QUEENSLAND LAW REFORM COMMISSION

Criminal Defences Review: Community attitudes literature review

By Jodie O'Leary

1. The terms of reference for the review of defences and excuses in the Criminal Code requests the Queensland Law Reform Commission (the Commission) to review self-defence, provocation (to assault and to murder), killing for preservation in an abusive domestic relationship and domestic discipline.[1] The Commission is also asked to consider the mandatory penalty of life imprisonment for murder.[2]

2. The terms of reference require the Commission, in making its recommendations to have regard to, inter alia, 'the need to ensure Queensland's criminal law reflects contemporary community standards.'[3] Further research is necessary to identify and understand the community standards against which to assess Queensland's criminal law. As such, the Commission has engaged a research team, led by Dr Hayley Boxall with Professors Kate Fitz-Gibbon and Lorana Bartels, to gather up-to-date evidence about Queenslanders' views. While the scope of that research and the conclusions that can be drawn will be limited, it will add to the Commission's working knowledge of community standards which will assist in the formulation of recommendations.

3. After noting the research questions, this literature review will briefly discuss the literature as to whether the criminal law should reflect or influence community standards. Then the focus will turn to a survey of the existing literature related to the research questions.

Research questions

4. The research project will answer the following research questions:

   I. What are the views of the Queensland community regarding whether particular conduct involving the use of force should be criminal?

   II. If the view is that particular conduct involving the use of force should be criminal, what circumstances does the Queensland community believe should reduce the culpability of a defendant?

   III. What are the views of the Queensland community regarding the offence of murder attracting a mandatory life sentence?

IV. What are the views of the Queensland community regarding the factors and information that should be used in determining the application of a mandatory life sentence in cases of murder?

V. What does the Queensland community understand about DFV (including coercive control) and how it can impact on victim-survivors?

VI. In relation to Questions i-v, is there variance in the views of the community across specific groups, including Aboriginal peoples and Torres Strait Islander peoples and victim-survivors of DFV and other forms of violence?

The value of community standards

5. It has been suggested that criminal laws reflect, and should generally adapt to changes in, social norms and community standards.[4] Criminal laws, it is argued, are the 'formal embodiment of a set of elementary moral values'[5] and, in a diverse society, 'may be the only society-wide mechanism that transcends cultural and ethnic differences.[6] Robinson and Darley posit that while criminal law rules can contribute to normative forces, this is only successful 'if the community accepts the law as a legitimate source of moral authority'.[7] It has been said that to retain legitimacy those laws 'must reflect-or at least come close to reflecting-what has elsewhere been termed the "fully expressed public morality"'.[8] As such, rules, standards and practices that are inconsistent with community views of justice and social norms should generally be eliminated or avoided as they will likely be controversial and ineffective.[9]

6. Robinson states:[10]

> the most important reforms for establishing the criminal law's moral credibility may be those to the rules governing which criminal liability and punishment are distributed …. The criminal law must earn a reputation for (1) punishing those who deserve it under rules perceived as just; (2) protecting from punishment those who do not deserve it; and (3) where punishment is deserved, imposing the amount of punishment deserved: no more, no less.

7. To avoid losing credibility, it is argued that 'the justice system's range of permissible defensive force outcomes must not, all other things being equal, drastically deviate from the community's perceptions of just results'.[11] This extends not only to consideration of whether a defence exemplifies the morality of conduct (that is the characterisation of what the actor did as moral or immoral), but also the morality of punishment in the circumstances of a case (that is, whether serious penal liability is an appropriate outcome).[12]

8. Concern has previously been expressed about the law's ability to account for community standards, including its approach to justifications and excuses.[13] This is partly because 'our knowledge of public attitude formation regarding criminal justice remains relatively superficial.'[14]

9. Society's moral values may differ across cultures or regions, and they may change over time.[15] Some commentators suggest that this impacts views about crime and punishment and that there is cultural variation in intuitions about justice.[16] Views may also differ depending on socio-demographic group (such as between genders, social class or age) or relate to experience of victimisation.[17] However, it is difficult to draw definitive conclusions as results may be dependent on methodological differences in the research conducted and/or underlying psychosocial mechanisms, such as levels of fear.[18] Further, levels of knowledge about the criminal justice system have been found to be clearly linked to public attitudes.[19] Research conducted in the United Kingdom, America, Canada and Australia confirms that the public is 'unaware of a great deal of factual and contextual information about many aspects of the criminal justice system'.[20]

10. As communities are heterogenous, it has been argued that it may be difficult to attribute values to one large community.[21] However, others note that there are broadly shared intuitions about serious wrongdoing and relative blameworthiness, that extend across cultures, genders and victim status.[22] For example:[23]

> empirical research by Professor Paul Robinson and others finds that, despite "pockets of disagreement," today's "[o]rdinary citizens share a robust consensus about the substantive wrongfulness of various crimes" – that is, "which acts are wrongful and how wrongful they are relative to other crimes" … "People show remarkable agreement on most crimes," … "when given detailed, concrete factual scenarios."

11. This has been noted to be the case for traditional crimes, such as violence.[24] Others note the qualification that while everyone opposes murder, rape, etc, they disagree about what counts as murder and rape.[25]

12. So while examining community values may be important, 'there are important choices to be made about how to ascertain public opinion and the extent to which policy should be responsive to public pressure'.[26]

Community views about whether particular conduct should be criminal and in what circumstances criminal culpability should be reduced

13. To examine the community's views about whether certain defences should be available in Queensland, the community can be asked questions about whether persons engaging in particular conduct should be criminally culpable. If the community thinks that particular conduct should not be criminal, it may mean that there should be no offence, or it may

mean that a complete defence should apply in the circumstances (because the conduct is justified).

14. If the community thinks that particular conduct should be criminal, there may be instances where the community thinks that certain factors should reduce the offender's level of culpability. In these circumstances it may be appropriate for a partial defence to apply or, alternatively, it may be that these factors should mitigate any sentence.

15. A survey of the literature did not uncover any research that asked questions of the Queensland community about whether particular conduct should result in criminal culpability. In 2013, it was noted that internationally 'there are few studies in psychological literature bearing on ordinary people's perceptions of the legitimacy of justification for acts that would otherwise generate liability'.27 However, there has been some international research considering community views as to whether conduct that may raise defences, such as self-defence (including more traditional defensive force situations as well as situations where women defend themselves against an abuser and women defend themselves against rape) and provocation, should result in liability. This research is discussed below.

Defensive force and force in response to provocation

16. Research in the United States of America specifically examined the community's perceptions about defensive force. In some of the research, cases were given to mock jurors for verdicts. In others, participants were asked to assess whether persons should be liable in particular scenarios.

17. Finkel, Meister and Lightfoot's research had mock jurors determine murder cases 'where a woman kills and pleads self-defence (a battered woman case, a subway case [where the woman is approached by youths and threatened while they asked for money], and an alleged rape case)' with variations as to seriousness of harm, level of force, options for retreat, imminence and expert evidence.[28] The participants were given the options of finding the woman:

- guilty – of first-degree murder
- guilty – of second-degree murder
- guilty – of voluntary manslaughter
- guilty but mentally ill
- not guilty by reason of insanity
- not guilty by reason of self-defence.

