⁷ *DPP v Aydin* [2005] VSCA 86 (Unreported, Callaway, Buchanan and Eames JJA, 3 May 2005), [8]–[12] (Callaway JA) (citations omitted).

¹⁴⁸ Sentencing Task Force, Victoria, *Review of Statutory Maximum Penalties in Victoria: Report to the Attorney-General* (1989) (written for the Task Force by Richard Fox and Arie Freiberg), 60.

offender plead guilty to the offence; the offender's previous character and the presence of any aggravating or mitigating factors. When weighing up the nature and gravity of the offence, the considerations a judge or magistrate might take into account include: the offender's intention; the consequences of the offence; the use of weapons; the offender's history of offending; the number of victims; the offender's response to previous court orders and alcohol or drug addiction.¹⁴⁹

According to the Sentencing Advisory Council's Report, *Homicide in Victoria: Murders, Victims and Sentencing*, a total of 124 offenders were sentenced to imprisonment for murder in 2007, accounting for 91 per cent of all offenders sentenced for this offence.¹⁵⁰ The terms of imprisonment for murder ranged from 10 years to life imprisonment, with an average length of 19 years and one month. Of those whom a non-parole period was set, these ranged from seven to 26 years, with an average of 15 years and four months.¹⁵¹ As life is the 'maximum' head sentence, only ten offenders were sentenced to life imprisonment for murder (that is 7 per cent of all offenders sentenced for murder) and all were men. Only one offender found guilty of murder was sentenced to life imprisonment without parole and this person was classed as a 'serial killer'. Of the nine offenders sentenced to life imprisonment for murder and eligible for parole, non-parole periods ranged from 23 to 33 years with an average of 25 years and three months.¹⁵²

Victoria abolished the partial defence of provocation in 2005,¹⁵³ but provocative conduct may still be considered in the sentencing process (where arguably it is better suited), as going to the 'culpability of the offender'. For example, in *R v Raby*,¹⁵⁴ the

¹⁴⁹ *Sentencing Act 1991* s 5(2).

¹⁵⁰ All of the offenders who were not sentenced to imprisonment for murder were sentenced to other custodial orders designed to treat their diagnosed mental conditions.

¹⁵¹ Sentencing Advisory Council, *Homicide in Victoria: Murders, Victims and Sentencing* (2007) Victorian Sentencing Advisory Council 16.

¹⁵² Sentencing Advisory Council, *Homicide in Victoria: Murders, Victims and Sentencing* (2007) Victorian Sentencing Advisory Council 17. See also Felicity Stewart and Arie Freiberg, *Provocation in Sentencing* (2009) Victorian Sentencing Advisory Council (2nd ed).

¹⁵³ *Crimes (Homicide) Act 2005* (Vic). This was followed by the introduction of the new ultimately ill-fated offence of 'defensive homicide'.

¹⁵⁴ *R v Raby* (Unreported, Supreme Court of Victoria, Teague J, 22 November 1994).

offender was found guilty of manslaughter on the basis of provocation for killing her husband after eleven weeks of an abusive marriage. The sentencing judge found that as a result of the provocation (viewed in the context of his past treatment of her), her actions were to be assessed as ‘indicating a relatively low level of moral culpability’.¹⁵⁵ This sentencing approach focuses on the gravity of the victim’s conduct and the reasons it caused the offender to commit the offence, rather than on the capacity of the offender to control themselves and whether or not the conduct caused the offender to lose self-control.¹⁵⁶ In its 2009 report, the Victorian Sentencing Advisory Council identified the central issues that should be considered in determining to what extent an offender’s culpability should be reduced by provocation in sentencing. These were namely the degree of provocation in terms of the offender having a justifiable sense of being wronged taking into consideration the nature, context and duration of the provocation; the degree to which the offender’s response was disproportionate and whether the provocation was and remained the operative cause of the offence.¹⁵⁷

Serious psychiatric illness (short of the defence of mental impairment or insanity),¹⁵⁸ or cognitive impairment or intellectual disability may also reduce an offender’s culpability, particularly where it influences the offender’s capacity to fully comprehend the nature or consequences of his or her behaviour.¹⁵⁹

¹⁵⁵ Ibid 4.

¹⁵⁶ Felicity Stewart and Arie Freiberg, *Provocation in Sentencing* (2009) Victorian Sentencing Advisory Council (2nd ed) [8.5.8].

¹⁵⁷ Felicity Stewart and Arie Freiberg, *Provocation in Sentencing* (2009) Victorian Sentencing Advisory Council (2nd ed) [10.1.10].

¹⁵⁸ *R v Verdins* (2007) 169 A Crim R 581; *R v Buckley*; *R v Vo* [2007] VSCA 102 (Unreported, Maxwell P, Buchanan and Vincent JJA, 23 May 2007); *R v Tsiaras* [1996] 1 VR 398, 400. See also Judicial College of Victoria, *Victorian Sentencing Manual* (2005) at 20 December 2007 [10.9.1.1], [10.9.1.1.3], [10.9.1.2.1]–[10.9.1.2.5], [10.9.1.4].

¹⁵⁹ *R v Verdins* (2007) 169 A Crim R 581; *Mason-Stuart v The Queen* (1993) 68 A Crim R 163 (CCA SA), 164; *DPP v Scott* [2000] VSC 247 (Unreported, Cummins J, 14 June 2000), [19]; Judicial College of Victoria, *Victorian Sentencing Manual* (2005) at 20 December 2007 [10.9.1.1], [10.9.1.1.3], [10.9.1.2.1]–[10.9.1.2.5], [10.9.1.4].

Offenders have to establish these ‘mitigating factors’ on the balance of probabilities.¹⁶⁰ It has been noted that this different onus of proof that applies to provocation in sentencing may reduce some of the criticisms of substantive provocation.¹⁶¹

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

After the set non-parole period has been served, an offender may be considered for release by the Victorian Adult Parole Board.¹⁶² The *Corrections Act 1986* (Vic) presently provides the Board with the power to make decisions relating to parole,¹⁶³ but the Act does not specify *how* the Board must make those decisions. In particular, it does not specify any criteria¹⁶⁴ that the Board must apply, nor does it provide any guidance or list any particular factors that the Board must consider when making its decisions.¹⁶⁵ Although it is not bound by any statutory provisions governing or guiding the exercise of its discretion, the Adult Parole Board itself has developed internal guidelines (‘Members’ Manual’) including factors to consider in making parole decisions.¹⁶⁶ This is different from many other jurisdictions where the relevant

¹⁶⁰ Felicity Stewart and Arie Freiberg, *Provocation in Sentencing* (2008) Sentencing Advisory Council Report (1st ed) [5.3.7]-[5.3.11]; *R v Storey* [1998] 1 VR 359, 371.

¹⁶¹ Felicity Stewart and Arie Freiberg, *Provocation in Sentencing* (2008) Sentencing Advisory Council Report (1st ed) [5.3.7]-[5.3.11] (citations omitted).

¹⁶² *Corrections Act 1986* (Vic) s 74.

¹⁶³ *Corrections Act 1986* (Vic) ss 74–77.

¹⁶⁴ For the meaning of ‘criterion’ as a test, rule, standard or requirement, see *Pillay v Minister for Immigration and Multicultural Affairs* [2000] FCA 112 (16 February 2000) [29]–[35].

¹⁶⁵ Sentencing Advisory Council, *Review of the Victorian Adult Parole System* (2012), 69.

¹⁶⁶ Sentencing Advisory Council, *Review of the Victorian Adult Parole System* (2012) 71.

legislation lists a series of factors or items of information that the parole authority must consider (see Table 3 for a comparative table of the parole considerations across Australia). The Members' Manual sets out a list of factors to be considered by members of the Board when deciding whether to grant parole, including the risk to the community; interests of the offender; any sentencing remarks; the nature and circumstances of the offence(s); the offender's criminal history; release plans; representations made by the victim or the victim's family; and any reports, assessments or recommendations made by a variety of professionals, including medical practitioners, psychologists, psychiatrists, custodial staff, support agencies and community corrections officers.

There is also a presumption against parole for offenders in Victoria who have been sentenced for murder and certain other fatal offences or where the body of the victim have not been located.¹⁶⁷

Tasmania

Tasmania similarly retains judicial discretion in the determination of both the head sentence and the non-parole period for murder, as life is the maximum available sentence for a murder conviction (see Appendix 12, 13 and 14). It is very rare that a court will impose the maximum sentence of life imprisonment.¹⁶⁸

The *Sentencing Act 1997* (Tas) draws a distinction between two categories of offenders for the purpose of the setting of a non-parole period by the sentencing court. As sentencing for murder is discretionary in this jurisdiction, those convicted of such an offence could fall in either of these categories and both categories will be outlined.

Firstly, there are provisions related to offenders who are sentenced to a fixed term of imprisonment.¹⁶⁹ A court has discretion whether to grant parole to this offender or

¹⁶⁷ Sentencing Advisory Council, *Parole* (30 August 2017) Sentencing Advisory Council <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/parole>>.

¹⁶⁸ This has only been invoked once, in *R v Martin Bryant* (Unreported, Supreme Court of Tasmania, Cox CJ, 22 November 1996).

¹⁶⁹ *Sentencing Act 1997* (Tas) s 17.

not.¹⁷⁰ In doing so, the court must consider the nature and the circumstances of the offence, the offender's antecedents or character, any other sentence the offender is undergoing and any other matter the court deems necessary or appropriate.¹⁷¹

Secondly, there are provisions in respect of offenders who are sentenced to a term of imprisonment for their natural life.¹⁷² Here discretion is provided to the sentencing court whether or not to set a non-parole period.¹⁷³ The manner in which the discretion is to be exercised is identical to the provisions above. If a court sets a non-parole period, then parole will be administered by the Parole Board.¹⁷⁴

As the partial defence of provocation has been abolished in Tasmania,¹⁷⁵ any 'provocative conduct' of the deceased is considered as part of the sentencing process, alongside the other sentencing factors that the court must take into account to arrive at an appropriate and proportionate sentence. In raising this, offenders have to prove (on the balance of probabilities) that they were provoked by the victim to a sufficient extent so as to justify the mitigation of their sentences.¹⁷⁶ This is in contrast to provocation existing as a partial defence to mitigate the offender's conduct, where the prosecution has to prove beyond reasonable doubt that the offender had *not* been provoked in the relevant sense.¹⁷⁷

Tyne v Tasmania [2005] TASSC 119 illustrates the Tasmanian approach. *Tyne* concerned an appeal against a 16 year sentence imposed for murder on the ground that it was manifestly excessive because, but for the abolition of the partial defence of

¹⁷⁰ *Sentencing Act 1997* (Tas) s 17(2)(a)-(b).

¹⁷¹ *Sentencing Act 1997* (Tas) s 17.

¹⁷² *Sentencing Act 1997* (Tas) s 18.

