



## Reforming Defences to Homicide in Victoria: Another Attempt to Address the Gender Question

**Bronwyn Naylor**

RMIT University, Australia

**Danielle Tyson**

Deakin University, Australia

### Abstract

In 2005 in the Australian state of Victoria, significant changes were made to the defences to homicide. These reforms were in response to long standing concerns about the gendered operation of provocation and self-defence by feminist researchers and advocates, Law Reform Commissions, the media and political pressures. This paper critically examines the reforms and the extent to which they have addressed these varied concerns and interests. The paper argues that these important law reforms have challenged some of the powerful narratives being used in the courts that minimise the existence and significance of family violence in intimate relationships. We see this particularly in judicial sentencing remarks. However, law reform must be accompanied by a shift in legal culture to be effective in practice. To this end, we argue that legal professionals need to have information about how to utilise the new family violence provisions as well as ongoing training and professional development to promote consistent understandings of family violence across the criminal justice system.

### Keywords

Provocation; self-defence; law and gender; feminist critique; homicide law reform.

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## Introduction

Laws on homicide have conventionally included defences which either completely exonerate the offender—for example, the defence of self-defence—or reduce the offender’s culpability from murder to a lesser form of homicide such as manslaughter. In Australian jurisdictions, the latter type of defence has included the partial defences of provocation, diminished responsibility<sup>1</sup> and excessive self-defence.

The Australian state of Victoria has seen a series of significant reforms to the law of homicide aimed at addressing long-standing criticisms of the gendered operation of these defences. There have been two key strands of concern: one focussed on men using the partial defence of provocation to excuse their actions in killing their partners by shifting part of the blame onto the deceased (usually a woman) for her own death; and the other on women who kill to protect themselves from serious harm or death in the context of on-going family violence but have not been able to successfully raise self-defence where appropriate. Reforms in 2005 reformulating self-defence—mainly through the introduction of a new offence of defensive homicide, and introducing the possibility of ‘social context’ evidence of family violence in a homicide trial—and the 2014 reforms clarifying self-defence and providing for jury directions on family violence seem to address these concerns. They are also symbolically important in giving explicit attention to family violence to problematise the conventional legal formulations of murder and the defences around masculine relationships and responses. Indeed, recent research examining legal responses to women and men charged with murder for killing an intimate partner since 2005 indicate that the reforms are making a difference (Douglas 2012; Tyson, Kirkwood, McKenzie and Naylor 2015). This paper considers some competing indications of their influence.

The reforms both changed the substantive laws and introduced guidance to make the family violence context explicit and relevant to the trial process. While changing law does not automatically change attitudes or practices, reformers hoped that the new laws would demonstrate new values and that these would be adopted and normalised over time.

It is vital that reforms are monitored and evaluated. As this paper argues, the decision to implement the 2014 reforms and, specifically, to abolish defensive homicide left little time to explore how the 2005 reforms were working in practice, particularly for women, given the (fortunately) relatively small number of homicide trials in Victoria. This paper outlines the evolution of reforms to the defences to homicide, particularly the 2005 and 2014 reforms, as driven by gender-focussed, feminist concerns. It then evaluates the operation of the reforms, and concludes that the substantial legal reforms have had some positive impacts but clearly are still taking time to influence legal practice and culture. We conclude by reflecting on how to better operationalise these significant legal changes.

## The law of homicide

The defences to homicide were developed at common law in the context of provision for the death penalty for murder. Self-defence, for example, was the subject of numerous cases brought before the High Court of Australia which resulted in the establishment of the terms of the defence as providing for a complete acquittal where the person used reasonable and proportionate force in genuine self-defence (see *Viro v R* (1978) 18 ALR 257; *Zecevic v DPP (Vic)* (1987) 162 CLR 645). The defence of provocation, which reduces liability (and penalty) from murder to manslaughter where the person lost control as a result of an accepted category of provocation and killed whilst out of control, was the subject of numerous High Court cases, from *R v Parker* (1963) 111 CLR 610 (ultimately appealed to the Privy Council) up to the currently accepted formulations of *Stingel v R* (1990) 171 CLR 312 and then *Masciantonio v R* (1995) 183 CLR 58.

In Australia a modified version of self-defence, the partial defence of ‘excessive self-defence’, was developed by the High Court to provide for situations where the accused genuinely believed they

were acting in self-defence, but were objectively acting unreasonably or disproportionately (*Viro v R* (1978) 18 ALR 257). This partial defence was abolished by the High Court in *Zecevic v DPP (Vic)* (1987) 162 CLR 645 and then reintroduced in statutory form in New South Wales (NSW) in s 421 of the *Crimes Act 1900* and (briefly) in the form of the defensive homicide offence in Victoria (Vic) in s 9AD of the *Crimes Act 1958*.