18. The research found considerable, but highly variable, support for self-defence (63% in the battered woman case, 27% for the subway case, and 23% for the rape case).[29] This

suggested that 'community sentiment for the self-defence defence may be considerably broader than verdicts from actual trials would indicate'.[30]

19. Not guilty by reason of self-defence was found to be the verdict of choice for the battered woman.[31] This was the case regardless of whether the woman shot her husband in a confrontational situation (where her husband approached with a gun, knife, or fists) or in non-confrontational situations (where the husband had threatened to beat and kill her later but first began to drink alcohol while watching television and she either shot him while he was awake watching television or asleep in front of the television). In the non-confrontational situations, the next most favoured verdict was guilty but mentally ill.[32]

20. In the rape case, the variables were: that the woman shot one of the three rapists during the rape when he said he was going to do it again; that 3 hours after being raped and warned that if she said anything to anyone they would do it again she went to their apartment and fired the gun upon the door opening; and that one month after the rape, she walked into a classroom and up to one of the perpetrators and shot him.[33] The verdict of choice in that case was guilty but mentally ill (37%), followed by not guilty by reason of self-defence (23%). Not guilty by reason of self-defence was significantly more likely to be the verdict where she shot him during the rape, whereas in the situations of delay the more likely verdicts were guilty by reason of mental illness or voluntary manslaughter.[34]

21. In the early 1990s Robinson and Darley studied the community's views on the use of deadly force in self-defence to determine if it aligned with the legal doctrine's rules, specifically the American Model Penal Code (MPC).[35] Participants were provided with scenarios that involved various types of defensive force (with various degrees of necessity in the use of force and various degrees of proportionality between the threatened harm and the force used) and asked whether the offender should be liable, and, if so, the appropriate level of punishment. **Appendix A** contains further detail about the study.

22. Robinson and Darley found that in many instances there was agreement with the distinctions made in the MPC.[36] However, their respondents generally said that 'a killing that has some claim to be carried out in self-defence, whether that claim is granted validity by the legal codes, should receive a mitigated punishment'.[37] Respondents frequently assigned no liability in cases to which the code attaches liability. 'Even when respondents assign liability, they typically assign considerably less punishment than would be suggested by codes.'[38] This was particularly so where the offender killed in a situation where they knew that deadly force was unnecessary because they could retreat. The MPC would not allow any mitigation of liability in that scenario but respondents did mitigate liability.[39] The researchers suggested that this raised 'the possibility that subjects would approve of alterations in the legal codes that decriminalise certain acts or reduce liability to those acts'.[40] Further, the responses saw blameworthiness on a continuum, rather than having dichotomous options of either full liability or no liability.[41]

23. In the late 1990s, Oleson and Darley conducted research in which participants in New Jersey were asked to judge case scenarios involving arguably appropriate and arguably excessive self-defence and defence of property.[42] The researchers also examined the respondent's confidence in the criminal justice system's ability to protect them and how that related to the punishments they assigned.[43] **Appendix B** contains further detail about the study.

24. This research found that participants were less likely to assign liability and 'more lenient in assigning sentences involving unnecessary deadly force [because they could have retreated or because they knew the attacker was unarmed] … as compared to a control case involving killing in response to a trivial threat'.[44] This differed to the law, which would have found no defence applies in all 3 situations and would have resulted in a sentence of 30 years for each. The authors noted that:[45]

> Code formulations should take into account community sentiment; our data, if confirmed in larger scale studies, suggest that individuals' sentiment is discrepant from the current code. Some large number of Americans do not believe in the limits that the code places on defensive counterforce.

25. The study recommended that follow up studies should include participants making judgments of whether the attacker is guilty of murder or is not guilty by reason of self-defence.[46]

26. Research in England and Wales has also studied public opinion as to various forms of homicide and their seriousness. Some of the scenarios included facts that potentially raised defences such as self-defence or provocation.

27. In the mid-90s, Mitchell studied public opinion to determine whether the public recognised variations in moral culpability or gravity between homicides that should then be reflected in different offences with different penalties. The research aimed to determine what justifications and excuses should be recognised, what factors the public treat as influencing gravity and what appropriate penalties were for the most serious homicides.[47] In a large-scale study, participants were provided with eight scenarios and asked to rank them and group them. They were also asked general questions about homicide. **Appendix C** contains further detail about the study.

28. Of this research, Mitchell has said 'there is evidence that the public separate offences reflecting varying degrees of moral blame, but it is impossible to discern any common pattern or classification'.[48] He has further noted that 'the difficulty is in identifying which factors are sufficiently important to affect the level of culpability reflected in an offence label, and which can be catered for at the sentencing stage'.[49]

29. The Law Commission of England and Wales commissioned a project as part of its Partial Defences to Murder Review. It wanted 'evidence of public opinion on homicides in which defendants would be likely to raise a defence based on provocation, diminished

responsibility or the use of excessive force in self-defence.'[50] Participants were asked to comment on various scenarios, to indicate whether the homicide cases presented were more or less serious and why. Sentence suggestions were also invited, and then the original facts of the scenarios were varied and respondents were asked whether the variation affected their assessment of offence seriousness. The scenarios included a situation in which an abused person killed their abusive intimate partner, provocation on various scales, self-defence and defence of others. **Appendix D** contains further detail about the study and the scenarios.

30. While caution is needed given the low numbers of participants in this study, Table 1 outlines the percentage of respondents who thought that offenders in various scenarios should not be prosecuted and, where they thought they should be prosecuted, the most favoured sentence range. All respondents thought that the contract killer should always be prosecuted and it was clearly the most serious of scenarios with the most favoured sentence range being natural life imprisonment. At the other extreme the majority of respondents felt that there should be no prosecution for the mercy killing and where there was prosecution the most favoured sentence range was non-custodial. The second least serious scenario was that involving the woman acting in response to seeing the attempted rape of her teenage daughter where approximately 16% suggested no prosecution. Where prosecution was suggested for that woman, the most favoured sentence range was also non-custodial. The battered wife and baby killing scenarios were the next highest situations attracting suggestions of no prosecution. However, the majority of those who favoured prosecution for the battered wife thought a sentence range of at least 5 years' imprisonment but less than 10 years' imprisonment was appropriate (which was also the most favoured sentence range in the taunted husband scenario). For those who favoured prosecution for the baby killing the results varied significantly, with equal majorities between those who favoured 5-10 years' imprisonment and life imprisonment with release on licence.

Table 1: Community perspectives as to liability and appropriate sentence range in England and Wales 2003

#	Scenario	% respondents suggesting no prosecution	Most favoured sentence range where prosecution was suggested
a.	The battered wife	3.2	At least 5 but less than 10 years' imprisonment (30.6%)
b.	*Camplin*	1.6	At least 5 but less than 10 years' imprisonment (22.6%)
c.	Attempted rape of daughter	16.1	A non-custodial sentence (24.2%)
c2.	Husband and attempted rape of daughter	1.8	At least 10 but less than 20 years' imprisonment (31.6%)

d.	Baby killing	3.2	Equally divided between at least 5 but less than 10 years' imprisonment (17.7%) and life imprisonment with release on licence (17.7%)
d1.	Noisy neighbour	1.7	At least 10 but less than 20 years' imprisonment (30%)
e.	Contract killer	0	Natural life imprisonment (45.2%)
f.	The argument	0	At least 10 but less than 20 years' imprisonment (32.2%)
g.	The bailiff	1.6	At least 10 but less than 20 years' imprisonment (37.1%)
h.	The brooding jealous husband	1.6	At least 10 but less than 20 years' imprisonment (24.2%)
i.	The mercy killing	59.7	Non-custodial sentence (17.7%)
j.	The cuckolded husband	0	At least 10 but less than 20 years' imprisonment (33.3%)

31. Mitchell found that respondents had some sympathy for those who kill in self-defence, even when it was arguable that disproportionate force was used.[51] Public opinion about a homicide by a battered woman was equivocal, with its assessment falling into the least, worst and middle level of seriousness fairly equally and outcomes ranging from no liability through to a penalty of natural life imprisonment. Mitchell also found that:[52]

> There appears to be widespread recognition that provocation mitigates the seriousness of a homicide; respondents commonly expressed sympathy and empathy for those who react emotionally to a stimulus, either through anger or fear or (cumulative) stress. A loss of self-control … does not seem to be particularly important, and even an element of premeditation will not automatically have an especially damning effect on the perceived level of seriousness.