¹⁷³ *Sentencing Act 1997* (Tas) s 17 s 18(1)(a)-(b).

¹⁷⁴ See generally *Corrections Act 1997* (Tas) ss 62-83.

¹⁷⁵ *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas).

¹⁷⁶ Felicity Stewart and Arie Freiberg, *Provocation in Sentencing* (2008) Sentencing Advisory Council Report (1st ed) [5.3.7]-[5.3.11]; *R v Storey* [1998] 1 VR 359.

¹⁷⁷ *Masciantonio v The Queen* (1995) 183 CLR 58 ; *Moffa v The Queen* (1977) 138 CLR 601 ; *R v Thorpe (No 2)* [1999] 2 VR 719.

provocation, Tyne would have been sentenced for manslaughter by reason of provocation.¹⁷⁸ It was contended that, despite the repeal of the partial defence, Tyne should have been sentenced as if provocation had reduced his crime to manslaughter. This argument was rejected. Chief Justice Underwood (with whom Slicer and Blow JJ agreed) observed:¹⁷⁹

Provocation is taken into account in the exercise of the sentencing discretion for murder. The degree of provocation is just an aspect of the sentencing discretion. In a suitable case, no doubt it could be urged that greater mitigatory weight than usual should be given to the provocation because not only did the insult cause the accused to lose the power of self-control, but it was so grave it would also have caused a reasonable person to lose that power.

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

Between the abolition of mandatory sentences of life imprisonment for murder in 1994 and ... [the abolition of substantive provocation] in 2003, sentences for manslaughter in provocation cases were substantially less than those for murder. The only reason for the great disparity between murder sentences and manslaughter sentences in provocation cases was the existence of [the partial defence of provocation] ... Now ... there is no reason for such a great disparity. When a murder has been brought about or contributed to by provocation, that is now simply a mitigating factor whose weight will depend on the circumstances.¹⁸⁰

Further, his Honour outlined the approach to be taken in sentencing an offender for murder where provocation is raised as a mitigating factor, stating:

¹⁷⁸ On appeal from *R v Tyne* (Unreported, Supreme Court of Tasmania, Crawford J, 7 July 2005).

¹⁷⁹ *Tyne v Tasmania* [2005] TASSC 119, [18].

¹⁸⁰ *Tyne v Tasmania* [2005] TASSC 119, [26]. This case was the Tasmanian case following the abolition of provocation as a partial defence in the State. The defence contention that Tyne should have been sentenced for murder as if provocation had reduced his crime to manslaughter, despite the repeal of the partial defence, was rejected.

The circumstances that a sentencing judge should take into account in relation to provocation in a murder case include the nature of the provocation, its severity, its duration, its timing in relation to the killing, any relevant personal characteristics of the offender (eg in cases of racial abuse) and the extent of the impact of the provocative conduct on the offender.¹⁸¹

New South Wales

In New South Wales, life imprisonment is the ‘maximum’ available head sentence for murder.¹⁸² The common law partial defence of provocation has been abolished and replaced with a narrower (and complex) statutory version of ‘extreme provocation’.¹⁸³

Unlike the mandatory sentencing regimes, the NSW scheme does not mean that an offender *must* receive a life sentence. The court’s discretion remains, and the court can consider a range of matters when deciding the appropriate sentence, including the objective seriousness of the particular offence/s, subjective features of the offender and even the victim’s conduct.¹⁸⁴

There are three standard non-parole periods prescribed for murder:

- a) 20 years for murder (general) committed on or after 1 February 2003;
- b) 25 years for the murder of a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim’s occupation committed on or after 1 February 2003; and
- c) 25 years for the murder of a child, whenever committed.

¹⁸¹ *Tyne v Tasmania* [2005] TASSC 119, [28].

¹⁸² *Crimes Act 1900* (NSW) s 19A

¹⁸³ The main case so far to consider the new NSW model is *Turnbull*; see *R v Turnbull (No 5)* [2016] NSWSC 439 (15 April 2016); *Turnbull v R* [2016] NSWCCA 109 (10 June 2016), *R v Turnbull (No 25)* [2016] NSWSC 831 (23 June 2016).

¹⁸⁴ *Crimes (Sentencing Procedure) Act 1987* (NSW) s 21A(3)(c).

Thus, the standard non-parole period for murder is generally 20 years, and the parole period cannot normally exceed one third of the non-parole period.¹⁸⁵ However, judicial discretion is not completely extinguished as a greater non-parole period may be imposed if ‘special circumstances’ exist.¹⁸⁶

Notably, the basis for partial defences (like provocation) or complete defences (like mental impairment) may be relevant to the determination of the appropriate sentence.¹⁸⁷ For instance, in *R v Heffernan* [2005] NSWSC 739, the sentencing judge considered ‘circumstances which did amount to provocation, albeit that they did not reach the level required to reduce murder to manslaughter’,¹⁸⁸ and held this still reduced the ‘objective criminality’ of the murder.¹⁸⁹ In a similar manner in *R v Verney* (unreported, New South Wales Criminal Court of Appeal, 1993), Hunt CJ observed:

a jury’s rejection of a defence of diminished responsibility does not mean that the judge is not entitled to find for himself from the evidence some impairment of the prisoner’s responsibility or culpability for his actions short of that which the defence pursuant to s 23A of the *Crimes Act 1900* requires.¹⁹⁰

However, the standard non-parole period does *not* apply to matters for which a life sentence is imposed.¹⁹¹ In New South Wales, ‘life means life’¹⁹² and so if an offender is sentenced to life imprisonment for murder, a non-parole period cannot be imposed

¹⁸⁵ *Crimes (Sentencing Procedure) Act 1999 (NSW)* s 44.

¹⁸⁶ See, for example, *Papworth v The Queen* [2011] NSWCCA 253.

¹⁸⁷ *R v Bell* (1985) 2 NSWLR 466 at 485; *R v Fraser* [2005] NSWCCA 77, [25].

¹⁸⁸ *R v Heffernan* [2005] NSWSC 739, [50].

¹⁸⁹ *Ibid* [54].

¹⁹⁰ See also *R v Cheatham* [2002] NSWCCA 360, [134].

¹⁹¹ *Crimes (Sentencing Procedure) Act 1999* s 54D(1)(a).

¹⁹² See, for example, Wali Shukoor, ‘Life Sentences in NSW: “Life Meaning Life” on Sydney Criminal Lawyers (3 September 2016) <<https://www.sydneycriminallawyers.com.au/blog/life-sentences-in-nsw-life-meaning-life/>>.

and the offender must serve the sentence for the term of his or her natural life.¹⁹³ That is, in cases where a court *does* exercise its discretion to hand down a life sentence, the offender will be imprisoned with no opportunity for release on parole.¹⁹⁴

Importantly, there is a high threshold for the imposition of a life sentence. Section 61 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) stipulates that:

A court is to impose a sentence of imprisonment for life on a person who is convicted of murder if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.

This requires that the court make a finding on the facts of the case that the level of culpability of the offender is so extreme that a life sentence is warranted. If so satisfied, the Court must then consider whether the offender's personal or subjective circumstances are capable of negating the need for a life sentence. In doing so, the court can take into account factors such as age, history and prospects of rehabilitation.¹⁹⁵ Life sentences in NSW are only imposed for the most aggravated and heinous murders.¹⁹⁶ Murders between intimate family members, for example, are categorised as 'as a worst case or a case falling within s 61(1) of the *Crimes (Sentencing Procedure) Act*.'¹⁹⁷

¹⁹³ *R v Harris* (2000) 50 NSWLR 409, [122], [125].

¹⁹⁴ *Crimes Act 1900* (NSW) s 19A. In other words, in cases where life imprisonment *is* imposed, the sentencing judge has no discretion to fix a non-parole period.

¹⁹⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(1).

¹⁹⁶ *Crimes Act 1900* (NSW) s 431A. See, for example, *R v Knight* (2006) 164 A Crim R 126; *R v Hillsley* (2006) 164 A Crim R 252; *R v Gonzales* [2004] NSWSC 822; *R v Walsh* [2009] NSWSC 764; *R v Stanford* [2016] NSWSC 1434 (13 October 2016) for rare cases where a life sentence has been imposed.

¹⁹⁷ *Gonzales v R* [2007] NSWCCA 321, [175] (Giles JA).

Prior to the introduction of this regime in 1999, the average time spent in prison by an offender convicted of murder serving a life sentence was 13 years.¹⁹⁸ Since then (in the period October 2004 to September 2011), 148 offenders were convicted of murder in New South Wales, all received a term of imprisonment, and 91 per cent of those received a sentence ranging from 18 years and life imprisonment.¹⁹⁹

Australian Capital Territory

In the Australian Capital Territory, life imprisonment is the maximum sentence available upon conviction of murder.²⁰⁰ The relevant considerations for determining the relevant sentence are provided in s 33 of *Crimes (Sentencing) Act 2005* (ACT).

Once the head sentence has been determined, and if this is more than one year imprisonment, then the court is empowered to impose a non-parole period.²⁰¹ There is a statutory presumption in favour of setting a non-parole period.²⁰² However, this is qualified by s 65(4) of the *Crimes (Sentencing) Act 2005* (ACT) which permits the court to decline to set a non-parole period if it believed that this would be ‘inappropriate’ having regard to the ‘nature of the offence or offences and the offender’s antecedents’.

The ACT statute has two provisions that are absent in all other legislation on sentencing in Australia.²⁰³ Namely, the court when sentencing an offender to imprisonment may recommend a particular condition or conditions of the offender’s

¹⁹⁸ See, for example, Wali Shukoor, ‘Life Sentences in NSW: “Life Meaning Life”’ on Sydney Criminal Lawyers (3 September 2016) <<https://www.sydneycriminallawyers.com.au/blog/life-sentences-in-nsw-life-meaning-life/>>.

¹⁹⁹ Select Committee on the Partial Defence of Provocation, New South Wales Legislative Council, *The Partial Defence Of Provocation* (2013) [2.77]. A breakdown of data that indicates the length of sentence imposed specifically for convictions based on manslaughter on the basis of provocation, as opposed to other types of manslaughter was not available.

²⁰⁰ *Crimes Act 1900* (ACT) s 12(2).

²⁰¹ *Crimes (Sentencing) Act 2005* (ACT) s 65(1).

²⁰² *Crimes (Sentencing) Act 2005* (ACT) s 65(2); Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Lawbook Co, 2015, 2nd ed) [650.4240].

