

SELF-DEFENCE AND THE REASONABLE WOMAN: EQUALITY BEFORE THE NEW VICTORIAN LAW

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[The Crimes Act 1958 (Vic) was amended in 2005 to codify self-defence to murder and introduce the offence of defensive homicide. The changes aimed to improve legal protection for women who kill abusive family members. Four such women have faced murder charges since the new provisions were enacted. Two of the cases did not proceed beyond the committal stage, and two resulted in defensive homicide convictions. The lack of understanding of the dynamics of family violence that limited the way in which common law self-defence applied to abused women is now affecting the application of the new provisions. Of the two convictions for defensive homicide, one complete acquittal and one conviction for murder appear to be more appropriate outcomes.]

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I INTRODUCTION

The Victorian Parliament made sweeping reforms to defences to homicide in November 2005. The *Crimes (Homicide) Act 2005* (Vic) amended the *Crimes Act 1958* (Vic) ('*Crimes Act*') to codify self-defence to murder¹ and recognise excessive self-defence as a partial defence to murder through the offence/alternative verdict of defensive homicide.² These amendments were supported by the introduction of a provision allowing the admission of evidence of prior family violence where a defendant is on trial for killing a family member.³ The primary aim of the reforms was to expand the scope of self-defence to apply more effectively to women who kill their abusive partners. The then Attorney-General described ss 9AC, 9AD and 9AH ('the new provisions') as

removing entrenched bias and misogynist assumptions from the law to make sure that women who kill while genuinely believing it is the only way to protect themselves or their children are not condemned as murderers.⁴

¹ *Crimes Act* s 9AC, as inserted by *Crimes (Homicide) Act 2005* (Vic) s 6.

² *Crimes Act* s 9AD.

³ *Ibid* s 9AH.

⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1844 (Rob Hulls, Attorney-General). The abolition of the partial defence to murder of provocation was, perhaps, the most significant amendment to the *Crimes Act* s 3B. The *Crimes (Homicide) Act 2005* (Vic) ss 5–6 also introduced provisions relating to intoxication (s 9AJ), duress (s 9AG), sudden or extraordinary emergency (ie necessity) (s 9AI) and infanticide (s 6).

Jurisdictions across the world struggle to provide legal protection for women who kill violent partners in circumstances where self-defence is not made out,⁵ but where, according to community standards, they do not deserve to be stigmatised as murderers.⁶ This issue is so well documented that one commentator suggests it is 'trite' to point it out.⁷ The law of self-defence is capable of accommodating the experiences of women who kill abusive partners. The problem is that sections of the community and the legal profession do not adequately understand the dynamics of family violence, and so the law of self-defence is not always applied to the experiences of abused women. Where the law of self-defence does not accommodate their experiences, abused women are not equal before the law.⁸

Victoria's reforms were preceded by several years of research by the Victorian Law Reform Commission ('VLRC'). Its research analysed extensive data on the social and psychological dynamics of violent relationships and involved consultations with academics, police officers, members of the legal and medical professions, domestic violence workers and victim advocates.⁹ If the reforms prove to be fairer to both abused women and to the broader community than the common law and statutory provisions in other jurisdictions, they have the potential to make a significant international impact by

⁵ The same difficulties apply to provocation, but that is no longer an issue in Victoria: see *Crimes Act* s 3B.

⁶ For some approaches taken in other jurisdictions, see generally *R v Lavallee* [1990] 1 SCR 852; New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No 73 (2001); United Kingdom Law Commission, *Partial Defences to Murder*, Final Report (2004) 70–1; Elizabeth Sheehy, 'Battered Women and Mandatory Minimum Sentences' (2001) 39 *Osgoode Hall Law Journal* 529, 532–3; Stuart M Kirschner, Thomas R Litwack and Gary J Galperin, 'The Defense of Extreme Emotional Disturbance: A Qualitative Analysis of Cases in New York County' (2004) 10 *Psychology, Public Policy, and Law* 102, 129; Donald W North, 'A License to Kill Your Spouse: A Critical Look at the Admissibility of Prior Acts Evidence as It Relates to the Louisiana Domestic Violence Exception' (2000) 27 *Southern University Law Review* 181.

⁷ Julia Tolmie, 'Battered Defendants and the Criminal Defences to Murder — Lessons from Overseas' (2002) 10 *Waikato Law Review* 91, 91. Some of those who have considered the issue are Jenny Morgan, *Who Kills Whom and Why: Looking beyond Legal Categories* (Victorian Law Reform Commission, 2002) 41–3; Alison Wallace, *Homicide: The Social Reality* (NSW Bureau of Crime Statistics and Research, 1986) 96–8, 103–5.

⁸ Australia is a party to the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981). Article 15(1) requires that 'States Parties ... accord to women equality with men before the law.'

⁹ VLRC, *Defences to Homicide*, Issues Paper (2002); VLRC, *Defences to Homicide*, Options Paper (2003); VLRC, *Defences to Homicide*, Final Report (2004).

providing a model to address a human rights issue that has confounded western courts and legislatures for decades.

There is a small but significant body of case material relating to the introduction of the new provisions, as four women have been charged with killing abusive family members since 2005.¹⁰ Prosecutions against 'SB' and Freda Dimitrovski did not proceed beyond committal proceedings,¹¹ and prosecutions against Karen Black and Eileen Creamer resulted in convictions for defensive homicide.¹² The material from these four cases provides a basis to analyse whether the reforms of the *Crimes Act* have affected, either positively or negatively, the legal position of women who kill abusive partners.

Part II of this article provides the background to the reforms of the Victorian law by outlining the law of self-defence and the problems with its

¹⁰ Since this article was written, Jemma Edwards has pleaded guilty to defensive homicide after stabbing her husband to death on 18 January 2011: *R v Edwards* [2012] VSC 138 (24 April 2012). Nineteen men have been convicted of defensive homicide in the same period: *R v Spark* [2009] VSC 374 (11 September 2009); *R v Smith* [2008] VSC 87 (1 April 2008); *R v Edwards* [2008] VSC 297 (13 August 2008); *R v Giammona* [2008] VSC 376 (26 September 2008); *R v Smith* [2008] VSC 617 (15 October 2008); *R v Baxter* [2009] VSC 178 (12 May 2009); *R v Wilson* [2009] VSC 431 (21 September 2009); *R v Parr* [2009] VSC 468 (16 October 2009); *R v Croxford* [2009] VSC 516 (16 October 2009); *R v Evans* [2009] VSC 593 (16 December 2009); *R v Taiba* [2008] VSC 589 (23 December 2008); *R v Trezise* [2009] VSC 520 (31 August 2009); *R v Middendorp* [2010] VSC 202 (19 May 2010); *R v Martin* [2011] VSC 217 (20 May 2011); *R v Ghazlan* [2011] VSC 178 (3 May 2011); *R v Svetina* [2011] VSC 392 (22 August 2011); *R v Jewell* [2011] VSC 483 (27 September 2011); *R v Monks* [2011] VSC 626 (2 December 2011); *R v Talatonu* [2012] VSC 270 (22 June 2012). Adverse publicity regarding male defendants charged with murder but convicted of defensive homicide was central to the decision of Parliament to have the Department of Justice review the new offence/alternative verdict: Department of Justice, 'Defensive Homicide: Review of the Offence of Defensive Homicide' (Discussion Paper, August 2010). The Attorney-General announced in June 2012 that the offence would be amended, but there is no indication yet of the direction of further reforms: see Alex White, 'State Set to Amend Defensive Homicide Law', *Herald Sun* (Melbourne), 26 June 2012, 2.

¹¹ The teenage defendant's name was suppressed for the criminal prosecution. She has since been identified in the media as 'SB' as a result of an investigation by the Coroners Court of Victoria into the death of her stepfather. The discontinuation of the prosecutions against 'SB' and Dimitrovski limits the available case material to media reports. However, further information on the case of 'SB' might become available in the future through the findings of the coronial investigation: see, eg, Michelle Draper, 'Sex Abuser Feared by Small Vic Community', *The Sydney Morning Herald* (online), 11 October 2011 <<http://news.smh.com.au/breaking-news-national/sex-abuser-feared-by-small-vic-community-20111011-1lil6.html>>; 'Murder Accused Walks Free after Charges Dismissed', *ABC News* (online), 7 May 2009 <<http://www.abc.net.au/news/2009-05-06/murder-accused-walks-free-after-charges-dismissed/1674920>>.

¹² *R v Black* [2011] VSC 152 (12 April 2011); *R v Creamer* [2011] VSC 196 (20 April 2011). For further information on the trial of Eileen Creamer, see also *Re Creamer* [2009] VSC 460 (7 October 2009); *R v Creamer* [2009] VSCA 323 (7 December 2009).

application to women who kill abusive partners. It includes a discussion of the cases of Heather Osland¹³ and Claire MacDonald,¹⁴ which were heard before the 2005 reforms were introduced. Although Osland was convicted and MacDonald was acquitted, both cases illustrate the difficulties abused women face in arguing common law self-defence. Widespread criticism of both cases directly contributed to the changes to the *Crimes Act*.

Part III discusses the provisions that codify self-defence (s 9AC), enact defensive homicide (s 9AD), and permit the evidence of family violence to be admitted in trials for domestic homicides (s 9AH).

Part IV considers the cases of ‘SB’ and Dimitrovski to assess how the new provisions have affected the exercise of prosecutorial discretion and judicial decision-making. While the lessons are inconclusive, because both cases involve traditional self-defence situations, the effect of the new provisions was evident in the committal proceedings and decisions not to proceed with the prosecutions.

Part V considers the convictions in *R v Black* (‘Black’)¹⁵ and *R v Creamer* (‘Creamer’).¹⁶ Both of these cases are firmly within the ambit of the law reform, as the reasonableness of the defendants’ belief in the need for lethal violence was the live issue. The cases enable the evaluation of the impact of the new provisions on prosecutorial conduct, defence strategy and judicial attitudes.

Part VI concludes that the new provisions do offer assistance to abused women in certain circumstances, but that they have neither seriously challenged pre-existing attitudes toward family violence dynamics nor delivered outcomes wholly satisfactory to either abused women or to the broader community. Black’s conviction for defensive homicide rests on the same assumptions about the nature of domestic violence and women’s responses to it that the new laws were intended to abolish or ameliorate. These attitudes may have denied her the complete acquittal that was open on the facts of her case. Creamer’s conviction rests on the same assumptions, and yet the new provisions may have directly contributed to her avoiding the conviction for murder that was open on the facts.

¹³ See *Osland v The Queen* (1998) 197 CLR 316 (‘Osland’).

¹⁴ See *MacDonald v DPP* [2004] VSC 431 (22 October 2004).

¹⁵ [2011] VSC 152 (12 April 2011).

¹⁶ [2011] VSC 196 (20 April 2011).