32. The research also revealed that the sub-group of secondary victims 'appeared to adopt a similarly analytical approach to the scenarios to that adopted by the main sample of respondents, and their views did not reveal any vindictiveness or higher level of sentencing'.[53]

Domestic discipline

33. In the Queensland Criminal Code, a parent, or a person in their place, or a schoolteacher or master can raise domestic discipline as a complete defence where they use such force as is reasonable in the circumstances by way of correction, discipline, management or control towards a child or pupil under the person's care.[54]

34. One way to examine whether this defence reflects contemporary community standards is to consider the prevalence of the use of force for correction, discipline, management or control by parents and teachers. Another way to examine contemporary community standards is by asking the community about its views about the appropriateness of parents or teachers using force for these purposes.

35. Research is available that has examined the use of or views about physical force for discipline or correction. This is sometimes framed as corporal punishment or smacking. This research does not explore whether persons who use physical force against children for disciplinary purposes should be held criminally liable. Further, there is no research that has examined the use of or views about physical force for purposes of management or control, either generally or in relation to criminal liability.

36. Recent Australian research sought to examine: the prevalence of smacking or using physical punishment for discipline; and community attitudes about whether it is necessary to use physical punishment to properly raise a child.[55] Haslam et al confirmed in 2023 that a majority of Australians (62.5%) had experienced corporal punishment in childhood.[56] Most of that was from parents (92%), and the remainder was from teachers (9.4%).[57] More than half of parents (53.7%) had used corporal punishment and just over a quarter (26.4%) believe that corporal punishment is necessary to raise children, with men more likely than women to endorse its necessity.[58]

37. That research found that while the experience of corporal punishment remains high in Australia, its use and beliefs about whether it should be used may be decreasing.[59] This is consistent with international research, research about individual Australian states, and other Australian research that is not necessarily representative.[60] The Australia Talks survey research in 2019 that asked whether smacking a child was an acceptable form of discipline, showed that Queensland respondents agreed with that statement at a higher rate (59%) than the national average (47%). This was the highest agreement rate of any Australian state or territory. Further, the percentage that agreed with the statement increased the further away from an urban area someone lived in Queensland.[61]

38. Respondents to the Relationships Australia website survey in 2017 specifically answered a question as to whether they thought it was 'reasonable to use an instrument such as a wooden spoon to smack/corporally punish a child'.[62] Although still in the minority, men (17%) were significantly more likely than women (8%) to report it as reasonable.[63] Other research in Victoria found that support for the punishment of children with implements (such as canes, sticks, belts or slippers), although it was still in the minority, increased between 2002 (4%) and 2006 (10%).[64]

39. Research internationally has demonstrated that use of and perceived acceptance of physical punishment varies between countries and within countries, such as between ethnic groups or according to religious identification.[65]

Community views about the mandatory life sentence for murder

Community attitudes about sentencing generally

40. Much of the research about community views or public opinion and whether it is aligned with criminal justice has occurred in the field of sentencing.[66] Some suggest that sentencing policy and practice should respond to community opinion to support public confidence in the criminal justice system.[67]

41. Determining the community's views or attitudes about sentencing is a complicated exercise. It may be undermined by the community's lack of understanding about the nature and extent of crime (particularly the misperception that crime is increasing and the overestimation of the percentage of crime that involves violence).[68] It may also be undermined by the community's lack of understanding about sentencing generally.[69] Numerous surveys indicate that the public has little knowledge about 'maximum sentences, sentencing options … sentencing patterns, recidivism rates, or any other aspect of the sentencing process.'[70]

42. Research has examined public knowledge about the meaning of sentencing terms, such as life imprisonment.[71] The Queensland Sentencing Advisory Council found that 'while community members may have a high level of confidence in their understanding of sentencing terms, they may not understand their precise meaning'.[72] For example, consistent with research in England and Wales,[73] Queensland research found that upon being exposed to the correct definition of life sentence 'almost all participants admitted that it did not align' with their original understanding.[74] Some thought a life sentence was time-limited and were not aware that in Queensland life imprisonment means that 'a person must either remain in prison or on parole for the rest of their life'; some were unaware there was a minimum non-parole period and some incorrectly assumed that prisoners serving life would be granted parole automatically.[75]

43. Questions about the severity of sentencing have consistently led to findings across numerous jurisdictions that the majority of the public perceive sentencing as too lenient, particularly for violent offences.[76] For example, in Canadian research in 2005 approximately three-quarters of the respondents thought sentencing was too lenient.[77] The Crime Survey for England and Wales in 2010-11 found likewise.[78] More recent surveys in England also returned results of 70% or more respondents thinking that sentencing was too lenient or not harsh enough.[79] In Australia, a nationally representative telephone survey found that 59% of respondents thought sentences were too lenient.[80] The view that sentencing is too lenient has remained fairly consistent across countries and across time.[81]

44. However, research in Australia, Canada, England, Wales and elsewhere has determined that most people underestimate the severity of current sentencing practices.[82] For example, despite increases in average prison sentence lengths since 1996 and the increase in the mandatory minimum for murder in England and Wales from 12 to 20 years (and an associated 70% increase in the average minimum term ordered to be served for a life sentence for murder[83]), the majority of the community thought that sentences were shorter and more than half of the community 'endorsed the view that the amount of time served by offenders convicted of murder was shorter today'.[84] Such misunderstandings were found to correlate with respondents' views about whether they believed that sentencing was too severe, too lenient or about right.[85] So while about two- thirds of the public thought that sentencing was too lenient, they were also significantly less accurate in their estimates of current sentencing practice.[86]

45. As such, it has been said that 'there needs to be greater public knowledge and understanding of current sentencing practice, of evidence on the effectiveness of different sentencing options, and the resource implications of sentences in order to improve the quality of public discourse on sentencing.'[87]

46. Another difficulty that is raised consistently in assessing community attitudes about sentencing relates to how questions are asked and the deficiencies of various methodologies in providing sufficient context and a sense of the offender as a person.[88] In those circumstances it may mean that respondents rely on stereotypes or think about the unrepresentative worst crimes and offenders.[89] It has been noted that the more information provided about a case the more likely respondents are to perceive sentences as appropriate.[90] For example, in a Tasmanian jury sentencing study, although 66% of respondents thought that sentences for violent offences were too lenient generally, only 35% thought that the sentence in the case they deliberated on should have been more severe.[91] Research in the United Kingdom also found that when surveyed about the sentencing of murder, 70% of respondents expressed that it was too lenient but this figure dropped to 41% when they were provided with a case study.[92] The inability to see the offender as a person though remains a problem, 'even in surveys that use vignettes or case studies based on real trials.'[93]

The views of particular groups

47. Earlier research in the United Kingdom found that men are more punitive than women.[94] This is consistent with research in Australia.[95] However, later research found that more women than men suggested that sentences were too lenient.[96]

48. Older adults are more likely to think sentencing was too lenient than younger adults.[97]

49. Those who were more educated and those who were employed full time were less punitive.[98] Those in a lower socioeconomic group were more likely to suggest sentences were too lenient.[99]

50. In some research, victims of crime have been found to be more punitive.[100] However, several studies have shown that victims of crime do not have more punitive attitudes.[101]

