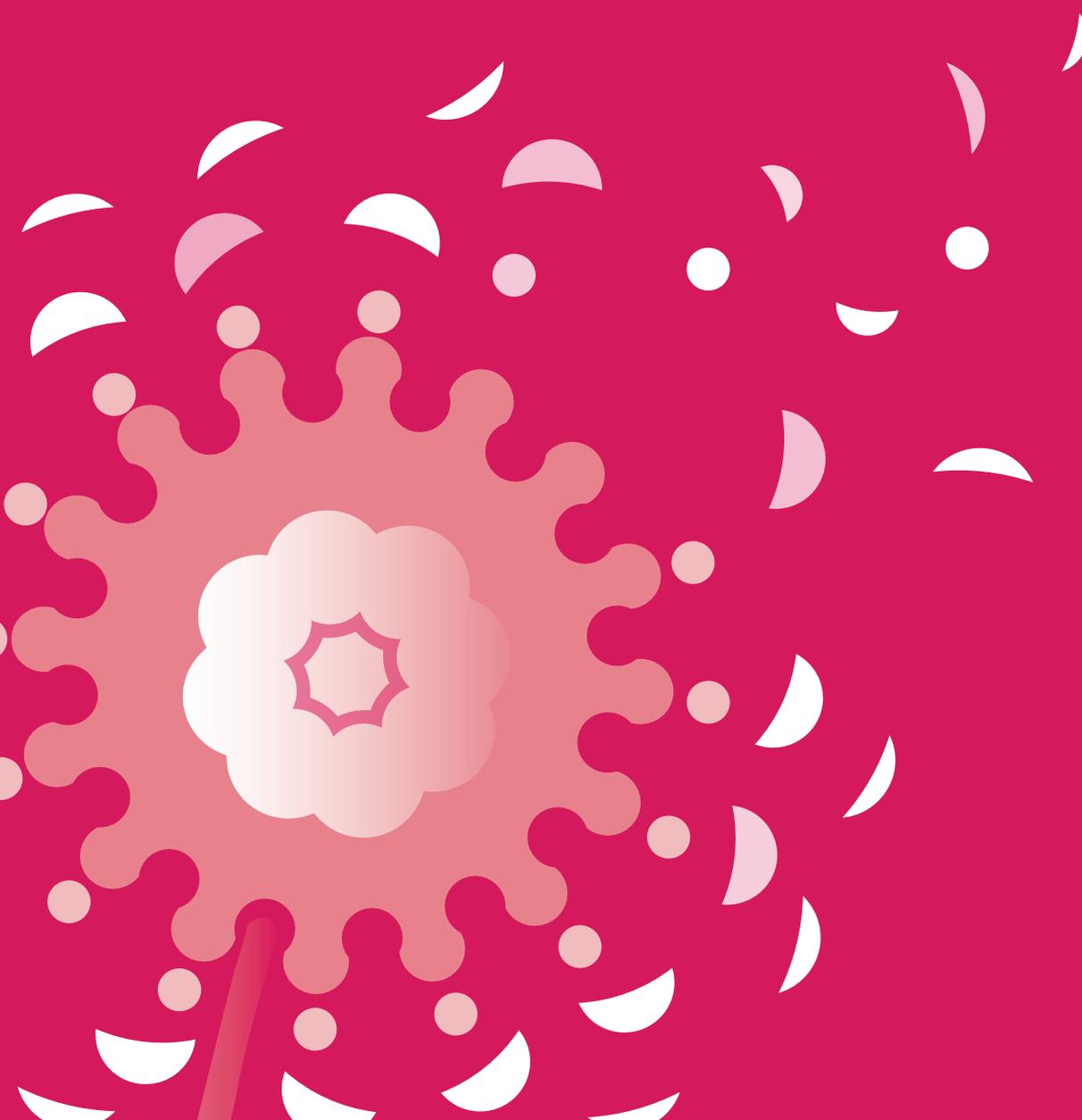


Out of Character?

Legal responses to intimate partner homicides
by men in Victoria 2005–2014



DISCUSSION PAPER

Domestic Violence Resource Centre Victoria

Domestic Violence Resource Centre Victoria
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First published 2016

DVRCV Discussion Paper No.10
ISSN 1441-0206

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ACKNOWLEDGEMENTS

This project received funding through the Victorian Legal Services Board Grant Program.

DVRCV acknowledges the support of the Victorian Government.

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DISCUSSION PAPER

Acknowledgements

This discussion paper focuses on intimate partner homicides by men in Victoria between 2005 and 2014. We wish to dedicate the paper to those who died as a result of these homicides and the family members who were affected by their deaths.

We would like to thank the following people for providing information, advice and/or feedback in relation to this research project:

- Karen Argiropoulos, Victorian Bar
- Chris Atmore, Federation of Community Legal Centres
- Greg Byrne PSM, Department of Justice and Regulation
- Sarah Capper, Victorian Women's Trust
- John Champion SC, Director of Public Prosecutions
- Phil Cleary, advocate
- Professor Jonathan Clough, Faculty of Law, Monash University
- Jane Dixon, Victorian Bar (prior to appointment as Justice at the Supreme Court)
- Libby Eltringham, Domestic Violence Resource Centre Victoria
- Helen Fatouros, Victoria Legal Aid
- Professor Arie Freiberg, Sentencing Advisory Council
- Andy Gargett, National Family Violence Prevention Legal Services
- Gemma Hazmi, Law Institute Victoria
- Detective Inspector Michael Hughes, Victoria Police
- Detective Superintendent Rod Jouning, Victoria Police
- Alison MacDonald, Domestic Violence Victoria
- Justice Marcia Neave AO (prior to appointment as Commissioner of the Royal Commission into Family Violence)
- Ross Porter, Victoria Police
- Detective Inspector John Potter, Victoria Police
- Gabriela Pulczynski, Victoria Legal Aid
- Jillian Prior, Aboriginal Family Violence Prevention and Legal Service Victoria
- Samantha Renwick, Victorian Bar
- Denise Roberts, No To Violence
- Ruth Shann, Victorian Bar
- Felicity Stewart, Sentencing Advisory Council
- Fiona Stubbs, Victoria Police
- Cate Taylor, Office of Public Prosecutions
- Rodney Vlasis, No To Violence

We are grateful for the insights of these people, who have generously provided their time and valuable expertise. While we have endeavoured to consider the various perspectives on the complex issues raised in this report, the views expressed in this report are entirely those of the authors and do not necessarily reflect the views of those consulted, or those of the funder.

We also thank the Transcript Information Services at the Victorian Government Reporting Service for providing transcripts of pleas and trials free of charge. We thank Lisa Harrison, Madeleine Ulbrick and Samantha Renwick for their assistance with data collection, and Susan Ball from the Victorian Legal Services Board for her support, encouragement and patience.

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While it is important that we explore the issues raised in this paper, please be aware that the material, particularly the case studies in chapters 6 to 10, is distressing.

CHAPTER 1

Introduction

Women are entitled to have domestic relationships with people that do not result in their death simply because their partner loses their temper or has too much to drink ... It is inexcusable and the law will do all it can to protect women from violent domestic partners ... The courts have consistently stated in relation to the crime of murder that killings of a domestic nature are no less serious than killings involving unrelated or stranger killings. Accordingly, whilst women are still dying at the hands of their domestic partners, the issue of general deterrence, in my view, remains very important.

Sentencing remarks, *R v Mulhall* [2012] VSC 471, para. 33

Over a 10-year period (2002–2012) in Australia, 488 women were killed by an intimate partner or ex-partner (Cussen & Bryant 2015a). These homicides are the extreme end of a continuum of violence against women and children in families. Domestic and family violence (hereafter referred to as family violence) has become the focus of increasing community concern in Australia over recent years.¹ There is a growing awareness of the scale, impact and costs associated with family violence.

Research and death reviews in Australia and internationally over the last two decades have highlighted that systemic failures in legal responses to family violence contribute to these deaths. For example, in the 1990s in Victoria, the Women's Coalition Against Family Violence (WCAFV)² documented the impact of domestic murders of women and children in *Blood on whose hands? The killing of women and children in domestic homicides* (WCAFV 1994). The book outlined the stories of women and children who had been killed in domestic homicides in Victoria. The accounts demonstrated the failure of the police, legal and support services to recognise and respond to family violence, and to prevent further family violence deaths.

Feminist researchers and activists in the 1980s and 1990s, in Australia and internationally, demonstrated that separation and a history of intimate partner violence and controlling behaviour

¹ In January 2015, Rosie Batty was named Australian of the Year for her courageous advocacy in raising awareness about family violence after her 11-year-old son, Luke Batty, was killed by his father (Cox 2015). In February 2015, the Victorian Government established a Royal Commission into Family Violence.

² DVRCV (then DVIRC) was a member of the coalition.

were central factors in sexual intimacy homicides perpetrated by men (for instance, Scutt 1983; Radford & Russell 1992; Mahoney 1991; Eastal 1993; WCAFV 1994).

Intimate partner homicides, whether perpetrated by men or women, generally occur in the context of men's violence against the woman in the relationship. However, men who kill often blame their female partner or ex-partner for their lethal violence, and have been able to use defences such as provocation to reduce a charge of murder to manslaughter. In contrast, it has been difficult for women who kill in response to their partner's violence to successfully access available defences.

Women's organisations, legal professionals, academics and activists have advocated for changes to homicide laws and legal processes to better recognise the social context of these killings. In most Australian states, changes have been made to the laws relating to homicide in an attempt to address these concerns. In Victoria, problems were identified with the use of the partial defence of provocation by men who kill their female intimate partners,³ while self-defence has been seen to be failing women who kill to protect themselves from their male partner's violence. In both contexts there has been inadequate recognition of the nature and impact of prior family violence and its link to the homicide.

Following a review by the Victorian Law Reform Commission (VLRC), changes to homicide laws were enacted in Victoria in 2005. The reforms sought to reduce excuses for men's violence against women and to better accommodate the experiences of primary victims who kill violent family members (VLRC 2002; ALRC & NSWLRC 2010, p. 622). Further reforms were made in 2014.

The reforms in Victoria have been held up as a 'trendsetting' example of feminist-inspired reforms to remediate gender imbalances in legal responses (Ramsey 2010; Forell 2006). While changes to the laws have been celebrated, little is known about the impact of the reforms in practice.

In 2010, Domestic Violence Resource Centre Victoria (DVRCV) and Monash University⁴ identified a shared interest in reviewing intimate partner homicides to examine whether the spirit of the reforms was being realised. Together we commenced a review of intimate partner homicides that occurred after the reforms. The first stage of the project⁵ examined cases of women who killed their intimate partners with a focus on whether, and to what extent, the reforms had improved the recognition of family violence and legal understandings of the circumstances in which women kill in response to violence.⁶

The second stage of the project explores legal responses to men who have killed in the context of sexual intimacy since the implementation of the reforms in 2005. It also continued to monitor cases of women who killed intimate partners. This work was made possible by a generous grant from the Victorian Legal Services Board Grants Program in 2013.⁷

This report outlines the findings of this second stage of the research.

The objective of this research was to look at the way that family violence is recognised and

3 For example, trial judges had expressed concerns about provocation for some time prior to a review in 2004 of defences to homicide in Victoria (Freiberg, Gelb & Stewart 2015, p. 65).

4 Dr Danielle Tyson, Department of Criminology, School of Social Sciences, Monash University.

5 Stage 1 of the project was funded by the Victorian Women's Benevolent Trust in 2012.

6 The findings are outlined in *Justice or judgement? The impact of the Victorian homicide law reforms on responses to women who kill intimate partners* (Kirkwood, McKenzie & Tyson 2013) and also in Tyson, Kirkwood, McKenzie and Naylor (2015) 'The effects of the 2005 reforms on legal responses to women who kill intimate partners' in Fitz-Gibbon and Freiberg (eds.) *Homicide law reform in victoria: prospect and retrospect* (The Federation Press: Leichhardt), and a journal article, Tyson, Kirkwood and McKenzie, 'Family violence in domestic homicides: a case study of women who killed intimate partners post-legislative reform in Victoria, Australia', *Violence against women* (forthcoming).

7 The research team expanded to include Associate Professor Bronwyn Naylor, Faculty of Law.

responded to in the legal processing of intimate partner homicides by male offenders since the law reforms in 2005. Our study provides a socio-legal analysis of homicide prosecutions based on an understanding that these homicides are part of a broader pattern of men's violence against women.

OVERVIEW OF REPORT

- Chapter 1 gives an overview of the current knowledge about intimate partner homicide in Australia and internationally, as well as a brief summary of the causes and dynamics of family violence.
- Chapter 2 outlines the law reforms implemented in Victoria in 2005 and 2014.
- Chapter 3 describes the purpose of the research and methods by which the research was undertaken.
- Chapter 4 gives a brief overview of the findings in relation to women in Victoria who killed intimate partners between 23 November 2005 and 31 December 2014.
- Chapter 5 provides a quantitative overview of the cases of intimate partner homicide by men between 23 November 2005 and 31 December 2014, including demographic data about the accused, the deceased and the killing, key contextual factors and the legal outcomes.
- Chapter 6 discusses family violence risk factors in the intimate partner homicides by men.
- Chapter 7 provides a discussion about the ways in which prior family violence is understood and discussed by legal professionals in the homicides perpetrated by men.
- Chapter 8 examines how evidence of prior family violence is used by the Crown in the prosecution process and whether or not it is admitted as evidence in trials of male offenders.
- Chapter 9 examines the types of arguments and narratives made in defence of the accused through the legal process, such as mental impairment, provocation and lack of intent or accident.
- Chapter 10 explores the recognition of family violence through the sentencing process, and the use of provocation as a mitigating factor in sentencing men who kill intimate partners.
- Chapter 11 provides conclusions.
- Chapter 12 provides recommendations.