²⁰³ Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Lawbook Co, 2015, 2nd ed) [650.4240].

parole.²⁰⁴ Additionally, the ACT statute has a discrete section that allows appeals against the non-parole period ‘if the court fails to set, or fails to set properly, a non-parole period for a sentence of imprisonment’.²⁰⁵ This appears to grant a right to the offender, the Director of Public Prosecution, the Attorney-General or the Secretary of the Sentence Administration Board²⁰⁶ in respect of the non-parole period (or failure to set a non-parole period) that is separate from a more general complaint that the sentence and the non-parole period are manifestly excessive.²⁰⁷

The process and procedure for parole are detailed in ss 117-170 of the *Crimes (Sentence Administration) Act 2005* (ACT). Ultimately, the overarching consideration when a parole decision is made in this jurisdiction is the ‘public interest’.²⁰⁸ The other criteria that govern the Parole Board determinations in granting parole to an offender are set out in ss 120(2)(a)-(m) of the *Crimes (Sentence Administration) Act 2005* (ACT). In brief, these include any sentencing remarks; the offender’s antecedents; any concern expressed to the Board by a victim; the likely effect of the offender being paroled on any victim; the offender’s conduct and participation in activities while imprisoned; the likelihood of recidivism and compliance with parole conditions and any special circumstances.

²⁰⁴ *Crimes (Sentencing) Act 2005* (ACT) s 67.

²⁰⁵ *Crimes (Sentencing) Act 2005* (ACT) s 68(1).

²⁰⁶ *Crimes (Sentencing) Act 2005* (ACT) ss 68(2)(a)-(d).

²⁰⁷ Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Lawbook Co, 2015, 2nd ed) [650.4240].

²⁰⁸ *Crimes (Sentence Administration) Act 2005* (ACT) s 120(1); *St John v Williams* [2006] ACTSC 105.

Sentencing Remarks Case Studies

Introduction

There is limited flexibility under the current law for South Australian courts when it comes to sentencing for murder given the mandatory minimum head sentence of life imprisonment and the usual mandatory minimum non-parole period of 20 years.

On a theoretical level, mandatory penalties are underscored by the assumption that all offences, within a particular category, are equally serious and, as a consequence, all offences within that category should attract the same penalty. However, it is apparent that the circumstances of offences vary significantly in both nature and severity.²⁰⁹ There is a broad range of offending that can constitute murder, such that murder offences differ widely in both severity and character 'probably more so than any other crime'.²¹⁰ Murder can encompass a single 'mercy' killing; an extremely violent, pre-meditated killing; or multiple killings.²¹¹ There is also a wide spectrum of subjective blameworthiness and moral culpability of the person or persons responsible for the killing(s), which ranges from recklessness and intentional motives of compassion to intentional killings for financial gain or callous and calculating offenders.²¹² In relation to manslaughter, the Tasmanian Supreme Court has similarly stated:²¹³

It encompasses a wide range of situations, varying in their degree of heinousness, to the extent that it has been said that "there is no offence in which the permissible

²⁰⁹ John Anderson 'The Label of Life Imprisonment in Australia: A Principled Or Populist Approach To An Ultimate Sentence' (2012) 35(3) *University of New South Wales Law Journal* 747, 748, 750.

²¹⁰ Alex Bailin, 'The Inhumanity of Mandatory Sentences' (2002) *Criminal Law Review* 641, 641 citing *Reyes v The Queen* [2002] 2 AC 235 (Lord Bingham).

²¹¹ Ibid.

²¹² John Anderson 'The Label of Life Imprisonment in Australia: A Principled Or Populist Approach To An Ultimate Sentence' (2012) 35(3) *University of New South Wales Law Journal* 747, 764; *R v Howe* [1987] AC 417, 433 (HL) (Lord Hailsham).

²¹³ *Attorney-General (Tas) v Wells* [2003] TASSC, [26].

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”.²¹⁴

General sentencing principles require that the penalty must be proportionate to the seriousness of an offence²¹⁵ and accordingly any mitigating or aggravating factors must be taken into account.²¹⁶ However, the restrictive nature of a mandatory sentence of life imprisonment makes it difficult for sentencing judges to properly reflect differing circumstances of the offence and levels of culpability of an offender. This is arguably of increased importance in context of homicide offences, as they are subject to the most severe sanctions.²¹⁷ A mandatory life sentence for murder provides no scope for accounting for the ‘differing degrees of moral seriousness’ in murder offences,²¹⁸ and hence why the opposition to mandatory life imprisonment by law reform bodies, academics and other commentators is overwhelming.²¹⁹

²¹⁴ Citing *R v Withers* (1925) 25 SR (NSW) 382 at 394-5.

²¹⁵ *Lowe v The Queen* (1984) 154 CLR 606; *Leeth v The Commonwealth* (1992) 174 CLR 455; *Kruger v The Commonwealth* (1997) 190 CLR 1, 63-8 (Dawson J), 141-2 (McHugh J); *Siganto v The Queen* (1998) 194 CLR 656, 670-2 (Gaudron J); *Muir v The Queen* (2004) 206 ALR 189, 194 (McHugh and Hayne JJ); *Hili v The Queen* (2010) 242 CLR 520, 527 [18], 535 [49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

²¹⁶ Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Report No 97 (2007) 299.

²¹⁷ Dirk van Zyl Smit, *Taking Life Imprisonment Seriously in National and International Law* (Kluwer Law International, 2002) 1.

²¹⁸ D Wood, ‘The Abolition of Mandatory Life Imprisonment for Murder: Some jurisprudential issues’ in H Strang and S Gerull (eds), *Homicide: Patterns, Prevention And Control, Conference Proceedings No. 17* (Australian Institute of Criminology, 1993) 237, 249; John Anderson ‘The Label of Life Imprisonment in Australia: A Principled Or Populist Approach To An Ultimate Sentence’ (2012) 35(3) *University of New South Wales Law Journal* 747, 764.

²¹⁹ See, for example, New Zealand Criminal Law Reform Committee, *Report on Culpable Homicide* (1976) [6]; Law Reform Commission of Tasmania, *Insanity, Intoxication and Automatism*, Report No. 61 (1988) 3; Law Reform Commission of Victoria, *Homicide*, Report No 40 (1991) [294]; Queensland Criminal Code Review Committee, *Final Report to the Attorney General* (1992) 55, 194; Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Discussion Paper* (1998) 65; New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (2001) [147]; Elizabeth Sheehy, ‘Battered Women and Mandatory Minimum Sentences’ (2001) 39 *Osgoode Hall Law Journal* 529; Graeme Coss, ‘Provocative Reforms: A comparative critique’ (2006) 30 *Criminal Law Journal* 138, 144; Sean McAnally, ‘The Penalty for Murder’ [1998] *New Zealand Law Journal* 420; Isabel Grant, ‘Rethinking the Sentencing Regime for Murder’ (2001) 39 *Osgoode Hall Law Journal* 655, 700–701.

The majority of defendants in Australian criminal courts plead guilty, and South Australia is no exception, such that in a number of these case studies a defendant's guilty plea is taken into account as a mitigating factor in sentencing.²²⁰

In South Australia, there does not appear to be any specific scope for a sentencing judge to account for an intellectual disability or cognitive impairment as a 'special reason' under s 32A(3) of the *Criminal Law (Sentencing) Act 1988* (SA) (see Appendix 2), but 'provocation' may be taken into account, since a 'special reason' under s 32A (or s 48 of the *Sentencing Act 2017* (SA) once it comes into effect) includes if the victim's conduct or condition substantially mitigates the offence.

The following case studies will be explored with a view to determining whether the current regime can fairly account for situations of genuine extraordinary instances provocation, domestic violence situations, and mental illness, cognitive impairment or intellectual disability short of insanity at the sentencing stage.

Provocation

In the past decade in South Australia since the present law came into effect, there have been only a few instances where provocation has been successfully raised to reduce murder to manslaughter.²²¹ These are: *R v Li* (2016); *R v Narayan* (2011); *R v Kelleher* (2010); *R v Simpson, Lovell and Grosser* (2008) and *R v Lambadgee* (2007)²²² (see Table 2 'Manslaughter (Provocation) Sentencing' below). The other cases canvassed in this section are instances where a defendant *might* have had the

²²⁰ *Criminal Law (Sentencing) Act 1988* (SA) s 10B. The South Australian model is distinctive in Australia in legislating specific time frames and reductions available at each of these points. For other jurisdictions, see *Sentencing Act 1991* (Vic) ss 5(2)(e), 6AAA; *Penalties and Sentences Act 1992* (Qld) s 13; *Sentencing Act 1995* (WA) s 9AA; *Sentencing Act 1995* (NT) s 5(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22; *Crimes (Sentencing) Act 2005* (ACT) s 35. See further Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) 89; Elizabeth Wren and Lorana Bartels, 'Guilty, Your Honour: Recent Legislative Developments on the Guilty Plea Discount and an Australian Capital Territory Case Study on Its Operation' (2014) 35 *Adelaide Law Review* 361, 371.

²²¹ *R v Narayan* [2011] SASCFC 61, [46]–[48]; *R v Li* [2016] SASCFC 152, [28], [37]–[38] (Stanley J), [50]–[54], [61]–[74], [123]–[126] (Lovell J).

²²² One case of manslaughter on the basis of provocation in the sample from 2007 (*R v Lambadgee*, Supreme Court of South Australia, 23 March 2007 (Vanstone J) No 90/2006) predates the commencement of the present law.

partial defence of provocation available in cases over the past 10 years in South Australia. It should be noted that the basis on which an offender charged with murder has been convicted of manslaughter is not always clear.

R v Bampton

In this case, the defendant plead guilty to murder. The defendant had been in a ‘poisonous’, volatile relationship with the deceased centred around drug abuse, and on at least two prior occasions the defendant had become violent towards the victim.

During an argument on the night of the murder, the deceased informed the defendant she had had sexual intercourse with another man. Later the defendant overheard her arranging to meet another man for sex over the phone, which the defendant perceived to be a serious taunt, and shot the deceased in the head with a .22 rifle from a range of approximately 2-3 metres in what was described as ‘a fit of anger’.

In sentencing, defence counsel submitted that the defendant could have ‘run a provocation defence’ at trial. Although the judge accepted that ‘acts of violence and domestic violence cannot be tolerated under any circumstances’, Sulan J impliedly accepted the victim’s conduct might have amounted to ‘special reasons’ to warrant the imposition of a sentence below the mandatory minimum non-parole period of 20 years. His Honour ultimately did set a non-parole period of 18 years, but this was on the basis of the defendant’s guilty plea and cooperation with the authorities.

R v Lindsay

As this case ultimately went on appeal to the High Court in 2015,²²³ this case will only be briefly flagged as a case in which the neither the original or the subsequent sentencing judge considered that the victim’s conduct substantially mitigated the conduct of the defendant pursuant to s 32A(2)(b) of the *Criminal Law (Sentencing) Act* 1998 (see Appendix 2). On both occasions, the court did not find ‘special reasons’ existed to warrant a non-parole period below the usual statutory minimum.

²²³ (2015) 255 CLR 272.

The court imposed a sentence of life imprisonment with a non-parole period of 23 years.