II BACKGROUND TO THE LAW REFORM

A *Women and Self-Defence to Murder*

In Victoria, murder is a common law offence.¹⁷ A person is guilty of murder if they cause the death of another person, intending to cause death or grievous bodily harm, or acting knowing that death or grievous bodily harm will probably result.¹⁸ Self-defence is a complete defence, including to a charge of murder. Until 2005, it too was covered in Victoria by the common law, through a two-limb test that required, first, that the defendant had a subjective belief in the need for lethal conduct and, secondly, that the defendant's belief in the need for the lethal conduct was objectively reasonable given their perception of the circumstances. The High Court articulated this test in *Zecevic v Director of Public Prosecutions (Vic)* by stating that the success of self-defence depended on

whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.¹⁹

The test applied to all offences and did not define the type of threat that might make a person believe they needed to take defensive action, even where that defensive action proved to be lethal.

According to the most recent analyses of the Australian Institute of Criminology's National Homicide Monitoring Program, in 2007–08 there were 260 homicide incidents in Australia, involving 308 offenders.²⁰ Of the offenders, 268 were male and 39 were female.²¹ Since the collection of these statistics began in 1989–90, men have accounted for approximately 80 per cent of homicide offenders each year.²² This profile is typical of offending across the

¹⁷ The *Crimes Act* s 3 only provides for the penalty for murder. It does not cover the elements of the offence. South Australia is the only other Australian jurisdiction that does not define murder by statute: see *Crimes Act 1900* (ACT) s 12; *Crimes Act 1900* (NSW) s 18; *Criminal Code Act 1983* (NT) sch 1 s 156; *Criminal Code Act 1899* (Qld) sch 1 s 302; *Criminal Code Act 1924* (Tas) sch 1 s 157; *Criminal Code Act Compilation Act 1913* (WA) app B sch s 279.

¹⁸ *R v Crabbe* (1985) 156 CLR 464.

¹⁹ (1987) 162 CLR 645, 661 (Wilson, Dawson and Toohey JJ).

²⁰ Marie Virueda and Jason Payne, *Homicide in Australia: 2007–08 National Homicide Monitoring Program Annual Report* (Australian Institute of Criminology, 2010) 25.

²¹ *Ibid.*

²² *Ibid.*

world.²³ Due to the high proportion of male homicide offenders, self-defence was developed, and has been consistently applied, in the context of ‘confrontational homicides’ between men.²⁴ Additionally, much of the development of self-defence occurred at a time when domestic violence against women was ‘a legally tolerated and accepted activity’.²⁵

Where men kill other men in self-defence, they usually respond with ‘immediacy’ during the original threat, and in a manner ‘proportionate’ to that original threat.²⁶ While neither characteristic is a formal requirement of the common law of self-defence, both have become closely associated with the defence.²⁷ This has serious consequences for women homicide offenders, who have most commonly killed within an intimate relationship.²⁸ A succession of Australian studies has found that a high proportion of women who kill an intimate partner are responding to long-term violence by the partner.²⁹ In these situations, women typically do not respond during a violent attack,³⁰

²³ See generally Pieter Spierenburg, *A History of Murder: Personal Violence in Europe from the Middle Ages to the Present* (Polity Press, 2008); Roger Lane, *Murder in America: A History* (Ohio State University Press, 1997); Ronald M Holmes and Stephen T Holmes, *Murder in America* (Sage Publications, 2nd ed, 2001).

²⁴ Morgan, above n 7, 41.

²⁵ Robbin S Ogle and Susan Jacobs, *Self-Defense and Battered Women Who Kill: A New Framework* (Praeger Publishers, 2002) 3.

²⁶ VLRC, Options Paper, above n 9, 115–18 [4.27]–[4.44]; Elizabeth A Sheehy, Julie Stubbs and Julia Tolmie, ‘Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations’ (1992) 16 *Criminal Law Journal* 369, 372–3; Morgan, above n 7, 41.

²⁷ Susan Edwards, ‘Abolishing Provocation and Reframing Self-Defence — The Law Commission’s Options for Reform’ (2004) *Criminal Law Review* 181, 189–91, 197.

²⁸ VLRC, Final Report, above n 9, 61 [3.8]–[3.9].

²⁹ Wallace, above n 7, 97, 103; Patricia Weiser Easteal, *Killing the Beloved: Homicide between Adult Sexual Intimates* (Australian Institute of Criminology, 1993) 73–4; Jenny Mouzos, *Homicidal Encounters: A Study of Homicide in Australia 1989–1999* (Australian Institute of Criminology, 2000) 119; Hugh Donnelly, Stephen Cumines and Ania Wilczynski, *Sentenced Homicides in New South Wales 1990–1993: A Legal and Sociological Study*, Monograph Series No 10 (Judicial Commission of NSW, 1995) 41. Australia’s gender proportions in intimate partner homicides are consistent with other western countries, except the United States of America where numbers of men and women who kill their intimate partners are almost the same: see Elizabeth Hore, Janne Gibson and Sophy Bordow, *Domestic Violence*, Research Report No 13 (Family Court of Australia, 1996) 5. However, in both Australia and the United States, women commit far fewer homicide offences than men overall, so the proportion of homicide offences by women that involve intimate partners is much higher than that for men: see VLRC, Options Paper, above n 9, 27 [2.46]–[2.47].

³⁰ Patricia Easteal, ‘Battered Women Who Kill: A Plea of Self-Defence’ in Patricia Weiser Easteal and Sandra McKillop (eds), *Women and the Law* (Australian Institute of Criminology, 1993) 37, 38.

and as they are often smaller and less experienced in physical combat than their victims, frequently use a weapon when retaliating.³¹ The actions of abused women, therefore, often lack both immediacy and proportionality. While that is not a formal basis for the defence to fail, the absence can cast doubt on whether the defendant's belief in the need for lethal violence was genuine and/or reasonable, which can legitimately defeat the defence.³² In 2003, the VLRC found that 'homicides in contexts other than spontaneous encounters rarely led to an acquittal on the basis of self-defence'.³³ The problem for abused women is that when they do kill,

they are likely to be excluded from the scope of self-defence due to its close identification with spontaneous encounters. Cases that deviate from this context may not be seen as 'real' cases of self-defence. This may be despite the fact that such killings were believed by the accused, on reasonable grounds, to be necessary in the circumstances.³⁴

When an abused woman is convicted of murder on this basis, she has been denied the protection of self-defence because her actions do not conform to established patterns of male violence. This constitutes a gender bias in the interpretation and application (although not the framing) of the defence, which is inconsistent with the bedrock principle of equality before the law.

³¹ Every woman in the VLRC's 2003 homicide study who killed without the assistance of another person used a weapon. Six women (50 per cent) used a knife, one woman (8.3 per cent) used a firearm, two women (16.7 per cent) used a blunt instrument, one woman (8.3 per cent) used fire, and two women (16.7 per cent) used some other kind of weapon. No women used their hands or feet, compared with 21 men (22.3 per cent of all male offenders): see VLRC, Options Paper, above n 9, 23 [2.35]. Another study has shown that only five per cent of men who are killed by their female partners are beaten to death by hand: see Jenny Mouzos, *Homicide in Australia: 2003–2004 National Homicide Monitoring Program (NHMP) Annual Report* (Australian Institute of Criminology, 2005) 17.

³² National Women's Justice Coalition, Submission to the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 5: Fatal Offences against the Person*, 25 August 1998, [5.3]; Anthony Hopkins and Patricia Eastaie, 'Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland' (2011) 35 *Alternative Law Journal* 132, 132; Australian Law Reform Commission, *Family Violence — A National Legal Response*, Final Report No 114 (2009) vol 1, 624.

³³ VLRC, Options Paper, above n 9, 112 [4.20].

³⁴ *Ibid.*

B Background to the New Provisions — Heather Osland

To a significant extent, the introduction of the new provisions was a response to an extensive public campaign over the case of Heather Osland.³⁵ The Parliamentary Secretary announced that the Crimes (Homicide) Bill 2005 (Vic) would

provide greater justice for women who are subjected to domestic violence ... There are few instances in recent legal history that have so outraged community activists for justice as much as the Heather Osland case ... This bill goes straight to the heart of dealing with the legislation regarding murder in cases of that ilk.³⁶

On 30 July 1991, Heather Osland and her adult son, David Albion, dug a hole in scrub near their home in Bendigo. Later on the same night, Osland mixed sedatives into the food of her husband, Frank Osland, and when he lost consciousness Albion hit him over the head with an iron pipe, killing him with one blow. Albion and Osland buried Frank Osland and then reported him missing. His body was discovered by police four years later, at which time Albion and Osland were both charged with his murder.³⁷ Osland argued self-defence at trial but was convicted of murder in 1996, and was unsuccessful in appeals to the Supreme Court of Victoria in 1997 and to the High Court in 1998.³⁸ She was released from prison in July 2005 after serving nine and a half years of a 14-year sentence.

³⁵ *Osland* has been the focus of a considerable amount of academic and professional attention: see, eg, Melinda Brown, 'Ramifications of the *Osland* Verdict' (1999) 73(5) *Law Institute Journal* 14; Joanne Roebuck, '*Osland v The Queen* — Comment' (1998) 5 *James Cook University Law Review* 164; Jocelyne Scutt, 'Restricted Vision — Women, Witches and Wickedness in the Courtroom' (2001) 6 *Deakin Law Review* 40; Gail Barnes, 'Private Violence, Gendered Justice' (1999) 24 *Alternative Law Journal* 67. It was also the focus of a large amount of public attention: see below n 54.

³⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1836 (Bruce Mildenhall). In this speech, Mildenhall also referred to the cases of *R v Ramage* [2004] VSC 508 (9 December 2004), *R v Ramage* [2004] VSC 391 (8 October 2004) and *R v Keogh* (Unreported, Supreme Court of Victoria, Hampel J, 15 February 1989), which also generated significant public criticism. However, in those cases the women were victims of lethal violence by their abusive partner, and the publicity surrounding them contributed to the abolition of provocation, not the introduction of defensive homicide. The victim in *Keogh* was Vicki Cleary and the case is often referred to informally as 'Cleary'.

³⁷ Albion was tried for murder in 1996 and acquitted on the basis that he acted in self-defence and in defence of his mother. A previous trial had resulted in a 'hung' jury: see *R v Osland* (1998) 2 VR 636, 638 (Winneke P, Hayne and Charles JJA).

³⁸ *Osland* (1998) 197 CLR 316. The appeal was dismissed by a majority of three (McHugh, Kirby and Callinan JJ, in separate judgments) to two (Gaudron and Gummow JJ in dissent).