INTIMATE PARTNER HOMICIDES IN AUSTRALIA

National studies on intimate partner homicide highlight trends that exist across Australia, and which are consistent with international research (for example, Stockl et al. 2013). Intimate partner homicides comprise a significant proportion of all homicides in Australia and are primarily perpetrated by men against female partners or ex-partners. Frequently these homicides occur in the context of prior violence and controlling behaviour.

The National Homicide Monitoring Program (NHMP) at the Australian Institute of Criminology collects data on all homicides in Australia. Their data shows that for the period 2002–12, one-quarter of all homicide incidents (25 per cent or 654 incidents) involved intimate partners (Cussen & Bryant 2015a).⁸ The majority of victims (75 per cent or 488) of intimate partner homicides were women and the majority of perpetrators (77 per cent or 503) were men.

⁸ The NHMP definition of intimate partner is where the victim and offender share a current or former intimate relationship, including same sex relationships and extramarital affairs (Bryant & Cussen 2015).

A history of domestic violence was recorded in 44 per cent of intimate partner homicides (Cussen & Bryant 2015a). Indigenous people are over-represented as both victims and offenders in intimate partner homicides in Australia (Cussen & Bryant 2015b).

The NHMP also has examined intimate partner homicides in same-sex relationships (Gannoni & Cussen 2014). Of the 1536 intimate partner homicide incidents recorded from 1989–90 to 2009–10 in Australia, approximately two per cent were classified as same-sex intimate partner homicides. Males comprised the majority of offenders in these homicides.

Family violence and separation in homicides

A recent review of domestic homicide-related deaths in NSW also found that men were the majority of perpetrators and women the majority of victims. The NSW Domestic Violence Death Review Team (NSWDVDRT) undertook a review of domestic violence related deaths over a 10-year period from 2000 to 2010 (NSWDVDRT 2015). They found that 238 cases occurred in the context of an identifiable history of domestic violence, which comprised 27 per cent of all homicides in NSW during that period. Similar to the NHMP data, the majority of the victims of those intimate partner homicides were women (76 per cent), and all of them were killed by a current or former male partner.

Of the women killed by their intimate partners, almost all (97 per cent) had been the victim of domestic violence during the relationship, and none had been the perpetrator (NSWDVDRT 2015, p. 4). However, almost all of the men (90 per cent) who were killed by their female intimate partners had been the perpetrator of domestic violence in the relationship. Seventeen per cent of the male victims were killed by a male partner in a same-sex relationship.

Recent separation was a key factor in the intimate partner homicides by men. Approximately one-third of the women in these homicides were killed by a former partner, and most were killed within three months of ending the relationship (NSWDVDRT 2015). Of the women killed by a current partner, in almost half of the cases one of the parties had expressed an intention to end the relationship in the three months prior to the killing. In contrast, of the men who were killed by an intimate partner, almost all (94 per cent) were killed by their current partner. Of those cases, only one per cent involved one of the parties indicating an intention to end the relationship and in just one case there had been intermittent periods of separation.

Victorian data on homicide prosecutions in the context of sexual intimacy was collected by the Victorian Law Reform Commission between 1 July 1997 and 30 June 2001. The VLRC found that the majority of these homicides (42 of 52 homicides) were perpetrated by men. In about half of the cases in which men killed women, there were allegations that the male had previously perpetrated family violence. In contrast, women were most likely to kill in response to alleged violence by the male deceased (VLRC 2003).

The VLRC's conclusions confirmed the results of an earlier Victorian homicide study by Polk (1994) who found that when men killed intimate partners they were usually motivated by jealousy and a desire to control their partner. Women rarely kill partners in those circumstances (Polk 1994; VLRC 2003).

More recently, the Victorian Systemic Review of Family Violence Deaths (VSRFVD) examined homicides in Victoria between 2000 and 2010 in which a perpetrator was identifiable, the criminal or coronial investigation had been finalised and the death involved an intimate or family relationship or occurred in the context of family violence (Walsh et al. 2012). Of the 288 homicides fitting these criteria, an intimate relationship was the most common relationship type with 136 (47 per cent) intimate partner homicides. Of the intimate partner homicides:

- 73 per cent involved male perpetrators, 23 per cent involved female perpetrators and 4 per cent involved both male and female perpetrators.
- In 63 per cent the deceased and perpetrator were in a current relationship, while in the remaining 37 per cent of cases, the couple were separated.
- A known history of family violence was identified in 60 per cent of cases. In three-quarters of these (75 per cent), the deceased person was the victim of prior family violence and the vast majority of these victims were women. In 22 per cent the deceased person was the perpetrator of the prior family violence and the majority were male (15 of the 18 perpetrators) (Walsh et al. 2012, p. 26).

MALE PERPETRATORS

Since the 2000s there has been a growth in the literature and research on men who kill intimate partners, with the implementation of family violence death reviews in countries such as the US, UK, Canada and Australia (Scutt 1983, p. 17; Bugeja et al. 2013, p. 180). A core theme of the research is the identification of the characteristics and risk factors for intimate partner homicide (see, for example, Campbell et al. 2003; Campbell et al. 2007; Dawson, Bunge & Balde 2009; Dobash et al. 2004; Dobash et al. 2007).

Johnson and Dawson (2011) point to two categories of risk in family violence homicides: societal-level factors and individual-level factors. Societal-level factors include gender inequality and divorce rates. Individual-level risk indicators include perpetrator factors (such as the perpetrator's prior controlling behaviour or substance abuse), relationship factors (such as separation), and victim factors (such as isolation). Risk assessment and risk indicators are discussed further in Chapter 6.

Background and personal characteristics

There is no single profile of a typical male perpetrator of intimate partner homicide. Research suggests they have varied backgrounds and personal characteristics (Juodis et al. 2014; Kivisto 2015; Dixon, Hamilton-Giachritsis & Browne 2008). There are, however, identifiable personal characteristics that increase the risk of perpetration of intimate partner homicide, in combination with situational and victim factors (see Chapter 6 for further discussion of risk factors).

A recent international review of studies of intimate partner homicide perpetrators indicates that rates of unemployment varied widely across studies, from 13 to 58 per cent (Kivisto 2015). Approximately half of all perpetrators had not graduated from high school, and between one-quarter and one-half of perpetrators had previously been arrested for a violent crime (Kivisto 2015). For example, a study in the USA by Campbell et al. (2003) found that 49 per cent had not graduated, and 22 per cent had a prior arrest for a violent crime. Studies suggest that approximately a quarter of male perpetrators were abused as children (Kivisto 2015, p. 302). In relation to substance dependence, one in 10 have a lifetime diagnosis of substance dependence, but despite generally high rates of substance abuse, studies find that most perpetrators were not under the influence of drugs or alcohol at the time of the homicide (Kivisto 2015). For example, in the UK-based study by Dobash and Dobash (2015) discussed below, 20 per cent were intoxicated at the time of the murder. An Australian study found that 36 per cent of intimate partner incidents involved the use of alcohol by the offender, which was a slightly lower rate than the use of alcohol in all other homicide incidents (Cussen & Bryant 2015a).

According to Kivisto (2015), rates of ‘psychotic’ mental illness identified in perpetrators were relatively consistent across studies, with close to one in 10 men who kill an intimate partner being psychotic. However, the data on the prevalence of mood disorders (such as depression) was less consistent, ranging from 17 to 56 per cent (Kivisto 2015, p. 302). For example, a study in England and Wales between 1997 and 2008 found mental illness affected a significant minority of intimate partner homicide perpetrators: 17 per cent had symptoms of depression and 7 per cent had symptoms of psychosis at the time of the offence, and 14 per cent had had contact with a mental health professional in the year prior to the offence (Oram et al. 2013). The rate of personality disorders also varies across studies, depending on the methodology used (Kivisto 2015). For example, a population-based study in the UK found a rate of 7 per cent (Oram et al. 2013), while studies based on forensic psychiatric assessments have found more substantial rates – such as a Swedish study that found a 38 per cent rate of personality disorder in perpetrators of intimate partner homicide (Belfrage & Rying 2004).

Motivation and cognition

Until relatively recently, only a small number of studies of intimate partner homicide have included interviews with male perpetrators (Juodis et al. 2014), and much of the research on perpetrators of intimate partner homicide or family violence has focused on socio-demographic characteristics, individual psychological profiles or problematic behaviour such as alcohol abuse (Dobash & Dobash 2011). However as Mathews, Jewkes and Abrahams (2015) have pointed out, while these observations may help to explain ‘why men are able to kill’ they do not explain ‘why women partners are the targets’, nor do they explain the circumstances in which these killings occur (p. 109). Dobash and Dobash (2011) argue that the cognitions of men, and their intentions and motivations are critical elements of these homicides. In the section below, we discuss the key findings from qualitative research on the motivations and cognitions of men who kill their intimate partners. This research pinpoints the role played by gender, masculinity and men’s orientations to women in these killings.

A key factor that distinguishes male-perpetrated intimate partner homicide from that perpetrated by women is the prevalence of separation in homicides by men (Campbell et al. 2003; VLRC 2004; Morgan 2002; NSW DVDR 2015). A US study found that half the women (51 per cent) killed by a male partner were killed as they were trying to leave and approximately half these women were leaving for the first time (Block 2009). A review of domestic homicides in Ontario, Canada, found that 80 per cent involved actual or pending separation (ODVDR 2004). The risk of homicide appears to escalate most when the man realises his wife will not return to the relationship, rather than when she actually leaves (Johnson 2008; Sheehan et al. 2015).

Men typically kill out of jealousy, possessiveness and a desire for ‘ownership’ and control of their partner, (Daly & Wilson 1988; Johnson & Hotton 2003; Polk 1994; Radford & Russell 1992; Wallace 1986; Websdale 1999; Dobash & Dobash 2015; Goussinsky & Yassour-Borochowitz 2012; Juodis et al. 2014; Adams 2007, Matthews, Jewkes & Abrahams 2014).⁹ For example, a Canadian study by Juodis et al. (2014) found that separation and possessiveness were common in domestic homicides: ‘[o]f the 37 domestic homicides, 70.3 per cent occurred in the context of relationship separation, 62.2 per cent involved constant and violent jealousy’ (p. 310). The study compared domestic and non-domestic homicide offenders, and found that inflicting pain and

⁹ By contrast when women kill an intimate partner, they typically do so out of despair, fear and desperation as a result of being subjected to domestic violence (Morgan 2002, p. 21; see also Stark 2007).

revenge was the main motivation of perpetrators of domestic homicides, while other homicide offenders were more likely to be motivated by money, drugs or alcohol. Some studies identify that the likelihood of men perpetrating intimate partner homicide increases if the victim has left the perpetrator for another partner (Garcia, Soria & Hurwitz 2007).¹⁰

A consistent and robust finding from studies of these men (Dobash, Dobash & Cavanagh 2009, p. 9; see also Sheehan et al. 2015, p. 271; Campbell et al. 2007) is that they frequently have a history of controlling, abusive or violent behaviour towards their partners.¹¹ For example, McFarlane et al. (1999) found 67 per cent had histories of family violence; Dobash and Dobash (2011) found that 59 per cent of men had physically abused the woman they killed; Juodis et al. (2014) found 54 per cent of the men were extremely controlling of their partners.

One of the most comprehensive examinations of the cognitions of men who kill intimate partners is the *Homicide in Britain* study (Dobash et al. 2001, 2004; Dobash et al. 2007; Dobash & Dobash 2011, 2015). The study investigated different types of murder in terms of risk factors, situational contexts and lethal intentions. The study included a total of 866 case files (786 men and 80 women) from 1980 to 2000, and 200 interviews with men and women (180 men and 20 women) who were serving life sentences for murder in prisons across Britain.

The research demonstrated that men who kill intimate partners do not always have problematic childhood backgrounds, or a history of persistent criminal behaviour – in fact they may be relatively ‘conventional’ men. A comparison between men who murdered intimate partners and men who murdered other men (Dobash et al. 2004) showed that, although both groups overall had more difficulties in their childhood backgrounds than might be expected in the general population, those who murdered intimate partners had more ‘conventional’ childhood and family backgrounds than men who murdered other men. As adults, compared to men who murdered other men, those who murdered partners were more likely to have completed high school education, to be employed, and less likely to have a history of substance or alcohol abuse, persistent criminal behaviour or of using physical violence in general (pp. 599–600).

Dobash, Dobash and Cavanagh (2009; see also Dobash & Dobash 2011, 2015) have undertaken a further detailed examination of 25 cases of ‘conventional’ men who did not have any previous convictions but had murdered an intimate partner. These killings by ‘ordinary’ employed, law-abiding men are typically attributed to their mental health problems, or the victim’s behaviour (such as infidelity or separation) which caused the offender to have ‘snapped’. Dobash, Dobash and Cavanagh (2009) compared these men with 79 men who had murdered an intimate partner and who had prior criminal convictions. They found that the ‘conventional’ men were less likely to have experienced childhood abuse, poverty, problems with schooling, drug or alcohol abuse or mental health. However what the two groups of men had in common was their cognitions about the victim and relationships. Many had an ongoing history of ‘problems with women’ particularly in intimate relationships (p. 214). Of all of the men, 59 per cent had physically abused the woman they killed (Dobash & Dobash 2011).¹² Of those who had been in a previous relationship, 57 per cent had abused their former partner, and in that sense tended to ‘specialize’ in violence against women (p. 121). For the

10 A history of intimate partner violence and/or separation is also a key factor in family homicides that involve the killing of children (Liem & Koenraadt 2008; Bourget, Grace & Whitehurst 2007; Kirkwood 2012; Websdale 2010; Johnson 2005; Jaffe et al. 2014).