Community views about mandatory sentencing

51. The community's views about mandatory sentences 'are divided, malleable and inconsistent, and … much depends on how the question is asked.'[102] As noted earlier in relation to sentencing generally, 'the methodology employed to gauge public opinion as well as the type and depth of information provided has a strong bearing on the results obtained.'[103] There are questions about whose views to consider, what methodology should be used, and whether it is necessary to obtain informed opinions or whether uninformed opinions can be relied on. Roberts has said that 'public knowledge of even well-publicized mandatory sentences is quite poor'.[104]

52. Research that engages in simple 'polls and representative surveys may elicit support for mandatory sentences but more informed, contextual and considered lay views are against it'.[105]

53. Canadian research in 2005 determined that, in response to a general question about mandatory minimum sentences, slightly more than half of respondents supported mandatory sentencing.[106] This was consistent with opinion surveys that were conducted in the United States and Australia.[107] However, the Canadian research also found that 'there was strong public support for mandatory sentencing legislation that also permits a limited degree of judicial discretion.'[108]

54. An Australian study used deliberative small group methodology to explore thoughts about mandatory sentencing.[109] That research found that participants were concerned about the impact of limiting judicial discretion on fair sentences as there was an inability to tailor the sentence to the specific circumstances of a case.[110] However, consensus was unable to be achieved in favour of or against mandatory sentencing.[111]

55. A Victorian study asked jurors questions about sentencing discretion and mandatory sentencing.[112] They were asked about how much discretion judges should have generally, then whether in their case the judge's discretion was enough. If they responded that the judge had too much discretion, they were then asked to indicate a preference between a mandatory minimum (below which a judge could not go), a starting point which has flexibility to move up or down or a mandatory sentence. That research supported judges having discretion. 58.8% of respondents thought that the judge should have a little discretion in deciding on the sentence, while 36.9% thought the judge should have a great deal of discretion and only 4.3% said they should not have any discretion.[113] A significant majority (83.2%) of the jurors thought the judge in their case had about the right amount of discretion. Where jurors thought the judge should have less discretion, they preferred a starting point (43.3%) and were least in favour of a mandatory sentence (21.7%).[114] Warner et al note that '[t]he interview results suggest that when jurors were given the

opportunity to think more about their responses, even fewer than indicated by the quantitative survey findings would support reducing judicial discretion.'[115]

Community views about sentencing for murder

56. Consistent with the concerns raised above at [41], [42] and [44], there is research (including Queensland research) that indicates that the public underestimate the proportion of people sentenced to imprisonment for murder,[116] as well as the average amount of time a person is required to serve in prison for murder.[117] One reason suggested for the results relates to the community's lack of understanding of the term murder and confusion about the difference between murder and manslaughter.[118]

57. Despite a reduction in the support for the death penalty over the years, Australian research conducted in 2008-9 that put the statement 'the death penalty should be the punishment for murder' to participants, 36% agreed, while 52% disagreed and strongly disagreed.[119] However, the researchers warned of the problematic nature of gauging public opinion using a top-of-the-head style opinion poll.[120]

58. The hardening of public opinion towards serious crime since the 1990s has been widely reported and recognised.[121] Polls conducted with adults in England and Wales indicate that 'there is significant public support for increasing the custodial sentence for murder' along with rape and burglary.[122] However, other studies done in the United Kingdom have stressed the importance of discretion in sentencing.

59. One study by Mitchell (see the study outlined in **Appendix D**) found that 62.9% of respondents 'said they did not favour a mandatory penalty for what are regarded as the most serious criminal homicides.'[123] The majority 'felt that even within this category of the most serious homicides there will inevitably be sufficient variations in gravity and heinousness that the judge ought to be able to reflect the more precise degree of seriousness in the sentence imposed.'[124] As such, the Law Reform Commission found that:[125]

> The notion that all murders, as the law is presently framed, represent instances of a uniquely heinous offence for which a single uniquely severe penalty is justified does not reflect the views of a cross section of the public when asked to reflect on particular cases.

60. Another study by Mitchell and Roberts, described in **Appendix E**, ultimately found that 'evidence demonstrates that the public are not opposed to a fixed-term alternative to the mandatory life sentence' for murder.[126] As such, they argued for reform that included 'judicial discretion rather than Parliamentary fiat'.[127]

61. Research in Canada, has demonstrated that, 'when asked a general question, almost all Canadians support a mandatory sentence of life imprisonment for offenders convicted of murder.'[128] However, when respondents were provided with an actual case description of a

person sentenced for the murder of his severely disabled daughter, approximately 75% voted against the imposition of the mandatory sentence.[129]

The views of secondary victims

62. As noted above at [32] some research suggests that secondary victims of homicide do not call for higher levels of sentencing than those who are not secondary victims. However, a collaboration between Killed Women and Ipsos delivered a survey to relatives of women who were killed through male violence. 115 respondents took part. Approximately three-quarters of respondents reported that the perpetrator was the current or ex-partner, husband or boyfriend of the victim.[130] 76% of the perpetrators were convicted of murder, and 16% of manslaughter.[131] 90% of relatives 'felt that the prison sentences given were too short.'[132] Where the perpetrator received a sentence of 20 years or less, 98% of respondents felt that was too short, and where a minimum term of 20 years or more was given, 83% also felt that was inadequate.[133] 'A large number of respondents stated that as a life had been taken, the perpetrator should spend their life in prison, and felt that anything less than life was inappropriate, particularly comparing the life-long grief experienced by relatives.[134]

Community understanding about domestic and family violence

63. Most, if not all, of the defences in this review can be raised in the context of domestic and family violence. That is, both perpetrators and victim-survivors of domestic and family violence may be charged with violent offences (such as common assault, assault occasioning bodily harm, wounding, serious assault, choking, suffocation or strangulation in a domestic setting, grievous bodily harm and acts intended to cause grievous bodily harm and other malicious acts, torture, manslaughter, unlawful striking causing death and murder). Depending on the charge, one or more of the defences of self-defence, provocation, killing for preservation in an abusive domestic relationship and domestic discipline may be relied upon to remove or reduce culpability.

64. A number of these defences require juries, who are empanelled from members of the community, to make determinations as to whether, for example:

- the violence/assault used by the other person caused the offender reasonable apprehension of death or grievous bodily harm[135]
- the force used by the offender was reasonably necessary,[136] reasonable in the circumstances,[137] or disproportionate[138]
- the person using force by way of defence believed, on reasonable grounds, that they could not otherwise preserve themselves from death or grievous bodily harm[139]
- particular conduct is of such a nature as to be likely to cause an ordinary person to lose self-control[140]

- the person believed it necessary to preserve themselves from death or grievous bodily harm (and there are reasonable grounds for that belief).[141]

65. As such, it is necessary for juries to understand the dynamics, features and impacts of domestic and family violence and what is reasonable in terms of response in that context. This is why this research is exploring what the Queensland community understand about domestic and family violence (particularly coercive control) and how it can impact on victim-survivors.

66. There has been research conducted Australia-wide, including in Queensland, about community awareness of and attitudes towards violence against women, including domestic and family violence.