One ground of Osland's High Court appeal was that the jury was given insufficient instruction on how to consider self-defence in the context of 'battered woman syndrome'.³⁹ The Court accepted that Frank Osland was extremely violent. There was overwhelming testimonial evidence that for 13 years he had subjected Osland to rapes, serious assaults, and threats with razor blades and loaded guns. He controlled her basic movements and social interactions. He threatened to shoot and dismember her children and return their bodies to her in garbage bags. The police attended the house on numerous occasions but no charges were ever laid. Osland left her husband eight times but on each occasion he either physically brought her back to their home, or she returned under threat of the death of herself or her children.⁴⁰

Supporters relentlessly campaigned for Osland's release during her incarceration, and for law reform after her release. They argued that she lost her trial and appeals because there was a lack of immediacy in the threat of violence that she faced from her husband, and that the law of self-defence was not responsive to women who kill in the context of an abusive relationship where the threat of violence is real but not immediate.⁴¹ These arguments certainly reflect the traditional problems facing abused women arguing self-defence to a court that understands the defence in the context of male violence. However, there are other explanations for its failure in Osland's case. The police prosecuted on the basis that she was a 'cold-blooded' murderer.⁴² Upon her High Court appeal in 1998, Kirby J accepted that lethal conduct within an abusive intimate relationship could be in self-defence 'where there was no actual attack on the accused underway but rather a genuinely appre-

A Petition of Mercy to the Governor of Victoria also failed in 1999: see *Osland v Secretary, Department of Justice [No 2]* (2010) 241 CLR 320, 325–6 [1]–[3] (French CJ, Gummow and Bell JJ).

³⁹ There were other grounds of appeal including the inconsistency of verdicts. Osland was convicted of murder when she did not cause the fatal blow, and Albion did cause the fatal blow and was acquitted. This ground also failed: *Osland* (1998) 197 CLR 316, 339–41 [64]–[68] (McHugh J).

⁴⁰ *Ibid* 388–9 [185]–[190] (Callinan J); Belinda Hawkins, *Producer's Notes* (2 November 2005) Australian Story <<http://www.abc.net.au/austory/content/2005/s1495909.htm>>.

⁴¹ See, eg, Debbie Kirkwood, *Legal Issues: The Trials of Heather Osland* (30 April 2003) Release Heather Osland Group <<http://home.vicnet.net.au/~rhog/legal.htm>>; Patricia Easteal, *Legal Issues 2: Women Who Kill a Violent Partner — Where's the Justice?* (30 April 2003) Release Heather Osland Group <<http://home.vicnet.net.au/~rhog/legal2.htm>>; Debbie Kirkwood, *Women Who Kill in Self Defence Campaign* (15 March 1998) People's Justice Alliance <<http://home.vicnet.net.au/~pjan/news/pja15003.htm#E25E4>>.

⁴² ABC Television, 'Convicted Husband Killer Heather Osland Released from Prison', *Stateline*, 22 July 2005 (Detective Sergeant Tony Thatcher) <<http://www.abc.net.au/stateline/vic/content/2005/s1420450.htm>>.

hended threat of imminent danger sufficient to warrant conduct in the nature of a pre-emptive strike.⁴³ However, in *Osland*'s case he found that there was 'clear evidence' that the domestic violence she experienced had abated in the years preceding Frank *Osland*'s death,⁴⁴ and that it was

plainly open to the jury, that the appellant's conduct was premeditated and effected with 'calm deliberation' and 'detached reflection' rather than reasonably necessary to remove further violence threatening her with death or really serious injury.⁴⁵

Irrespective of the merits of *Osland*, the case remains significant because it provoked wider public debate that motivated Parliament to review the scope of self-defence, and expand it to accommodate women who kill abusive partners where their actions lack proportionality and/or immediacy.

C Transition to the New Provisions — Claire MacDonald

The 2006 murder case against 40-year-old kindergarten teacher, Claire MacDonald, marks the transition from the common law to the new provisions of the *Crimes Act*. The provisions were not yet in force at the beginning of MacDonald's trial, and so did not apply to her. However, the VLRC's Final Report had been published, and the Crimes (Homicide) Bill 2005 (Vic) had been debated in the Parliament and the media, creating awareness among members of the legal profession and the community of the issues facing abused women and the likely effect of relevant statutory changes.⁴⁶

MacDonald was prosecuted for murdering her husband, Warren MacDonald, in September 2004 on their property in Acheron, central Victoria. She admitted that she intentionally killed him, but pleaded not guilty and argued self-defence at trial. The court was told that Warren MacDonald had physically, psychologically and sexually abused MacDonald for 17 years, and threatened to kill her if she ever left him. On the night before the killing, he subjected her to a barrage of abuse and threats of violence, including anal

⁴³ *Osland* (1998) 197 CLR 316, 382 [172].

⁴⁴ *Ibid* 379 [170]. The main evidence of the abatement of the violence were telephone intercepts of *Osland* talking to her friend, Gwen, and her daughter, Erica: at 396–7 [195] (Callinan J).

⁴⁵ *Ibid* 382 [173]. Evidence that *Osland* would benefit financially from her husband's death also supported this conclusion: at 355 [110] (McHugh J).

⁴⁶ Debbie Kirkwood, 'Elizabeth Scott — The First Woman Hanged in Victoria: How Far Have We Come?' (2006) 1(1) *Domestic Violence and Incest Resource Centre Quarterly* 14, 19.

rape. He had also been physically abusive toward their five children, who, at the time, were aged between two and a half and nine years.⁴⁷

MacDonald had the children tell their father that her Land Rover battery had gone flat and she needed him to collect her from a particular area on their property. She wore a camouflage t-shirt and rubber gloves and hid in trees for 90 minutes holding his high-powered rifle with telescopic sights. The rifle was loaded with five bullets and she had a sixth bullet in her pocket. When he arrived and approached the Land Rover she shot at him five times, loaded the extra bullet and shot at him again. The cause of death was found to be blood loss resulting from three bullet wounds to the chest, abdomen and head. MacDonald told the police that after the shooting: 'I walked over to him, put my hands on him, told him how much I hated him, and I hated him for making me do this'. She then phoned emergency services.⁴⁸

The prosecution case was that the MacDonalds' marriage was unhappy and the killing was a cold-blooded execution from a 'sniper's nest'.⁴⁹ The Crown argued against self-defence on the basis that the killing was 'punitive rather than defensive' and that the '*link between fear and apprehension borne of the events of the night before and the act of killing itself was clearly broken*'.⁵⁰ On behalf of the defence, a psychiatrist gave evidence at trial that MacDonald's endurance of persistent abuse, fear, bullying and domination indicated a diagnosis of 'learned helplessness',⁵¹ which is a key characteristic of 'battered woman syndrome'.⁵² The jury completely acquitted MacDonald.⁵³

Legal commentators supported MacDonald's acquittal and found that the conduct of her case confirmed the need for the pending law reforms. The Victorian Department of Justice argued in 2010 that the Crown's attempt to defeat MacDonald's self-defence claim on the basis of the lack of an immediate threat 'illustrate[s] the disconnect between the traditional legal interpreta-

⁴⁷ Department of Justice, above n 10, 28–9.

⁴⁸ Peter Gregory, 'Woman Killed Husband from "Sniper's Nest"', *The Age* (Melbourne), 21 February 2006, 5.

⁴⁹ *Ibid.*

⁵⁰ Transcript of Proceedings, *R v MacDonald* (Supreme Court of Victoria, Justice Nettle, 28 February 2006) cited in Department of Justice, above n 10, 29 (emphasis added).

⁵¹ Department of Justice, above n 10, 29.

⁵² Learned helplessness was one of the core features in the formulation of the concept of 'battered woman syndrome': see Lenore E Walker, *The Battered Woman* (Harper & Row Publishers, 1979) 43; Lenore E Walker, *The Battered Woman Syndrome* (Springer Publishing, 1984) 86–7.

⁵³ Department of Justice, above n 10, 29.

tion of the law of self-defence and the realities of family violence.⁵⁴ The other contentious issue in the MacDonald case was the defence's reliance on the concept of 'battered woman syndrome', which had been subject to 'trenchant criticism' for some years.⁵⁵ The syndrome has been criticised for suggesting that 'women's responses to violence are irrational, individualised and due to a psychological condition, rather than the reasonable and normal reactions of someone placed in these circumstances.'⁵⁶ In *Osland*, the High Court expressed reservations about the appropriateness of the 'battered women's syndrome'. Kirby J had 'sympathy' for the appellant's criticism of the word 'syndrome' because it appeared to be an 'advocacy driven construct' designed to 'medicalise' evidence, and it failed to acknowledge that 'motivations are complex and individual: arising from personal pathology and social conditions rather than a universal or typical pattern of conduct'.⁵⁷

Critics of 'battered woman syndrome' advocate a shift away from the focus on the psychology of the defendant woman who has killed an abusive partner.⁵⁸ They argue that the preferable approach is to emphasise 'social framework evidence', which explains the violence the woman has experienced

⁵⁴ *Ibid.* The broader public was not so approving of the decision. There was media commentary that the element of planning was incompatible with self-defence, that she should have just left the relationship, and that the courts are licensing women to kill and letting them get away with murder: see, eg, Derryn Hinch, *Self-Defence?* (6 March 2006) Hinch.net <http://web.archive.org/web/20080721081701/http://www.hinch.net/says_archive06/Mar06/6-3-06.htm>; Anna Marshall, 'Female Domestic Violence — Women Licensed to Kill by Australian Courts' (7 March 2006) *Australian News Commentary* <http://australian-news.net/Claire_MacDonald.htm>.

⁵⁵ Geraldine Mackenzie and Eric Colvin, 'Victims Who Kill Their Abusers: A Discussion Paper on Defences' (Discussion Paper, Queensland Attorney-General and Minister for Industrial Relations, 14 April 2009) 10–13. The original learned helplessness theory was developed through experiments on dogs using Pavlovian conditioning: Martin E P Seligman, Steve F Maier and James H Geer, 'Alleviation of Learned Helplessness in the Dog' (1968) 73 *Journal of Abnormal Psychology* 256. Some academic psychologists and psychiatrists continue to use the concept of learned helplessness in relation to humans: see, eg, Neta Bargai, Gershon Ben-Shakhar and Arieh Y Shalev, 'Posttraumatic Stress Disorder and Depression in Battered Women: The Mediating Role of Learned Helplessness' (2007) 22 *Journal of Family Violence* 267.

⁵⁶ VLRC, Final Report, above n 9, xxxv.

⁵⁷ *Osland* (1998) 197 CLR 316, 372 [161] (citations omitted).