11 Controlling behaviour by men towards their female partner is also an important feature of many cases in which men intentionally kill their children (Kirkwood 2012; Ferguson 2009).

12 Nearly half of the men without prior convictions had previously been violent towards their partners (Dobash, Dobash & Cavanagh 2009).

majority of men in both groups, their intimate relationships had been ‘characterized by conflict, abuse, and controlling behaviour, as well as jealousy and possessiveness’. The men used violence to enforce rigid standards based on their beliefs about appropriate behaviours for women and men (p. 123).

Interviews with 20 incarcerated men in South Africa also identified the central role of attitudes and social norms regarding masculinity (Mathews, Jewkes & Abrahams 2014). For the men in the study, being dominant in their relationships with women was central to their sense of manliness (p. 120). Many were unemployed or lived in poverty, which increased their insecurities about their masculinity. These men felt ‘belittled’ by their partner’s desire to leave, or their perceived infidelity and felt that their control and masculinity was challenged because they had lost control over their female partner.

Controlling attitudes also featured in a study of 18 men in Israel, which compared those who were violent towards their partners with men convicted of murdering their partners (Goussinsky & Yassour-Borochowitz 2012). The study found these groups of men had different motivations: one of the main differences was that 75 per cent of the murder cases involved the woman expressing an intention to leave the man, while cases of physical violence occurred ‘in situations in which the man’s feeling of control over the woman was undermined’ (p. 557). In homicides, the idea of separation resulted in deep despair and threatened the man’s sense of identity (p. 561). Sheehan et al.’s 2015 study of intimate partner homicides in the USA reports similar findings, suggesting that homicide is often triggered by a loss of control over the victim.

Attitudes towards women have also been identified as a factor in a study of intimate partner homicides in an Indigenous community in central Australia between January 2000 and November 2008 (Lloyd 2014). There was a history of reported and unreported violence against the victim and/or prior partners in every case. Offenders typically justified their violence through assertions of their victim’s sexual infidelity, failure to attend to the offender’s domestic needs and allegations of neglecting their children. The normalisation of violence, alcohol consumption and attitudes ‘embedded in contemporary gender relations’ (p.103) were key factors.

Studies typically find that the offenders continue to blame the deceased women after the killing. Dobash and Dobash’s (2015) detailed analysis of men’s accounts of the murder and information from prison professionals revealed that, when in prison, men continued to express a lack of remorse or empathy with the victim, and either ‘blamed alcohol, claimed it was an accident, and/or blamed the victim in particular or women in general’ (pp. 87–89). These men typically saw themselves as ‘victims who had been wronged’ and viewed their anger and violence as ‘appropriate and justified’ (p. 254). Interviews with 31 men convicted of murdering intimate partners in the USA by Adams (2007) also indicated that the men were self-centred and blamed the women for the violence, and had strong notions of ownership of the women. Adams found that most of the men believed their partners were having affairs (even when there was evidence they were not) and constantly monitored their whereabouts and behaviour. Blaming attitudes and the belief that the victim’s behaviour pushed the offender into committing the homicide were also identified in a study in Israel by Dilmon and Timor (2013), and in the study by Mathews, Jewkes and Abrahams (2014).

A number of studies have identified that intimate partner homicides often involve pre-planning. For example, the Canadian study by Juodis et al. (2014) examined the correctional files of homicide offenders to compare domestic and non-domestic homicides. Most domestic homicides did not occur 'out of the blue': 82.9 per cent of cases showed elements of planning, and 40 per cent occurred in 'cold blood' and were not immediately preceded by conflict or emotional arousal on the part of the perpetrator (p. 310). An earlier Canadian study by Dawson (2005) found evidence of premeditation in a third of the total of 703 intimate partner homicide cases examined, though premeditation was more often found in cases in which the perpetrator committed suicide after the homicide.¹³ There was also evidence of pre-planning in the Israeli study by Goussinsky and Yassour-Borochowitz (2012).

NATURE AND DYNAMICS OF FAMILY VIOLENCE

The homicide literature highlights that domestic homicides frequently occur in the context of a history of family violence and are themselves an extreme example of family violence. It is therefore important to consider the nature and dynamics of family violence to understand this phenomenon. The analysis of legal responses to domestic homicides throughout this report draws on the following understanding of family violence.

As will be discussed in Chapter 3, family violence includes a broad pattern of behaviour, and is not limited to physical assaults. This understanding has been reflected in legislative definitions.

Family violence has serious short-term and long-term impacts on physical, mental, sexual and reproductive health for women and for their children, and can lead to homelessness and poverty (VicHealth 2007; Tually et al. 2008; WHO 2013).

Family violence is prevalent in Australia, and elsewhere. For example, the Australian Bureau of Statistics (ABS) 2012 *Personal safety survey* (ABS 2013) estimated that one in six adult women in Australia (and one in 19 adult men) have experienced intimate partner violence since they were 15 years old. In 2014–15 in Victoria, police recorded 70,906 family violence incidents (Crime Statistics Agency 2015). In 2013–14, 35,135 family violence intervention order (FVIO) applications were finalised by the Victorian Magistrates' Court (Magistrates' Court of Victoria 2014). A great deal of family violence is hidden and under-reported. For example, the 2012 *Personal safety survey* (ABS 2013) found that of the women who had experienced current partner violence only 20 per cent had contacted the police, while 48 per cent had told a family member or friend. The reasons that victims do not report violence include a perception that police do not understand family violence or respond proactively, a fear that reporting would result in further violence, and embarrassment or shame (Birdsey & Snowball 2013; Mulrone 2003).

Family violence is gendered and mainly perpetrated by men against women. While men can be victimised by a partner, studies that analyse the impact and context of violence show that women are less likely to subject their male intimate partners to the same level of severe, terrorising, continuing and escalating violence as that used by men towards their female intimate partners (VicHealth 2013; Wangmann 2010; Braaf & Barrett Meyering 2013; Kimmel 2002).

The motivations and impacts of intimate partner violence differ for men and women. Reviews of studies identify that women's violence against partners is primarily motivated by self-protection or

13 Indicators of premeditation included when the offender made prior threats to kill, broke into the victim's home, purchased a gun, brought a gun to the home, and killed the victim while she was sleeping (Dawson 2005).

retaliation for their partners' violence, or is expressive and motivated by anger or frustration (Braaf & Barrett Meyering 2013). In contrast men's violence is more likely to be 'instrumental' – a tactic to gain control (Kimmel 2002) – and is more likely to result in injury and fear (Braaf & Barrett Meyering 2013; Wangmann 2010).

Key determinants of violence

The research literature, including a recent, comprehensive Australian review of the evidence by Our Watch, ANROWS and VicHealth (2015) has consistently identified that the unequal distribution of power between men and women sets the necessary context in which family violence occurs. The four factors that are consistently associated with higher rates of violence against women are:

- condoning of violence against women
- men's control of decision-making and limits to women's independence in public and private life
- rigid gender roles and stereotyped constructions of masculinity and femininity
- male peer relations that emphasise aggression and disrespect towards women (Our Watch, ANROWS & VicHealth 2015; see also VicHealth 2007).

These key 'drivers' are reinforced by other factors, including the condoning of violence in general, socio-economic inequality and discrimination, individual experiences of violence, and weakening of prosocial behaviour, particularly due to the harmful use of alcohol.

For example, men who hold traditional views about gender roles and relationships and have a strong belief in male dominance are more likely to perpetrate violence against their intimate partners than those who do not (Our Watch, ANROWS & VicHealth 2015; VicHealth 2007; WHO & London School of Hygiene and Tropical Medicine 2010; Heise 2015). Additionally, global comparisons identify higher rates of violence against women in countries in which there is greater gender inequality (United Nations Development Fund for Women 2010; WHO 2013, Our Watch ANROWS & VicHealth 2015). The research also identifies evidence of a 'backlash' response when male dominance is challenged. When women's education increases relative to men's, or when women play a more prominent role in work life, there are increased rates of violence against women (Bailey & Peterson 1995; Atkinson, Greenstein & Lang 2005). This suggests that violence or threats of violence may be used 'to re-establish the traditional "gender order"' (Our Watch, ANROWS & VicHealth 2015, p. 31).

Community attitudes that support traditional gender roles, trivialise violence or blame the victim, can contribute to the acceptance of family violence. A national survey in 2013 found that family violence is still not well understood in the Australian community (VicHealth 2014). While almost all respondents acknowledged slapping, pushing or threatening as forms of partner violence, they were less likely to recognise controlling a partner's social relationships or access to finances (VicHealth 2014; see also a survey of young Australians by Our Watch [2015]). Many believed that violence against women is caused by an inability to manage anger, and many found it hard to understand why women stay in a violent relationship (VicHealth 2014). Research commissioned by the Australian government demonstrates that, among young people and adults, there are prevailing attitudes that blame female victims for violence, minimise disrespectful or aggressive behaviour by men and boys, and show empathy with male perpetrators (Taylor Nelson Sofres 2015).

Although family violence is prevalent across all cultures and socioeconomic groups, certain groups of women experience much higher rates of violence than others. For example, cross-country comparisons suggest that the prevalence of violence against women is highly variable between

countries (WHO 2013; Stockl et al. 2013). While cultural norms relating to gender and attitudes towards violence against women may contribute, they are only part of the picture. For women from migrant and refugee communities, experiences of family violence are also affected by migration and settlement experiences, changes in gender dynamics in families, economic factors, and racism, social exclusion and discrimination in the Australian community (Multicultural Centre for Women's Health 2015, Webster & Flood 2015).

Disadvantage, marginalisation and discrimination intersect with gender, creating additional barriers for some women and children who experience family violence. For example, nationally, Indigenous women experience disproportionately high levels of family and sexual violence, (Cussen & Bryant 2015b). The effects of colonisation, discrimination and intergenerational trauma contributes to these high rates of violence (Aboriginal Family Violence Prevention & Legal Service Victoria 2015). Women with disabilities also experience high rates of violence from multiple perpetrators, and disability-based discrimination is a contributing factor (Woodlock et al. 2014, Women with Disabilities Victoria 2015). For women from migrant and refugee communities, language and cultural differences, social isolation, prejudicial attitudes, and inadequate or culturally inappropriate services may prevent them from seeking assistance (Bhandary & Byrnes 2014; Rees & Pease 2006; inTouch Multicultural Centre Against Family Violence 2015; Multicultural Centre for Women's Health 2015; Webster & Flood 2015).

Other factors that may contribute to high rates of family violence include unemployment and low income, poor mental health, childhood abuse and/or exposure to violence, and alcohol or drug abuse (VicHealth 2007; WHO & London School of Hygiene and Tropical Medicine 2010). However, by themselves, these factors have been found to be neither necessary nor sufficient conditions for family violence to occur (OurWatch, VicHealth & ANROWS 2015; VicHealth 2007). For example, there are mixed research findings in relation to the contribution of socioeconomic factors to rates of family violence (Our Watch, VicHealth & ANROWS 2015), with some studies finding an association between low incomes or disadvantage and increased violence (for example, Benson et al. 2003; Sabina 2013), and others finding none (for example, Mouzos & Makkai 2004, European Commission 2010).

As the recently developed Australian prevention framework identifies, the association between socioeconomic factors and violence is best understood 'in conjunction with backlash theories' (Our Watch, VicHealth & ANROWS 2015, p. 31). As discussed earlier, there is evidence of a 'backlash' response to change that occurs in societies where expected power hierarchies are challenged. Research identifies that men who have fewer economic and social resources than their partners (whether in the form of employment, education or income) are more likely to perpetrate violence against women, 'but this is primarily among men holding stereotypical beliefs about their roles as "providers"' (Our Watch, VicHealth & ANROWS 2015, p. 31; see also Bailey & Peterson 1995; Atkinson, Greenstein & Lang 2005).

Some research shows that the risk and severity of violence may increase with alcohol or drug use (for example, Abramsky et al. 2011; Graham, Bernards & Wilsnack 2011; Gil-Gonzalez et al. 2006). However, the evidence for a causal association between the abuse of alcohol and violence is weak (Gil-Gonzalez et al. 2006; OurWatch, VicHealth & ANROWS 2015; Taft & Toomey 2005). Most women who are subjected to physical violence report that their partner was not drinking or using drugs at the time (Mouzos & Makkai 2004). The social context in which alcohol is consumed also plays a role (Webster & Flood 2015; Bennet & Bland 2008). For instance, only a small number of women act aggressively when intoxicated (Taft & Toomey 2005). Some argue

that substances are used by male perpetrators to give themselves permission to act in ways they know are unacceptable (Bennet & Bland 2008; Humphreys, Thiara & Regan 2005; Holmila et al. 2014).

Factors such as drugs and alcohol, childhood abuse or poor mental health in perpetrators can exacerbate the frequency or severity of violence, but only when they occur in conjunction with the key determinants of violence outlined earlier (VicHealth 2007; OurWatch, VicHealth & ANROWS 2015).