The harsh penalty for murder provided obvious incentives for defendants to raise defences and for these to be fine-tuned by courts by regular analysis on appeal. This driver persisted even when capital punishment was abolished in many jurisdictions and the penalty for murder was instead a mandatory life sentence. Over time, jurisdictions such as Victoria (in 1986) and NSW (in 1982) have modified the sentence for murder to provide for judicial discretion in sentencing. This has meant that potentially exculpatory factors motivating the killing can also be considered in sentencing.

Reforms to homicide laws have, therefore, been influenced by the heavy penalty for murder. They have also been influenced by changing political and social values about where on the spectrum particular harm falls and/or whether, and to what extent, particular motivations or contexts are acceptable excuses or justifications for lethal violence. In this article, changing social values and critiques of homicide defences are considered, before we turn to the specific rationales for the 2005 Victorian legislative reforms.

### **Early critiques of the defences to homicide**

A set of critiques began to develop in the 1970s and 1980s as part of the broader political and social critique of power led by class, race and gender movements. Critical Legal Studies scholars exposed the underpinnings of legal decision-making in terms of class and power. Critiques by feminists and critical race theorists developed these insights, beginning from the feminist work of, for example, MacKinnon (1987, 1989) in the US, Smart (1989) in the UK and Graycar and Morgan (1990) in Australia.

At the same time, the prevalence of violence within families was finally being acknowledged. The previously unquestioned entitlement of men to control women, and the ‘normality’ of violence and controlling behaviours towards women, began to be challenged. Identification of the issue prioritised the collection of data, using crime and victim studies, to better understand the phenomenon (see, for example, Mugford 1989).

In Australia (as elsewhere), homicide laws and the accepted defences, therefore, came under challenge for their gendered formulation and operation. By the late 1980s in Victoria and other jurisdictions, two lines of critique were evolving. One focussed on the types of male violence that were ‘minimised’ by being identified as less culpable through the existence of a specific defence. For example, the defence of provocation was criticised for providing an excuse for men reacting to women’s rejection of them or to a woman’s ‘infidelity’. The other focussed on the lack of defences available to women who killed. Homicides (like most offences) are predominantly committed by men, who commit around 85 per cent of homicide offences (Bryant and Cussen 2015). So it is not surprising that critical attention focussed first on cases of men arguing that their violence could be excused or justified on the basis of the woman’s failure to act as they wished through defences such as provocation (Crofts and Loughnan 2013; Law Reform Commission of Victoria 1991).

However with increasing acknowledgement of domestic violence, and some high profile cases such as that of Heather Osland in Australia and Kiranjit Ahluwalia in the UK, attention then extended both in Australia and internationally to women committing fatal violence, where their victim was an intimate partner who was violent towards them (see *Osland v R* (1998) 197 CLR 316; *R v Ahluwalia* [1992] 4 All ER 889; Women’s Coalition Against Family Violence 1994). These

cases demonstrated that the conventional defences did not 'work' for or reflect the lives of women in the way they did for men (Morgan 2002; Victoria Law Reform Commission 2004).

A person who uses violence to defend themselves against a threat of serious violence can raise the defence of self-defence: this response is seen as justifiable. The defence was developed in the context of fights between men, where one threatened a harm so serious that the other responded in kind, causing death. In contrast, women who were in a violent domestic relationship, and who killed their violent partner, did not always fit the traditional paradigm. Self-defence is defined in terms of the necessity and proportionality (or reasonableness) of the violent response to a threat. The violence these women faced at the moment when they killed may have been minor or their victim may have been drugged by the perpetrator or asleep (as for example in the cases of *Osland* and *Ahluwalia*). They may have used weapons where their partner's violence was with use of his fists. Increasing understandings of the dynamics of violent domestic relations led to a reconceptualising of women's violent responses in some of these cases as being 'self-defence': that is, they faced ongoing threats of serious violence which they could not escape without killing the perpetrator (Stubbs and Tolmie 1999). However, the formulation of the defence of self-defence focussed on an immediate and proportionate reaction to an equally violent threat, and arguments in court based on self-defence tended to be unsuccessful.

A series of cases in Australia and elsewhere tried to either extend the concept of self-defence, or present the violent relationship within the paradigm of provocation, by arguing that the woman's psychological reaction to being in a violent relationship was equivalent to that of a man arguing self-defence or provocation in traditional contexts (for example, *Osland v R* (1998) 197 CLR 316). A difficulty was in showing that the family violence warranted a fatal reaction (whether defensive or provoked), particularly where the evidence was that the woman had continued to live with the violent partner. Psychological explanations termed 'battered woman/wife syndrome' (BWS) were used to argue that, for the woman victim of domestic violence, a syndrome of passivity and helplessness could develop which prevented her from being able to leave, but from which she could 'snap' and kill (Stubbs and Tolmie 1999).

BWS was raised either to present the partner violence as provocative conduct which formed the basis for a provocation defence, or to make the woman's fatal response understandable as self-defence.<sup>2</sup> BWS was subsequently itself criticised as pathologising women's responses to family violence; its evidence-base was also extensively challenged (Douglas 2015).