Australia

67. The National Community Attitudes towards Violence against Women Survey (NCAS) measures Australian's understanding and attitudes to violence against women and complements the Australian Bureau of Statistics' Personal Safety Survey.[142] That survey has found that understanding and attitudes regarding violence against women is improving in Australia.[143]

68. There have also been improvements in the understanding of the diverse forms of violence against women but there was less recognition of non-physical forms of domestic violence such as financial and emotional abuse as well as the exploitation of the partner's identity or experience (such as migrant status).[144] A sizeable minority of respondents still hold attitudes that minimise the seriousness of violence and shift blame to victims, as they agree that 'much of what is called domestic violence is a normal reaction to day-to- day stress and frustration (23%) and that a woman can make a man so angry he "accidentally" hits her (19%)'.[145] There is still a minority that retain misconceptions that violence can be justified or excused in certain circumstances and it is easy to leave violent relationships.[146] In response to the question of who is more likely to experience fear as a result of domestic violence, 70% said women, 28% said both equally and only 1% said men.[147]

69. Women and non-binary respondents were significantly more likely to have an advanced understanding of violence against women than men.[148] English speakers were more likely to have a significantly higher understanding of violence against women than those who spoke languages other than English at home and those who were born in Australia had a significantly higher understanding than those who came from a non-main English speaking country and had lived in Australia for less than six years.[149]

70. There has been specific research examining Australian public attitudes and awareness of coercive control.[150] Coercive control 'is almost always an underpinning dynamic of family and domestic violence. Perpetrators exert power and dominance over victim-survivors using patterns of abusive behaviours over time that create fear and deny liberty and

autonomy'.[151] It has been said that 'coercive control is highly predictive of lethality'.[152] Just over half of the Australian public 'say they know what the term coercive control means.'[153] However the vast majority of Australians have condemnatory attitudes towards coercive control.[154] Men, young people and those from non-English speaking backgrounds 'were less aware of and concerned about coercive and controlling behaviours than other cohorts of the Australian population'.[155]

Queensland

71. The Queensland Government Statistician's Office (QGSO) has conducted the Queensland Social Survey annually since 2017. The survey aims to provide a measure of the Queensland community's perceptions and attitudes about various issues, including awareness of, responses to and attitudes towards domestic and family violence to determine if they are changing (by comparing results over time). A report detailing the most recent results of that survey was published in November 2023.[156]

72. A significant number of respondents (96.5%) recognised that controlling a partner by preventing them from seeing family and friends is a form of domestic and family violence and 93.4% thought it was very or quite serious. 94.6% recognised that repeatedly criticising a partner to make them feel bad or useless is a form of domestic and family violence that was very or quite serious. However, adults from culturally and linguistically diverse (CALD) backgrounds (7.7%) were 'statistically significantly more likely than Queensland adults who were not from CALD backgrounds (3.4%) to think that criticising a partner to make them feel bad or useless was not that serious or not serious at all'.[157] 98.7% thought that it was a very or quite serious form of domestic and family violence to threaten to share intimate, nude or sexual images of a partner without their permission. 94.4% thought it was a very or quite serious form of domestic and family violence to harass a partner via repeated phone or electronic means. Less (93.7%) thought it was a very or quite serious form of domestic and family violence to try to control a partner by denying them access to money. Females were statistically more likely than males to think that controlling by denial of access to money, and harassing a partner with repeated phone/electronic means was a very or quite serious form of domestic and family violence.[158]

73. The NCAS also provides a breakdown of the Queensland results.[159] Queensland, like the rest of Australia has made improvements in the understanding of violence against women.[160] On the whole the results of Queensland on the survey did not significantly differ from the rest of Australia.[161]

Appendix A

1. Robinson and Darley studied the community's views on the use of deadly force in self-defence and compared it to the various elements of the defence in the Model Penal Code in the United States of America (MPC).[162] Part of the relevant section of the MPC is extracted here.

Model Penal Code § 3.04

§ 3.04. Use of Force in Self-Protection.

(1) Use of Force Justifiable for Protection of the Person.
Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(2) Limitations on Justifying Necessity for Use of Force.

...

(b) The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if:

(i) the actor, with the purpose of causing death or serious bodily injury, provoked the use of force against himself in the encounter; or

(ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating ... except that:

(A) The actor is not obliged to retreat from his dwelling or place of work ...

2. Subjects were presented with a short scenario of a person's conduct and asked whether and, if so, how much liability and punishment the person should receive for that conduct.[163] Those scenarios were then varied to align with various theories and changes in liability were examined. The liability/punishment scale ranged from no liability, to liability but no punishment, 1 day imprisonment, 2 weeks, 2 months, 6 months, 1 year, 3 years, 7 years, 15 years, 30 years, to life imprisonment.

3. The core of the scenario presented was: Man 1, who legally carries a gun for protection, is walking on a deserted street in a city at night. He is accosted by man 2, under various circumstances, and shoots and kills him. [164]

4. Different versions were put to respondents, where there was no self-defence, where Man 1 killed in self-defence, where Man 2 was unarmed, where Man 1 could retreat, where Man 1 is mistaken as to the threat or as to the ability to retreat, where Man 1 provoked the attack, and where Man 1 mistakenly believes deadly force is legal. Table 2 below is extracted directly from Table 3.1 in the publication of the original research.[165]

5. When Man 1 killed in self-defence and would have a complete defence and be acquitted under the MPC, 71% of respondents afforded no liability and 97% afforded no liability or no punishment. The liability given by respondents to Man 1 when he killed without self-defence was approximately 8, which equates to 15 years imprisonment. However, for a number of the situations where Man 1 would have been liable to murder according to the MPC (scenarios 3, 4, 8 and 9) respondents assessed him as less liable, at a scale of punishment somewhere between 3-7 years imprisonment, with the lowest scale of punishment (when Man 1 knew deadly force was not necessary and could have retreated) being somewhere between 6 months to 1 year imprisonment. In that same situation, 23% afforded Man 1 no liability and 40% no liability or no punishment. Robinson states that 'while a numerical majority appear to support the retreat rule, they support it as a basis for liability significantly short of what the Code assigns to that case, which is liability for murder.'[166] In the scenario where Man 1 provokes an attack by Man 2 but then kills Man 2, Robinson notes that 'respondents see clear blameworthiness in [Man 1] but not of the level of a murderer (as the Code provides).'[167]

Table 2: Self-defence liability

Scenarios	(a) Liability	(b) % No Liability (N)	(c) % No Liability or No Punishment (N+0)	(d) Model Penal Code Result	(e) "Force Was Reasonable"	(f) Maximum Force Permissible
1. Killing, no self-defense	7.97	3	9	Liable for murder	2.20	2.34
2. Killing, self-defense	0.14	71	97	Complete defense	7.97	7.83
Knows deadly force is not necessary because:						
3. Unarmed attacker	6.66	6	14	Liable for murder	2.97	3.54
4. Could retreat	4.63	23	40	Liable for murder	4.06	4.46
5. Could retreat from home	0.77	43	86	Complete defense	6.20	7.00
Believes deadly force is necessary but:						
6. Mistaken as to threat	1.40	31	80	Complete defense or mitigation	5.89	5.31
7. Mistakenly believes retreat not possible	0.49	54	94	Complete defense	6.86	6.77
8. Actor provokes attack	6.40	6	17	Liable for murder	5.11	4.31
Believes deadly force is not necessary but:						
9. Mistakenly believes deadly force legal	6.71	3	17	Liable for murder	2.74	3.20

Liability Scale: N=No criminal liability, 0=Liability but no punishment, 1=1 day, 2=2 weeks, 3=2 months, 4=6 months, 5=1 year, 6=3 years, 7=7 years, 8=15 years, 9=30 years, 10=life, and 11=death.

Key to column heads:

(e) The amount of force the actor used was reasonable under the circumstances: 1=strongly disagree, 5=unsure, and 9=strongly agree.

(f) What is the maximum amount of force that someone should be able to use to protect themselves in this situation? 0=no force, 2=risk of bodily injury, 4=bodily injury, 6=serious bodily injury, 8=serious bodily injury with risk of death, and 10=death.