R v Li

The offender was charged with the murder of his mother, who he killed in March 2011 when he was just 18 years of age. Li was found not guilty of murder by the jury, but guilty of manslaughter by operation of provocation. In sentencing, Kelly J was satisfied that the offender lost control in the course of an altercation with the deceased, and killed her by hitting her over the head and then strangling her to death whilst still in that state. No mental illness or condition was present in this case which went to explaining the killing of his mother, however it was observed in sentencing that the offender had an upbringing that ‘might be expected to result in emotional difficulties’ with the deceased verbally, emotionally and sometimes physically abusing him.

Her Honour did not find that the conduct of the offender’s mother substantially mitigated the conduct in strangling her to death, and special reasons did not exist for the purposes of s 32A of the *Criminal Law (Sentencing) Act 1988* (SA).²²⁴ Further, Her Honour observed:

... I cannot think that Parliament intended that a person who has already received the benefit of a partial defence of provocation by the verdict of guilty to the crime of manslaughter should, in effect, be given a double discount for that very same conduct when imposing a non-parole period.

Kelly J categorised the killing as in the more serious category of an offence of manslaughter, and imposed a head sentence of nine years with a non-parole period of seven years, two months and 11 days.

²²⁴ This finding was upheld on appeal. See *R v Li* [2016] SASCF 152, [46] Stanley J (Peek J agreeing), [133] (Lovell J).

R v Cox

In this case, Cox was found to be mentally competent and was ultimately found guilty of murder following a judge only trial before White J.²²⁵ Any suggestion of a provocation defence was rejected by White J.²²⁶

The murder occurred in the context of a domestic relationship. White J observed that the violence inflicted on the deceased was motivated by a belief that the deceased had been unfaithful and because the infliction of violence (both verbal and physical) was the method that the defendant was accustomed to adopt with the deceased.

Although this case was decided before the introduction of s 32(5) and 32A of the *Criminal Law (Sentencing) Act 1998* (see Appendix 1 and Appendix 2), White J still examined in sentencing the defendant's psychiatric condition of 'morbid jealousy' as it provided an 'underlying explanation' for his violence. That was the condition led the Cox's strong belief, bordering on conviction, that the deceased had been unfaithful to him. However, White J found that this condition did not 'compromise [the defendant's] awareness that a physical assault was quite wrong, nor was [the defendant's] ability to control [him]self during the course of the assault impaired'.

A sentence of life imprisonment with a non-parole period of 21 years was imposed.

R v Narayan

In *The Queen v Narayan* [2011] SASCFC 61, Mrs Narayan had killed her husband following psychological (including flaunting an affair he was having) and physical abuse. This abuse had meant Mrs Narayan developed a learned helplessness based upon her cultural and personal beliefs.

Mrs Narayan was charged with murder. She provided the DPP with a signed statement setting out what she did that amounted to manslaughter with the report of an expert which clarified how she had poured petrol on her husband and set him alight. Mrs Narayan offered to plead guilty to manslaughter by reason of provocation.

²²⁵ *R v Cox* [2006] SASC 188 (27 June 2006) (White J).

²²⁶ [2006] SASC 188, [187]-[195].

The parties were unable to resolve the case and it proceeded to trial, Mrs Narayan pleading not guilty to both murder and manslaughter at trial. The jury returned a verdict of not guilty for murder but guilty of manslaughter on the basis of provocation. In sentencing, Sulan J noted that upon confronting her husband about his affair, he had responded to Mrs Narayan by turning his back on her and saying 'No you won't, you bitch'. Sulan J noted that saying this was treating the defendant with 'absolute disdain' and 'was worse than the blows you had received and worse than the beatings you had received', amounting to provocation.

In relation to manslaughter, Sulan J noted the present law required that a non-parole period be at least four-fifths the length of a head sentence. This is subject to the court's discretion to fix shorter non-parole period if 'special reason' exist. During sentencing submissions, it was accepted by Sulan J that 'special reasons' existed such that the non-parole period for manslaughter was able to be fixed at less than the usual four-fifths of the head sentence. Sulan J noted that the offence was committed in circumstances in which the deceased's conduct substantially mitigated Mrs Narayan's conduct and also because of the degree in which Mrs Narayan had co-operated in the investigation and prosecution of the offence and the circumstances surrounding that cooperation.

The defendant was ultimately sentenced to six years imprisonment, with a non-parole period of three years (43% of head sentence). The sentence was wholly suspended. The sentence was upheld on appeal, the Court of Criminal Appeal observing that, whilst the sentence may well have been merciful, it was not unduly lenient.²²⁷ If convicted of murder, the likely non-parole period here would have been just less than 20 years.

²²⁷ [2011] SASFC 61 (1 July 2011).

R v Ali

In this case, Ali was found guilty of manslaughter. The killing occurred following notification that he had not paid certain accounts, of which the defendant was unaware. During this confrontation, the victim ‘spoke and acted in an aggressive manner’ and ‘made abusive and hurtful statements’ about Ali’s mother in which the court observed that the ‘language used was particularly offensive to a member of the Afghani community’. A fight developed, in which Ali stabbed and wounded the victim several times, causing death. Although Ali (facing a manslaughter charge) did not claim to be the subject of ‘legal provocation’, Gray J remarked in sentencing:

I consider it probable that [the victim] was the instigator of the fight. I am satisfied that at the very least the conduct of [the victim] materially contributed to the volatility and to the fight that ensued. I am satisfied that [the victim]’s conduct substantially mitigated your conduct.

In this case, Gray J was satisfied that a special reason existed having regard to the fact that the offence was committed in the circumstance where the victim’s conduct substantially mitigated the offender’s conduct. Ali was ultimately sentenced to four years and 10 months imprisonment with a non-parole period of 18 months.

R v Archer

In this case, Archer pleaded guilty to the murder of his female partner in the context of domestic violence. In determining the non-parole period, Kelly J observed that as the defendant was a controlling and abusive man who ‘thinks he owns his partner’s life’, this case represented a ‘very serious category for the crime of murder’. Notwithstanding Archer’s guilty plea, Kelly J declined to apply the full discount, as it would have been disproportionate to the gravity of the offending (especially noting the context of domestic violence). Kelly J imposed a non-parole period of 22 years.

R v Curtis

In this case, Curtis was found guilty by the jury of manslaughter on the apparent basis of an unlawful and dangerous act in relation to the killing of his de facto partner. Curtis brutally bludgeoned his partner to death with items including a wheel brace, a wheel rim, a saucepan and two stones. The jury convicted him of murder.

Gray J observed that the deceased had been subject long-term and ‘ingrained domestic violence’ at the hands of Curtis and that the frequency and seriousness of those assaults had significantly escalated over time. His Honour noted that at trial, the defendant’s conduct had been explained by an accusation that the victim was acting inappropriately with another man while the defendant was incarcerated. However, Gray J swiftly emphasised that this conduct did not mitigate the defendant’s actions, and noted:

Domestic violence is insidious. It is a serious problem in our community. Generally, it is perpetrated on women by a male partner. Usually the male partner is physically stronger. Often a weapon is used. The women in these circumstances are the weak and vulnerable and are in need of and deserve protection. Domestic partners are entitled to look to the law and those involved in all aspects of the law to provide them with real protection. Your criminal conduct toward your *de facto*, [the victim], was cowardly and despicable and falls into the worst category of domestic violence.

Curtis was sentenced to a term of imprisonment of 17 years and six months, and due to the ‘serious nature of your past and present offending and the focus of your offending on domestic partners’ a non-parole period of 14 years was fixed.

R v Simpson, Lovell and Grosser

In this case, the defendant, Lovell, pleaded guilty to manslaughter on the basis of provocation, after kicking and beating the victim to death in a ‘sustained and violent attack’. Lovell asserted he lost control after he saw the deceased ‘groping’ his partner, Ms Lovell, in his home. Lovell was aware that the deceased was a convicted sexual offender and that Ms Lovell had previously been in an abusive relationship and had been a victim of a serious sexual assault when she had been 18 years old.

In sentencing, Kelly J had regard to the report of a psychologist, who identified that Lovell had a number of mental health issues, and a ‘serious problem with anger and impulsive behaviour’ that was material to how he had come to lose his self-control. Kelly J accepted that the deceased’s actions in assaulting Ms Lovell were provocative, but that Lovell’s reaction was disproportionate and excessive to the provocation.

Kelly J accepted that the deceased’s assault of Ms Lovell mitigated the defendant’s conduct and therefore amounted to a ‘special reason’ under s 32A(3)(a) *Criminal Law*

(Sentencing) Act 1998 (see Appendix 2). Kelly J imposed a total head sentence of nine years and four months, with a non-parole period of six years (less than the usual mandatory four-fifths of the head sentence).²²⁸ If convicted of murder, the head sentence and non-parole period would have been notably higher.

R v Lambadgee

The jury acquitted the defendant of the murder of his father but found him guilty of manslaughter. The defence of provocation was raised at trial. In sentencing, Vanstone J ultimately 'consider[ed] it likely that it was that route which led the jury to convict you of manslaughter' and imposed sentence on this basis.

The provocative conduct appeared to be the father's 'disparaging' words in reference to the defendant's homosexuality, and that this meant he would not provide him with grandchildren. The defendant then assaulted a family friend, and left the premises. The defendant then returned to the premises with a knife, threw a brick through the glass sliding doors, entered and threatened to stab him, and then did so fatally in the chest.

Vanstone J observed:

While I have accepted that the deceased acted provocatively – perhaps heartlessly rather than maliciously – that is no justification whatsoever for what occurred.

The total head sentence was set at eight years and five months (including seventeen months for breach of a good behaviour bond, and a reduction of one year for a guilty plea to manslaughter notwithstanding that it had been rejected by the Director of Public Prosecutions). The non-parole period was fixed at five and a half years.

R v Kelleher

In this case, the jury acquitted Kelleher of murder, but found him guilty of the manslaughter after he had killed the victim by hitting him violently over his head with an iron bar as he lay on his bed following taunts about the Rebels outlaw motorcycle group. The jury accepted that the gravity of the deceased's taunts – which he knew

²²⁸ *Criminal Law (Sentencing) Act 1988* (SA) s 32. See Appendix 1 below.

was a topic about which Kelleher was extremely vulnerable – his behaviour and his ‘continual goading’ provoked the defendant into a loss of self-control under which he killed. As observed by Vanstone J, ‘the jury must have found that the ordinary man, faced with provocative conduct of this gravity – measured through [the defendant’s] eyes – could have reacted as [the defendant] did.’

In sentencing for manslaughter, Vanstone J noted that the court retains the discretion to determine both the head sentence and non-parole period, so long as the non-parole period is set at least four-fifths of the head sentence.²²⁹ Kelleher was sentenced to imprisonment for 13 years and nine months, with a non-parole period of 11 years.

²²⁹ *Criminal Law (Sentencing) Act 1988* (SA) s 32. See Appendix 1 below.