CONCLUSION

Research has clearly established that the majority of intimate partner homicides are perpetrated by men and occur in the context of prior family violence. Women's attempts to leave the relationship frequently precede these homicides. Socially constructed notions of masculinity and entitlement to power and control play a key role, and offenders often continue to blame the victim and minimise their responsibility after the homicide. The research highlights that individual factors such as unemployment, substance abuse or mental health problems are contributing factors that may increase the risk of men perpetrating family violence and/or intimate partner homicide, particularly when combined with traditional attitudes about gender and relationships.

Family violence and intimate partner homicides continue to be serious social problems in Australia. State and federal governments have acknowledged the need to take action to prevent family violence and homicides, for instance, see the Victorian Government's *Action plan to address violence against women and children 2012–2015* (Victorian Government 2012) and the *National plan to reduce violence against women and children 2010–2022* (Council of Australian Governments 2011, 2015). In service, policy and legal responses, a shared understanding of the gendered nature of family violence and intimate partner homicides is necessary for an effective system response to address family violence, and to prevent further deaths (DVRCV 2015; Our Watch, VicHealth & ANROWS 2015).

There have been considerable reform efforts to improve legal responses to intimate partner homicides over recent decades. The Supreme Court of Victoria has identified that 'homicide cases before the Supreme Court represent family violence at its most extreme' (Supreme Court of Victoria 2015, p. 4). As a superior court, it plays a key role in setting precedents to be followed, and the Supreme Court's response to family violence matters is 'a small, but important part of the overall response to family violence in our community' (p. 1). Additionally, the Court noted that: 'Analysis of these cases can provide valuable insights and inform prevention strategies in the broader context' (p. 1).

This paper provides an analysis of 51 intimate partner homicides by men in Victoria between 2005 and 2014, identifying the key factors involved and legal system responses. It also includes a brief overview of intimate partner homicides by women in Victoria during the same period (Chapter 4). The following chapter will outline the law reforms in Victoria since 2005, which were introduced in order to improve the legal responses to intimate partner homicides.

CHAPTER 2

Law reforms to improve responses to intimate partner homicides

In July 2003, James Ramage strangled his wife Julie at their former home in Melbourne. Julie had left James several weeks before the killing, which was, according to the sentencing judge, 'sudden, unexpected, and emotionally destabilising' for James (R v Ramage [2004] VSC 508, para. 5). On the day Julie was killed, she told James that their relationship was over. James alleged that she taunted him by comparing him to her new partner. James said he 'lost control' and killed her. At his trial, he argued both lack of intent and provocation. The jury was told that James was controlling but heard little detail about this. The jury did not hear how James had broken Julie's nose by headbutting her early in their marriage, or that she had feared he would kill her (Kissane 2004; Cleary 2005). This evidence was ruled as inadmissible at the trial because it was hearsay, had happened some time before the homicide, and was unduly prejudicial to the accused. The jury found James Ramage not guilty of murder, but guilty of manslaughter. He was sentenced to 11 years' imprisonment with an 8-year minimum non-parole period.

James Ramage's conviction for the provocation manslaughter of his wife was the subject of considerable public outrage in Victoria. It occurred at a time when the Victorian Government was considering the introduction of comprehensive reforms to the laws relating to defences to homicide. For several years, researchers and community campaigners had been calling on the government and legal system to reduce gender bias in legal responses to intimate partner homicides.¹⁴ Specifically, there was concern about the law's inability to recognise the nature and impact of family violence and its role in intimate partner homicide, whether in the case of a man who kills as part of a pattern of family violence or a woman who kills in response to family violence. The two key strands of concern focused on men using the partial defence of provocation to excuse

14 For instance, Phil Cleary, whose sister Vicki Cleary was killed by her ex-partner in 1987; the Federation of Community Legal Centre's Heather Osland campaign; Feminist Lawyers; the Victorian Women's Trust; and Jane Ashton, Julie Ramage's sister.

their actions in killing their intimate partners,¹⁵ and women who kill to protect themselves from serious harm or death in the context of ongoing family violence not being able to successfully raise self-defence.¹⁶

This chapter will outline key reforms to defences to homicide that have been implemented in Victoria as a means to address some of these concerns. It will firstly give a brief overview of homicide offences and available defences and the purposes of sentencing.

HOMICIDE LAWS

There are two primary homicide offences: murder and manslaughter. To be convicted of murder a person must be found (beyond reasonable doubt) to have intended to kill or cause serious injury (grievous bodily harm) or to have known that death or serious injury was a likely result of their actions. Murder can carry a much higher sentence than manslaughter. A person convicted of murder is liable to life imprisonment (*Crimes Act 1958* [Vic] s. 3), while a person convicted of the lesser crime of manslaughter may receive a maximum sentence of 20 years (*Crimes Act 1958* s. 5).

A person may be found guilty of manslaughter if they committed an unlawful and dangerous act or a negligent act but did not intend to kill or cause grievous bodily harm. There are also a number of defences to a charge of murder. The defences of self-defence and mental impairment can result in a person being acquitted of murder. There have also been ‘partial’ defences, which reduced the offence to provocation manslaughter or defensive homicide, but these have been abolished in Victoria. The approaches taken by prosecuting and defence counsel will be strongly influenced by these available options.

VICTORIAN REFORMS IN 2005

In September 2001 the Attorney General gave the Victorian Law Reform Commission (VLRC) a reference to review the defences to homicide. After a lengthy process of consultation, the VLRC proposed a series of recommendations for changes to the laws relating to homicide, as outlined in *Defences to homicide: final report* (VLRC 2004). Subsequently, a raft of legislative reforms were implemented in Victoria through the *Crimes (Homicide) Act 2005* (Vic). The amendments included:¹⁷

- repealing the partial defence of provocation
- clarifying the requirements of self-defence to better accommodate the experiences of abused women who kill in ‘non-confrontational’ circumstances (s. 9AC)
- recognising excessive self-defence through the creation of a new offence of defensive homicide (s. 9AD)
- clarifying the laws of evidence so that relevant evidence about family violence can be admitted (s. 9AH).

¹⁵ See for example, Cleary 2002, 2005; Horder 1992; Howe 1994, 1999, 2002, 2010; Scutt 1997; WCAV 1994; Morgan 1997, 2002; VLRC 2002; Department of Justice 2010; Tyson 1999, 2013.

¹⁶ See for example Tolmie 1991; Kirkwood 2006; Sheehy, Stubbs & Tolmie 2012; Sheehy 2014. There was a significant community campaign in Victoria in relation to the case of Heather Osland, who was sentenced in 1996 to 14-and-a-half years in prison for killing her abusive husband. Concerns about Heather Osland’s case were a key reason for the review of defences to homicide in Victoria (VLRC 2003).

¹⁷ The VLRC’s review (2003, 2004) also considered the defences of diminished responsibility, duress and necessity, infanticide, automatism, and mental impairment. These will not be considered further here.

Abolition of provocation as a defence

The partial defence of provocation operated to reduce murder to manslaughter if the following criteria were established:

- (a) there was evidence of provocative conduct by the victim;*
- (b) the defendant lost self-control as a result of that provocation;*
- (c) the provocation was such that it was capable of causing an ordinary person to lose self-control and form an intention to cause serious bodily harm or death; and*
- (d) the provocation must have actually caused the defendant to lose self-control and the defendant must have acted while deprived of self-control and before he or she had the opportunity to regain his or her composure.*

Masciantonio v The Queen (1995) 183 CLR 58 at 66

Historically, the law had some sympathy for killings committed in anger in response to particular kinds of ‘provocative’ conduct (VLRC 2003, p. 45). One of the main contexts in which the defence of provocation developed was in the context of a man who killed his wife upon finding her with a lover.

Criticisms of the controversial partial defence of provocation have a long history (see Horder 1992; Howe 1994, 1997, 2000; Cleary 2005; Morgan 1997; Tyson 1999, 2013). The main concerns were:

- Provocation was a defence used more successfully by male defendants than female defendants (VLRC 2003, p. 53). Provocation was criticised as being based on archetypal male responses to ‘provocative conduct’, such as insults to male ‘honour’ (VLRC 2004, p. 28).
- Provocation condoned men’s violence against women. It was most often used by men who killed their partners in response to jealousy or their female partner attempting to leave the relationship (VLRC 2003, p. 53; VLRC 2004, p. 30).
- Provocation in effect blamed the victim for inciting their own death because of their conduct.
- Provocation perpetuated the myth that family violence by men is the result of a ‘loss of control’ rather than a deliberate, instrumental act to harm or to ensure control (VLRC 2003, p. 61; VLRC 2004, p. 32).
- Provocation was applied to non-violent homosexual advances and used to excuse homophobic killings (Freiberg, Gelb & Stewart 2015, p. 57; VLRC 2004, p. 26).

Provocation was abolished as a partial defence in 2005,¹⁸ but remains a factor for consideration by judges in sentencing offenders. The VLRC was of the view that differences in culpability should generally be dealt with at the sentencing stage (VLRC 2004, p. 57). It did express concern, however, that the problems that led to the abolition of provocation could re-emerge at sentencing (VLRC 2003, p. 103).

The VLRC also identified that a risk that a lack of information about usual patterns of family violence might lead courts to impose inappropriately low sentences on offenders who claimed that the killing was a one-off emotional response to a particular situation, such as the partner’s decision to leave, but who in fact had been violent to their partners throughout their relationship (VLRC 2004, p. 289). To address this, the VLRC recommended that expert social framework evidence about family violence could be relevant for the prosecution to use in sentencing, noting that ‘the

18 Provocation has also been abolished in Tasmania and Western Australia and modified in New South Wales and Queensland.

prosecution's sentencing submission could refer to evidence about previous patterns of violence which exacerbate the culpability of an offender' (p. 290).¹⁹

Since the 2005 reforms came into effect, there have been a number of cases where a provocation-type claim has been made by the accused and/or his defence counsel to argue for a reduction in culpability for murder and as a factor in sentencing. In Chapter 9 we discuss cases in which the accused mobilised a provocation narrative as part of the explanation of the killing. In Chapter 10 we examine claims of mitigating provocation in sentencing.

Clarification of self-defence

The reforms recommended by the VLRC were intended to address the barriers women face in establishing their actions as self-defence. Self-defence has traditionally been framed around immediate confrontations between men of relatively equal strength. Research undertaken by the VLRC (2003) on homicide prosecutions in Victoria from 1996 to 2001 demonstrated that self-defence was most frequently and successfully argued by men when they killed in the context of a spontaneous fight with another man – usually a friend, acquaintance or stranger (p. 112). However, women rarely kill in these circumstances; they are far more likely to kill to protect themselves from a violent intimate partner. In intimate partner homicides committed by women where the woman has previously been subjected to family violence, her actions may not be a response to an immediate attack but rather to ongoing violence or the threat of violence. As women are often smaller and physically weaker than their male partners, women may kill their abusive partners when they are asleep or have their guard down (VLRC 2004, p. 62). In intimate partner homicides, women typically use a weapon, such as a knife, in response to a man who is not using a weapon. Therefore, the actions of a woman in killing an abusive partner may appear 'disproportionate' to the threat, and consequently 'unreasonable', an interpretation that reflects what the VLRC said was a fundamental 'failure to recognise the nature of violent relationships' (VLRC 2003, p. xix).

Under the 2005 Crimes (Homicide) Act legislation, the statutory definition of self-defence provided 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 really serious injury (s. 9AC).

This provided a subjective test equivalent to that previously established in the common law.

If the jury accepted that a defendant held a subjective belief that their conduct was necessary, the jury then had to consider whether the person had 'reasonable grounds' for their belief (s. 9AD). If the jury found that the person did have 'reasonable grounds' for the belief that they had to kill in self-defence, the person would be acquitted. If they did not have reasonable grounds, the defendant would be found guilty of the (now abolished) offence of defensive homicide. The 2005 amendments also made it clear that, in cases of family violence, self-defence could be raised even if the accused person was responding to a harm that was not immediate, or if excessive force was used (s. 9AH).

¹⁹ See also 'Admissibility of evidence of family violence' on page 21.

It was, alternatively, possible for the jury to find the defendant guilty of the lesser offence of manslaughter by unlawful and dangerous act, or by gross negligence, if they did not have the level of intention required to prove murder.

Introduction of defensive homicide

The VLRC recommended the introduction of a partial defence of excessive self-defence to 'give women and others who kill in response to family violence a possible partial defence, should they be unable to successfully argue self-defence' (2004, p. 102). Instead of a defence, the reforms established a new, less serious offence of defensive homicide to fulfil this role.²⁰ In introducing defensive homicide in parliament, then Attorney-General Rob Hulls, observed that both self-defence and provocation had 'evolved from a bygone era' (Office of the Attorney-General Victoria 2005).

Section 9AD of the *Crimes Act 1958* provided that defensive homicide was relevant as follows:

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.

Thus, where a defendant could demonstrate that they had a *genuine belief* in the need to kill in self-defence, but was found to have had no reasonable grounds for that belief, they could be acquitted of murder and found guilty of defensive homicide.

Admissibility of evidence of family violence

A key new provision in the 2005 homicide legislation was section 9AH, which provided for evidence highlighting the relationship and social context of family violence to be admitted in cases of homicide.

The legislation provided that family violence evidence (as elaborated in s. 9AH[3]) could be admitted as relevant to determining whether the person had the required belief in the necessity of their actions in self defence (s. 9AC) and/or whether they had 'reasonable grounds' for that belief (s. 9AD).