These concerns were first addressed in 1991 in a report on homicide by the Law Reform Commission of Victoria (LRCV). It recognised the gendered critique, and received submissions from women's groups and others, most of which supported the retention of provocation. The LRCV recommended retention of provocation, stating that the evidence showed that juries did not routinely accept men's provocation arguments, and that it would be 'ironic to abolish provocation' when recent cases had begun to make provocation more available to women (1991: 76).

### **Reform of the defences to homicide in Victoria**

By 2000 these gender-based critiques were well established. At that time a newly-elected government re-established the briefly-disestablished LRCV, (renamed the Victorian Law Reform Commission (VLRC)), and gave the VLRC a reference to review all defences to homicide.

#### ***The 2005 reforms***

The VLRC's recommendations are outlined in its 2004 report and were implemented through the *Crimes (Homicide) Act 2005* (Vic) with some modifications. The 2005 amendments included abolition of the defence of provocation (with matters of culpability such as provocation to be taken into account, if at all, as mitigation at sentencing), the clarification and codification of self-

defence (as a full defence), and provision for the introduction of expert evidence of family violence. In a significant modification of the VLRC recommendation, a proposed defence of excessive self-defence was re-framed as a new offence of 'defensive homicide'.

The provision for introducing evidence of family violence was developed in a new s 9AH *Crimes Act 1958* (Vic). The section set out a range of forms of 'family violence evidence' that could be introduced to explain how family violence might have led the defendant to believe that their fatal violence was necessary and reasonable (s 9AH(3)). It also stated that, where family violence is alleged in a homicide prosecution, a belief in the need to kill in self-defence can be raised even if the response is not immediate or the use of force is excessive (s 9AH(1)), addressing the doctrinal hurdles for women under the common law noted above.

The express provision for expert evidence on these matters addressed the evidentiary requirement that, to be admissible in a trial, evidence must be legally 'relevant'. The reforms explicitly permit introduction of evidence of circumstances widely known to be important in understanding family violence dynamics, but traditionally not seen as legally 'relevant' to the moment of killing. These include the cumulative effect of family violence (including its psychological effect), social, cultural and economic factors, and the general nature and dynamics of family violence including the possible consequences of separation.<sup>3</sup>

Any discussion of murder and defences to it takes place in the shadow of the lesser offence of manslaughter. In Victoria, to be guilty of murder, the prosecution must prove that the killing was 'intentional': that is, the defendant either intended to cause death or grievous bodily harm (gbh), or was reckless as to causing death/gbh (*Crabbe* 1985). A killing that was not intentional in this way but resulted from an unlawful and dangerous act or from gross negligence is still a criminal offence, but is classified as the lesser offence of manslaughter, with a maximum penalty of 20 years. This means that a person who argues they did not 'intend' the very serious level of harm may either be acquitted, or convicted of manslaughter. This is relevant to the options available both to defendants deciding whether to plead guilty, and to a jury at trial, as will be seen in the discussion below. The 2005 reforms made self-defence and the family violence provisions available to manslaughter as well (s 9AE).

Feminist researchers and advocacy groups, media and government were monitoring the effect of the reforms. By 2010, at least two patterns were emerging. At the time, only two women had killed a violent intimate partner since the reforms. Neither case proceeded to trial as proceedings were discontinued on the basis that it was very unlikely that the jury would have convicted either women on the evidence (Victoria Department of Justice (VDoJ) 2010: 31-32). The outcomes in these two cases were seen as a sign that the reforms were working for women defendants (VDoJ 2010: 29-32). Second, a substantial number of men who had killed other men had been convicted of defensive homicide either as a result of a plea or after a trial, mainly in what were perceived to be one-on-one 'spontaneous' encounters (VDoJ 2010: 33). This picture was seen as potentially problematic.

### ***The 2014 reforms***

In 2010 and again in 2013, the Victorian government launched reviews into the acceptability of the defensive homicide offence. The 2010 review was prompted by concerns over how the law was operating in cases involving men who killed their female partners and, in particular, the convictions of Anthony Sherna (*DPP v Sherna* [2009] VSC 526) and Luke John Middendorp (*R v Middendorp* [2010] VSC 202) for manslaughter and defensive homicide, respectively (VDoJ 2010: 10). The outcomes in these two cases led commentators to speculate whether, in the absence of provocation, defensive homicide had simply become a replacement excuse for men's violence against women (Capper and Crooks 2010: 21; Howe 2010). The 2010 review was put on hold following a change in government. The incoming government reiterated these concerns with the



operation of defensive homicide. In 2013 submissions were invited in response to a VDoJ consultation paper, which proposed abolition of defensive homicide on the ground that it was being ‘inappropriately ... relied upon by men who kill ... in circumstances which are very similar to those where provocation previously applied’. It found that ‘[t]he price of having defensive homicide for the comparatively small number of women who kill is substantially outweighed by the cost of inappropriately excusing men who kill’ (VDoJ 2013: viii-ix).