Table 2: Manslaughter (Provocation) Sentencing

Case	Type	Plea?	Facts	Head Sentence	Non-parole period
<i>R v Li</i> (2016)	Provocation Assault (family member)	No	Defendant hit mother over the head and strangled her during an altercation, following years of verbal, emotional and sometimes physical abuse from the deceased.	9 years	7 years, 2 months, 11 days
<i>R v Narayan</i> (2011)	Provocation Domestic Assault	Offered to plead guilty to manslaughter, but was rejected.	Defendant poured petrol on her husband and set him alight following years of psychological and physical abuse from the deceased. Defendant cooperated in the investigation and prosecution.	6 years	3 years
<i>R v Kelleher</i> (2010)	Provocation Assault	No	Defendant hit deceased over the head with an iron bar after he made taunts about the Rebels motorcycle group.	13 years 9 months	11 years

Case	Type	Plea?	Facts	Head Sentence	Non-parole period
<i>R v Simpson, Lovell and Grosser</i> (2008)	Provocation Assault	Guilty plea	<p>Defendant lost control after he saw the deceased ‘groping’ his partner.</p> <p>Defendant had previously been in an abusive relationship and had been a victim of rape.</p> <p>Defendant had a number of mental health issues, and a ‘serious problem with anger and impulsive behaviour.</p>	9 years 4 months	6 years
<i>R v Lambadgee</i> (2007)	Provocation Family member	Offered to plead guilty to manslaughter, but was rejected.		8 years 5 months	5 years 6 months

Cognitive Impairment

Sentencing judges in South Australia have generally declined to accept that a mental illness, intellectual disability or cognitive ability that falls short of the defence of mental impairment under Part 8A of the *Criminal Law Consolidation Act* amounts to a ‘special reason’ to allow a court to depart from the mandatory non-parole period for murder.²³⁰

This situation is anomalous. Such offenders are generally afforded consideration in sentencing and mental illness, intellectual disability or cognitive ability are regarded as potential, though not automatic, mitigating factors.²³¹ The rationale for this is that if ‘total’ mental impairment absolves all criminal blame, then significant mental or cognitive incapacity short of the high threshold for the defence of mental impairment (or insanity at common law) should generally operate to reduce an offender’s culpability.²³² However, the present South Australian mandatory minimum non-parole period regime is unsatisfactory in that it restricts, if not precludes, offenders convicted of murder or a serious crime against the person from being sentenced to a non-parole period below the statutory minimum. South Australia does not have a partial defence to murder as exists in other jurisdictions such as England or New South Wales of diminished responsibility.

The following is a selection of case studies where the sentencing judge has made remarks about the offender’s diminished or otherwise reduced capacity in the form of

²³⁰ See *R v A, D; R v Barry Walter Coleman*. See also South Australia, *Parliamentary Debates*, Legislative Council, 24 July 2007, 448 (Hon P Holloway).

²³¹ See *Criminal Law (Sentencing) Act 1988* s 10(1)(l). The range of such matters is more extensively defined in s 11(1)(f) of the *Sentencing Act 2017* (SA) coupled with the expansive definition of ‘cognitive impairment’ in s 5(1) of that Act. See further Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 2014) 318–331 [9.155]–[9.170] (psychiatric and psychological illness) 331–339 [9.175] (intellectual disability); *R v Verdins* (2007) 16 VR 269; *R v McIntosh* (2008) 191 A Crim R 370; *Muldrock v R* (2011) 244 CLR 210.

²³² Judith Ablett-Kerr, ‘A Licence to Kill or an Overdue Reform? The Case of Diminished Responsibility’ (1997) 9 *Otago Law Review* 1. See also Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 2014) 318–331 [9.155]–[9.170] (psychiatric and psychological illness) 331–339 [9.175] (intellectual disability).

cognitive impairment or intellectual disability may have been a factor in the offending for murder and manslaughter cases over the past 10 years in South Australia.

R v A, D

This case concerned a 14 year old defendant who was sentenced as an adult following a guilty plea to the charge of murder. The deceased was also 14 years old, and died as a result of a stab wound received during an altercation between the two. Expert evidence was accepted by Sulan J that the defendant's cognitive abilities at the time of the offending were 'probably the age of about 8-10 years of age' and as His Honour observed that if this were the test then this 'would put you almost younger than the legislation provides for criminal responsibility'. In sentencing, Sulan J observed:

Section 32A(2) provides that if the court is satisfied that special reasons exist, the court may set a non-parole period shorter than the prescribed period. I note that s 32A(3), which determines the test of special reasons, has no provision that deals with the mental capacity of the person who committed the murder.

In order for special reasons to exist, the individual's position, insofar as his mental development, is not a factor which would give rise to special reasons.

Although Sulan J held that the offender's cognitive impairment did not constitute a 'special reason', the defendant's guilty plea, his age at the time of his offending and his 'difficult upbringing' resulted a non-parole period of only six years.

R v Coleman

In this case, the defendant was found guilty of murder by jury verdict for the 'frenzied and violent' stabbing of a friend following a night out drinking. During sentencing, David J observed that the defendant was intellectually disabled, in the sense that he was in the 'bottom 2% of IQ testing of people in the community'. Notwithstanding this, the defendant was held fit to stand trial and was mentally competent to commit a crime. It was acknowledged that this mild intellectual disability would be exaggerated by the effects of the large amounts of alcohol consumed by Coleman on the night of the murder. However, this did not amount to a 'special reason' as contemplated by the *Criminal Law (Sentencing) Act 1988*, and the defendant received a sentence of life imprisonment with the usual minimum non-parole period of 20 years.

R v Kageregere

In this case, the defendant was found guilty of murder at a judge alone trial for the killing of his wife who died by a fire lit by the accused. Shortly before the defendant ignited the fire, he had punched her and knocked her unconscious. Believing she was dead, the defendant lit the fire hoping that her death would be attributed to the ensuing fire and that he would escape any responsibility for her death.

Kourakis J (as he then was) identified that the mandatory minimum non-parole period is prescribed in respect of an offence ‘at the lower end of the range of objective seriousness’, but this offence was outside that range because ‘[t]he offence was committed in the context of an abusive domestic relationship’ with the ignition of the fire being motivated by the ‘defendant’s continuing anger over aspects of your relationship’ and a ‘desire to avoid apprehension’ for assaulting her.

His Honour did accept that the defendant had ‘limited intellectual capacity’ as well as post-traumatic stress disorder as a result of civil war in Burundi and acknowledged the separation from family, impoverishment and despair which played a part in his offending. However, Kourakis J stated that ‘[y]our subjective circumstances demand sympathy but do little to mitigate or even explain the offence’ and for the offences of arson and murder, imposed a total non-parole period of 26 years.

R v Hall

Hall pleaded guilty to the crime of murder of his partner, Kelly Elizabeth Johnson, whom he assaulted first with a frypan and then caused death by stabbing her multiple times with a kitchen knife. This was following Ms Johnson’s decision to enter into a relationship with another man and to move out of Hall’s home. There was however no evidence that Hall had any prior history of violence.

In the course of sentencing, Kelly J observed:

You are a man of low average intelligence ... Those factors no doubt have contributed to you becoming a lonely isolated adult with poor social skills. One can identify with your feelings of anger, jealousy and grief at the break-up of your relationship with Ms Johnson. However, in your case, these emotions were exacerbated by some of the deficits in your personality identified in the reports.

Her Honour found there *were* special reasons to reduce the mandatory non-parole period of 20 years, but this was rather on the basis that after the crime Hall flagged down a passing police car and confessed his guilt. After being credited for his guilty plea, and his cooperation with police, a non-parole period of 17 years was set.

R v Fraser

In this case, Fraser pleaded guilty to murder, after the killing of his partner as a result of the application of a ligature to the deceased's neck during sexual activity.

Nyland J acknowledged a number of psychological and psychiatric reports that contained a 'consistent expression of opinion that [the defendant's] intellectual capacity is of borderline severity and you are functionally illiterate'. Further, Fraser was described as essentially suffering from a form of chronic or complex post-traumatic stress disorder arising out of his childhood trauma and subsequent traumatic events, which were identified to have played a significant role in the offence.

Counsel for the defendant relied on the defendant's 'intellectual deficits' to reduce his subjective culpability. However, Nyland J noted that, despite these deficits, the Fraser was clearly well aware of the risks involved in his actions and persisted regardless. Fraser was sentenced to life imprisonment, and after a discount for time served and a plea of guilty, a non-parole period of 22 years was imposed.

R v Hallcroft

In this case, the defendant pleaded guilty to murder, after stabbing the deceased with a knife and beating him with a wooden club upon discovering that the deceased had used up the defendant's prescription medication. The crime was especially brutal. The defendant amputated the victim's legs and disposed of the body in a wheelie-bin some 100 metres down the road from his home.

Hallcroft pleaded guilty at arraignment after offering a plea to manslaughter shortly before the answer charge date, for which the sentencing judge imposed a 30 per cent discount. In light of psychological and psychiatric reports, Kelly J observed that the defendant was a man 'suffering a mild intellectual disability with an IQ well below average', and had further reduced his 'already impaired cognitive function' through

years of drug and alcohol abuse. This went to explaining the defendant's apparent lack of insight into the gravity of his offending. But this was of little weight here. Her Honour remarked:

Sadly, many offenders who commit dreadful crimes are at the lower end of the intellectual scale and, to that extent, there is nothing particularly unusual about your deficits.

Kelly J did not categorise the murder as being at the lower end of the range of objective seriousness to which the minimum mandatory non-parole period of 20 years applies. Commencing with a starting point of 22 years non-parole and then applying the 30% discount, the judge sentenced the defendant to life imprisonment with a non-parole period of 15 years.²³³

R v Smith

In this case, the defendant was found guilty by the jury of the murder of her 18-month year old daughter after hitting her repeatedly over the course of a day.

Although this was prior to the introduction of the mandatory sentencing regime, in sentencing, Duggan J observed that the psychological reports before him indicated that Smith had an 'intellectual level which [was] below average and within the borderline range'. His Honour went on to state that the history of family violence inflicted by the offender's father and her below average IQ 'could lead to potentially inadequate parenting skills and inappropriate coping mechanisms'. Accordingly, Smith was sentenced to life imprisonment, but with a non-parole period of 14 years.

R v T, J

In this case, the defendant (who was a youth) was sentenced as an adult following a guilty plea to the murder of a stranger in what was described as a 'frenzied and relentless attack' initially carried out with a knife and then a large brick.

²³³ The difficult question of the interaction of the statutory guilty plea discount regime with the mandatory sentencing regime for murder was considered by the Court of Appeal in *R v Hallcroft* (2016) 126 SASR 415.