⁵⁸ David L Faigman and Amy J Wright, 'The Battered Woman Syndrome in the Age of Science' (1997) 39 *Arizona Law Review* 67, 78–9; Marilyn McMahon, 'Battered Women and Bad Science: The Limited Validity and Utility of Battered Woman Syndrome' (1999) 6 *Psychiatry, Psychology, and Law* 23, 33–4; Zoe Rathus, 'There Was Something Different about Him That Day: The Criminal Justice System's Response to Women Who Kill Their Partners' (Women's Legal Service, 2002) 7–8; Sheehy, Stubbs and Tolmie, above n 26, 384–5.

and the effect it has had on her confidence, social relationships and economic position. It also ensures that the evidence related to the particular circumstances of the defendant is placed in the context of additional evidence relating to the general effect of violent relationships,⁵⁹ including the risk of facing violence from the abusive partner if the abused woman tries to leave the relationship.⁶⁰ ‘Social framework evidence’ permits the jury to see the lethal conduct of the woman as a rational response to a ‘battered woman reality’, rather than a pathological response attributable to a ‘battered woman syndrome’.⁶¹ The fact that ‘battered woman syndrome’ helped MacDonald to secure her acquittal, as indeed it has helped other women in North America and Australia,⁶² does not alleviate concerns about its continued application.⁶³

III THE LAW REFORM

A Codification of Self-Defence

The Victorian Parliament codified self-defence to murder in 2005 to clarify the requirements of the defence and to make it more inclusive of the experiences of abused women.⁶⁴ Parliament did not accept the recommendation of the VLRC that the statute should, like the common law, be silent regarding

⁵⁹ Myrna S Raeder, ‘The Double-Edged Sword: Admissibility of Battered Woman Syndrome by and against Batterers in Cases Implicating Domestic Violence’ (1996) 67 *University of Colorado Law Review* 789, 803–4; VLRC, Final Report, above n 9, 172–8 [4.96]–[4.110].

⁶⁰ These factors are now reflected in the *Crimes Act* s 9AH(3).

⁶¹ Regarding ‘reality’ or ‘syndrome’ see reference to the appellant’s preference: *Osland* (1998) 197 CLR 316, 370 [157] (Kirby J); Patricia Easteal, ‘Battered Woman’s Reality’ in Allan Jamieson and Andre Moenssens (eds), *Wiley Encyclopedia of Forensic Science* (John Wiley & Sons, 2009) 272–5.

⁶² *R v Runjanjic* (1991) 56 SASR 114; Stanley Yeo, ‘Hickey’ in ‘Case and Comment’ (1992) 16 *Criminal Law Journal* 261, 271.

⁶³ The criticism of the use of ‘battered woman syndrome’ was not directed at the defence who raised it, but with the legal situation that meant it was the best option available to an abused woman: see above n 58.

⁶⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1836 (Bruce Mildenhall). The VLRC recommended that the provision on self-defence to murder provide that the complete defence would be available where a defendant believed the harm to which they responded was ‘inevitable’, whether or not it was immediate: see VLRC, Final Report, above n 9, 81 [3.63]. The Parliament did not accept this recommendation: see Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1843–4 (Rob Hulls, Attorney-General).

the type of threat that can justify the application of self-defence.⁶⁵ Rather, s 9AC provides that

[a] person is not guilty of murder if he or she carries out the conduct that would otherwise constitute murder while believing the conduct to be necessary to *defend himself or herself or another person from the infliction of death or real-ly serious injury*.⁶⁶

The clarification that immediacy and proportionality are not required for self-defence to succeed will assist abused women. However, the narrowing of the range of possible threats that can sustain a self-defence argument might prove detrimental to improving their position. The most overt and significant amendment to the common law is that the s 9AC test is entirely subjective and does not consider the reasonableness of the defendant's belief. However, satisfaction of the subjective test does not necessarily result in an acquittal because the jury still has to consider s 9AD, which creates the offence of defensive homicide. This new offence has the potential to both assist and disadvantage abused women.

B *Excessive Self-Defence/Defensive Homicide*

In considering intimate partner homicide in 2004, the VLRC concluded that the 'lack of a halfway house for women and others who kill in these circumstances may result in convictions for murder where manslaughter would have been the more appropriate result.'⁶⁷ On this basis, it recommended to Parliament the reintroduction of the partial defence of excessive self-defence. The Parliament went beyond the recommendation of the VLRC and reintroduced excessive self-defence not only as an alternative verdict to murder, but also as an offence in itself.⁶⁸ Section 9AD enacts the offence of defensive homicide:

⁶⁵ VLRC, Final Report, above n 9, 81 [3.65]. See also Draft Proposals for a Crimes (Defences to Homicide) Bill: at app 4, 318.

⁶⁶ *Crimes Act* s 9AC (emphasis added). The Parliamentary Debates did not explain the reason for this change or why the new section on self-defence to manslaughter in s 9AE retains the wider common law view.

⁶⁷ VLRC, Final Report, above n 9, 102 [3.106].

⁶⁸ The VLRC recommended that excessive self-defence result in a conviction for manslaughter, but defensive homicide was introduced by Parliament so that the reasoning behind the jury's decision was clear and would assist the judge in sentencing: see Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1350–1 (Rob Hulls, Attorney-General).

A person who, by his or her conduct, kills another person in circumstances that, but for section 9AC, would constitute murder, is guilty of an indictable offence (defensive homicide) and liable to level 3 imprisonment (20 years maximum) if he or she did not have reasonable grounds for the belief referred to in that section.⁶⁹

The effect of s 9AD is that a defendant with a genuine belief in the need for lethal violence, but no reasonable basis for the belief, will be acquitted of murder but convicted of defensive homicide. Parliament's rationale for this provision was that the culpability of a person who kills while unreasonably believing their actions to be necessary to defend themselves or another, is substantially less than that of someone who kills in the absence of such a belief. However, the commitment to the principle of the sanctity of life determines that such a defendant must still be deemed to have committed a serious homicide offence.⁷⁰

C Evidence of Family Violence

Section 9AH was enacted to provide for the admission of evidence of family violence where the defendant in a family homicide matter alleges previous violence by the deceased. The definition of family violence includes physical, sexual and psychological abuse, and threats of any of those forms of abuse.⁷¹ The evidence that can be admitted may relate to the history of the relationship, the nature and dynamics of violent relationships generally, and the effect of family violence (both generally and in the particular case).⁷² The evidence is intended to assist the court to understand the nature of the threat the defendant faced, and his or her state of mind, and explain the fear, desperation and lack of options that can lead a woman to resort to lethal violence rather than simply leaving a violent relationship.⁷³ Subsection (1) makes clear that

where family violence is alleged a person may believe, and may have reasonable grounds for believing, that his or her conduct is necessary ...

⁶⁹ *Crimes Act* s 9AD.

⁷⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1350 (Rob Hulls, Attorney-General).

⁷¹ *Crimes Act* s 9AH(4).

⁷² *Ibid* s 9AH(3).

⁷³ For further discussion (in a different jurisdiction) on the role of evidence in the context of intimate partner homicide, see Explanatory Notes, Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009 (Qld) 2.

even if —

- (c) he or she is responding to a harm that is not immediate; or
- (d) his or her response involves the use of force in excess of the force involved in the harm or threatened harm.⁷⁴

This provision is of critical importance as it directly confronts the problem abused women have faced in having their belief in lethal conduct considered genuine and reasonable. It provides a basis for them to have the full protection of self-defence based on their circumstances rather than on a psychological disorder.⁷⁵

D Application of the New Provisions

The new provisions were not intended to apply exclusively to women who kill abusive partners. The VLRC argued that family violence ‘can occur in the context of any close personal relationship’ and acknowledged that, while its discussion focussed on women who kill male partners, the same issues arise for ‘others subjected to family violence who kill their abusers.’⁷⁶ Nonetheless, women abused by male partners were repeatedly disadvantaged under the common law, and the provision was explicitly framed with them in mind. The paradigm case was a woman who had been subjected to psychological and physical violence, perhaps for many years.⁷⁷ Her partner had threatened to kill her or her children if she ever left him. A minor incident occurred that made her believe he was going to kill or seriously injure her or her children, and so she killed him first. Under the common law, she could go to trial and argue self-defence. However, in the absence of a clear and immediate threat,⁷⁸ the jury might find that she did not genuinely believe her actions were necessary,⁷⁹ but rather that she killed in anger or to avenge previous violence.⁸⁰ Alternatively, the jury might accept that she believed her actions were

⁷⁴ *Crimes Act* ss 9AH(1)(c)–(d).

⁷⁵ Australian Law Reform Commission, above n 32, 647.

⁷⁶ VLRC, Final Report, above n 9, 61 [3.9]. The provision was intended to cover situations involving family violence. However, in the first five years, 11 of the 13 defensive homicide convictions arose from non-family violence. This concerned Parliament and influenced the decision to institute a review of the offence/alternative verdict: see Department of Justice, above n 10, 5.

⁷⁷ VLRC, Final Report, above n 9, 2–3 [1.3]–[1.4].

⁷⁸ *Ibid* 61, 77–81.

⁷⁹ *Ibid* 81–4.

⁸⁰ *Ibid* 90–2.

necessary but decide that there was no reasonable basis for the belief. In either case, self-defence would fail under the common law and she would be convicted of murder. Her only other option, if the prosecution was agreeable, was to plead guilty to manslaughter and avoid trial altogether. However, the guilty plea would deprive her of the chance to seek acquittal.⁸¹

Defensive homicide was intended to provide abused women with an option beyond going to trial and risking a murder conviction, or pleading guilty to avoid a murder conviction. Under s 9AD, the abused woman can still go to trial and seek acquittal on the grounds of self-defence. However, if that fails, she can be convicted of defensive homicide instead of murder, as long as the jury accepts that she believed her conduct to be necessary to prevent death or really serious injury, and only rejects self-defence because there was no reasonable basis for the belief. The conviction would be the same as, or equivalent to, the conviction available under a plea agreement, but she would not have to sacrifice the chance of a complete acquittal. This is of clear advantage to abused women. However, the problem is that defensive homicide only applies if the woman's belief in the need for lethal violence is conceptualised as 'unreasonable'. The result, demonstrated by the outcomes in *Black* and *Creamer*, is the paradox that defensive homicide has the potential to both unfairly advantage and unfairly disadvantage an abused woman.

IV DISCONTINUED AND DISMISSED CASES:

'SB' AND DIMITROVSKI

'SB' and Dimitrovski were the first cases of women killing abusive family members to arise after the 2005 law reform. Remarks by the prosecutors, defence counsel and the judiciary provide insight into whether the changes to the law were in any way responsible for the cases not proceeding to trial.

A 'SB'

The first murder prosecution that did not proceed to trial involved an 18-year-old woman in regional Victoria, 'SB', who shot her 34-year-old stepfather in the back of the head with a shotgun, causing his instant death. The shooting occurred after four years of 'relentless', almost daily, sexual abuse of 'SB' by her stepfather, and immediately after he had used the same gun to threaten her into performing oral sex on him. The day after the

⁸¹ Ibid 105–10; Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1837 (Bruce Mildenhall); Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1844 (Rob Hulls, Attorney-General).

shooting, she dismembered his body with a handsaw, buried the torso in the back yard, put the limbs and head in plastic rubbish bags, and took them to a camping ground 16 kilometres away. She threw the limbs down two long-drop toilets and hid the head in the bush.⁸² She was arrested a month later when the torso was found in the yard. She told police that she 'was his' and had to kill either herself or him to stop the abuse. The police found 10 000 digital photos and videos in the deceased's shed, many of them showing sexually violent acts between him and 'SB' dating from the time she was 14 years old.⁸³

Committal proceedings commenced against 'SB' on charges of murder and illegal interference with a human corpse. However, the Director of Public Prosecutions entered a *nolle prosequi* before trial, on the basis that there was no reasonable prospect that a jury would convict the defendant of any offence, because such a strong self-defence case arose from the 'overwhelming' evidence of physical, sexual and psychological abuse. It was reported that the Director's 'decision also took into account new legal provisions in Victoria about self-defence and family violence.'⁸⁴ Because of the withdrawal of the charges by the prosecution, the new provisions of the *Crimes Act* were not actually argued in court.