While evidence of family violence was admissible prior to the reforms if it was accepted as relevant, the new legislation made it clearer what evidence could be relevant and how it may be relevant. The 2005 amendments broadly defined family violence to include physical, sexual or psychological abuse (which need not involve actual or threatened physical or sexual abuse), and intimidation, harassment, damage to property, or threats of any of those forms of abuse (s. 9AH[4], now s. 322J). Under the 2005 reforms, the evidence can include the history of the relationship between the accused person and a family member, the nature and dynamics of violent relationships generally, and the effects of family violence. These effects may include the possible consequences of separation from the abuser, the psychological impact of violence on people who are or have been in a relationship affected by family violence, and social or economic factors that impact on people who are or have been in a relationship affected by family violence (s. 9AH[3]).

Allowing admission at the trial of such 'social context evidence', which provides a broader understanding of the context of family violence and challenges common misconceptions, was a

²⁰ Defensive homicide operated not only as an alternative verdict to murder, but also as an offence in itself.

response to concerns over the widespread use of pathologising legal narratives in explanations of the behaviour of women who kill violent partners (Morrissey 2003; Nicolson 1995; Rollinson 2000; Sheehy 2015; Sheehy, Stubbs & Tolmie 1992; Stubbs 1992; Stubbs & Tolmie 1999, 2005, 2008; Wells 2000).²¹

The VLRC saw this evidence as necessary to build as complete a picture as possible of the situation of the accused prior to the homicide. To overcome the potential problem caused by judges and jurors relying on their own knowledge and understanding of violent relationships to assess what ‘normal’ behaviour might be for a victim of abuse, the VLRC recommended that the evidence be supplemented wherever possible with expert evidence on family violence, including case-specific expert evidence (VLRC 2004, p. 160). The VLRC emphasised that arguments put to the judge and jury about the situation of the accused and his or her reactions should be informed by current expert knowledge about the nature and dynamics of family violence (p. 141). The VLRC also pointed out that evidence from a professional who has expert knowledge of family violence is useful not only during trials, but also for judges in sentencing offenders (pp. 187, 289).

The reforms were specifically intended to recognise the potentially cumulative effect of family violence on an individual and the particular dynamics of abusive relationships (Crimes [Homicide] Act, s. 9AH; Douglas 2008, pp. 55–6; Douglas 2012, p. 369). Family violence evidence can assist a jury to understand why a woman may subjectively believe it to be necessary to kill her partner to defend herself in the context of ongoing family violence, even if the threat of violence is not immediate. However, as explained above, satisfaction of the subjective test does not necessarily result in an acquittal. The jury may be satisfied that the belief was genuine, but still conclude it was not ‘reasonable’ – in which case they could find the offender guilty of the offence of defensive homicide.

Evidence Act reforms

The VLRC also identified that ‘establishing the facts in a homicide trial, including where there is a history of prior violence between the accused and the deceased, poses particular challenges for both the prosecution and the defence as one of the most important witnesses to the event is dead’ (VLRC 2004, p. 131). In some cases, the rules of evidence in relation to hearsay statements prevented family violence evidence from being adduced in trials (for example, where a deceased victim had previously told other people about family violence). The VLRC recommended the introduction of exceptions to the hearsay rule in criminal proceedings for murder or manslaughter, for example, to allow admission of evidence of a previous representation made by a person who is not available to give evidence (pp. 142–159).

Changes to hearsay rules were introduced as part of more extensive reforms to the law regarding the admissibility of evidence in Victoria. The rules of admissibility of evidence in Victoria are determined according to the *Evidence Act 2008* (Vic) (discussed further in Chapter 8).

²¹ In particular, the use of ‘battered women syndrome’, which stereotypes female defendants as helpless, had resulted in a focus on women’s psychology rather than on the social and economic forces that prevent women from leaving violent partners (Randall 2004; see also Ramsey 2010).

HOMICIDE LAW REFORMS IN 2014

In 2014 a number of further reforms were made to the homicide laws through the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic):

- abolition of defensive homicide
- changes to self-defence
- changes to family violence evidence provisions
- introduction of jury directions about family violence
- amendments to evidence laws to prevent the use of evidence demeaning the deceased.

Abolition of defensive homicide

The abolition of defensive homicide followed the release of a discussion paper in 2010 by the Victorian Department of Justice (DoJ, now the Department of Justice and Regulation) calling for submissions on whether defensive homicide was being used appropriately and should be retained (DoJ 2010). There was a change of government shortly after and the incoming government also noted concerns about the use of defensive homicide, including that the laws were overly complex for juries to understand, and that defensive homicide was not operating as intended because it was predominantly used by male offenders who killed other men. Concern was also expressed by media commentators, including the claim that the defence had been ‘hijacked by thugs and drug addicts’ (Hunt 2013). A further review was announced, and submissions were invited in response to a consultation paper released by the Department of Justice in September 2013 (DoJ 2013), proposing the abolition of the defensive homicide. In 2014 the offence of defensive homicide was abolished through the *Crimes Amendment (Abolition of Defensive Homicide) Act*.²²

Changes to self-defence

The 2014 amendments reframed various defences to homicide and relocated and renumbered them in the *Crimes Act 1958*. The defence of self-defence was reformulated to require both a subjective belief that the conduct was ‘necessary in self-defence’ (s. 322K[2][a]) and – the only substantive change – 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’. This reform was intended to simplify self-defence and, in the context of family violence, to assist jurors to focus on the situation faced by the accused (Victoria, Legislative Assembly 2014, p. 2835).

Proving that the response was ‘reasonable in the circumstances’ is central to whether or not the person will be acquitted, and the amendments included that a person who was intoxicated when committing an offence, who raises self-defence or any of the other defences to homicide, will have the ‘reasonableness’ of their response assessed against the standard of a ‘reasonable person who is not intoxicated’, unless their intoxication was not self-induced (s. 322T).

The 2014 amendments extended self-defence, duress and necessity (‘sudden or extraordinary emergency’) to non-fatal offences to the person, but give them more limited operation where they were to be raised as defences to a charge of murder, where it would have to be shown that the threat or emergency was of ‘death or really serious injury’. A note to s. 322K defining self-defence specifically states that a person may claim to have acted in self-defence, for example, in order to ‘prevent or terminate ... unlawful deprivation of liberty’ (s. 322K[2]), a scenario previously

²² As outlined in Chapter 4, we argued that defensive homicide should be retained (see also Crofts & Tyson 2013; Tyson et al. 2015; Ulbrick, Flynn & Tyson forthcoming 2016).

recognised in the 2005 amendment to the application of self-defence to manslaughter as potentially relevant for victims of family violence.

Family violence evidence provisions

The 2014 amendments largely reproduced the family violence provisions of the previous legislation (see previous s. 9AH) but clarified their application. They inserted a new s. 322J titled 'Evidence of Family Violence', which spelt out the potential relevance of family violence to self-defence and duress. It restated the broad range of behaviour included in the concept of family violence (now s. 322J, previously s. 9AH) and reaffirmed that family violence evidence can be relevant to a self-defence argument both in relation to the issues of immediacy and proportionality of the action, and to both the subjective and the objective elements of the defence (s. 322M). Its application for the defence of duress is similarly spelt out in s. 322P.

Directions to the jury about family violence

The 2014 amendments also addressed the ways a jury can be assisted in such trials by providing for the trial judge to give 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 (including, for example, that it is not uncommon for a victim to stay with an abusive partner or to not report violence to police).²³ These directions were introduced to address potential juror misconceptions about family violence (Victoria, Legislative Assembly 2014, pp. 2835). The directions were incorporated into the *Jury Directions Act 2013* (Vic) in ss. 32(6) and 32(7) respectively (now ss. 59 and 60 of the *Jury Directions Act 2015* [Vic]).

Amendment to the Evidence Act

Finally, the Crimes Amendment (Abolition of Defensive Homicide) Act includes an amendment to the evidence legislation allowing the exclusion of evidence 'if its probative value is substantially outweighed by the danger that it might unnecessarily demean the deceased in a homicide trial' (s. 1[b] introducing a new s. 135[d] to the Evidence Act). This is aimed at preventing defence arguments that inappropriately allege behaviour by the victim, which effectively blames the victim for her own death. At the same time, recognising that a victim who killed an abusive partner would need to introduce family violence evidence, the new provision includes a note specifically exempting family violence evidence from this principle.²⁴

CONCLUSION

This chapter has outlined the changes to homicide laws in Victoria in 2005 and 2014, which were intended to address gender bias in the law by improving legal responses to intimate partner homicides that occur in the context of family violence. The key reforms were amendments to self-defence, the creation and then abolition of the offence of defensive homicide, the introduction of specific family violence social context evidence provisions, new jury directions in relation to family violence, and changes to the Evidence Act to disallow evidence that unnecessarily demeans the deceased.

²³ Defence counsel must request the judge to give these directions.

²⁴ The note exempts the use of family violence evidence in such cases even though such allegations may be considered offensive to the deceased (DoJ 2013, p. 53).

These have all been important reforms expressly recognising the gendered nature of the defences to homicide. They are aimed at making the defences more accessible to women who kill an abusive partner, and at assisting jurors to understand the dynamics of family violence relevant to both men and women who kill their intimate partner. We argue that defensive homicide should have been retained as a safety net for women who kill abusive partners (Tyson et al. 2015). With that reservation, we consider that the reforms have appropriately responded to concerns about these defences. The reforms need to be monitored to determine how they work in practice.

This report will explore homicide cases that occurred after the 2005 reforms to examine what impact the reforms have had on legal responses to intimate partner homicides, particularly in terms of the recognition of family violence. The following chapter outlines the aims of the research and the method of data collection and analysis.

CHAPTER 3

Aim and methodology

RESEARCH AIMS AND APPROACH

The aim of this research is to explore the recognition of family violence in legal responses to intimate partner homicides since the reforms to the laws of homicide in Victoria in 2005. The study focuses on the evidence of family violence and the ways in which family violence was described, discussed and responded to by legal professionals during the prosecution. While we consider how family violence is identified and presented, we are primarily interested in how it is understood and what impact it has on the explanations about the perpetrators' and victims' behaviour and the responses to them in legal proceedings. In examining the recognition of family violence, the research also considers the use of gendered narratives that excuse or minimise men's violence against women. The key research question is 'How is family violence recognised in criminal prosecutions for intimate partner homicides in Victoria?'

The study examines intimate partner homicides in Victoria that occurred since the reforms to the homicide laws in November 2005 until 31 December 2014. Our focus in this paper is homicides by male offenders (though we provide a brief summary of factors in homicides by female offenders in Chapter 4).

Our analysis of family violence in intimate partner homicides is based on the research evidence (outlined in Chapter 1) and our combined knowledge about the nature and dynamics of family violence. This evidence identifies that family violence, and intimate partner homicides, are a gendered phenomenon. Throughout our qualitative analysis, we apply a family-violence lens²⁵ to the cases of intimate partner homicide by focusing on evidence, information and discussions about family violence.

This study involves a socio-legal theoretical analysis of the cases, drawing on feminist legal storytelling and narrative approaches. These approaches identify the 'stories' or 'narratives' told in legal accounts of violence against women (see for example Morgan 1997; Graycar 1996; Sarmas 1994). These approaches recognise that within the criminal justice process, legal categories and

25 By this we mean that we examined the homicide cases in the light of the current evidence-base about the nature and dynamics family violence.

frameworks constrain the telling of stories or narratives about violence, and that the narrative that emerges about ‘the facts’ is a particular interpretation of the evidence, and does not necessarily reflect the ‘truth’ or ‘reality’ of women’s experiences. In characterising law as narrative, the legal storytelling approach debunks the law’s claims to autonomy and objective truth (McBarnet 1981).

TERMINOLOGY AND DEFINITIONS

In this paper, we use the term ‘intimate partner homicides’ and ‘sexual intimacy homicides’ to describe the cases we are examining. The majority of the cases we examine involve the killing of an intimate partner.²⁶ However, our case selection criteria include killings of ‘sexual rivals’ as well as intimate partners or ex-partners. A sexual rival²⁷ refers to a person whom the offender considered to be a rival because he was associating with the offender’s partner or ex-partner. Seven cases in our study involved the killing of a sexual rival. These cases share similar characteristics to intimate partner homicides as they frequently occur in the context of prior family violence and/or sexual jealousy and are frequently intended to harm the partner or ex-partner in addition to the person killed. These cases are included in our study in order to enable comparisons of our data with the data provided by the VLRC in their review of homicide defences (VLRC 2003, p. xiv).²⁸ In their study, the VLRC referred to all of these homicides as ‘sexual intimacy homicides’. In this paper we use the terms ‘sexual intimacy homicides’ and ‘intimate partner homicides’ interchangeably. Our conclusions refer primarily to ‘intimate partner homicides’ as they form the majority of cases and capture the focus of the study, which is on the history of the relationship between the man and his partner prior to killing her or his sexual rival.

Definition of family violence

For the purpose of the research we adopted the definition of family violence used in s. 5(1) of the *Family Violence Protection Act 2008* (Vic).²⁹ The definition includes physical or sexual violence, already recognised as criminal offences. It also includes non-physical acts, such as psychological or emotional abuse and economic abuse, as well as behaviour that is threatening or coercive, or controls or dominates a family member and causes them to feel fear for their wellbeing or safety, or for the wellbeing or safety of others. It further includes exposing a child to abusive behaviour,

26 We included homicides perpetrated by marital or de facto partners and partners in ongoing sexual/intimate relationships, including extramarital affairs. We did not include homicides where the sexual relationship had not been ongoing (i.e. we did not include cases where the homicide occurred on the occasion the accused and deceased first met). Our study includes heterosexual and homosexual intimate relationships (there was only one case of a killing in the context of a same-sex relationship in our sample).