Nyland J observed that a likely factor in the offending was the defendant's 'cognitive functioning', with assessments indicating the offender fell within the 'range of mild mental retardation'. As a result of this level of intellectual functioning, the offender was described as having 'poor problem-solving skills' such that it was 'very difficult' to 'evaluate the consequences' of any actions. Nyland J stated that the non-parole period would have been set at 25 years, but was reduced by 10 years by way of a discount, resulting in a non-parole period of 15 years.

Table 3: Comparison of Australian Adult Parole Regimes²³⁴

Parole Board's Jurisdiction							
Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory
Adult Parole Board has discretion in relation to all prisoners who have a non-parole period.	Parole is automatic for sentences of imprisonment of less than 3 years, although Parole Authority can revoke. Parole Authority has discretion for sentences longer than 3 years.	Court sets parole release for sentences less than 3 years, although Parole Board can revoke. Regional Parole Board has discretion for parole for sentences 3–8 years. Queensland Parole Board has discretion for sentences longer than 8 years.	Parole is automatic for certain prisoners sentenced to less than 5 years. Parole Authority has discretion for sentences longer than 5 years or for offenders excluded from automatic parole (imprisoned for sex offences, personal violence offences, arson).	Prisoners Review Board has discretion in relation to all prisoners who have a non-parole period.	Parole Board has discretion in relation to all prisoners who have a non-parole period.	Parole Board has discretion in relation to all prisoners who have a non-parole period.	Parole Board has discretion in relation to all prisoners who have a non-parole period.

²³⁴ Sentencing Advisory Council, *Review of the Victorian Adult Parole System* (2012), 239.

Nature and source of guidance							
Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory
Internal Developed by Adult Parole Board and set out in annual report and unpublished Members' Manual.	Legislative Set out in s 135 of the <i>Crimes (Administration of Sentences) Act 1999</i> .	Legislative and Ministerial guidelines Guidelines made under <i>Corrective Services Act 2006</i> s 227. The <i>Corrective Services Act 2006</i> governs cancellation of parole.	Legislative Set out in s 67 of the <i>Correctional Services Act 1982</i> .	Legislative Set out in s 5A, 5B and 20(2) of the <i>Sentence Administration Act 2003</i>	Legislative Set out in s 72(4) of the <i>Corrections Act 1997</i> .	Legislative Set out in s 120 of the <i>Crimes (Sentence Administration) Act 2005</i> .	Internal Powers set out in <i>Parole of Prisoners Act 1979</i> . Guidelines (published in annual report), which emphasise that each case is considered on its merits, and that the factors listed are a guide only.
Threshold test or overriding principle							
Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory
None.	The Parole Authority must not make a parole order for an offender unless it is satisfied, on the	Principles for Board decision-making. Highest priority should always be	The paramount consideration of the Parole Board when determining an application under this section	The Prisoners Review Board or any other person performing functions under this Act must	None.	The Parole Board may make a parole order for an offender only if it considers that parole is	None.

	balance of probabilities, that the release of the offender is appropriate in the public interest (s 135(1)).	the safety of the community (Guideline 1.2). The Parole Board should consider whether there is an unacceptable risk to the community if the offender is released to parole and whether the risk to the community would be greater if the offender does not spend a period of time on parole (1.3).	for the release of a prisoner on parole must be the safety of the community (s 67(3)(a)).	regard the safety of the community as the paramount consideration (s 5B).		appropriate for the offender, having regard to the principle that the public interest is of primary importance (s 120(1)).	
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Factors for consideration in granting parole

	Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory
The Offence	Nature and circumstances of the offence(s).	The nature and circumstances of the offence to which the offender's sentence relates		Where the prisoner was imprisoned for an offence or offences involving	The circumstances of the commission of, and the seriousness of, an offence for			Nature and circumstances of the offence(s).

		(s 135(2)(c)).		violence, the circumstances and gravity of the offence, or offences, for which the prisoner was sentenced to imprisonment (but the Parole Board may not substitute its view of these matters for the view expressed by the court in passing sentence) (s 67(4)(c)).	which the prisoner is in custody (s 5A(b)).			
Criminal History	Prior criminal history.	The offender's criminal history (s 135(2)(e)).	The prisoner's prior criminal history and any patterns of offending (2.1(c)).				The offender's antecedents (s 120(2)(b)).	The prisoner's criminal history and patterns of offending.
Sentencing remarks	Comments made by the sentencing court.	Any relevant comments made by the sentencing court (s 135(2)(d)).	The recommendation for parole, parole eligibility date or any recommendations or comments of	Any relevant remarks made by the court in passing sentence (s 67(4)(a)).	Any remarks by a court that has sentenced the prisoner to imprisonment that are relevant to any of the	Any remarks made by the court in passing sentence (s 72(4)(d)).	Any relevant recommendation, observation and comment made by the sentencing court	Comments made by the sentencing judge when imposing sentence.

			the sentencing court (2.1(a)).		matters mentioned in paragraph (a) or (b) (s 5A(c)).		(s 120(2)(a)).	
Previous parole	Previous history of supervision in the community.		The prisoner's compliance with any other previous grant of community-based release, resettlement leave program, community service or work program (2.1(f)).	The behaviour of the prisoner during any previous release on parole (s 64(4)(e)).	The behaviour of the prisoner when subject to any release order made previously (s 5A(h)).	The behaviour of the prisoner during any previous release on parole (s 72(4)(h)); the behaviour of the prisoner while subject to any order of a court (s 72(4)(i)).		Previous history of supervision in the community.
Risk to community	Assessment of the potential risk to the community if the offender is released from custody.		The likelihood of the prisoner committing further offences (2.1 (d)). Whether there are any other circumstances that are likely to increase the risk the prisoner presents to the community (2.1 (g)) (see also (h) below).		The degree of risk (having regard to any likelihood of the prisoner committing an offence when subject to an early release order and the likely nature and seriousness of any such offence) that the release of the prisoner would appear to present	The likelihood of the prisoner reoffending (s 74(4)(a)); the protection of the public (s 72(4)(b)).	The likelihood that, if released on parole, the offender will commit further offences (s 120(2)(i)).	The possibility of the offender reoffending while on parole and the likely nature of the reoffending. The risk of harm to the community and the victim.

					to the personal safety of people in the community or of any individual in the community (s 5A(a)); the likelihood of the prisoner committing an offence when subject to an early release order (s 5A(i)).			
Release Plans	Release plans and whether suitable accommodation is available.		Whether the prisoner has access to supports or services that may reduce the risk the prisoner presents to the community (2.1 (h)).	The probable circumstances of the prisoner after release from prison or home detention (s 67(4)(g)).		The probable circumstances of the prisoner after release from prison (s 72(4)(k)).		Release plans including accommodation and employment.
Expert reports	Assessments and recommendations made by appropriate professionals, including psychiatrists,	Any report in relation to the granting of parole to the offender that has been prepared by or on behalf of the Probation	Any submissions made to the Parole Board by an eligible person (2.1 (e)). Any medical, psychological,	Any reports tendered to the Parole Board— (i) on the social background, or the medical, psychological or psychiatric		Any reports tendered to the Parole Board on the social background of the prisoner, the medical, psychological or	Any report required by regulation in relation to the granting of parole to the offender (s 120(2)(e)); any	Reports, assessments and recommendations made by a variety of professionals, including medical

	psychologists, and community corrections officers.	and Parole Service, as referred to in section 135A(h) and any other report in relation to the granting of parole to the offender that has been prepared by or on behalf of the Review Council, the Commissioner or any other authority of the state (s 135(2)(i)).	behavioural or risk assessment report relating to the prisoner (2.1 (i)).	condition, of the prisoner; (ii) from community corrections officers or other officers or employees of the Department (s 67(4)(f)).		psychiatric condition of the prisoner or any other matter relating to the prisoner, including in the case of a prisoner who is or has been a forensic patient any report of the Chief Forensic Psychiatrist (s 72(4)(j)).	other report prepared by or for the Territory in relation to the granting of parole to the offender (s 120(2)(f)).	practitioners, psychiatrists, psychologists, custodial staff and/or community corrections officers.
Offender's Submissions	Submissions made by the offender, the offender's family, friends and potential employers, or any other relevant individual.							Submissions made by the prisoner, the prisoner's family, friends and any potential employers or other relevant individuals; submissions made by the legal representatives of the prisoner.

Victim's Submissions	Written submissions made by the victim(s) or by persons related to the victim(s).	The likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole (s 135(2)(g)).		If, in relation to an offence for which the prisoner was imprisoned, there is a registered victim – the impact that the release of the prisoner on parole is likely to have on the registered victim and the registered victim's family (s 67(4)(ca)).	Issues for any victim of an offence for which the prisoner is in custody if the prisoner is released, including any matter raised in a victim's submission (s 5A(d)).	Any statement provided under subsection (2B) by a victim, or, if subsection (2AB) applies, the parent or guardian of the victim, of an offence for which the prisoner has been sentenced to imprisonment (s 72(4)(ka)).	Any submission made, and concern expressed, to the Parole Board by a victim of the offender (s 120(2)(c)). The likely effect of the offender being paroled on any victim of the offender, and on the victim's family, and, in particular, any concern, of which the Board is aware, expressed by or for the victim, or the victim's family, about the need for protection from violence or harassment by the offender (s 120(2)(d)).	The victim's safety, welfare and whereabouts. Representations made by the victim or by persons related to the victim.
Behaviour in custody	Conduct of the offender while in custody and		The prisoner's cooperation with authorities both	The behaviour of the prisoner while in prison	The behaviour of the prisoner when in custody	The behaviour of the prisoner while in prison	The offender's conduct while serving the	Institutional reports in relation to the

	whether any positive drug tests have been recorded.		in securing the conviction of others and preservation of good order within the corrections system (2.1(b)).	or on home detention (s 67(4)(d)).	insofar as it may be relevant to determining how the prisoner is likely to behave if released (s 5A(e)).	and, if the prisoner has been in a secure mental health unit, while in that secure mental health unit (s 72(4)(g)).	offender's sentence of imprisonment (s 120(2)(g)). The security rating of the prisoner within the prison.	prisoner's behaviour while in prison.
Participation in Rehabilitation	Willingness to participate in relevant programs and courses while in custody.		Recommended rehabilitation programs or interventions and the prisoner's progress in addressing the recommendation (2.1(j)).		Whether the prisoner has participated in programs available to the prisoner when in custody, and if not the reasons for not doing so (s 5A (f)); the prisoner's performance when participating in a program mentioned in paragraph (f) (s 5A(g)).	The rehabilitation of the prisoner (s 72(4)(c)).	The offender's participation in activities while serving the sentence of imprisonment (s 120(2)(h)).	Rehabilitation courses undertaken by the prisoner. Education courses undertaken by the prisoner.
Community Safety		The need to protect the safety of the						

		community (s135(2)(a)).						
Public Confidence		The need to maintain public confidence in the administration of justice (s 135(2)(b)).						
Successful Re-integration		The likelihood of the offender being able to adapt to normal lawful community life (s 135(2)(f)).					Whether parole is likely to assist the offender to adjust to lawful community life (s 120(2)(k)).	
Drug testing		If the Drug Court has notified the Parole Authority that it has declined to make a compulsory drug treatment order in relation to an offender's sentence on the ground referred to in section 18D(1)(b)(vi) of the <i>Drug Court Act 1998</i> , the						

		circumstances of that decision to decline to make the order (s 135(2)(ia)).						
Compliance with conditions of Parole				The likelihood of the prisoner complying with the conditions of parole (s 67(4)(b)).	The likelihood of the prisoner complying with the standard obligations and any additional requirements of any early release order (s 5A(j)).	The likelihood of the prisoner complying with the conditions (s 72(4)(e)).	The likelihood that, if released on parole, the offender will comply with any condition to which the parole order would be subject (s 120(2)(j)).	Whether the prisoner can be adequately supervised in the community under the standard conditions of parole or whether further conditions of parole should be imposed.
Other Matters		Such other matters as the Parole Authority considers relevant (s 135(2)(k)). Such guidelines as are in force under section 185A (s 135(2)(j)).		Any other matters that the Parole Board thinks are relevant (s 67(4)(h)).	Any other consideration that is or may be relevant to whether the prisoner should be released (s 5A(k)).	Any other matters that the Parole Board thinks are relevant (s 72(4)(l)).	Any special circumstances in relation to the application (s 120(2)(l)); anything else prescribed by regulation (s 120(2)(m)); Subsection (2) [the list of criteria] does not limit the matters the Board may	Any other matters that the Parole Board thinks are relevant.