A substantial joint submission by DVRCV, Monash University, Federation of Community Legal Centres and the Victorian Women’s Trust endorsed by 14 women’s advocacy groups challenged these assumptions and argued for retention of defensive homicide:

Our starting point is that women who kill to protect themselves from family violence should have access to a full acquittal on the grounds of self-defence. However, based on recent research that examined in detail cases of women who have killed partners since the 2005 reforms, we do not yet have sufficient evidence to show that self-defence can readily be raised by female defendants at trial. (Domestic Violence Resource Centre Victoria, Monash University et al. 2013: 1-2)<sup>4</sup>

Nonetheless, *the Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) came into operation on 9 September 2014.

The most substantial change for present purposes was the foreshadowed removal of the defensive homicide offence, in s 3 of the amending act. The Minister stated that defensive homicide has ‘predominantly been relied on by men who have killed other men in violent confrontations, often with the use of a weapon and often involving the infliction of horrific injuries’, which had led to ‘justifiable community concern that the law, like provocation once did, is allowing offenders to “get away with murder”’ (Parliament of Victoria 2014).

The legislation made several other changes including shifting all the provisions to a different part of the *Crimes Act 1958* (Vic) with consequential renumbering; self-defence was also reformulated to require a belief that the conduct was ‘necessary in self-defence’ (s 322K(2)(a)) and the conduct was a ‘reasonable response in the circumstances as the person perceives them’ (s 322K(2)(b)) (rather than having to show ‘reasonable grounds for the belief’). It was made clear that a person may claim to have acted in self-defence, for example, in order to ‘prevent or terminate ... unlawful deprivation’ (s 322K note 2), a scenario which has previously been noted as potentially relevant for victims of family violence. The application of the defence to an intoxicated person was also clarified (s 322T).

The potential relevance of family violence to self-defence was developed based on the previous s 9AH, with the concept of family violence now being defined in s 322J. If raised in an argument based on self-defence, family violence evidence is stated to have possible relevance both to issues of immediacy and proportionality of the action, and to both the subjective and the objective elements of the defence (s 322M).<sup>5</sup>

To facilitate the effectiveness of these provisions at trial, the 2014 amendments also provided for directions to the jury on how family violence evidence may be relevant to the defences of self-defence and duress, and to explain the scope and significance of family violence. For example the judge may explain that family violence is not limited to physical abuse; that people react differently to experiencing family violence; and that it is not uncommon for a victim to stay with the abusive partner and not to report the violence. These directions were incorporated into the *Jury Directions Act 2013* (Vic) in ss 32(6) and 32(7) respectively (now ss 59 and 60 *Jury Directions Act 2015* (Vic)).

Not surprisingly, the way in which women and men drew on the law reforms of 2005 was very different, but was seen as raising different concerns. These are considered in turn.

### **Female defendants**

In 2012, a team of researchers from the Domestic Violence Resource Centre Victoria (DVRCV), and Monash University commenced a study of intimate partner homicides committed by women and prosecuted in Victoria between the introduction of the reforms on 23 November 2005 and 1 October 2013 (see Kirkwood, McKenzie and Tyson 2013).<sup>6</sup> The study found that, although the legislative changes provided the potential for progress, there had been limited evidence of this in practice (Kirkwood et al. 2013; see also Tyson et al. 2015; Tyson, Kirkwood and McKenzie 2016).

Of the seven cases prosecuted, there was a history of family violence in all the cases (see Kirkwood et al. 2013: 14-15),<sup>7</sup> and all of the women were initially charged with murder. Three pleaded guilty to manslaughter, one pleaded guilty to defensive homicide, one was found guilty of defensive homicide, and one was found guilty at trial of manslaughter. The study concluded that, although the women were more likely to plead guilty to manslaughter or defensive homicide, the capacity to introduce a broader range of evidence on family violence was not being utilised by legal professionals (Kirkwood et al. 2013: 39).

The new provisions in s 9AH envisaged expert evidence on, for example, the 'general nature and dynamics' of family violence and the 'cumulative effect' of such violence, from general experts on family violence and 'case specific' expert evidence to contextualise the situation of the accused within the framework of current knowledge of family violence (VLRC 2004: 141). In the cases analysed, the only expert evidence had been more conventional psychiatric and psychological assessments of the women (Kirkwood et al. 2013: 47).

In conclusion, this study found no clear indication of greater readiness on the part of the legal professionals to recognise a family violence context as supportive of a full acquittal on the basis of self-defence, although of course some cases may not in themselves have necessarily supported such a finding. However, there is evidence that some of these cases might have been appropriate for an acquittal.<sup>8</sup>

Two areas of reform warrant more detailed discussion: the provision for context or 'framework' evidence; and the abolition of defensive homicide.