B *Freda Dimitrovski*

The second case involving the killing of an abusive family member that did not proceed to trial was that of Freda Dimitrovski. She was a 57-year-old woman from Shepparton who stabbed her intoxicated 63-year-old husband, Sava Dimitrovski, twice with a pocket knife after he hit her in the face, threw her to the ground and then assaulted their adult daughter. He died in hospital the following day, and Dimitrovski was charged with his murder. Committal proceedings commenced and included the presentation of evidence of family

⁸² Department of Justice, above n 10, 30–1; Chris Johnston, 'Murder Charge Dropped against "Sex Slave" Teen', *The Age* (online), 27 March 2009 <<http://www.theage.com.au/national/murder-charged-dropped-against-sex-slave-teen-20090327-9czp.html>>.

⁸³ Chris Johnston, above n 82; Australian Associated Press, 'Teen to Face Trial over Stepdad's Murder', *9 News* (online), 14 January 2009 <<http://news.ninemsn.com.au/national/718462/teen-to-face-trial-over-stepdads-murder>>; Australian Associated Press, 'Murder Charges Dropped for Abused Teen', *9 News* (online), 27 March 2009 <<http://news.ninemsn.com.au/national/794168/murder-charges-against-vic-teen-dropped>>. There was no apparent public opposition to the withdrawal of the charges, and the Victorian Supreme Court judge hearing the matter described the withdrawal as 'responsible and necessary'.

⁸⁴ ABC Local Radio, 'Charges Dropped against Teenager Who Killed Her Stepfather', *PM*, 27 March 2009 (Mark Colvin) <<http://www.abc.net.au/pm/content/2008/s2528412.htm>>.

violence under s 9AH. It was not disputed that during their 30-year marriage, Dimitrovski suffered persistent physical and psychological abuse from her husband. It was reported that defence counsel explicitly raised the new provisions of the *Crimes Act*, arguing that they

make it plain a wife is entitled to defend herself, even if she's responding to harm that's not immediate ... in the context of family violence, the accused is not required to wait until an attack is in progress, as long as the accused believes it necessary to protect themselves or a family member.⁸⁵

This submission explains the new provisions, although it does not seem relevant in the present case, given that two assaults on Dimitrovski had just been committed and one was in progress against her daughter at the time she used lethal violence. In May 2009, presiding Magistrate Annabel Hawkins discharged Dimitrovski at the conclusion of a three-day committal hearing. The Magistrate found that there was overwhelming evidence of previous family violence, and she was not satisfied that there was sufficient evidence to prove either murder, defensive homicide or manslaughter, or to disprove self-defence.⁸⁶

C Impact of the New Provisions

The Magistrate's decision to discharge Dimitrovski received support from legal commentators, who attributed it, at least in part, to the new provisions. Dr Bronwyn Naylor, the Director of Equity for the Faculty of Law at Monash University, noted approvingly that the new provisions demonstrated a move away from relying on 'battered woman syndrome' toward 'much more accurate legislation' that brings lethal violence by abused women 'closer to self-defence.'⁸⁷ The authority to discharge a defendant rather than direct that they be tried is part of the jurisdiction of the Magistrates Court.⁸⁸ However,

⁸⁵ Kim Stevens, 'Wife Walks Free — Magistrate Dismisses All Charges against Abused Mother', *Shepparton News* (Shepparton), 7 May 2009, 1, quoting the closing submissions of Ian Hill QC (defence counsel for Ms Dimitrovski), on the third day of the committal hearing for Ms Freda Dimitrovski, Shepparton Magistrates' Court, 6 May 2009, quoted in Department of Justice, above n 10, 31 (ellipsis in original). There was no apparent public comment on the dropping of the charges.

⁸⁶ Department of Justice, above n 10, 31.

⁸⁷ Kim Stevens, 'Breakthrough Case — Dismissed Murder Charge Defence Successful under New Laws', *Shepparton News* (Shepparton), 8 May 2009, 3, quoted in Department of Justice, above n 10, 32.

⁸⁸ *Magistrates' Court Act 1989* (Vic) s 25(1)(c). The section was amended by the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009* (Vic) sch

such a determination is an unusual outcome in a murder case where the identity of the perpetrator is not in question, and it is likely that the decision was influenced by the new provisions.⁸⁹

In the course of its review of defensive homicide in 2010, the Victorian Department of Justice expressed satisfaction that the cases of 'SB' and Dimitrovski demonstrate a 'very different approach' and stand 'in marked contrast' to the arguments employed by both prosecution and defence in MacDonald's case.⁹⁰ The Department was confident that the cases 'indicate that the *Crimes (Homicide) Act 2005* has introduced significant improvements to the criminal justice system in dealing with situations in which a woman kills in response to long-term family violence.'⁹¹

However, celebration of the success of the new provisions may be premature. Neither immediacy nor proportionality were at issue in either of the discontinued cases, and so neither is an example of a situation in which an abused woman has traditionally been disadvantaged. A number of women's advocates collectively submitted to the Department of Justice review that 'the reason these two cases did not proceed to trial is because they fit into traditional notions of self-defence. It does not necessarily follow ... that other women defendants who kill a violent abuser will receive a similar outcome.'⁹²

In addition, the case against 'SB' demonstrates the same failure to understand the connection between prior abuse and lethal violence that was evident under the common law, and which the new provisions were designed to remedy. The Crown prosecutor, Mark Gamble, told the committal Court: '[s]he shot him so she didn't have to do it again ... a jury could form the view, albeit against a background of abuse, [that] it was not committed in self-defence'.⁹³ This advances the argument that a woman who shoots a man to stop him forcing her to perform violent sexual acts, sometimes at gunpoint, does not believe she is defending herself from really serious injury, and should not necessarily be protected by the law. This is a submission that is incompatible with the common law of self-defence as well as with the new provisions. Although the submission was made in committal proceedings

s 82.25, to refer to the 'accused' rather than the 'defendant', but in other respects is unchanged from the time of the Dimitrovski committal hearing.

⁸⁹ The author is indebted to an anonymous reviewer for raising this point.

⁹⁰ Department of Justice, above n 10, 32.

⁹¹ Ibid.

⁹² Danielle Tyson, Sarah Capper and Debbie Kirkwood, Submission to Victorian Department of Justice, *Review of the Offence of Defensive Homicide*, 13 September 2010, 8.

⁹³ Australian Associated Press, 'Teen to Face Trial over Stepdad's Murder', above n 83.

rather than at trial, and the case was ultimately discontinued, it presents a challenge to the proposition that the cases of MacDonald or Osland would be argued differently under the new provisions. The following discussion on Karen Black questions whether the fear of rape, without violence, would be a sufficient basis for a defence under s 9AC.

V CONVICTIONS: *BLACK* AND *CREAMER*

In April 2011, Karen Black and Eileen Creamer were both convicted of defensive homicide for killing their male partners. Black pleaded guilty to the offence and Creamer was found guilty by a jury. Both of the women were in their early 50s and were sentenced in the Supreme Court of Victoria within eight days of each other.⁹⁴ They both argued that their partners were violent, and that because of that previous violence they genuinely believed that they needed to use lethal violence. However, they both accepted, retrospectively, that their belief was not reasonable and so they were not entitled to a complete acquittal. The cases suggest that pre-existing attitudes toward women and family violence survived the statutory amendments and produced unintended outcomes that are not satisfactory to either abused women or to the broader community. The facts in *Black* demonstrate that a complete acquittal on the basis of self-defence was open. The facts in *Creamer* suggest that a conviction for murder was the appropriate result.

A *Karen Black*

On 30 October 2009, Karen Black stabbed to death her de facto partner of five years, Wayne Clarke, in the kitchen of their home in Corio, just outside of Geelong. Black arrived home after working a 12-hour nightshift as a machinist in a carpet factory. She and Clarke went shopping together, and later to a hotel where they drank for some time. During the day, Clarke had been 'nitpicking and criticising ... and niggling ... with respect to the prospect of sexual intimacy on the weekend.'⁹⁵ When they returned home from the hotel, they fought for some time over a number of routine domestic issues. Black then moved into the kitchen and Clarke followed her, 'sticking his chest out',

⁹⁴ Black was sentenced in Geelong on 12 April 2011 to nine years in prison with a non-parole period of six years: *Black* [2011] VSC 152 (12 April 2011). Black unsuccessfully appealed her sentence on the grounds that it was manifestly excessive, and that inadequate weight was given to the impact of family violence: *Black v The Queen* [2012] VSCA 75 (26 April 2012). Creamer was sentenced in Melbourne on 20 April 2011 to 11 years in prison with a non-parole period of seven years: *Creamer* [2011] VSC 196 (20 April 2011).

⁹⁵ *Black* [2011] VSC 152 (12 April 2011) [17] (Curtain J).

pinning her into the corner of the kitchen, and continuing the argument. She told police that she warned Clarke at the time ‘he was pushing it too far’ and that she grabbed a kitchen knife, but Clarke kept her cornered and continued to ‘egg [her] on’.⁹⁶ She described to police how he was

coming closer and closer to me and was pointing his finger at me, and I was thinking because he was so drunk he would probably want to *force himself on me sexually and I was just thinking well what else could he do to me. Would he just stick his finger into my forehead*[?] ⁹⁷

While cornered in the kitchen in this situation, Black stabbed Clarke twice in the chest with the kitchen knife. He had a blood alcohol content of 0.22 grams per 100 millilitres of blood at the time of his death.⁹⁸ Although Black had been drinking, she did not claim to be intoxicated. Upon stabbing Clarke, she immediately sought assistance from her teenage son, Clint Black, who was also present in the home. He administered first aid, called an ambulance and began driving Clarke to the hospital. The ambulance met them in transit, but Clarke died before reaching the hospital, as a result of haemorrhage from the two stab wounds. Black handed herself in to local police at almost the same time that Clarke was met by the ambulance. She confessed that she had stabbed Clarke and ‘could not justify what had happened’. She told police that ‘[a]t the time, I wanted to kill him’.⁹⁹

1 *History of Violence*

The police and the Crown initially took Black’s confession at face value, as that of a remorseful murderer, and charged her accordingly. However, further reflection resulted in the acceptance of her plea to defensive homicide. Black described how Clarke ‘*was never physically violent towards me, but he’d poke me with his finger and he’d point at me and jab me in the chest and on the forehead. He would sometimes force himself upon me sexually.*’¹⁰⁰ She also detailed to police a situation where she returned home after an outing with friends and found a knife and a gold coin placed on her pillow. Clarke refused to explain what they meant but his message was clear, and from that time on Black never went out without him.¹⁰¹ Clint Black supported his mother’s

⁹⁶ Ibid [2].