							consider (s 120(3)).	
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Appendices

Appendix 1: *Criminal Law (Sentencing) Act 1988 (SA) s 32*

32—Duty of court to fix or extend non-parole periods

(1) Subject to this section, where a court, on convicting a person of an offence, sentences the person to imprisonment, the court must—

(a) if the person is not subject to an existing non-parole period—fix a non-parole period; or

(b) if the person is subject to an existing non-parole period—review the non-parole period and extend it by such period as the court thinks fit (but not so that the period of extension exceeds the period of imprisonment that the person becomes liable to serve by virtue of the sentence, or sentences, imposed by the court); or

(c) if the person is serving a minimum term imposed in respect of an offence against a law of the Commonwealth or is liable to serve such a term on the expiry of an existing non-parole period—fix a non-parole period in respect of the sentence, or sentences, to be served upon the expiry of that minimum term.

(2) Where the sentence of imprisonment is imposed for an offence committed during a period of release on parole or conditional release from a previous sentence of imprisonment or detention, the court, in fixing a non-parole period under subsection (1)(a), must have regard to the total period of imprisonment (or detention and imprisonment) that the person is, by virtue of the new sentence and the balance of the previous sentence, liable to serve.

(3) Where a prisoner is serving a sentence of imprisonment but is not subject to an existing non-parole period, the sentencing court may, subject to subsection (5), fix a non-parole period, on application by the prisoner or the presiding member of the Parole Board.

(4) The fact that the prisoner has completed a non-parole period previously fixed in respect of the same sentence of imprisonment or that a court has previously declined to fix a non-parole period in respect of that sentence does not preclude an application under subsection (3).

(5) The above provisions are subject to the following qualifications:

(a) a non-parole period may not be fixed in respect of a person who is liable to serve a total period of imprisonment (or detention and imprisonment) of less than one year;

(ab) if fixing a non-parole period in respect of a person sentenced to life imprisonment for an offence of murder, the mandatory minimum non-parole period prescribed in respect of the offence is 20 years;

(b) where a person who is subject to a sentence of life imprisonment is further sentenced to imprisonment by the Magistrates Court or the Youth Court, the question of whether a non-parole period should be fixed or extended must be referred to the court by which the sentence of life imprisonment was imposed;

(ba) if fixing a non-parole period in respect of a person sentenced to imprisonment for a serious offence against the person, the mandatory minimum non-parole period prescribed in respect of the offence is four-fifths the length of the sentence;

(c) a court may, by order, decline to fix a non-parole period in respect of a person sentenced to imprisonment if the court is of the opinion that it would be inappropriate to fix such a period because of—

(i) the gravity of the offence or the circumstances surrounding the offence; or

(ii) the criminal record of the person; or

(iii) the behaviour of the person during any previous period of release on parole or conditional release; or

(iv) any other circumstance.

(5a) If—

(a) a court sentences a person under section 18A to the 1 penalty for a number of offences; and

(b) a mandatory minimum non-parole period is prescribed ("mandatory period) in respect of any of those offences, any non-parole period to be fixed by the court under that section—

(c) must be a period not less than the mandatory period prescribed in respect of the relevant offence; and

(d) if there is more than 1 such offence in respect of which a mandatory period is prescribed—must be a period not less than the greater of any such

mandatory period; and

(e) must be commenced or be taken to have commenced on the date specified by the court (which may be the day on which the person was first taken into custody or a later date specified by the court that occurs after the day on which the defendant was taken into custody but before the day on which the person is sentenced).

Appendix 2: *Criminal Law (Sentencing) Act 1988* (SA) s 32A (or s 48 of the *Sentencing Act 2017* (SA) once it comes into effect)

32A—Mandatory minimum non-parole periods and proportionality

(1) If a mandatory minimum non-parole period is prescribed in respect of an offence, the period prescribed represents the non-parole period for an offence at the lower end of the range of objective seriousness for offences to which the mandatory minimum non-parole period applies.

(2) In fixing a non-parole period in respect of an offence for which a mandatory minimum non-parole period is prescribed, the court may—

(a) if satisfied that a non-parole period that is longer than the prescribed period is warranted because of any objective or subjective factors affecting the relative seriousness of the offence, fix such longer non-parole period as it thinks fit; or

(b) if satisfied that special reasons exist for fixing a non-parole period that is shorter than the prescribed period, fix such shorter non-parole period as it thinks fit.

(3) In deciding whether special reasons exist for the purposes of subsection (2)(b), the court must have regard to the following matters and only those matters:

(a) the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct;

(b) if the offender pleaded guilty to the charge of the offence—that fact and the circumstances surrounding the plea;

(c) the degree to which the offender has cooperated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of, any such co-operation.

(4) This section applies whether a mandatory minimum non-parole period is prescribed under this Act or some other Act.

Appendix 3: Sentencing Act 1995 (NT) s 53A

Non-parole periods for offence of murder

(1) Subject to this section, where a court (the sentencing court) sentences an offender to be imprisoned for life for the offence of murder, the court must fix under section 53(1):

(a) a standard non-parole period of 20 years; or

(b) if any of the circumstances in subsection (3) apply – a non-parole period of 25 years.

(2) The standard non-parole period of 20 years referred to in subsection (1)(a) represents the non-parole period for an offence in the middle of the range of objective seriousness for offences to which the standard non-parole period applies.

(3) The circumstances referred to in subsection (1)(b) are any of the following:

(a) the victim's occupation was police officer, emergency services worker, correctional services officer (as defined in section 16 of the Correctional Services Act), judicial officer, health professional, teacher, community worker or other occupation involving the performance of a public function or the provision of a community service and the act or omission that caused the victim's death occurred while the victim was carrying out the duties of his or her occupation or for a reason otherwise connected with his or her occupation;

(b) the act or omission that caused the victim's death was part of a course of conduct by the offender that included conduct, either before or after the victim's death, that would have constituted a sexual offence against the victim;

(c) the victim was under 18 years of age at the time of the act or omission that caused the victim's death;

(d) if the offender is being sentenced for 2 or more convictions for unlawful homicide;

(e) if the offender is being sentenced for one conviction for murder and one or more other unlawful homicides are being taken into account;

(f) at the time the offender was convicted of the offence, the offender had one or more previous convictions for unlawful homicide.

(4) The sentencing court may fix a non-parole period that is longer than a non-parole period referred to in subsection (1)(a) or (b) if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted.

(5) The sentencing court may refuse to fix a non-parole period if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole.

(6) The sentencing court may fix a non-parole period that is shorter than the standard non-parole period of 20 years referred to in subsection (1)(a) if satisfied there are exceptional circumstances that justify fixing a shorter non-parole period.

(7) For there to be exceptional circumstances sufficient to justify fixing a shorter non-parole period under subsection (6), the sentencing court must be satisfied of the following matters and must not have regard to any other matters:

(a) the offender is:

(i) otherwise a person of good character; and

(ii) unlikely to re-offend;

(b) the victim's conduct, or conduct and condition, substantially mitigate the conduct of the offender.

(8) In considering whether the offender is unlikely to re-offend, the matters the sentencing court may have regard to include the following:

(a) whether the offender has a significant record of previous convictions;

(b) any expressions of remorse by the offender;

(c) any other matters referred to in section 5(2) that are relevant.

(9) The sentencing court must give reasons for fixing, or refusing to fix, a non-parole period and must identify in those reasons each of the factors it took into account in making that decision.

(10) The failure of the sentencing court to comply with this section when fixing, or refusing to fix, a non-parole period does not invalidate the sentence imposed on the offender.

(11) This section applies only in relation to an offence committed:

(a) after the commencement of the Sentencing (Crime of Murder) and Parole Reform Act 2003 ; or

(b) before the commencement of that Act if, at that commencement, the offender has not been sentenced for the offence.

(12) In subsection (3): "unlawful homicide" means the offence of murder or manslaughter.

Appendix 4: *Criminal Code 1913 (WA) s 279 (extract)*

279. Murder

(1) If a person unlawfully kills another person and —

(a) the person intends to cause the death of the person killed or another person;
or

(b) the person intends to cause a bodily injury of such a nature as to endanger, or be likely to endanger, the life of the person killed or another person; or

(c) the death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life,

the person is guilty of murder.

Alternative offence: s. 280, 281, 283, 284, 290 or 291 or Road Traffic Act 1974 s. 59.

(2) For the purposes of subsection (1)(a) and (b), it is immaterial that the person did not intend to hurt the person killed.

(3) For the purposes of subsection (1)(c), it is immaterial that the person did not intend to hurt any person.

(4) A person, other than a child, who is guilty of murder must be sentenced to life imprisonment unless —

(a) that sentence would be clearly unjust given the circumstances of the offence and the person; and

(b) the person is unlikely to be a threat to the safety of the community when released from imprisonment,

in which case, subject to subsection (5A), the person is liable to imprisonment for 20 years....

Appendix 5: *Sentencing Act 1995* (WA) s 90

90 Life imprisonment for murder, imposing

(1) A court that sentences an offender to life imprisonment for murder must either —

(a) set a minimum period of —

(i) at least 15 years, if the offence is committed by an adult offender (within the meaning given in The Criminal Code section 1(1)) in the course of conduct that constitutes an aggravated home burglary (within the meaning given in that section); or

(ii) at least 10 years, in any other case, that the offender must serve before being eligible for release on parole; or

(b) order that the offender must never be released.