27 The term ‘sexual rivals’ was used by the VLRC (2003) and we adopted this term for our study.

28 The source of cases examined by the VLRC was based on files held by the Office of Public Prosecutions. This was a more comprehensive source of data than the source in our study (the AustLII online database). The VLRC study also included co-accused individuals in their data (for example, cases where more than one person was involved in the homicide), which we did not. It should be noted that, in the homicides by men between 2005 and 2014, which are the focus of our report, there were no cases in which more than one person was charged with a homicide offence.

29 This definition is preferable to the definition in the *Crimes Act 1958* (s. 322J) as discussed in Chapter 2. The Family Violence Protection Act definition is broader and includes reference to coercive behaviour and other acts that control, dominate, or cause the victim to fear for their wellbeing or that of others. Further, the preamble of the Family Violence Protection Act includes information about the gendered nature of family violence and the exploitation of power imbalances. Therefore we have included a recommendation that the *Crimes Act 1958* (s. 322J) should be amended in line with the definition of family violence in the Family Violence Protection Act (see Recommendations, p. 132).

even where the behaviour is not directed at that child. Damaging property and limiting a person's liberty can also fall under this definition.

This broad legislative definition of family violence adopted in our research, reflects a shift, both in Victoria and internationally, to a more comprehensive understanding of family violence as coercive, controlling behaviour. Historically, policy, legal, and criminal justice responses to family violence have been based on a 'violent incident' model, which equates violence with discrete assaults and physical injury (ALRC & NSWLRC 2010; Hanna 2009; Bettinson & Bishop 2015). However, the experiences of those subjected to family violence have demonstrated that much of the harm does not relate to physical violence or injury. Perpetrators use a range of tactics to degrade, control and isolate their partner, and the majority of these tactics do not involve physical violence.³⁰ This has been described as 'patriarchal or intimate terrorism' (Johnson 2008) and 'coercive control' (Stark 2007). Most of these tactics are not recognised as criminal offences.³¹

In our examination of responses to family violence, we applied this broad definition. Based on this approach we identified examples of family violence, such as possessiveness and controlling behaviour, in the cases we analysed. These behaviours were not necessarily identified or described as evidence of 'family violence' by the legal professionals involved.

The definition of family violence in the *Crimes Act 1958* (s. 322J), outlined in Chapter 2) is also quite broad. It frames the legal approaches to the cases in our study, and will be taken into account in the discussion of family violence throughout this report.

CASE SELECTION AND SOURCES

Intimate partner homicides that occurred after 23 November 2005 were included if the accused had been committed to stand trial on a charge of murder or manslaughter (and the case had proceeded beyond the committal hearing). Any cases that had not proceeded to a sentencing hearing for murder, manslaughter or defensive homicide by 31 December 2014 were excluded. Matters that had proceeded beyond the sentencing stage but were awaiting appeal were included.³²

Cases were identified by monitoring reports in the media and via the Australasian Legal Information Institute (AustLII) database, which is Australia's largest online database on legislation and case law. However, we note that a limitation of this database is that not all cases that are heard in the Victorian Supreme Court are published online. A small number of the sentencing judgments are restricted to protect individuals involved in the case. Additionally, there may be a delay in the publication of some cases. Some homicides are followed by the suicide of the perpetrator, and

³⁰ Tactics reflect the changing social and technological context. For example, technology is increasingly used as part of the abuse – such as through phone location tracking, threats made via text messages, posting sexually intimate photos online or via social media (Woodlock et al. 2014).

³¹ We note that in the United Kingdom the *Serious Crime Act 2015* (UK), which received royal assent on 3 March 2015, creates a new offence of coercive and controlling behaviour in intimate or familial relationships (s. 76). The offence carries a maximum sentence of 5 years' imprisonment, a fine or both.

³² Our study excluded:

- cases in which a person was initially charged with a homicide-related offence but the prosecution did not proceed beyond the committal stage of the Magistrates' Court (for example, the case of Freda Dimitrovski, see Kirkwood, McKenzie & Tyson 2013, p. 13)
- cases in which the accused was found not guilty by reason of mental impairment (these matters proceeded as a hearing pursuant to s 21[b] of the *Crimes [Mental Impairment and Unfitness to be Tried] Act 1997* [Vic], and were heard by a judge, based on the agreement between the prosecution and the defence that the evidence established the defence of mental impairment)
- cases in which the accused was found guilty of manslaughter by suicide pact.

these cases are not included in our research as the perpetrator could not be subject to criminal prosecution. Therefore, it is important to acknowledge that our sample does not represent all intimate partner homicides that occurred in Victoria during this period.

The sources of data were primarily transcripts of trials and plea hearings which we obtained from the Victorian Government Reporting Service (VGRS) and sentencing remarks which are publicly available via AustLII.³³ Some supplemental information was obtained from relevant media reports and coronial findings.

Through this process, a total of 51 homicides by male offenders were identified and are the focus of this report. These cases are discussed in Chapters 5–10. Additionally, by way of context, Chapter 4 provides a brief summary of 13 cases of intimate partner homicide by women since the reforms in 2005.

Ethics clearance for this research was granted by the Monash University Human Research Ethics Committee (Reference Number CF12/0758 – 2012000334) on 21 May 2012 and 15 April 2014.

DATA ANALYSIS

The research involved both quantitative and qualitative data analysis techniques. The quantitative and descriptive data identifies key demographic information relating to the characteristics of the accused, the killing, the deceased, and the outcomes of the prosecution process (described in Chapter 5), as well as the identification of any risk indicators in the cases (Chapter 6). The sources for this analysis were the sentencing remarks and Court of Appeal judgments in each of the 51 cases, with additional information regarding evidence of prior family violence obtained from the plea and trial transcripts, where available.

The qualitative analysis of legal responses and narratives (described in Chapters 6–10) drew on sentencing remarks and Court of Appeal judgments, as well as transcripts of plea hearings and trials. This detailed analysis was based on transcripts in 31 cases:

- 22 cases in which the accused pleaded guilty – in these cases our analysis was based on plea hearing transcripts
- nine cases in which the accused went to trial – in these cases our analysis was based on trial and plea hearing transcripts and rulings.

A cross-section of cases was selected for this detailed analysis to ensure key factors and themes were explored. The focus was on cases where there was evidence of a history of family violence. The selection included cases that involved murder and manslaughter convictions, cases involving current or separated relationships, cases involving different types of family violence, killings of intimate partners and sexual rivals, and cases in which a range of defence narratives were apparent. In some cases transcripts were not available because they were either subject to an appeal or under a suppression order, and these could not be included in the detailed analysis of themes.

The data analysis program NVivo was used to code data from sentencing and appeal judgments into themes. The researchers met regularly to determine the coding scheme and to ensure consistency in coding (including cross coding of a small number of cases). The analysis of pleas and trials was based on manual coding of printed transcripts using colour-coded highlighting to identify themes. The coding process was used to gather data about any evidence of family violence,

33 Access to transcripts was facilitated by the Office of Public Prosecutions, Melbourne, Victoria, and the Victorian Government Reporting Service.

how this was discussed and recognised by the various legal professionals and expert witnesses, information about legal issues relevant to family violence evidence, and narratives that were used to explain, excuse or justify the homicide (including any evidence of provocation-type narratives, such as a loss of control or provocative conduct by the victim).

There are a number of methodological limitations to this study. Firstly, we did not have access to the brief of evidence and therefore relied on the evidence about family violence raised during pleas and trials, based on the transcripts and sentencing remarks. It is likely that in at least some cases there was evidence that was not referred to during the prosecution process either because it was not seen to be relevant or because it was deemed to be too prejudicial to the accused. Secondly, family violence is a hidden phenomenon. Many victims do not disclose violence to others or report it to the police (as discussed in Chapter 1). For this reason it is highly likely that in a considerable proportion of cases, incidents of family violence occurred but were not known to police and witnesses, and therefore this was not part of the evidence presented during the legal process.

The following chapters of this report outline the findings of our analysis of intimate partner homicides. While the focus of our report is on the cases perpetrated by men, in Chapter 4 we provide, by way of context, an overview of our key findings in relation to the cases in which women killed intimate partners.

CHAPTER 4

Intimate partner homicides by women in Victoria (2005–14)

I have never met a person with such obsessive jealousy, and it was a problem every day ... he would even follow her when she went to the toilet, and stand outside the door. He followed her everywhere she went. I am 100 per cent sure that [he] would have killed mum eventually.

Letter provided to the court by the accused's son,
The Queen v Hudson [2013] VSC 184, para. 28

This chapter provides a brief summary of key themes in cases of women who killed intimate partners in Victoria between 2005 and 2014. It provides an overview of the findings of stage one of our research project.³⁴ We continued to monitor intimate partner homicides involving female accused during stage two of the project and the additional cases we identified are included in the analysis in this chapter. This chapter also outlines two brief illustrative case studies. The findings show that women continue to face difficulties through the legal process due to limited recognition of family violence and its impact on victims who kill abusive partners.³⁵

The legal outcomes for the 13 female defendants whose cases we identified that proceeded beyond a committal hearing in Victoria³⁶ are shown in Table 5 in Appendix 1.

34 For an outline and discussion of the findings from stage one see our discussion paper *Justice or judgement? The impact of the Victorian homicide law reforms on responses to women who kill intimate partners* (Kirkwood, Tyson & McKenzie 2013), and also Tyson et al. (2015) and Tyson, Kirkwood & McKenzie (forthcoming 2016).

35 For this reason we have argued for the continued need for a partial defence such as defensive homicide (Tyson et al. 2015).

36 Our study does not include the small number of cases in which prosecutions were discontinued.

HISTORY OF FAMILY VIOLENCE

In almost all of the cases (12 of the 13 cases), there was evidence of previous controlling, violent, threatening or sexually abusive behaviour by the deceased. In four cases the deceased had been subject to a family violence intervention order, and in an additional case the deceased had previously been convicted of a family violence-related offence, for which he had served time in prison.

The killings often occurred in the context of recent abusive behaviour or threats by the deceased. In nine cases the accused alleged that the killing was a defensive response to violence or threatened violence by the deceased. Additionally, in one case there was evidence that the deceased had slit the accused's throat three days prior to the killing. In a further case, the accused alleged that the killing was a response to the deceased having indecently assaulted their daughter.

LEGAL OUTCOMES FOR WOMEN ACCUSED

Table 5 in Appendix 1 shows that of the 13 cases of women who killed intimate partners, nine were convicted of manslaughter (five via a plea of guilty), and four were convicted of defensive homicide (two via a plea of guilty). Four women raised self-defence at trial and none were successful.

MISCONCEPTIONS ABOUT FAMILY VIOLENCE

Despite the broad definition of family violence in the Crimes (Homicide) Act (outlined in Chapter 2) our research shows that there continues to be a greater likelihood of courts recognising physical violence than other forms of family violence such as sexual assault, threats, and coercive and controlling behaviour. Consequently, patterns of violent and abusive behaviour, which have a cumulative effect on victims, were not recognised.

Despite an increase in overall awareness of family violence in the legal and wider community, misconceptions about family violence were evident in legal narratives in the cases we analysed. For example, there was a failure to recognise how a history of being subjected to family violence may affect women's responses to the threat of violence, limited understanding of why victims may remain in abusive relationships and little recognition of the cumulative impact of various forms of family violence (for further discussion see Tyson et al. 2015).

Feminist legal academics have argued that stereotypes about battered women make it very difficult for women who kill abusive partners to meet the threshold required to successfully claim self-defence (Douglas 2012; Stubbs & Tolmie 2008). In a study of homicides by women in Victoria and Queensland, Douglas found that those who were acquitted on the grounds of self-defence had a prior history of serious physical violence by the abuser, had 'actively protected their children from the abuser, and the killing was the first time ... they had physically fought back' (Douglas 2012, p. 377). She argues that these women could be described as 'benchmark battered women': they were physically smaller than their partners, they did not have a history of drug use or a criminal record, they had previously attempted to leave the relationship and they had sought intervention from the police (p. 377). By contrast, the women in the other cases analysed by Douglas failed to meet this 'benchmark' in some way (p. 377). They were thus unable to make a successful argument that they had acted in self-defence. Likewise, none of the women in our study fit the criteria for this 'benchmark'.

BARRIERS FOR INDIGENOUS WOMEN

Four of the 13 women in our study were Indigenous. Indigenous women are over-represented as both victims and perpetrators of domestic homicides in Australia (Chan & Payne 2013). This over-representation needs to be considered in light of the high rates of violence against Indigenous women and children in Australia (Mouzos & Makkai 2004).

All of the Indigenous women in our study were convicted of manslaughter. In three of the cases, an early plea of manslaughter was accepted by the Crown. In the case of Tracey Kerr, discussed below, a manslaughter plea was rejected but she was found guilty of manslaughter at trial.

Stubbs and Tolmie (2008) have argued that Indigenous women may be adversely judged against standards based on white, middle-class stereotypes of women's behaviour and consequently may not be seen as entitled to a particular defence or mitigation of sentence. For example, Indigenous women experience high rates of unemployment, poverty, violence, criminal offending and incarceration, alcohol and substance abuse, as well as gender and racial discrimination. They may be less likely to have involved the police or to have pursued legal protection for family violence, and more likely to have physically retaliated against the abuser (p. 141). This may lead Indigenous women to feel pressured to plead guilty to lesser offences rather than go to trial and risk a conviction for murder.