### ***Provision for context evidence***

As outlined above, the reforms introduced provisions stating explicitly that evidence of family violence could be used where a defendant argued that they acted in self-defence (*Crimes Act 1958* (Vic) ss 332M, 322J). The provisions also extended the operation of the defence of self-defence by stating that a person could argue that they acted in self-defence where they were facing family violence, even if they did not act immediately, and even if their actions were, on the face of it, disproportionate (*Crimes Act 1958* (Vic) s 322M).

The reform provisions, therefore, provided that evidence about family violence generally can be legally 'relevant'. It was unclear whether and where opinions from witnesses about the general nature of family violence would be admitted.<sup>9</sup> In other jurisdictions there has been debate about whether a specific provision for social context evidence is needed, and the issue has led to debate within individual cases; its formulation in legislation, therefore, both validates it and serves an explanatory and educative function (see Douglas 2015: 98).

As the VLRC (2004: xxxiv) observed in recommending this reform:

Neither the honesty of the accused's belief, nor the reasonableness of the accused's action, can be properly evaluated unless the jury is aware of, and understands, the broader context of violence between the accused and the deceased and the accused's situation.

The study by Kirkwood et al. (2013) emphasised the importance of social context evidence not just to explain the situation but also to show that a woman may kill in self-defence as an act of agency equivalent to that of the traditional male defending himself against an assailant.

The Victorian reform provisions also encouraged the introduction of this evidence by a broader range of family violence experts but, until recently, the use of the family violence provisions and introduction of social context evidence has been limited. A review of Victorian and Queensland cases by Douglas (2012: 377) identified the continuing impact of the stereotypical 'real' battered woman and concluded that 'it remains very difficult for battered women to meet the threshold required to succeed in a claim of self-defence'. Those cases resulting in an acquittal on the basis of self-defence were of women who met the 'benchmark' of being 'smaller than their partners, white, drug-free, monogamous and without a criminal record', and 'suffered fierce physical abuse over many years'.<sup>10</sup> Commentators pointed to a tendency for cases to emphasise the woman's behaviour as irrational or helpless, more in line with a BWS analysis, rather than as a 'rational' or reasonable response to the situation (Douglas 2015: 102; Kirkwood et al. 2013: 45-46; Tyson et al. 2016: 16).

The recent cases of *DPP v Bracken* [2014] VSC 94 and *DPP v Williams* [2014] VSC 304 were the first to use the social context provisions (at that time s 9AH) from different family violence experts. Phillip Bracken was acquitted of the murder of his female partner after shooting her five times with a rifle at point-blank range (*DPP v Bracken* [2014] VSC 94). In *Bracken* it was not disputed that his partner suffered from several serious mental health issues, regularly verbally abused him and sometimes physically abused him during their four-year relationship, and had threatened Bracken and his father on the day of the killing (Collom 2015: 19). Expert evidence was adduced at the trial by a forensic psychiatrist who gave general and specific social framework evidence on the 'psychological entrapment' which may encourage a victim to stay in an abusive relationship (Collom 2015: 29). The approach was therefore not dissimilar to a traditional BWS case. Soon after, Angela Williams was charged with murder after she killed her partner by hitting him 16 times with a pick-axe. She was acquitted of murder but found guilty of defensive homicide (*DPP v Williams* [2014] VSC 304). Williams had killed her partner and buried his body in 2008; she confessed to the killing four years later. In *Williams* it was not disputed that her partner was a very heavy drinker, frequent marijuana user and dealer, and was the dominant controlling party in the relationship, that he frequently verbally abused her, occasionally punched or kicked holes in the wall of the family home, and had a long history of inflicting serious violence against other people (Collom 2015: 19-20). For the first time in a homicide trial, a law professor and family violence expert, Professor Patricia Easteal, gave general context evidence about the dynamics of family violence and the ways in which women kill, and used the hostage metaphor to describe the psychological reasons why women tend to stay with violent partners (Collom 2015: 30). An increasingly nuanced understanding of family violence was evident in both cases. As Collom observed, the defence in *Bracken* and *Williams* recognised that the defendants could kill in self-defence in response to: (a) non-physical forms of family violence; and (b) the cumulative impact that the family violence had on them (Collom 2015: 21). Indeed, the sentencing judge in *Williams* observed that family violence can be 'belittling and controlling' and can form a pattern of abuse that may seem minor on its own but under which the victim can reach a point of 'explosive' violence that seems 'disproportionate' (*DPP v Williams* [2014] VSC 304 [26, 32]). As Douglas put it, this approach seems to have been 'strongly influenced by s 9AH, suggesting the provision may be having an educative effect' (2015: 106).



### ***Abolition of defensive homicide***

Defensive homicide was introduced to provide a 'half way house' for defendants found to have genuinely believed they were acting in self-defence, but whose assessment of the need to defend themselves was found not to be objectively reasonable. It was abolished in 2014 because it was seen as being too readily used by men charged with killing other men. A number of feminist researchers and advocates were critical of the proposal to abolish defensive homicide, arguing that it provided an important alternative for women who were able to show that they genuinely believed they faced lethal violence but where the jury was not satisfied that the belief or response was reasonable (DVRCV, Monash University et al. 2013; Kirkwood et al. 2013; Tyson et al. 2016).