⁹⁷ Ibid [18] (emphasis added).

⁹⁸ Ibid [4].

⁹⁹ Ibid [6].

¹⁰⁰ Ibid [12] (emphasis added).

¹⁰¹ Ibid [14].

version of her relationship with Clarke. He had seen bruises on her body, and said that '[m]ost of the times from what I saw Wayne treated mum like shit especially if he'd been drinking. If he had been drinking he was like a tormentor'.¹⁰² The Crown and the Court both accepted that Clarke's conduct was readily covered by the new definitions of physical, sexual and psychological abuse in s 9AH.¹⁰³ The Crown also accepted that the background of family violence caused Black to believe that it was necessary for her to stab Clarke in order to avoid death or really serious injury. However, it further took the view that there were no reasonable grounds for that belief.¹⁰⁴ Black agreed and pleaded guilty to defensive homicide.

2 *Pleas to Manslaughter*

At the time that it made recommendations to the Victorian Parliament, the VLRC was not only concerned that abused women failed to successfully argue self-defence at trial,¹⁰⁵ but also that 41.4 per cent of the women charged with homicide offences pleaded guilty to murder or manslaughter.¹⁰⁶ A study by Stubbs and Tolmie found that even where there was a viable defence of self-defence, '[p]leading guilty to manslaughter ... in exchange for the prosecution agreeing to drop murder charges, has emerged as perhaps the most common defence strategy in battered women's homicide cases in Australia.'¹⁰⁷

The VLRC hoped that the trend toward pleading guilty would 'be somewhat alleviated should excessive self-defence be reintroduced, as self-defence will no longer be an 'all or nothing' defence.'¹⁰⁸ The VLRC accepted that some women would still plead guilty to a lesser charge rather than risk a conviction for murder upon trial,¹⁰⁹ and in some cases a guilty plea is appropriate to the circumstances. However, some women plead guilty when an acquittal is open on the facts of their case. They might plead guilty to avoid the stress of a trial and public disclosure of intimate relationship details, or to finalise the matter

¹⁰² Ibid [7].

¹⁰³ Ibid; *Crimes Act* s 9AH(4).

¹⁰⁴ *Black* [2011] VSC 152 (12 April 2011) [8] (Curtain J).

¹⁰⁵ VLRC, Final Report, above n 9, 64 [3.14].

¹⁰⁶ Ibid 106. The same investigation found that 37.3 per cent of men charged with homicide offences pleaded guilty.

¹⁰⁷ Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Charges of Homicide: The Structural and Systemic versus the Personal and Particular' in Wendy Chan, Dorothy E Chunn and Robert Menzies (eds), *Women, Madness and the Law: A Feminist Reader* (Glasshouse Press, 2005) 191, 198.

¹⁰⁸ VLRC, Final Report, above n 9, 107 [3.119]–[3.120].

¹⁰⁹ Ibid.

quickly, to secure a sentence reduction,¹¹⁰ to more effectively plead mitigation in sentencing submissions,¹¹¹ or because they perceive they will be disadvantaged by the gendered interpretation of self-defence.¹¹² Parliament's decision to enact defensive homicide as an offence, rather than to simply recognise excessive self-defence as a partial defence, may have frustrated the VLRC's attempt to discourage guilty pleas. A conviction for an intermediate offence that recognised that they acted in self-defence, albeit unreasonably, could be preferable to risking a conviction for murder at trial or pleading guilty to the broader intermediate offence of manslaughter. Any combination of these factors may have encouraged Black to plead guilty. However, her personal disposition presents an additional possible explanation for her guilty plea.

3 *Black's Background*

Black had been sexually abused by her father as a child, and then later physically abused by her brother, her husband and Clarke.¹¹³ Female victims of domestic violence often blame themselves, at least in part, for the violence they experience,¹¹⁴ and child sexual abuse survivors are more likely than others to 'self-blame', because of 'cognitive distortions' resulting from 'previous victimization'.¹¹⁵ An experienced clinical and forensic psychologist interviewed Black after her arrest. He described her as an 'unassertive and timid woman'¹¹⁶ of slightly below average intelligence, who despite having been 'clearly' subjected to domestic violence, did not identify as having been

¹¹⁰ Ibid.

¹¹¹ Stubbs and Tolmie, above n 107, 193.

¹¹² Canadian Association of Elizabeth Fry Societies, Submission to Department of Justice, *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, 1998.

¹¹³ *Black* [2011] VSC 152 (12 April 2011) [10] (Curtain J).

¹¹⁴ See Arthur L Cantos, Peter H Neidig and K D O'Leary, 'Men and Women's Attributions of Blame for Domestic Violence' (1993) 8 *Journal of Family Violence* 289, 296–9; Emma Williamson, 'Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control' (2010) 16 *Violence against Women* 1412, 1417.

¹¹⁵ Terri L Messman-Moore and Patricia J Long, 'The Role of Childhood Sexual Abuse Sequelae in the Sexual Revictimization of Women: An Empirical Review and Theoretical Reformulation' (2003) 23 *Clinical Psychology Review* 537; Sarah E Ullman and Cynthia J Najdowski, 'Prospective Changes in Attributions of Self-Blame and Social Reactions to Women's Disclosures of Adult Sexual Assault' (2011) 26 *Journal of Interpersonal Violence* 1934; Cantos, Neidig and O'Leary, above n 114, 296–9. This study also found that the level of blame that women attribute to themselves varies according to various factors, including the frequency and intensity of the violence experienced, whether the relationship was continuing or over, general relationship satisfaction, and the time elapsed between the violence and the interview about it.

¹¹⁶ *Black* [2011] VSC 152 (12 April 2011) [15] (Curtain J).

abused.¹¹⁷ This observation is supported by Black's comment in her record of interview, that Wayne was never physically violent, but did have forced sexual intercourse with her.¹¹⁸ She also told police that she should not have let Wayne get to her,¹¹⁹ as though the problem in her relationship with Clarke was her coping ability rather than his abuse. However, her comments reflect a distorted sense of self-blame rather than a reasoned assessment of her criminal liability.

4 Reasonableness

The prosecution accepted that the s 9AC criteria were satisfied, and that Black believed the stabbing was necessary to defend herself from death or really serious injury. This acceptance is significant in itself given the wording of the section. Under the common law, lethal violence in response to a fear of rape would likely have satisfied the requirements for self-defence, given that it did not specify the type of harm that had to be threatened for self-defence to murder to be claimed.¹²⁰ However, s 9AC does specify that lethal conduct must be in response to the threat of death or really serious injury. If Black had framed her reason for lethal violence as fear of rape, she may not have had the protection of either ss 9AC or 9AD. However, her inclusion of the details of being forced to have sexual intercourse as part of the circumstances that made her fear serious physical violence, was a sufficient basis for the new provisions to apply.¹²¹ However, this was not a basis for a complete acquittal because the prosecution only accepted the genuineness of her belief and disputed the reasonableness of it.

According to the sentencing judge,

where the family violence was limited to threats, intimidation, harassment, jabbing and prodding as it was on this occasion, the Crown contend, and ... it is acknowledged by your plea, that the belief that the knife could have been turned on you or that you had to get him first, or that you yourself were at risk of really serious harm if you did not act was not based on reasonable grounds.¹²²

¹¹⁷ *Ibid* [12]–[13].

¹¹⁸ *Ibid* [12]. See above n 100.

¹¹⁹ *Ibid* [7].

¹²⁰ *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 661–2 (Wilson, Dawson and Toohey JJ).

¹²¹ The author is indebted to an anonymous reviewer for raising this point.

¹²² *Black* [2011] VSC 152 (12 April 2011) [8] (Curtain J).

The sentencing judge found that this conclusion

must be so when one considers that although Mr Clarke had you cornered in the kitchen and, indeed, was intoxicated, he was not armed, and ... to have stabbed him twice may be said to be disproportionate to the threat he then posed to you.¹²³

However, contrary to the remarks of the sentencing judge, a conviction was not inevitable. As Hopkins and Eastal note, '[r]easonableness is context dependent',¹²⁴ and 'the Victorian amendments put beyond doubt that reasonableness must be considered by reference to the battered woman's full situational and psychological predicament',¹²⁵ rather than simply in the context of the events and circumstances immediately prior to the killing. The Victorian Parliament shared this view and enacted s 9AH to give it effect. Black had told the police: 'I got to the stage where *I wasn't sure what he'd do to me*. When he got past that point with his drinking, I'd just go and lock myself in my room.'¹²⁶ Clint Black shared his mother's sense of the unknown possibilities of Clarke's behaviour. He described occasions of having to 'pull him up because it was getting a bit out of hand. *I don't know what he would've done*.'¹²⁷ It was open to a jury to find that Black and her son's fears were not unreasonable, and that she was entitled to a complete acquittal.

Clarke may not have escalated his violence toward Black on the night of his death. The issue is whether it was reasonable for Black to believe that he could have killed or seriously injured her. The answer clearly articulated throughout every stage of her case is 'no'. However, evidence on the dynamics of violent relationships clearly indicates the opposite. Section 9AH allows evidence of 'the general nature and dynamics of relationships affected by family violence' to be admitted at trial.¹²⁸ If Black had gone to trial, she could have called expert witnesses to explain to the jury that family violence frequently escalates.

According to a report commissioned by the United States National Institute of Justice ('USNIJ') in 2005, several studies have examined 'escalation'

¹²³ Ibid [22]. The judge's reference to 'disproportionate to the threat' reflects the common law language of excessive self-defence, rather than the Victorian statutory language of 'reasonable grounds for the belief'. The difference may not be meaningful.

¹²⁴ Hopkins and Eastal, above n 32, 136.

¹²⁵ Ibid 137.

¹²⁶ *Black* [2011] VSC 152 (12 April 2011) [12] (Curtain J) (emphasis added).

¹²⁷ Ibid [7] (emphasis added).

¹²⁸ *Crimes Act* s 9AH(3)(d).

within intimate partner violence and found that, while patterns vary across different types of relationship and different types of violence, increases in the frequency and intensity of domestic violence were common and unpredictable.¹²⁹ On the completion of their research, the USNIJ authors acknowledged their failure to determine the circumstances in which domestic violence would escalate, even though that was one of their key purposes. They reported: ‘we were unable to distinguish the correlates associated with different escalation trajectories.’¹³⁰ The findings of another study undertaken for the USNIJ similarly ‘contradicted overgeneralizations [sic] about high-risk batterers’ who are ‘not easily “typed” or predicted.’¹³¹

In 2004, the VLRC addressed the general proposition that abused ‘women’s fear of future violence ... is irrational or unreasonable’.¹³² It called that proposition a ‘myth’,¹³³ and cited the findings of two academic studies that victim fear was the most reliable predictor of future domestic violence,¹³⁴ because abused women are hyper-vigilant and attuned to signals of impending violence.¹³⁵ Women who misjudge the likelihood of future domestic violence generally overestimate their safety rather than overestimate the risk of violence.¹³⁶

¹²⁹ Alex R Piquero et al, Submission No 212298 to United States National Institute of Justice, *Assessing the Offending Activity of Criminal Domestic Violence Suspects: Offense Specialization, Escalation, and De-Escalation Evidence from the Spouse Assault Replication Program*, December 2005, 11–12.