(2) Any minimum period so set begins to run when the sentence of life imprisonment begins.

(3) A court must make an order under subsection (1)(b) if it is necessary to do so in order to meet the community's interest in punishment and deterrence.

(4) In determining whether an offence is one for which an order under subsection (1)(b) is necessary, the only matters relating to the offence that are to be taken into account are —

(a) the circumstances of the commission of the offence; and

(b) any aggravating factors.

Appendix 6: *Sentencing Act 2002* (NZ) s 102

(1) An offender who is convicted of murder must be sentenced to imprisonment for life, unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust.

(2) If a court does not impose a sentence of imprisonment for life on an offender convicted of murder, it must give written reasons for not doing so.

Appendix 7: *Corrective Services Act 2006* (Qld) s 181

181 Parole eligibility date for prisoner serving term of imprisonment for life

- (1) This section applies to a prisoner who is serving a term of imprisonment for life.
- (2) The prisoner's parole eligibility date is the day after the day on which the prisoner has served the following period of time—
 - (a) if the Criminal Code, section 305(2) applied on sentence—30 years or the longer time ordered under that section;
 - (b) if the Criminal Code, section 305(4) applied on sentence—25 years or the longer time ordered under that section;
 - (c) if the prisoner is serving a term of imprisonment for life for an offence of murder and paragraphs (a) and (b) do not apply—20 years;
 - (d) otherwise—15 years...

Appendix 8: *Criminal Code Act 1899* (Qld) s 304

304 Killing on provocation

- (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.
- (2) Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of an exceptional character.
- (3) Also, subsection(1) does not apply, other than in circumstances of an exceptional character, if—
 - (a) a domestic relationship exists between 2 persons; and
 - (b) one person unlawfully kills the other person (the *deceased*); and

(c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done—

(i) to end the relationship; or

(ii) to change the nature of the relationship; or

(iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.

(4) Further, subsection (1) does not apply, other than in circumstances of an exceptional character, if the sudden provocation is based on an unwanted sexual advance to the person.

(5) For subsection(3)(a), despite the *Domestic and Family Violence Protection Act 2012*, section 18(6), a domestic relationship includes a relationship in which 2 persons date or dated each other on a number of occasions.

(6) Subsection (3)(c)(i) applies even if the relationship has ended before the sudden provocation and killing happens.

(7) For proof of circumstances of an exceptional character mentioned in subsection (2) or (3) regard may be had to any history of violence that is relevant in all the circumstances.

(8) For proof of circumstances of an exceptional character mentioned in subsection (4), regard may be had to any history of violence, or of sexual conduct, between the person and the person who is unlawfully killed that is relevant in all the circumstances.

(9) On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only.

(10) When 2 or more persons unlawfully kill another, the fact that 1 of the persons is, under this section, guilty of manslaughter only does not affect the question whether the unlawful killing amounted to murder in the case of the other person or persons.

(11) In this section –

unwanted sexual advance, to a person, means a sexual advance that—

(a) is unwanted by the person; and

(b) if the sexual advance involves touching the person—involves only minor touching.

Examples of what may be minor touching depending on all the relevant circumstances—

patting, pinching, grabbing or brushing against the person, even if the touching is an offence against section 352(1)(a) or another provision of this Code or another Act

Appendix 9: Criminal Code Act 1899 (Qld) s 305

305 Punishment of murder

(1) Any person who commits the crime of murder is liable to imprisonment for life, which can not be mitigated or varied under this Code or any other law or is liable to an indefinite sentence under part 10 of the *Penalties and Sentences Act 1992*.

(2) If the person is being sentenced—

1. (a) on more than 1 conviction of murder; or
2. (b) on 1 conviction of murder and another offence of murder is taken into account; or
3. (c) on a conviction of murder and the person has on a previous occasion been sentenced for another offence of murder;

the court sentencing the person must make an order that the person must not be released from imprisonment until the person has served a minimum of 30 or more specified years of imprisonment, unless released sooner under exceptional circumstances parole under the *Corrective Services Act 2006*.

(3) Subsection (2)(c) applies whether the crime for which the person is being sentenced was committed before or after the conviction for the other offence of murder mentioned in the paragraph.

(4) If—

(a) the person killed was a police officer at the time the act or omission that caused the person's death was done or made; and

(b) the person being sentenced did the act or made the omission that caused the police officer's death—

(i) when—

(A) the police officer was performing the officer's duty; and

(B) the person knew or ought reasonably to have known that he or she was a police officer; or

(ii) because the police officer was a police officer; or

(iii) because of, or in retaliation for, the actions of the police officer or another police officer in the performance of the officer's duty;

the court sentencing the person must make an order that the person must not be released from imprisonment until the person has served a minimum of 25 or more specified years of imprisonment, unless released sooner under exceptional circumstances parole under the *Corrective Services Act 2006*.

(5) The *Penalties and Sentences Act 1992*, section 161Q also states a circumstance of aggravation for the crime of murder.

Appendix 10 *Crimes Act 1958* (Vic) s 3

3 Punishment for murder

Notwithstanding any rule of law to the contrary, a person convicted of murder is liable to—

(a) level 1 imprisonment (life); or

(b) imprisonment for such other term as is fixed by the court— as the court determines.

Appendix 11 *Sentencing Act 1991* (Vic) s 5(2)

Sentencing guidelines

(2) In sentencing an offender a court must have regard to—

(a) the maximum penalty prescribed for the offence; and

(ab) the standard sentence, if any, for the offence; and

- (b) current sentencing practices; and
- (c) the nature and gravity of the offence; and
- (d) the offender's culpability and degree of responsibility for the offence; and

(daaa) whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated; and

(daa) the impact of the offence on any victim of the offence; and

(da) the personal circumstances of any victim of the offence; and

(db) any injury, loss or damage resulting directly from the offence; and

(e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so; and

(f) the offender's previous character; and

(g) the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances.

Appendix 12: *Criminal Code* 1924 (Tas) s 158

158. Murder

Any person who commits **murder** is guilty of a crime, and is liable to imprisonment for the term of the person's natural life or for such other term as the Court determines.

Appendix 13: *Sentencing Act* 1997 (Tas) s 17

Division 2 - Parole 17. Court may bar or limit eligibility for parole

(1) This section does not apply to a sentence of imprisonment for the term of an offender's natural life.

(2) A court that imposes a sentence of imprisonment on an offender, either on the conviction of the offender or on the determination of an appeal, or, on appeal, confirms the imposition of such a sentence, may order –

(a) that the offender is not eligible for parole in respect of that sentence; or

(b) that the offender is not eligible for parole in respect of that sentence before the expiration of such period as is specified in the order.

(3) The period specified in an order under subsection (2)(b) is not to be less than one-half of the period of that sentence.

(3A) Where a court imposes a sentence of imprisonment and does not make an order under subsection (2), the offender is not eligible for parole in respect of that sentence.

(4) In exercising its discretion under subsection (2), a court may have regard to such matters as it considers necessary or appropriate and, without limiting the generality of this, may have regard to all or any of the following:

(a) the nature and circumstances of the offence;

(b) the offender's antecedents or character;

(c) any other sentence to which the offender is subject.

(5) An order under subsection (2) forms, for all purposes, part of the sentence to which it relates.

(6) An offender in respect of whom –

(a) an order has been made under subsection (2)(a); or

(b) subsection (3A) applies – is not eligible to be released on parole in respect of his or her sentence.

(7) A court must give reasons for making an order under subsection (2).

(8) If the whole or part of a sentence of imprisonment is suspended, only the operative sentence is to be taken into account for the purposes of this section.

(9) In subsection (8), operative sentence means that part of a sentence of imprisonment which has not been suspended.

Appendix 14: *Sentencing Act 1997* (Tas) s 18

18. Court to make order on eligibility of life prisoner for parole

- (1) A court that sentences an offender to imprisonment for the term of the offender's natural life, either on the conviction of the offender or on the determination of an appeal, must order –
- (a) that the offender is not eligible for parole in respect of that sentence; or
 - (b) that the offender is not eligible for parole in respect of that sentence before the expiration of such period as is specified in the order.
- (2) For the purposes of subsection (1), a court may have regard to such matters as it considers necessary or appropriate and, without limiting the generality of this, may have particular regard to all or any of the following:
- (a) the nature and circumstances of the offence;
 - (b) the offender's antecedents or character;
 - (c) any other sentence to which the offender is subject.
- (3) An order made under subsection (1) forms, for all purposes, part of the sentence to which it relates.
- (4) An offender in respect of whom an order has been made under subsection (1)(a) is not eligible to be released on parole in respect of the offender's sentence.
- (5) A court must give reasons for making an order under this section

Appendix 15: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21

21 General Power To Reduce Penalties

- (1) If by any provision of an Act an offender is made liable to imprisonment for life, a court may nevertheless impose a sentence of imprisonment for a specified term.
- (2) If by any provision of an Act or statutory rule an offender is made liable to imprisonment for a specified term, a court may nevertheless impose a sentence of imprisonment for a lesser term.
- (3) If by any provision of an Act or statutory rule an offender is made liable to a fine of a specified amount, a court may nevertheless impose a fine of a lesser amount.

(4) The power conferred on a court by this section is not limited by any other provision of this Part.

(5) This section does not limit any discretion that the court has, apart from this section, in relation to the imposition of penalties.

Appendix 16: Crimes (Sentencing) Act 2005 (ACT) s 10

Imprisonment

(1) This section applies if a court is sentencing an offender convicted of an offence punishable by imprisonment.

(2) The court may, by order, sentence the offender to imprisonment, for all or part of the term of the sentence, if the court is satisfied, having considered possible alternatives, that no other penalty is appropriate.

Note 1: An order sentencing an offender to imprisonment may be part of a combination sentence together with other sentencing options (see pt 3.6).

Note 2: See s 133G for additional matters that apply in sentencing a young offender to imprisonment.

(3) If the court sentences the offender to imprisonment, the sentence must be served by full-time detention at a correctional centre, unless—

(a) the court orders otherwise; or

(b) the offender is released from full-time detention under this Act or another territory law.

Examples—par (a)

1 the court makes an intensive correction order

2 the court makes a suspended sentence order

Example—par (b)

release on parole under the Crimes (Sentence Administration) Act 2005

Note 1 For a young offender who is under 21 years old when the sentence is imposed, see s 133H.

Note 2 An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(4) If the court sentences the offender to imprisonment, the court must record the reasons for its decision.

(5) Failure to comply with subsection (4) does not invalidate the sentence of imprisonment.

(6) This section also applies subject to any contrary intention in the law that directly or indirectly creates the offence or directly or indirectly affects its scope or operation.

(7) This section is subject to chapter 5 (Imprisonment).