The counter argument is that women who might have been entitled to acquittal may be more likely to plead guilty to the half-way offence to avoid the risk of a trial for murder, and that juries may be more likely to convict of the half-way offence where they might otherwise have acquitted, out of caution. For example, Fitz-Gibbon argues that both men and women risked missing the opportunity for a full acquittal when defensive homicide was available (2015: 132).

These arguments continue to be made in NSW which legislated for excessive self-defence as a partial defence following its abolition by the High Court in *Zecevic v DPP (Vic)* (1987) 162 CLR 645. Indeed, as Toole notes, this type of defence has been 'in and out of favour in Australian laws for over half a century' (2013: 478). The debate seems to be between principled and practical laws. On the one hand, Fitz-Gibbon (2015: 138) argues persuasively that laws (such as defensive homicide) should not be introduced on the assumption that other laws, such as self-defence, will not work in practice for women. There is some merit in adopting such a principled argument. On the other hand, this may disadvantage individual women who face a murder conviction if they cannot persuade a jury of both limbs of self-defence as a result of gendered stereotypes. The focus of self-defence on 'reasonableness' highlights continuing challenges for some women to show that their behaviour was, in fact, 'reasonable' in light of ongoing limitations in understanding of the consequences of family violence. As Tyson et al. (2015: 92) conclude, '[g]ender-based stereotypes continue to influence perceptions of what is a reasonable response in the circumstances'.

We do not have to resign ourselves to such stereotypes: context evidence is intended to reshape those narratives by explaining the necessity and rationality of some women's responses to family violence. Arguably, retaining defensive homicide and reviewing its operation in light of the educative role played by the other reforms would have been more constructive. Indeed, as King et al. have emphasised, the *Williams* case 'indicates that defensive homicide did operate as intended ... as a safety net between murder and an outright acquittal' (2016: 175).

### **Male defendants**

As already explained, the 2005 and 2014 reforms were driven by very different concerns about women's and men's killings of intimate partners. The 2014 reforms were primarily a response to a perceived overuse of defensive homicide by men, which some believed had the effect of reintroducing the partial defence of provocation by the back door (for, example, see Fitz-Gibbon and Pickering 2012). Below we provide a brief overview of the defensive homicide convictions involving men who killed other men before turning to a discussion of cases involving men who killed their intimate partners, and considering the accuracy of the government's critique of defensive homicide.

### ***Men who killed men***

Between 2005 and 2014, there were 33 defensive homicide convictions; 27 of these involved a male perpetrator who killed another man usually in the context of a violent altercation, and 20 of these were resolved by a guilty plea (Ulbrick, Flynn and Tyson 2016: 28-34). The argument advanced in these cases was that the defendant feared that he would be killed or seriously injured,

and so killed to protect himself; his genuine fear was accepted but his response was regarded as unreasonable.

It should be noted that killings in the course of a dispute or fight (usually but not always between men) are unfortunately relatively common forms of homicide, and commonly lead to a conviction for manslaughter in line with the High Court's analysis in *R v Wilson* (1992). In the absence of proof of intention to kill or cause grievous bodily harm, or recklessness as to death/gbh—often difficult to show in the context of a fight—manslaughter can be an appropriate outcome and carries the same maximum penalty as defensive homicide: 20 years imprisonment.

This was not recognised in the debates leading up to the abolition of defensive homicide (cf. Fitz-Gibbon 2015: 135). However, a separate discourse developed around these 'one punch' killings which had its own political trajectory (unrelated to the present discussion but discussed elsewhere) (see, for example, Quilter 2014).

The decision to abolish defensive homicide was, therefore, highly controversial, one fuelled by what Ulbrick et al. (2016: 24) observe was 'a populist, punitive framework, claiming that current laws were akin to "men getting away with murder"', and inappropriately using defensive homicide for killing both women and men. In *R v Middendorp* [2010] VSC 202, commentators emphasised the defendant's significantly greater size compared with his female victim and the nature of his violence in critiquing the decision.<sup>11</sup> It is important to point out here that there was little call for reform about the cases of women who killed, or about the (lack of) use of expert evidence.<sup>12</sup> The question therefore being asked by women's advocates was whether the criminal justice system had in practice failed to take account of the ways in which family violence could affect a woman and to provide an explanatory context for her killing. Indeed the question was whether it was *able* to do so, given continuing dominant narratives about family violence (Kirkwood et al. 2013). The question being asked by the media and law and order advocates, however, was whether defensive homicide had been an inappropriate excuse for male-to-male violence.<sup>13</sup>

### ***Men who killed women***

The reforms in 2005 and 2014 addressed the killings by men of intimate partners by abolishing the provocation defence and, nine years later, the offence of defensive homicide. Only two cases involving male defendants relied directly on the reforms to argue that they killed to defend themselves against the violence of their (female) partner (*Middendorp* and *Bracken* discussed above). While *Middendorp* was widely criticised as noted, the decision in *Bracken* was generally seen as an appropriate result: it was the first (and only) case since the reforms to result in a full acquittal on the grounds of family violence-based self-defence. This was significant (aside from the statistically unusual gender pattern) for the use made of expert evidence on family violence.