¹³⁰ *Ibid* 47.

¹³¹ D Alex Heckert and Edward W Gondolf, Submission No 202997 to United States National Institute of Justice, *Predicting Levels of Abuse and Reassault among Batterer Program Participants*, February 2004, 50.

¹³² VLRC, Final Report, above n 9, 162.

¹³³ *Ibid*.

¹³⁴ *Ibid*, citing Heckert and Gondolf, above n 131 and Arlene N Weisz, Richard M Tolman and Daniel G Saunders, ‘Assessing the Risk of Severe Domestic Violence: The Importance of Survivors’ Predictions’ (2000) 15 *Journal of Interpersonal Violence* 75.

¹³⁵ Julia Tolmie, ‘Provocation or Self-Defence for Battered Women Who Kill?’ in Stanley Meng Heong Yeo (ed), *Partial Excuses to Murder* (Federation Press, 1991) 61, 72. Stark refers to this hyper-vigilance as the ‘special reasonableness of battered women’, which he distinguishes from the concept of reasonableness generally applied in self-defence cases: Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007) 353–4. However, the aim of the Victorian legislation is to have the experiences of abused women brought within the broader concept of reasonableness without the need for special defences: see VLRC, Final Report, above n 9, 68–9 [3.27]–[3.29].

¹³⁶ Weisz, Tolman and Saunders, above n 134, 87; Jacquelyn C Campbell et al, ‘Intimate Partner Homicide: Review and Implications of Research and Policy’ (2007) 8 *Trauma, Violence, & Abuse* 246, 263.

The level of violence that Black faced from Clarke the night that she stabbed him was neither more nor less than she had faced previously. However, she developed a belief over time that the violence could and would escalate and place her at risk of really serious injury or death. Her belief was a direct result of the patterns of prior violence by Clarke toward her. Escalation is a common feature of violent domestic relationships, and a victim's fear is the best predictor of future violence. Clarke was big enough to cause serious injury to Black, even unarmed, and he was intoxicated, angry and being deliberately and persistently physically intimidating at the time that she used lethal violence against him. Black may have been wrong in thinking that Clarke posed a threat to her physical safety that night, but this does not mean that she was unreasonable in thinking so. She may also have been right. In either case, a complete acquittal would have been a viable option if arguments under ss 9AC and 9AH were put to a jury. Of course the jury may have reached the same conclusion as the Crown and convicted Black of defensive homicide. However, at least she would have had a chance to secure a not guilty verdict.

The impact of s 9AH was not evident in *Black*. The apparent reasoning is reminiscent of the pathologising arguments involving battered woman syndrome: Black suffered the effects of prior abuse that skewed her judgment about the risk she faced from Clarke; she developed the unreasonable belief that she was in danger, when all he did was corner her, poke her in the chest and verbally abuse her; he frequently behaved this way or worse without causing her any serious injury, so there was no reason to believe his violence would intensify that night; her unreasonable belief was sufficient to justify her avoiding a conviction for murder, but not for avoiding a homicide conviction and a lengthy prison sentence.

B *Eileen Creamer*

Eileen Creamer is the only woman in Victoria convicted of defensive homicide upon trial for murder. She was charged with having murdered her husband, David Creamer, in February 2008, after his body was found in the bedroom of their house in Moe in the Latrobe Valley. The autopsy concluded that he died as a result of blunt force trauma to the head and a single stab wound to the abdomen.¹³⁷ Creamer was arrested and charged with his murder in April 2009. She maintained until the point of trial that she was not involved in David's death, but then made a late offer to plead guilty to

¹³⁷ *R v Creamer* [2011] VSC 196 (20 April 2011) [26] (Coghlan J).

defensive homicide. The offer was refused by the prosecution and she defended the murder charge before a jury on the basis of guilt of either defensive homicide or manslaughter.¹³⁸

1 *Prosecution Case*

The murder case was strong and the judge understood why the Crown refused Creamer's plea offer.¹³⁹ It was the prosecution case that David and Eileen Creamer's 10-year marriage was 'open', but marred by jealousy and insecurity. After they married in South Africa in 1997, he moved to New Zealand and she followed him there eight months later. He later moved to Australia, and she followed him 13 months later. They both openly had long- and short-term extramarital affairs in New Zealand and Australia. Shortly after she arrived in Victoria, Creamer advertised in the Moe local paper to meet male companions. A long-term relationship resulted from one advertisement and continued until the time of David Creamer's death. David and Eileen Creamer had been sleeping in separate bedrooms for some time, indicating that the marriage was essentially over. He had been in South Africa just weeks before his death, and planned to remarry his former wife, and either move back to South Africa or bring her and their two sons to Australia to live. This was the final straw that would end the fragile Creamer marriage.¹⁴⁰

Out of anger, frustration and fear of the end of the relationship, Creamer bashed and stabbed her husband to death. While not premeditated, it was an intentional killing not subject to any defences. Creamer raised a number of matters favourable to her case for the first time in trial, despite numerous pre-trial interviews with police and medical staff. This new evidence was self-contradictory, lacked integrity, undermined Creamer's credibility and added weight to the Crown case.¹⁴¹

2 *Defence Case*

Creamer's version of the events leading to her husband's death was different to that offered by the Crown. She agreed that the marriage was 'open' and that they had separate bedrooms, but testified that they were still married and had an ongoing sexual relationship. There were tensions and violence in the

¹³⁸ Ibid [1]–[4].

¹³⁹ Ibid [4].

¹⁴⁰ Ibid [5]–[11].

¹⁴¹ Ibid [24]–[29].

marriage. David Creamer constantly nagged her into watching pornography and having ‘kinky’ sex with him. He pressured her to have group sex with him, or have sex with other men while he watched. He posted photos of her on the internet to facilitate this happening. Creamer alleged that her husband had raped her while they were in New Zealand. She was in Melbourne with her lover on the night of Friday, 1 February 2008, and returned home the following day. When she arrived home, her husband harassed and intimidated her about not getting back earlier. There were two other men present at the time, and David Creamer later explained that he was arranging a sexual liaison between her and them. The Creamers fought about that and a number of other matters, including him accusing her of having sex with his brother. She fell asleep after the fight and awoke to find her husband repeatedly hitting her in the genitals with a stick.¹⁴²

According to her version, on the following day, David Creamer was initially apologetic for his behaviour, but then became aggressive, placing his semen-stained sheets on her head and telling her to smell them. He then went to his bedroom. Eileen Creamer went there later and saw the African tribal stick, a *knobkerrie*, which he had earlier used to hit her genitals.¹⁴³ He spoke harshly and abusively to her and she thought he was about to physically attack her. She grabbed the *knobkerrie* and started hitting him. He continued to verbally abuse her and she ran outside. He followed her, dragged her back inside, and picked up a knife from the kitchen. They struggled in the bedroom, and David Creamer slapped his wife on the face while the knife was sitting on the bedside table. He tried to put his penis in her mouth, and urinated on her, and said he was going to ‘finish her off’. She hit him in the genitals and pushed him on the floor, and she thinks that that must have been when she stabbed him although she cannot actually remember doing so. She disposed of the *knobkerrie* in the school grounds across the road, and later disposed of the knife. When she returned from the school her husband was in the shower. However, the next morning she found him dead inside their home and went immediately to seek the assistance of their neighbours.¹⁴⁴

¹⁴² Ibid [14]–[17].

¹⁴³ A *knobkerrie* is a wooden stick with a knob at one end that is used as a club or a missile for hunting animals or in human warfare.

¹⁴⁴ *Creamer* [2011] VSC 196 (20 April 2011) [19]–[23] (Coghlan J).

3 *Creamer's Credibility*

The judge found Eileen Creamer to be an 'unsophisticated witness'¹⁴⁵ whose 'version of the killing does not much accord with the known facts'.¹⁴⁶ He did not believe that there were other men present when she arrived home from Melbourne, or that her husband threatened to 'finish her off', or that she did not know he was planning to remarry his ex-wife. The judge found that some of her claims were contradicted by medical evidence, and on that basis rejected that David Creamer had left the house during their fight, or showered afterwards. The judge accepted that Eileen Creamer had bruising of the genitals that was not inconsistent with the alleged assault with the *knobkerrie*, but noted that she had not reported any such assault to the police or to the doctor who examined her at the police station. He did not express his own views on the allegation of rape in New Zealand, but suggested that the jury had rejected it because she raised it for the first time at trial, and had moved to Australia to be with her husband after it was alleged to have occurred.¹⁴⁷ He also explicitly stated: 'I do not accept all the matters raised about domestic violence in the written submissions made on your behalf'.¹⁴⁸

The inconsistencies in Creamer's testimony, and the lack of independent evidence to contest or corroborate her story, make it difficult to understand the context of the killing. The judge described it as 'problematical' to determine what evidence of domestic violence the jury accepted,¹⁴⁹ and even 'harder to assess' the impact the jury believed any such domestic violence had on motivating Creamer's lethal violence.¹⁵⁰ Of the alleged violence by her husband, the judge sentenced Creamer with reference to the sexual intimidation and harassment only, both of which were directly substantiated by material retrieved from David Creamer's computer.¹⁵¹

¹⁴⁵ Ibid 25.

¹⁴⁶ Ibid [24].

¹⁴⁷ Ibid [24]–[32].

¹⁴⁸ The transcript of the sentencing remarks states 'I *do* accept all the matters raised about domestic violence in the written submissions made on your behalf': see *ibid* [36] (emphasis added). However, it is clear from the audio recording, and from the context, that Coghlan J said 'I *do not* accept all the matters raised about domestic violence in the written submissions made on your behalf': Audio Recording of Proceedings, *R v Creamer* (Supreme Court of Victoria, Coghlan J, 20 April 2011) <http://wms26.streamhoster.com/supreme/Live_1/sentence_creamer_20apr11.wma>.

¹⁴⁹ *Creamer* [2011] VSC 196 (20 April 2011) [31] (Coghlan J).

¹⁵⁰ Ibid [32].

¹⁵¹ Ibid [7].

4 *History of Violence*

The sexual bullying and pressures that Creamer experienced are readily covered by s 9AH. The definition of family violence in this section includes psychological abuse, which it specifies may take the form of intimidation and harassment.¹⁵² The section also provides that a series of acts can, in combination, constitute violence 'even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.'¹⁵³ In sentencing, the judge went further, and held that David Creamer's 'relatively long-term relationship with Marion Trewarn and his stated ambition to resume his relationship with his first wife are all part of the material which would come under the heading of domestic violence'.¹⁵⁴ Although it is an intentionally broad provision, s 9AH does not contemplate such factors being covered by the definition of family violence. The VLRC and the Victorian Parliament agreed that it was particularly objectionable to tolerate killings that occur 'in response to a person who is exercising his or her personal rights, for instance to leave a relationship or to start a new relationship with another person.'¹⁵⁵ In fact, the partial defence of provocation was abolished in 2005 specifically because male defendants' reliance on it to justify killing former partners was deemed an affront to current community standards.¹⁵⁶ Categorising the intention to leave a relationship and/or re-partner as domestic violence provides an avenue for using the new provisions to sanction 'end of relationship' homicides.