Appendix B

1. Oleson and Darley studied the community's views about the use of deadly force in the self-defence and defence of property.[168] In that study, participants were asked to judge 8 cases (4 concerning self-defence and 4 concerning defence of property) and to respond to questions about each. They were asked to indicate, on a scale of N for no criminal liability, zero for liability but no punishment and from 1-11 for the most minimal punishment to the most extreme punishment (the death penalty). They were asked to assume the offender would serve their entire sentence and not be released early.[169]

2. Respondents were also asked whether the force used was necessary and whether the threat could have been avoided by retreat. This was by way of indicating agreement with a series of statements, such as 'The force that [the perpetrator] used was necessary to protect himself', or [the perpetrator] 'could have effectively protected himself by using less force than he did' or [the perpetrator] 'could have avoided the threat by retreating to his house in safety'. Responses could range from 1 (strongly disagree) to 9 (strongly agree). They were also asked to indicate the maximum amount of force that someone should be able to use to protect themselves in this situation. Responses could range from 1 (no force) to 9 (Death penalty).

3. The other questions that respondents faced included a scale assessing confidence in the criminal justice system.

4. The discussion below only reports on the findings with respect to self-defence. It does not extend to defence of property as that is not within our terms of reference.

5. As shown in table 3, 35% of research participants thought the person should be criminally liable for scenario (1), 100% for scenario (2), 80% for scenario (3) and 84% for scenario (4).[170] Where self-defence would have been available as a complete defence under the MPC, respondents afforded a sentence of half a year. In circumstances where self-defence would not apply because of the trivial nature of the threat, respondents afforded a 15-year sentence. In other situations that would not have been afforded a defence under the MPC, respondents suggested sentences of approximately 4 and 5.75 years, much less than the sentence of 30 years they would have faced in New Jersey.

Table 3: Community perspectives as to liability for counterforce in New Jersey

No.	Vignette	Respondents attributing liability (%)	Respondents sentence rating (years)	Liability under MPC (in New Jersey) for murder
(1)	A person who used deadly force in defending themselves against someone who had a knife and would kill them	35%	0.5	Complete defence

(2)	A person who killed someone that was swearing at them	100%	15.27	No defence - 30 years imprisonment
(3)	A person who killed another when they could have retreated	80%	4.03	No defence - 30 years imprisonment
(4)	A person who killed person despite knowing they did not have a weapon	84%	5.77	No defence - 30 years imprisonment

6. Respondents thought there was a continuum of necessity and a continuum of permitted levels of force.[171] Oleson and Darley also found that those respondents with greater confidence in the criminal justice system recommended longer sentences for offenders, whereas those 'with less confidence in the system seemed to believe that a person should not be punished as much for taking the law into his or her own hands'.[172]

Appendix C

1. Mitchell engaged 822 participants for his study. These participants were representative of the key demographics in England and Wales.[173]

2. Eight scenarios were put to respondents and they were asked to rank them in order of seriousness from 1 to 20 (with the most blameworthy being 20) and to provide reasons for their ratings and suggest appropriate sentences. Some scenarios were also considered with alternative facts. The 8 scenarios were:

   a. **Burglary**

      A burglar was disturbed by the female owner of a house. He panicked, picking up an ashtray and hit her over the head with it. She died.

   b. **Terminally ill woman (mercy killing)**

      For months a wife, who was terminally ill and in great pain, had been begging her husband to put her out of her misery. He gave in to her request and suffocated her while she was sleeping.

   c. **Woman drowning (omission)**

      A young woman slipped and fell into a lake. A passer-by saw her drowning. He could swim but did not try to save her. She drowned.

   d. **Man and woman arguing (thin skull)**

      A male and female who did not previously know each other got into an argument at the supermarket. The man pushed the woman gently and she tripped and bumped her head against a wall. She had an unusually thin skill and died from her injuries.

   e. **Mountain climbers (necessity)**

      Two mountain climbers were roped together when one slipped and fell. The other tried to hold on to the rocks but knew that if he did not cut the rope they would both die. To save himself, he cut the rope and the other climber fell to his death.

   f. **Battered spouse**

      A woman had been physically and sexually abused by her husband for 3 years. After he started hitting her again one evening she waited until he was sleeping then hit him over the head with a saucepan, killing him.

   g. **Two men arguing at work (self-defence)**

      Two men argued and then fought at work. One picked up a screwdriver and lunged at the other. Fearing he would be stabbed, the unarmed man grabbed a spanner and hit the other man over the head with it, killing him.

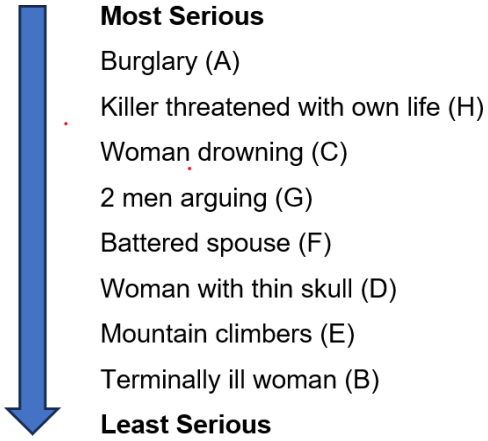
h. Killer threatened with his own life (duress)

A group of terrorists threatened a man's life if he did not agree to kill a businessman. He was told that he had a week to kill that person and if he told the police he would be shot. Scared for his life, he killed the businessman.

Seriousness

3. The result was a ranking order from most serious to least serious as depicted in Figure 1. The most serious, the burglary, was given a mean rating score of 15.5, the 2 men arguing produced a mean of 9.1 and the battered spouse 8.1. The least serious, the terminally ill woman was given a mean score of 3.5.[174]

Figure 1: Public opinion as to seriousness of homicides



4. Of specific relevance to this review, the battered spouse scenario attracted a wide range of responses, with a split of almost 33% of respondents rating it as one of the 3 worst cases, 40% rating it as one of the 3 least serious, and 27% putting it in the middle.[175] Those who were critical of the battered spouse noted that alternatives were available.[176] Those who ranked it low in severity said 'the killer had been "driven to the end of her tether"'. Others said she needed to save her own life, or that she had suffered such abuse'.[177]

5. Ultimately though Mitchell found that the ratings and recommended sentences for the 'homicides involving self-defence … [and] battered spouses' were more equivocal, making it unwise to offer any implications about justifications or excuses for killing'.[178]

6. In addition to the scenario questions, respondents were asked to describe what they thought were the worst homicides generally (that would attract a score of 20) and indicate how they should be sentenced, and to identify what they thought were the least serious killings.[179] In so doing, respondents focused on the type of victim, the killer's apparent motive and the method of killing.[180] More than half determined that the most serious

homicides would involve a child; over a third said that it would involve a defenceless victim.[181]

7. When asked to describe the least serious types of homicide (that would attract a score of 1), respondents largely expressed that those involved euthanasia/mercy killings (49%), accidental killings (30%) and killing in self-defence or for self-preservation (13%).[182] Those who rated self-defence/self-preservation as the reasons for killing being least serious referred to the killer's motivation, that is they needed to save their own life, or had no alternative course available.[183]

Grouping

8. One of the study's aims was to determine whether the public feel that variations in the gravity of homicides 'should be reflected in convictions for different offences such as murder and manslaughter, or some alternative form of formal labelling'.[184] Respondents were asked to separate the eight scenarios into piles that represented separate categories of crime.[185] Mitchell states that the[186]

> study strongly suggests that ordinary people agree with the principle of fair labelling, at least in relation to homicide, that the nature and magnitude of the wrongdoing should be reflected by the recognition of distinct offence categories. [However] the ways in which respondents placed the scenario cards into different piles did not provide any really clear indication of how homicides might be categorized or sub- grouped.