The provision encouraging expert evidence from a wider range of experts is relatively new, and it is clearly taking time for legal practitioners to make full use of it. In a second study conducted by DVRCV and Monash University researchers<sup>14</sup> examining legal responses to men charged with murder or manslaughter for killing a female intimate partner between 2005 and 2014, 36 men, or 71 percent (n=45) were convicted of murder after pleading guilty or following a trial (McKenzie et al. 2016: 43-44). However, the authors also found a continuing use of narratives minimising the significance of any background involving family violence, both in pleas and trials, and at sentencing.

Common themes in defence narratives in this study included lack of intent (in over one-third of the cases, the offender claimed the death was the result of an accident); that the offender killed in self-defence (two men argued they were the primary victims of family violence and a further five men claimed the violence was 'mutual' and they were defending themselves from the

deceased's aggressive behaviour); or that the offender had a mental illness or impairment at the time of the homicide (in many cases the accused's poor mental state was attributed to the relationship breakdown or relationship difficulties more generally) (McKenzie et al. 2016: 90-91, 93-94).

Provocation type narratives also featured in the cases analysed: 18 of the men alleged they either 'lost control', 'snapped', 'saw red' or suffered an 'inexplicable surge of emotion' in the moments prior to the killing (McKenzie et al. 2016: 96). Moreover, significant narratives that emerged in the cases presented family violence 'as primarily physical violence, as an "anger problem", as a result of alcohol and drug use, or a mental health problem, as "mutual" or as "out of character"' (McKenzie et al. 2016: 62). Other narratives implied an expectation that the victim should have left the perpetrator or sought legal protection. The authors concluded that, whilst these depictions of family violence are admittedly products of the adversarial nature of the legal system and legal rules in relation to proof and evidence, these narratives nonetheless draw on and maintain community misconceptions about family violence (McKenzie et al. 2016: 62).

The effect of the reforms—and changes in the community and legal attitudes more generally—are more evident in judicial sentencing remarks. While provocation was abolished as a defence in 2005, it continues to be a relevant factor that the judge may take in to account when sentencing. Part of the impetus for the abolition of provocation was to challenge its victim-blaming narratives and the defence's tendency to excuse men's violence against intimate partners. In a study of post-provocation sentencing judgments for the 10-year period since the reforms, Hunter and Tyson (2016: 28) found that concerns that the gendered assumptions underpinning provocation's 'narratives of excuse' for men's violence would simply re-emerge at sentencing have not been borne out. Rather, they found that, although sentencing narratives continue to reproduce the language of provocation (for example, that the offender lost control), some judges appear to be picking up on the spirit of the reforms. One judge in particular went much further than the other judges in making explicit comments affirming women's rights to autonomy and equality, in line with the reforms. Adopting a broad understanding of family violence as 'both of an emotional and physical nature', King J in *R v Azizi* [2010] VSC 112: [18] found that the defendant had 'treated her as a person lacking in individual rights, and a person that must do what she was told to do by you' (see also Hunter and Tyson 2017).

Other commentators have similarly noted that judges in post-reform cases can be seen to have adopted the gendered critique of power and control within intimate relations. As Freiberg, Gelb and Stewart (2015: 65) have emphasised, this is a pattern in judicial remarks which has been developing since at least the early 2000s so is not solely attributable to the reforms—judges are of course part of the community and influenced by changing values—but it is likely that the reforms have also been educative. There has also been judicial and practitioner training on family violence and its dynamics, at least in Victoria (Judicial College of Victoria 2016), which would also be having an impact.

## Conclusion

Have the Victorian reforms to homicide defences made them more responsive to the gendered critiques outlined here? Nearly 30 years ago, Carol Smart (1989) warned feminist researchers and activists not to be seduced by the promise of law reform to change gendered relations. More recently Douglas (2012: 378) reiterated that it will take 'more than statute reform' to change women's experiences of justice.

Our evaluation of the 2005 and 2014 Victorian reforms suggests that they will usefully direct and constrain ways of incorporating understandings of family violence in homicide trials. They make it possible for current evidence-based knowledge of family violence to become part of the plea hearing or trial decision-making for female defendants, at least.

They also represent important symbolic statements about the significance of family violence and its role in homicides in intimate relations. They spell out gendered power narratives in ways that would have been unthinkable—and perhaps unrecognisable—40 years ago.