The judge also noted that the verdict of defensive homicide demonstrates that the jury accepted the existence of family violence, because without family violence, the killing would have been a clear case of murder.¹⁵⁷ Those sentencing remarks are, however, incomplete, in that the mere existence of family violence does not provide the basis for a defence. Kirby J held in *Osland*:

No civilised society removes its protection to human life simply because of the existence of a history of long-term physical or psychological abuse ... there is

¹⁵² *Crimes Act* s 9AH(4).

¹⁵³ *Ibid* s 9AH(5)(b).

¹⁵⁴ *Creamer* [2011] VSC 196 (20 April 2011) [34] (Coghlan J).

¹⁵⁵ VLRC, Final Report, above n 9, 56 [2.95].

¹⁵⁶ *Ibid*; *Crimes Act* s 3B; Office of the Attorney-General, 'Hulls Announces Major Reform to Homicide Laws' (Media Release, 4 October 2005) <http://www.legislation.vic.gov.au/domino/Web_Notes/newmedia.nsf/>; Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1830 (Andrew McIntosh).

¹⁵⁷ *Creamer* [2011] VSC 196 (20 April 2011) [37] (Coghlan J).

no legal *carte blanche*, including for people in abusive relationships, to engage in premeditated homicide.¹⁵⁸

The Victorian legislation does not change the position stated by Kirby J. The VLRC was adamant that '[p]eople who kill in the context of family violence clearly should not have an automatic claim to self-defence.'¹⁵⁹

The fundamental issue raised in *Creamer* is whether there was a nexus between Creamer's lethal violence and David Creamer's prior abuse of her. Lethal violence can only be justified at law in a very small minority of domestic violence cases. The general features that characterise such cases were clearly absent from the Creamer marriage.¹⁶⁰ Creamer had freedom of movement and a significant support person, and had been located a significant distance away from the matrimonial home, with her lover, only the day before the homicide. Rather than being obsessive, jealous and controlling, the court accepted that her husband encouraged and facilitated Creamer's affairs.¹⁶¹ Far from preventing her from leaving him by threats or force, David Creamer had planned to leave her, and was absent from their home most weekends. He twice shifted overseas without her and they only reunited when she moved countries to be with him. He had also spent several weeks in South Africa without her, less than two months before his death. Creamer's account of physical violence from David immediately prior to the stabbing provides a basis for a self-defence argument. However, interestingly, no such argument was advanced, and the account of the violence was so lacking in credibility that the judge completely excluded reference to it when sentencing her for defensive homicide.

5 *Attitudes to Family Violence*

In *Creamer*, as in *Black*, attitudes to family violence that predate the statutory amendments to the *Crimes Act* are evident. However, in Creamer's case they worked to her advantage, especially when combined with the judge's very

¹⁵⁸ *Osland* (1998) 197 CLR 316, 375–6 [165].

¹⁵⁹ VLRC, Final Report, above n 9, 68 [3.28].

¹⁶⁰ Self-defence is most commonly understood to 'justify' rather than 'excuse' a defendant's conduct. However, there is considerable debate about the distinction: see Reid Griffith Fontaine, 'An Attack on Self-Defense' (2010) 47 *American Criminal Law Review* 57.

¹⁶¹ *Creamer* [2011] VSC 196 (20 April 2011) [5], [7] (Coghlan J).

broad and favourable interpretation of the new provisions. The VLRC's research confirmed previous studies that

[w]hen men killed in the context of sexual intimacy it was most likely to be in circumstances of jealousy or control (33 or 78.6% of the men) whereas when women killed it was most likely to be in response to alleged violence by the male deceased (four women or 40.0%).¹⁶²

This offending profile has resulted in a stereotyped understanding of intimate partner homicides based on male 'control', 'obsessive jealousy' and 'dominance', and female 'submission' and 'deference'.¹⁶³ According to this perspective, where the male is the offender, the homicide directly arises from the violence that he has used to subordinate the woman,¹⁶⁴ and where the female is the offender, the homicide arises as a desperate response to the controlling violence of the man.¹⁶⁵ This perspective prevails to such an extent that in the general and legal community, as well as in scholarship, it can sometimes substitute for a critical analysis of the circumstances of individual cases.¹⁶⁶

Bradfield proposes that this dominant perspective on intimate partner homicide has benefited women who kill abusive partners where the circumstances surrounding the killing are unclear. She argues that abused women have been found guilty of 'no intent' manslaughter where their actions actually indicate an intent to kill that should result in a murder conviction.¹⁶⁷

¹⁶² VLRC, Options Paper, above n 9, 29 [2.53]. See also Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (Cambridge University Press, 1994) 23; Mouzos, *Homicide in Australia*, above n 31, 12, 42.

¹⁶³ Judith Isabel Buckingham, *Patterns Of Violence in Intimate Relationships: A Critical Examination of Legal Responses* (PhD Thesis, University of Canterbury, 2006) 11, 18–19 <<http://ir.canterbury.ac.nz/handle/10092/849>>; Evan Stark, 'Rethinking Coercive Control' (2009) 15 *Violence against Women* 1509, 1511–12; Rebecca Bradfield, 'Women Who Kill: Lack of Intent and Diminished Responsibility as the Other "Defences" to Spousal Homicide' (2001) 13 *Current Issues in Criminal Justice* 143, 145; Donnelly, Cumines and Wilczynski, above n 29, 41.

¹⁶⁴ Stark, 'Rethinking Coercive Control', above n 163, 1510.

¹⁶⁵ Campbell et al, above n 136, 253.

¹⁶⁶ In the *Osland* proceedings, the Victorian Court of Appeal and the High Court both declined to take the dominant approach and faced years of vigorous opposition from the public and legal commentators who applied the dominant perspective to the case: see *R v Osland* [1996] 2 VR 636; *Osland* (1998) 197 CLR 316; above nn 35, 41.

¹⁶⁷ Bradfield, above n 163, 151–2. 'No intent manslaughter' is not a formal legal category. Under the common law, involuntary manslaughter is generally categorised as either unlawful and dangerous act manslaughter: *Wilson v The Queen* (1992) 174 CLR 313, 323–7 (Mason CJ, Toohey, Gaudron and McHugh JJ), or negligent manslaughter: *Nydam v The Queen* [1977]

Bradfield considers that the tendency to find women guilty of lesser offences is dependent on 'evidentiary ambiguity' being 'resolved in favour of a construction of the killing that endorses the image of the passive and inert woman, more acted upon than acting.'¹⁶⁸ According to this argument, it is more believable to a court that a woman was oppressed and abused, and in desperation lashed out with violence that had the unintended consequence of death, than that she intended to cause death for any of the multitude of reasons that motivate a person to commit murder.¹⁶⁹

Bradfield's argument has application to Eileen Creamer, because gaps in the evidence made it difficult to understand the circumstances surrounding David Creamer's death, and therefore, determine her level of culpability. Despite the known facts supporting the murder charge, and the questions regarding her credibility, the jury returned a verdict of defensive homicide, which the judge's sentencing remarks validated. The judge found that Creamer was 'overwhelmed' by her circumstances and 'dependent upon David Creamer'.¹⁷⁰ The positive outcome for Creamer seems to be based on the traditional conceptions of female subservience, emotional lability and lack of coping skills,¹⁷¹ even though the new statutory provisions, including the one she expressly relied on to avoid a murder conviction,¹⁷² were intended to reduce the need for abused women to rely on these stereotypes.

VR 430, 439–40 (Young CJ, McInerney and Crockett JJ). However, the basis of all involuntary manslaughter is unlawful killing where the offender's moral culpability is considered to be lower than that required to meet the requisite mental state for murder, ie they have 'no intent' to kill. The different categories of manslaughter are not reflected in charges, convictions or statutory provisions. The *Crimes Act* (Vic) s 5 refers only to the penalty and conviction for the overriding offence of 'manslaughter'. This means the distinction in categories is rarely meaningful in practical terms, and reference is commonly made to 'no intent' manslaughter. This is to distinguish it from voluntary manslaughter where the defendant does have the intent to kill but defences such as provocation or excessive self-defence operate to reduce the charge to manslaughter. In the post-provocation environment of Victoria, the 'no intent' defence is likely to take on much greater importance.

¹⁶⁸ Bradfield, above n 163, 154.

¹⁶⁹ This dominant perspective of intimate partner homicide has not precluded men from relying on a history of psychological abuse by a female partner to avoid a murder conviction under the new Victorian provisions: see *DPP (Vic) v Sherna [No 2]* [2009] VSC 526 (20 November 2009). Sherna was convicted of manslaughter (which was not affected by the 2005 reforms) rather than defensive homicide, but relied on the new s 9AH for admission of evidence of previous family violence.

¹⁷⁰ *Creamer* [2011] VSC 196 (20 April 2011) [33], [38] (Coghlan J).

¹⁷¹ Bradfield, above n 163, 152–3. There was no apparent public objection to the conviction for the lesser offence or to the sentence imposed.

¹⁷² *Crimes Act* s 9AD.

VI CONCLUSION

The VLRC and the Victorian Parliament made concerted attempts to both improve the legal position of women who kill abusive partners and uphold contemporary community standards regarding culpability for murder. However, the new provisions in the *Crimes Act* have demonstrated their potential to both protect and criminalise lethal conduct by women in inappropriate and unintended ways. *Black* demonstrates that the efficacy of the codification of self-defence, and the utility of provisions enacted to expand the understanding of reasonableness in relation to abused women, is critically limited by the concurrent enactment of defensive homicide, which rests on the conception of the belief and behaviour of abused women as not being reasonable. The acceptance of a lack of reasonableness perpetuates long-established stereotypes of women and family violence, which can result in convictions for defensive homicide where complete acquittals would seem to be more appropriate. On the other hand, *Creamer* indicates that the new provisions can also activate those pre-existing stereotypes in a way that stretches the protection of defensive homicide beyond its intended boundaries, to circumstances where conviction for murder might be more in line with community expectations and standards.

The case material on the new provisions is still too limited to serve as the basis for any firm recommendation on the future of defensive homicide. However, it raises sufficient doubts about the adequacy and effectiveness of the current provisions to suggest the need for subsequent cases to be closely monitored, to determine whether this offence is undermining the intended effect of the new provision on self-defence, to the detriment of either individual defendants or the broader community. If defensive homicide does prove disadvantageous to either or both of these groups, the Victorian Parliament will need to consider the proposition that the new statutory self-defence provisions will most effectively achieve equality before the law for women who kill abusive partners when they are supported by a clearer understanding of the dynamics of family violence and without recourse to any 'half-way' offence.