Each of the Indigenous women in our study had a history of being subjected to violence from multiple intimate partners. For instance, the judge said that Melissa Kulla Kulla had suffered abuse 'virtually from the time [she was] born' (*R v Kulla Kulla* [2010] VSC 60, para. 31) and 'had scars all over [her] body from the various injuries inflicted upon [her], by men, over these years' (para. 54). A lifetime of being subjected to violence was also identified in Tracey Kerr's case.

CASE STUDY: TRACEY KERR

In May 2012 Tracey Kerr caused multiple injuries to Doug Barrett, including a stab wound to the neck. He died from a heart attack brought on by the injuries he suffered. Tracey Kerr was charged with murder and was convicted of manslaughter. She was sentenced to 7 years' imprisonment with a minimum non-parole period of 4 years and 6 months (*DPP v Kerr* [2014] VSC 374).

Tracey Kerr told police she was acting in self-defence. She and Doug Barrett had been having a sexual relationship for several months. Tracey Kerr said that she and Doug Barrett had been drinking in the bungalow at the back of his house, and that he tried to rape her, grabbed her by the hair and hit her.

Tracey Kerr had suffered abuse from various perpetrators since childhood. As a child she had been violently raped and spent several months in hospital. This left her with long-term physical and psychological damage, including post-traumatic stress disorder. Tracey Kerr had a history of prior convictions for alcohol and other minor offences. She also had intellectual impairment.

The defence counsel argued that Doug Barrett, an 'older, more capable man', had been taking advantage of Tracey Kerr who was a 'vulnerable, damaged, younger Aboriginal woman', and that there was 'some evidence of family violence by Mr Barrett within their relationship' (Transcript of trial, 12 May 2014, p. 698).

Like the other Indigenous women in our study, Tracey Kerr offered to plead guilty to manslaughter. However, in her case this was rejected by the Crown, who proceeded to trial for murder. The jury ultimately convicted her of manslaughter (*DPP v Kerr* [2014] VSC 374).

LIMITED EFFECT OF NEW EVIDENCE PROVISIONS

In the cases we examined, there was limited uptake of the newly introduced family violence evidence provisions, despite that fact that the majority of cases occurred in the context of a history of family violence. With the exception of the case of Angela Williams, expert evidence was confined to that provided by forensic psychiatrists and psychologists who had undertaken psychological assessments of the women. This evidence did not relate to the broader social context of family violence.

In the case of Angela Williams, an academic with expertise in family violence was called by the defence counsel to provide evidence about the social context of family violence.

CASE STUDY: ANGELA WILLIAMS

In 2008 Angela Williams killed her partner Douglas Kally by hitting him multiple times with his pickaxe at their home. She was found guilty of defensive homicide at trial in April 2014 and was sentenced to 8 years' imprisonment with a minimum non-parole period of 5 years (*DPP v Williams* [2014] VSC 304).³⁷

The defence led evidence that the killing occurred during a confrontation in which Douglas Kally accused her of sleeping with another man, pushed, punched and shouted at her and called her a 'fucking fat slut' (para. 15). Angela Williams buried the body in the backyard and told their children, family and friends that Douglas Kally had left to live interstate. Four years later Angela Williams confessed to police and told them she killed him because she had believed her life was in danger.

Evidence at the trial showed that Angela Williams had been a victim of physical, sexual and psychological abuse during her 23-year relationship with Douglas Kally. They began their relationship when she was 17 years old. Douglas Kally was older, and had pressured her to leave school and did not want her to work. He was dominant and controlling throughout the relationship (para. 25). He was known as the local drug dealer and, after his third arrest for drug dealing, forced Angela Williams to take the blame so he could avoid a prison sentence. The couple's two children, who were in their teens at the time of the killing and adults at the time of the trial, told the court they had lived in fear of their father and gave evidence of physical violence and threats by their father towards them and their mother.

The defence called an expert witness to provide the jury with information about the general nature and dynamics of family violence. The witness had an extensive academic background as a researcher in family violence (paras. 33, 34). The admission of this expert evidence was in line with the intentions of the VLRC (2004, para. 4.131), which had sought to encourage the courts to accept a 'broad range' of experts, including academics and family violence workers, stating that 'people best qualified to give expert evidence on family violence are likely to include those with direct experience working with people who have experienced family violence and with knowledge

³⁷ Angela Williams offered to plead guilty to defensive homicide prior to the trial but her offer was rejected by the Crown.

of current research in the field'.³⁸ This was the first case in which an expert with this background was used by defence counsel to provide family violence social context evidence in relation to a female offender.

In sentencing Angela Williams, the judge acknowledged the significance of family violence and its cumulative impact, noting that it is not uncommon for a victim of violence to use a weapon or to inflict violence that may appear out of proportion to the immediate threat (*DPP v Williams* [2014] VSC 304, paras. 20, 25, 30). However, the judge also outlined a number of aggravating factors, which she said demonstrated a lack of remorse on the part of Angela Williams and a desire to protect herself after she killed her partner. The first was the burying of the body: '[e]ven if you initially did that out of a sense of fear or panic, you were acting to conceal his body and protect yourself from discovery' (para. 38). The other aggravating factor was the 'elaborate series of lies about Mr Kally having run away and abandoned his family' which Angela Williams maintained for four years after killing him (paras. 8, 11, 13, 39).

Concealing the death and telling lies about the whereabouts of the deceased may be consistent with a victim's experience of family violence, considering that victims typically fear that they will be disbelieved or blamed for the violence. This is seen in other cases of women who kill violent partners (for instance in the case of Heather Osland (Kirkwood 1997). Research by Fugate et al. (2005) and Baker (2013) shows that many women fear that their family and friends will not believe that they have been subjected to family violence, and carry a sense of shame and self-blame about the violence they have experienced. A common tactic of a perpetrator of violence is to make his victim feel his violence is her fault. As Baker (2013) has observed, shame and a fear that others will not believe her actions were necessary may contribute to why a woman who kills an abusive partner may conceal her partner's death.

IMPORTANCE OF A PARTIAL DEFENCE FOR MURDER

The case of Angela Williams also highlights the importance of the availability of a partial defence such as defensive homicide for female defendants. Angela Williams was ultimately unsuccessful in arguing self-defence at trial and was convicted of the offence of defensive homicide. Had defensive homicide not been available at the time, she may have been convicted of murder.

Victoria and Tasmania are now the only Australian states that have no partial defence to murder. Other jurisdictions have recognised the need to maintain partial defences, particularly for female defendants (see, for example, NSWSCPDP 2013). Sheehy, Stubbs and Tolmie (2012, 2015) also remain concerned about the impact of abolishing partial defences on women who kill their abusers. Douglas (2012, p. 371) has also noted 'the importance of the "halfway house" provided by defensive homicide'. An analysis of the impact of reforms to abolish partial defences in Victoria, New Zealand and several other jurisdictions has led Wake (2015) to conclude that the risk that the primary victim of the family violence may be convicted of murder is unacceptable and the reforms ought to be reconsidered.

Without the option of an alternative such as defensive homicide, a woman who kills an abusive partner in Victoria faces an 'all or nothing' choice of pleading guilty to manslaughter or arguing

³⁸ The VLRC (2004: 141) further recommended that if the accused is Indigenous, experts should include professionals who have direct experience working with Indigenous women.

self-defence at trial and risking a murder conviction.³⁹ The Crown may not accept a plea of guilty to manslaughter in cases where there is evidence of an intention to kill (such as when there are multiple blows with a weapon). Under recently introduced changes to the law of self-defence in Victoria, in order to claim the full defence and have a real chance at being acquitted, a woman must show that she acted from a genuine fear of serious injury or death, and also that her actions were reasonable in the circumstances.⁴⁰ This is where evidence of family violence is most important in explaining why it could be seen to be reasonable for someone to kill.

The recent amendments to the *Jury Directions Act 2013* in ss. 32(6) and 32(7) respectively (now ss. 59 and 60 of the *Jury Directions Act 2015*) provide for the trial judge to give 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, that it is not uncommon for a victim to stay with an abusive partner or to not report violence to police). It is too early to determine what impact this will have in cases in which women kill abusive partners.

CONCLUSION

Despite the spirit and intentions of the reforms in 2005, this research demonstrates that women who kill in response to family violence are still likely to struggle to successfully argue self-defence, due to a lack of understanding about the impact of family violence and stereotypical ideas about who is a legitimate or 'benchmark' victim. While there have been some improvements in the recognition of family violence, and the new evidentiary provisions make it more likely that family violence will be considered and linked to arguments about the accused woman's actions, our findings show that the recognition of the nature, dynamics and impact of family violence on victims remains limited (Tyson et al. 2015). Gender and culture-based stereotypes continue to influence perceptions of what is a reasonable response in the circumstances.

³⁹ For further discussion on defensive homicide see Tyson et al. 2015.

⁴⁰ As discussed in Chapter 2, the Crimes Amendment (Abolition of Defensive Homicide) Act also introduces a clearer and simpler statutory test for self-defence, which focuses on whether an accused's conduct was a 'reasonable response in the circumstances the person perceives them'. The test promises to be more responsive to the perspectives of victims of family violence.

CHAPTER 5

Intimate partner homicides by men in Victoria (2005–14)

This chapter provides an overview of homicide cases involving men who kill in the context of sexual intimacy. It outlines some of the key characteristics of the offenders, the victims and the context in which the death occurred.

The study identified a total of 51 men who killed in the context of sexual intimacy in Victoria between 23 November 2005 and 31 December 2014.⁴¹ Forty-three of these men killed a female intimate partner or ex-partner, one man killed a male sexual partner, and seven killed a male sexual rival.

CHARACTERISTICS OF THE ACCUSED

Age

The age range of the men in our study at the time of the killing was between 20 and 74 years. Over half (30 offenders) were aged over 40 years at the time of the killing.

The average age of the men was 41 years and 3 months.⁴² As with other studies of domestic homicide (see Cussen & Bryant 2015a, p. 5), this is older than the average age in other studies of male homicide offenders in general (for example, Sentencing Advisory Council 2013; Bryant & Cussen 2015).⁴³

41 As discussed in Chapter 3, 23 November 2005 was when the reforms to Victoria's homicide laws came into effect. Note also data that was excluded as discussed in Chapter 3.

42 Median age was 41 years.

43 For example, in the Victorian Sentencing Council's (2013) statistics for all men sentenced for murder (in all contexts, not only sexual intimacy) between 2007–08 and 2011–12, the average age was 38 years and 10 months. Similarly, the National Homicide Monitoring Program (NHMP) reports that the average of offenders of all known homicide offenders in 2011–12 was 33.2 years, and this age has remained relatively stable since the NHMP commenced (Bryant & Cussen 2015, p. 23).

Place of birth

Almost two-thirds of the men were born in Australia (29 men).⁴⁴ Forty-one per cent (21 men) were born overseas, in a range of countries.

Indigenous status

Only two of the men in our sample were identified as being Indigenous (4 per cent). This contrasts with other Australian data. For example, the National Homicide Monitoring Program (NHMP) found that between 2011 and 2012, Indigenous people comprised 11 per cent of all homicide offenders (Bryant & Cussen 2015). A recent study in NSW reported that 10 per cent of the men who killed intimate partners and 31 per cent of the women who killed intimate partners identified as Aboriginal (NSWDVDRT 2015, p. 6).⁴⁵

Employment status and occupation

Just over half of the men (27 men) were employed at the time of the offence. They worked in a range of occupations including mining, landscaping, retail, accountancy and as small business owners. Thirteen men (25 per cent) were unemployed, and a further seven men were receiving a disability pension.⁴⁶ Additionally, two men were studying and one was retired from the workforce.⁴⁷

Prior convictions

While 45 per cent of the men (23 men) had no prior convictions, the remaining 55 per cent (28 men) had previously been convicted of an offence. Of those men, almost two-thirds (18 men) had convictions for threats or assaults relating to physical or sexual violence. Nine of these 18 men had convictions for violence towards the victim or former partners or other family members, and nine had convictions for violence towards others.

Use of drugs or alcohol

Over half of the accused men (28 men) had a history of drug or alcohol abuse (predominantly alcohol abuse).

In 17 cases (33 per cent) the sentencing judge accepted that drugs or alcohol played a role in the offence.⁴⁸ In most of these cases alcohol was involved (13 cases), while in other cases other substances were involved, often in combination (for example, in three cases the accused had used the drug 'ice' prior to the killing, along with other drugs).⁴⁹

This finding is similar to the rate of drug and alcohol use by offenders in national data on intimate partner homicides (Cussen & Bryant 2015a).

44 In one case there was no information about the accused's place of birth. Percentages are of all cases where information was available.

45 It should be noted that the figure in our study is low in comparison to other data, and is likely to reflect the limited sources of data used in our study. For example, the NHMP study includes data from police services and the National Coronial Information System, while our data is limited to Victorian homicide prosecution data. See discussion in Chapter 3. Future research should try to access additional source data to establish a more accurate picture of Indigenous status.

46 This is a smaller percentage than in the recent survey of homicides nationally, which found that 47 per cent of all male homicide offenders were unemployed (Bryant & Cussen 2015, p. 25).

47 There was no available data regarding employment status in one case.

48 It should be noted that intoxication or ingestion of drugs at the time of the offence was rarely accepted as mitigating the sentence and in some cases it was an aggravating factor.

49 In one case it was unclear whether the judge accepted that the accused's use of substances or alcohol contributed to the homicide.