Sentencing

9. In relation to sentence, Mitchell found that 55% of respondents would recommend a death sentence for what they perceived as the worst possible homicides, whereas 34% would recommend natural life imprisonment, 6% between 20-30 years, and 3% between 5-20 years.[187]

Appendix D

1. Mitchell undertook a review for the Law Commission of England and Wales, which was not intended as a national survey (due to time and financial constraints), but instead was said to 'provide a flavour of public sentiment on many of the issues falling within the Law Commission's terms of reference' on the partial defences to murder.[188] It aimed to build on earlier work that provided data regarding public perceptions of homicides.

2. 62 interviews (of approximately 1 hour and 15 minutes each) were conducted in England in August-October 2003 with individuals drawn from various parts of the country and reflecting a cross-section of backgrounds and personal circumstances. The Commission also wanted to obtain the views of the next of kin of persons killed, so a sub-group (15/62) of the survey comprised these secondary victims. The majority of the interview was devoted to asking participants to comment on scenarios to determine if they thought it was a more or less serious homicide and to identify the factors that impacted that assessment. A sentence indication was also sought.

3. The scenarios and their variations are outlined in Table 4 below.

Table 4: Scenarios and their variations

	Scenario	Facts	Variations
A	The battered wife	A woman had been physically and verbally abused by her husband for many years. He came home one night, insulted and punched her. She decided she could take no more, so she waited until he was asleep, took a knife from the kitchen and stabbed him to death.[189]	Variations of the facts were that: the woman was verbally but not physically abused by her husband the woman had been previously raped by her husband (not physically and verbally abused) there was clear evidence that the woman was clinically depressed when she killed her husband the gender roles were reversed and the man killed his abusive wife after the husband had gone to bed, their son (who had witnessed the abuse over the years) came in. Acting together, the son held his father down while the woman, having got a knife from the kitchen, fatally stabbed him and they then disposed of the body.

B	*Camplin*	A 15-year-old boy agreed to have sex with a man and afterwards felt ashamed and the man ridiculed him. The boy picked up a frying pan nearby and hit the man repeatedly over the head, killing him.[190] (This scenario was based on the facts of *DPP v Camplin* [1978] AC 705.)	
C1	Attempted rape	An Asian woman came home to find 2 white men attempting to rape her 15-year-old daughter. She got a knife from the kitchen and the men shouted racist abuse at her and started to run away. She chased them and stabbed one several times in the back, killing him.[191]	Variations of the facts included that the men were not raping the daughter but were burgling the house (burglary)
C2	The husband and the attempted rape	A variation of C1, instead of chasing the men, the woman waited for her husband to come home and told him what happened. He knew the men, so he took a knife and went to one of the men's homes and stabbed him to death. A week later he saw the other man in the street and he deliberately ran him down in his car, killing him.	
D1	The baby killing	A 19-year-old man was the father of a constantly crying baby. One night the man, who had a job interview the following day, was kept awake by the baby crying. He went into the bedroom and shook and hit the baby, who subsequently died.[192]	
D2	The noisy neighbour	A variation of D1, instead of the baby, it was a neighbour's constantly loud music that kept the man awake. He repeatedly asked him to turn it down. The music started at midnight and the man got up, got a knife and went next door to ask him to lower the volume, the neighbour laughed and the man fatally stabbed him.	
E	The contract killing	A man agreed to kill his victim for 5000 pounds. He did so 2 days later.	

F	The argument	There was an argument between 2 men, one man began punching and kicking the other, who then pulled a knife and fatally stabbed the other with it.[193]	Variations of the facts included that: both parties were women there was a prior relationship between the parties drugs or alcohol had been consumed prior
G	The bailiff	A father (with a wife and 3 school age children) was served with an eviction notice to vacate his house of 20 years. He had lost his job and was in rental arrears. He was depressed about the loss of job and eviction notice. When the bailiff arrived to enforce the notice, the man shot him with a lawfully-registered gun.	Variations of the facts included that he was clinically depressed when he killed.
H	The brooding jealous husband	A woman told her husband that when their children leave home she would leave him and live with another man. The husband brooded for 4 weeks and then poisoned her tea. He said he couldn't bear the thought of her being with another man, and psychiatrists reported that he suffered from an extreme form of jealousy.[194]	
I	The mercy killing	A man nursed his terminally ill wife for several years. He gave in to her regular requests to put her out of her misery, and smothered her with a pillow.	Variations of the facts included that he was clinically depressed when he killed.
J1	The cuckolded husband	A man's wife had had a series of affairs. He decided to kill her if she had another affair. He discovered she was having a further affair and he strangled her to death. He was not mentally ill.[195]	Variations of the facts included that the gender roles were reversed and the woman killed the man.
J2	The taunted husband	A variation of J1, where when the husband discovered she was having an affair he confronted her and she taunted him about his sexual inadequacy - whereupon he lost his temper and killed her.	

4. In this research, public opinion on (A) - the battered wife - was equivocal. One-third of respondents said it was in the worst 3 scenarios, one-third ranked it in the least serious and one-third ranked it in the middle. The range of punishment was between none to

natural life imprisonment. The majority of responses said that this homicide should obtain a fixed period of imprisonment (in single figures). While in this case it was recognised that premeditation aggravated the homicide,[196]

> this response was sometimes moderated by suggestions that the woman experienced a cumulative anger and that although she appeared outwardly calm, she may well have still been emotionally upset when she stabbed her husband. Moreover, some commented that it may be unrealistic to expect her to retaliate immediately after his abuse, because she would simply have suffered more abuse. The difficulty respondents had in assessing the gravity of this homicide was also illustrated by the fact that the criticism that she should have left him was sometimes counter balanced by recognition of the fact that it might not be easy to do so. A small number of respondents thought that it was more appropriate to treat this as a kind of self- defence rather than provocation.

5. Those who thought scenario (A) was one of the most serious scenarios specified the premeditation and alternative courses of action available as aggravating. Those who were more sympathetic were of the view that premeditation was misleading because her state of mind would have been in turmoil as a result of the lengthy abuse she had suffered.[197]

6. When the facts of (A) were varied to remove the physical abuse, the majority thought this was more serious but thought it should be dealt with by way of an increased sentence rather than a different offence. Some thought that as there was no physical threat to her wellbeing it was not as bad, but others thought that verbal abuse can be very bad.[198]

7. When the facts of (A) were varied to the rape, half thought it made it less serious and half said it made no difference. When the facts were varied to clinical depression, the majority thought it should be viewed very differently. One-third said she should not be prosecuted for homicide. Where prosecution was favoured, the majority said imprisonment was inappropriate.[199]

8. Little difference was noted when gender roles were reversed. However, the majority thought that when the son was involved in (A) the killing was worse.

9. Detail about responses to each of the other scenarios is provided in the research. Scenario (E) (the contract killing) was seen as the most serious and scenario (I) (the mercy killing) the least, but the other eight scenarios were 'viewed as of intermediate seriousness.'[200]

10. Also, given the responses to C and F, respondents had some sympathy for those who killed in self-defence, even though it was arguable that disproportionate force had been used.[201] Further, respondents had sympathy for killers for whom a mental abnormality was present.[202]

Appendix E

1. Mitchell and Roberts conducted research with a goal of exploring the consequences on public opinion of abolishing the mandatory life sentence for murder.[203] This research included 1027 interviews across England and Wales and six focus groups. Interviews included questions about the public attitudes to sentencing purposes (and specifically for murder), public perceptions of murder trends, the perceptions of leniency of sentence (including for murder) and of how long a person convicted of murder spends in prison, and of how often a person who is released on licence for murder reoffends.