The abolition of the defence of provocation seems to have been effective in removing that gendered defence narrative (although recent research identified remnants in some trials and pleas). There is evidence that claims by men to have ‘snapped’ or ‘lost control’ when faced with a sexual rejection or with the partner’s infidelity are not being accepted as mitigation at the time of sentencing, with judges using the opportunity to denounce these assertions of masculine entitlement (Freiberg, Gelb and Stewart 2015: 143). The sentencing judge in *R v Neacsu* [2012] VSC 388: [43], for example, stated: ‘Your wife was entitled to leave you. You may not have liked that, but she had the right to do so.’

There is also evidence that the use of context evidence may be developing, and with it the likely educative effect of such information about the occurrence and impact of family violence on women’s responses. Whether the reforms will, in the short term, change the daily practices of lawyers and judges is less clear. As some commentators have observed in this area, there is undoubtedly a need for ‘comprehensive, consistent, and ongoing training’ for legal professionals to combat the common myths about and barriers to disclosing family violence, including how the use of expert evidence may assist in support of a defence of self-defence (Tyson et al. 2015: 92).

Most reforms aimed at addressing social inequalities require broader social as well as legal change, and many fail because they are imposed on an unreceptive audience. It may be that the reforms to homicide defences are finally coming at a good time, when family violence is high on the community agenda. Whether they can produce fundamental change in legal procedure and narratives remains to be seen.

#### *Correspondence:*

Bronwyn Naylor, Professor of Law, Graduate School of Business and Law, RMIT University, 124 La Trobe Street, Melbourne VIC 3000, Australia. Email: [bronwyn.naylor@rmit.edu.au](mailto:bronwyn.naylor@rmit.edu.au)

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<sup>1</sup> This is known as ‘substantial impairment by abnormality of mind’ in NSW: s 23A *Crimes Act 1900* (NSW).

<sup>2</sup> See *Osland v R* (1998) 197 CLR 316. Evidence of BWS was accepted by the Supreme Court of South Australia in *R v Runjanjic and Kontinnen* 1991 and the Supreme Court of Canada in *Lavallee v R* (1990) 55 CCC (3d) 97 where Wilson J stated, ‘Expert evidence on the psychological effect of battering on wives and common law partners must, it seems to me, be both relevant and necessary in the context of the present case [of a wife who killed her violent husband]’ (*Lavallee v R* (1990) 55 CCC (3d) 97: 112).

<sup>3</sup> See current s 322J(1) *Crimes Act 1958* (Vic).

<sup>4</sup> Referencing the 2013 study by Kirkwood, McKenzie and Tyson.

<sup>5</sup> Its application for the defence of duress is similarly spelt out in s 322P.

<sup>6</sup> Dr Debbie Kirkwood and Ms Mandy McKenzie (DVRCV) and Dr Danielle Tyson (Monash University).

<sup>7</sup> The authors identified eight cases where women killed an intimate partner. Of these, one was not committed for trial.

<sup>8</sup> Commentators have noted, for example, the way in which the sentencing of Karen Black, on her plea to defensive homicide, framed the non-physical violence suffered by Black as ‘limited’ to threats, intimidation and so on, and focussed on the immediate violence rather than highlighting the evidence of a prior history violence and its effects over time, such that the homicidal response was seen as disproportionate – that ‘the cumulative violence led Black to overreact’, (ie was unreasonable) rather than being seen as a context in which she might have reasonably believed it was necessary to kill to defend herself (Douglas 2015: 102; Kirkwood, McKenzie and Tyson 2013: 20; Tyson et al. 2015: 10-12).

<sup>9</sup> *Osland v R* (1998) 197 CLR 316: [161],[167] cited in Douglas (2015: 95-96). Kirby J in *Osland*, for example, was critical of BWS evidence but commented that expert evidence about ‘the general dynamics of abusive relationships’ would be admissible if relevant and from an appropriately qualified expert as relationship or context evidence.

- <sup>10</sup> Kirkwood, McKenzie and Tyson (2013: 44) confirmed Douglas' analysis, finding that, '[i]n the cases that we analysed, none of the women's circumstances met this benchmark, and none successfully argued self-defence. The authors also observe that: 'All the women who have killed their intimate partners since the 2005 reforms have done so in the context of family violence. While it may not always be the case that women who kill in response to family violence acted in self-defence, it is concerning that none of the women whose cases were analysed were acquitted on the basis of self-defence' noting the apparent problem of the 'benchmark' hurdle (Kirkwood, McKenzie and Tyson 2013: 44, citing Douglas 2012: 377).
- <sup>11</sup> Leader-Elliott concludes that the decision was 'exceptional', an outlier (2015: 171).
- <sup>12</sup> An exception is Elder and Lee 2014.
- <sup>13</sup> As mentioned earlier, these cases would probably have been treated as manslaughter, with the same potential penalty. This point was not, however, taken up in the media argument. See, for example, Hunt 2013.
- <sup>14</sup> Dr Debbie Kirkwood and Ms Mandy McKenzie (DVR CV) and Dr Danielle Tyson and Professor Bronwyn Naylor (Monash University).

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### **Legislative material**

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