2. The respondents were randomly assigned three of the following murder scenarios and asked to choose a sentence from among a range of definite sentence ranges, from 'up to four years' through to 30 years or more, or, alternatively, imprisonment for natural life, without release at any point:

Murder Scenarios Used in the Research

1. *Frank, aged 18, burgled the home of Alex who was a 64-year-old widower. Alex disturbed Frank during the burglary, and Frank hit him several times over the head with a hammer, killing him. Frank said he just reacted without thinking.*
2. *Jess had recently ended her relationship with Mark, but he went to her house to try to persuade her to take him back. When she told him she did not love him anymore, he became upset and stabbed her to death with a kitchen knife.*
3. *Nick and Oliver ran rival minicab businesses. Nick thought that Oliver had sabotaged his radio system preventing him from contacting his drivers. Knowing he had a knife in his pocket, Nick went to Oliver's offices and confronted him about this. They argued and that led to a scuffle, in the course of which Nick fatally stabbed Oliver in the chest.*
4. *One evening Terry accused his partner Peter of having an affair with another man. They argued and Peter, who denied the allegation, called Terry a 'bastard'. Terry then picked up an ashtray and hit Peter over the head with it, killing him.*
5. *Jim decided to rob a bank. He bought a shotgun and was prepared to kill anyone who tried to prevent him. He entered the bank, pointed the gun at the cashier and demanded money. When the cashier pushed the alarm bell Jim shot him dead and fled.*
6. *Pete and Bert had an argument and Pete punched Bert in the face. Pete then left to walk home. Meanwhile Bert got into his car and set off after Pete. He approached Pete from behind and drove the car straight at Pete, tossing him high into the air. Bert then drove off leaving Pete lying dead on the pavement.*
7. *Gary and Jane had an argument at a party at their house. When Max intervened to try to calm things down, Gary picked up a knife and stabbed him with it.*
8. *Graham was six years old and suffered from a series of untreatable extremely serious mental and physical disabilities. His mother Jane testified that she could not bear to see him suffer any more. One day she walked into a side ward in the hospital and disconnected the life-support machinery from Graham.*
9. *Brian was 18 years old and he broke into the house of Fred who was 68. Brian was just about to pick up the TV set when Fred confronted him. Fred kept shouting out 'Help! Help!' and Brian picked up a cushion and suffocated him with it.*

3. The results are reproduced in Table 5 below:[204]

Table 5: Public Sentencing Preferences in Murder Scenarios: Percentage Choosing Options

	Up to 9 years in prison	10 to 19 years	20 to 29 years	30 years or more, with release at some stage	Imprisonment for offender's natural life	Total
Scenario						
1	8	22	20	17	33	100%
2	3	24	25	20	30	100%
3	5	31	24	16	24	100%
4	20	39	18	8	14	100%
5	1	10	20	18	52	100%
6	3	28	25	13	33	100%
7	11	36	20	14	19	100%
8	79	9	7	2	4	100%
9	5	22	26	15	32	100%
Average across all scenarios	*15%*	*25%*	*21%*	*14%*	*26%*	*100%*

Question: 'Imagine you are a judge sentencing people convicted of murder. Please tell me which of the sentences on this card is most appropriate for this case?' Row totals are rounded.

4. Mitchell and Roberts made the following observations, as a result of this research:[205]

- First, in all but one scenario at least two-thirds of respondents favoured finality to the sentence, a minority (approximately one-third) of respondents believed that natural life was an appropriate sentence to impose. This contrasts with previous polls that asked about general attitudes and suggested a strong public demand for life without parole or the death penalty.
- Secondly, even in the most serious case (scenario 5), only 52% favoured a natural life (or indeterminate) sentence. This suggests support for the principle of proportionality and for natural life sentences for the most serious cases.
- Thirdly, there was wide variation among the responses.

References

1 Terms of reference paras 2(a)-(d).

2 Terms of reference para 3.

3 Terms of reference para 7(d).

4 See e.g. Paul Robinson and John Darley, Justice, Liability, and Blame: Community Views and the Criminal Law (Westview Press, 1995) <https://scholarship.law.upenn.edu/faculty_scholarship/1634> ('Justice, Liability, and Blame').

5 T Markus Funk, 'Cracking Self-Defense's Intractable "Difficult Cases"' (2021) 100(1) Nebraska Law Review 1, 15.

6 Paul H Robinson and John M Darley, 'Utility of Desert' (1996) 91(2) Northwestern University Law Review 453, 457.

7 Ibid 476.

8 Funk (n 5) 15; see also Tom R Tyler, Why People Obey the Law (Princeton University Press, 2006) 64 notes that '[t]he most important normative influences on compliance with the law is the person's assessment that following the law accords with his or her sense of right and wrong…'

9 Joshua Kleinfeld et al, 'White Paper of Democratic Criminal Justice Democratizing Criminal Justice Symposium: Policy Proposals' (2016) 111(6) Northwestern University Law Review 1693, 1697 ('White Paper of Democratic Criminal Justice Democratizing Criminal Justice Symposium'); Paul H Robinson and John M Darley, 'Intuitions of Justice: Implications for Criminal Law and Justice Policy' (2007) 81(1) Southern California Law Review 1, 18 ('Intuitions of Justice').

10 Paul H Robinson, Intuitions of Justice and the Utility of Desert (Oxford Academic, online edn, 2013) 209 <https://academic.oup.com/book/9189>.

11 Funk (n 5) 15-6.

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118 Jeffs et al (n 71) 18-9.

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173 Mitchell (n 13) 456.

174 Ibid 458.

175 Ibid 459.

176 Ibid 460.

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178 Ibid 469.

179 Ibid 458.

180 Ibid 462.

181 Ibid 463.

182 Ibid 464.

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185 Ibid.

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188 Law Commission (n 50) 180.

189 Ibid 182. This scenario was designed this way as provocation was probably not available because although the defendant might have lost her self-control when abused by her husband,

she had ample time in which to cool down. Diminished responsibility was a possible alternative defence if she was suffering from clinical depression and that abnormality substantially impaired her mental responsibility.

190 Ibid 185. In Camplin the defence was provocation and immediacy of the response was important as was the accused's age.

191 Ibid. This scenario was designed to invoke thoughts of both provocation and defensive force, but there may be issues with immediacy and over-reaction.

192 Ibid 187. This scenario raises issues of provocation but proportionality is an issue.

193 Ibid 188. This scenario had an element of self-defence but there are concerns about proportionality.

194 Ibid 191. Provocation may be raised but will unlikely be successful in this scenario.

195 Ibid 192-3. This scenario is unlikely to amount to provocation. .

196 Ibid 182.

197 Ibid 183.

198 Ibid 184.

199 Ibid.

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201 Ibid 196.

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203 This research is reported in Barry Mitchell and Julian V Roberts, Exploring the Mandatory Life Sentence for Murder (Hart Publishing, 2012); Mitchell and Roberts, 'Sentencing for Murder' (n 126); Barry Mitchell and Julian V Roberts, Public Opinion and Sentencing for Murder: An Empirical Investigation of Public Knowledge and Attitudes in England and Wales (Nuffield Foundation, October 2010).

204 This table is a replica of Table 6.3 in Mitchell and Roberts, Exploring the Mandatory Life Sentence for Murder (n 203) 96.

205 Ibid 97; Mitchell and Roberts, 'Sentencing for Murder' (n 126) 152.