Mental health conditions at time of the homicide

Nineteen men had been diagnosed with or had sought treatment for a mental health condition *prior* to the homicide.⁵⁰

After the homicide, most of the accused were assessed by a psychiatrist or psychologist engaged by the defence. Thirty-nine men were retrospectively diagnosed as having had a mental health condition at the time of the offence. Depression-related conditions were commonly diagnosed (in 24 cases). Anxiety conditions and post-traumatic stress disorders were also diagnosed, along with personality disorders (such as antisocial or borderline personality disorder) and a variety of other conditions. In six cases, the accused was retrospectively diagnosed as having been suffering an adjustment disorder at the time of the killing.

The role of mental health issues in the killing is complex and should be interpreted cautiously, considering that the assessment of the accused's mental health was by forensic psychiatrists engaged by the defence after the killing. (See Chapter 9 and 10 for further discussion of the role of mental impairment as a defence in trials and as a mitigating factor in sentencing.)

CHARACTERISTICS OF THE DECEASED

Only very limited information was available in the court material about the victims in the 51 homicides.⁵¹ The following section provides a brief summary.

Gender and relationship to accused

In the majority of the sexual intimacy homicides by men (43 cases), the deceased was a female current or ex-partner of the defendant. In one case the deceased was the male sexual partner of the male offender. In the remaining seven cases the deceased was a male sexual rival of the offender.⁵²

Age

The age range of the deceased was between 17 and 72 years. The average age of victims was 39 years.⁵³ National data on homicide victims reports similar findings.⁵⁴ The average age of female victims was 41 years.⁵⁵ The average age of male victims was much younger, at 34 years.

Parenting status

Of the women who were killed, the majority (32 of the 41 cases where data was available) were mothers. Sixteen had children with the accused.

50 Information about whether the accused had sought assistance for a mental health disorder was not available in some cases. In 19 cases it was noted that the accused had previously sought treatment for his mental health condition (often through a general practitioner). In five cases it was unclear whether the accused had previously been diagnosed or sought treatment.

51 For instance in most cases the place of birth or cultural background of the victim was not mentioned.

52 In these 'sexual rivalry' cases, the deceased male had begun a relationship with the accused's partner or ex-partner, or was a friend or associate of the accused's partner.

53 Median was 38.5 years. In four cases there was no information available regarding the victim's age.

54 National data shows that in 2010–12 the average age of homicide victims was 37.9 years (38.6 years for female victims) (Bryant & Cussen 2015, p.18).

55 Based on 40 cases of female victims where age data was available, and seven cases of male victims where age data was available.

DETAILS OF THE CRIME

Method of killing

The most common method of killing in the homicide cases was stabbing with a knife or sharp instrument.⁵⁶

In our study, just under one-quarter of the deaths were the result of strangulation with hands or a cord or rope. In each case the deceased was female. This is a higher percentage of strangulation deaths than in national data, where strangulation was the cause of death in only 7 per cent of homicides in Australia (Bryant & Cussen 2015).

TABLE 1
METHOD OF KILLING

Method of killing ⁵⁷	Number of cases	Percentage of total
Stabbing with knife or sharp instrument	20	40%
Strangled	12	24%
Firearm	5	9%
Hit with blunt object (e.g. cup, stick, hammer)	4	8%
Punched, kicked, beaten (no weapon used)	5	9%
Burned	1	2%
Hit by car	1	2%
Other ⁵⁸	1	2%
Unknown	2	4%
Total	51	100

Presence of children

In 15 cases (almost 30 per cent), children were present when the killing took place.⁵⁹ In some of these cases, the deceased's young children were asleep in nearby rooms. In other cases, children witnessed or overheard their mothers being killed and, in several cases, tried to intervene.

⁵⁶ This is similar to national data on all homicides in Australia between 2010–11 and 2011–12 (Bryant & Cussen 2015), which found that stabbing was the largest single cause of death (37 per cent).

⁵⁷ In several cases, multiple methods were used in the fatal attack (e.g. the victim was stabbed then strangled). The data recorded is for the primary cause of death as noted in the sentencing judgment.

⁵⁸ In one case, the deceased was struck by the accused, fell to the ground and hit her head, and was then dragged and left near a creek. She died as the result of airway obstruction.

⁵⁹ In one case (*R v Singh*) the daughter of the deceased and accused overheard part of the killing on the phone.

Indicators of premeditation

In 15 cases, there was some indication of a prior intention to kill the victim or the planning of the homicide by the offender.⁶⁰ For example in several cases the offender had threatened to kill the victim in the weeks or months prior to the homicide, and in four cases there was evidence that the offender had made detailed plans – such as having the victim abducted, preparing a grave, or travelling interstate to lie in wait for the victim.

KEY CONTEXTUAL FACTORS

The following discussion identifies key factors that appeared to be directly relevant to the circumstances of the killing or the nature of the relationship, such as sexual jealousy, possessiveness and separation, and a history of family violence. These will be discussed further in Chapter 6.

Separation

Our research shows that separation was an important factor in sexual intimacy homicides by men.

Of the 51 cases of sexual intimacy homicides by men, 29 cases (57 per cent) occurred in the context of actual, pending or previous breakdown of the relationship. In these cases, the accused's partner had expressed a desire to separate, had previously attempted to leave, or had commenced leaving the relationship. In 18 cases the homicide occurred within days or weeks of the victim expressing her intention to separate; however, in five cases the homicide occurred years after the separation. Additionally, in six cases, the accused had perpetrated violence and the deceased had attempted to separate, but the relationship had been re-established just before the killing.⁶¹

It is likely that pending separation was a factor in other cases. This may not have been mentioned when the accused provided his account of the killing. In Chapter 6 we discuss the relevance of separation in more detail as a risk factor in these homicides.

Sexual jealousy or possessiveness

In six cases the homicide appears to have occurred in the context of the accused's jealousy or possessiveness, even though there was no evidence that the accused's partner had expressed an intention to separate. In these cases, the accused expressed jealousy because his partner was talking to another man, or said he suspected his partner was having an affair. Three of these men killed other men who were perceived to be a threat to the relationship.

60 These indicators are based on those used in other homicide studies (Dawson 2005; Wallace 1986). The indicators include when the offender made prior threats to kill in front of witnesses, the offender made prior attempts to kill, broke into the victim's home, followed or laid in wait for the victim, abducted the victim, purchased a weapon, brought a weapon to the home, or killed the victim while she was sleeping (Dawson 2005). These cases were not necessarily described as premeditated or planned by the sentencing judge.

61 In these six cases, the deceased's unhappiness about the relationship appeared to have been a factor connected to the killing. In each of these cases, the accused had perpetrated family violence and the deceased had either obtained an intervention order or had told others she wanted to separate, however there was evidence that she had returned to the relationship. See for example, the case of David Hopkins, discussed in Chapter 6.

History of family violence by male accused

In over half of the cases (27 cases, or 53 per cent), there was evidence that the accused had previously been controlling, threatening, or physically violent towards his partner or ex-partner. In most of these cases the accused had physically assaulted or threatened to harm or kill his partner or ex-partner, while in two cases there was evidence of controlling behaviour but no apparent evidence of physical violence.

There was no mention of any evidence of a history of family violence or controlling behaviour in one-third of the cases (17 cases). Additionally, in seven cases, the evidence was unclear; however, there were indications that the accused may have previously been violent or controlling. Considering that abuse typically occurs in private, is underreported, and the victim is no longer alive to give evidence, it is possible that there was also prior family violence in these cases.

TABLE 2
PREVIOUS FAMILY VIOLENCE BY MALE ACCUSED⁶²

History of family violence	Type of family violence	Number of cases	Percentage of total
Yes	Prior physical violence and/or threats to harm or kill ⁶³	25	49%
	Prior controlling behaviour ⁶⁴	2	4%
Unclear ⁶⁵		7	14%
No evidence		17	33%
Total		51	100%

It is also notable that in seven of the 51 cases, there was evidence of the accused having also perpetrated violence towards a previous partner. In one case, the accused, Leigh Robinson, had murdered a previous girlfriend, for which he had served 15 years in prison.

Prior police or court intervention for family violence by accused

In 13 cases (one-quarter of the total sample) the police or courts had intervened in relation to alleged prior family violence by the accused.

In eight of these cases, the accused was subject to an intervention order at the time of the killing, in relation to his violence towards his partner or ex-partner. Several men had also been charged with assault in relation to their violent behaviour towards their partners.

⁶² The source of information for this table included trial and plea transcripts, sentencing remarks, media reports and reports of coronial investigations. The evidence of family violence listed in this table is based on our identification of evidence of prior family violence in these sources. This evidence was included in the sentencing remarks in the majority of cases; however, in two cases evidence was presented in the trial but was not mentioned during sentencing (for example, in one case there was evidence that the deceased had an interim intervention order against the accused, and in the other, witnesses gave evidence of physical violence by the accused, but this was not mentioned in sentencing remarks). Violence that was part of the incident resulting in the homicide was not included in the table.

⁶³ In these cases, there was evidence of physical violence or threats and in many cases there was also controlling behaviour.

⁶⁴ In these cases, there was prior controlling behaviour but the judge stated there had been no evidence of physical violence.

⁶⁵ In these cases, there was some indication of previous family violence by the accused (for example, the accused was described as 'controlling' or 'very nasty'); however, there was no additional information.

In four additional cases, an interim intervention order had been in place but this had not been finalised, and in one case police had attended the home for family violence but no charges or protection orders appear to have followed.

‘Mutual violence’ or abuse by deceased

Seven of the male accused alleged that their female partners had previously been controlling, abusive or violent towards them. In five of these cases, the defence accepted that the accused had been violent but argued that the abuse in the relationship was ‘mutual’, and that the deceased had also been ‘aggressive’ or ‘controlling’, or that the violence wasn’t always ‘one way’⁶⁶ (see Chapter 7 for further discussion of ‘mutual’ violence).

In two cases, the male accused argued that he was the primary victim of prior family violence from his female partner. In these cases there was no evidence of the accused having been violent towards the deceased, but there was evidence of controlling behaviour or physical violence by the deceased.

THE PROSECUTION PROCESS AND OUTCOMES

The majority of men in this study (45 men) were initially charged with murder, and six with manslaughter.

Convictions

As indicated in Table 3, almost three-quarters of the men in our study were convicted of murder (36 men, or 71 per cent). This is a higher percentage than in a study of sexual intimacy homicides prior to the abolition of provocation in Victoria (VLRC 2003), which found that 27 of the 42 men (or 64 per cent) were convicted of murder, while 31 per cent were convicted of manslaughter.⁶⁷ This suggests that the abolition of provocation has resulted in a small increase in the number of murder convictions for men who may previously have had their murder charge reduced to manslaughter on the basis of provocation. This appears to be predominantly due to an increase in guilty pleas to murder.

Of the 36 men convicted of murder in our study, 23 (64 per cent) pleaded guilty. This is higher than the average rate of guilty pleas for murder in Victoria between 2009–10 to 2013–14, which was 48 per cent (Sentencing Advisory Council 2015a).⁶⁸

Of the 13 men convicted of manslaughter, over half (7 men) pleaded guilty.

⁶⁶ In these cases, there was no evidence that the accused had disclosed the violence to witnesses or contacted police.

⁶⁷ The VLRC (2003, p. 28) reported on four years of data from 1 July 1997 to 30 June 2001. It is important to note that only limited comparison can be made with the data from VLRC 2003. As noted in Chapter 3, there were differences between the source of the VLRC data and the source in our study. Additionally, the VLRC study included male co-accused in homicides.

⁶⁸ Note that the Sentencing Advisory Council’s study of guilty pleas in the higher courts (2015a) includes male and female defendants, and homicides in all contexts, not just sexual intimacy.

TABLE 3
HOMICIDE OUTCOMES FOR MALE ACCUSED

Conviction/outcome	Number (percentage of total)	Plea or trial	Number
Guilty: Murder	36 cases (71%)	Plea of guilty	24
		Found guilty after a trial	12
Guilty: Manslaughter	13 cases (25%)	Plea of guilty	7
		Found guilty after a trial	5
		Decision of Court of Appeal (after appeal of conviction)	1
Guilty: Defensive Homicide	1 case (2%)	Found guilty after a trial	1
Acquitted	1 case (2%)	Acquitted by a jury after a trial	1
Total	51 (100%)		51

Defences raised at trial

Twenty men ‘raised’ a defence at trial.⁶⁹ Over half of those men (11 men) argued that they did not intend to kill. In most of these cases, the accused argued that the killing was accidental or that they had no specific intention to kill. Seven men raised self-defence, or argued that their actions had been a defensive response to aggression by the deceased. In some cases, the accused raised more than one defence. Self-defence was raised in combination with lack of intent in five cases.⁷⁰

Only one man raised mental impairment as a defence at trial.⁷¹

⁶⁹ It should be noted that defences aren’t technically ‘raised’ by the defence. Defences are raised on the evidence and must be disproved by the prosecution rather than proved by defence counsel. This discussion of ‘defences raised’ follows from the method used by the VLRC (2003, footnotes 188, 190, 191). Intoxication, denial of participation and lack of intention are not technically defences. For example, lack of intention is not actually a legal defence, but rather it goes towards disproving the elements of the offence. However, as did the VLRC, we use these terms for the sake of simplicity and ‘because the result of successfully raising these is the same as successfully using a true defence’ (VLRC 2003, p. 42, footnote 188).

⁷⁰ For example, Ralph Pennisi raised self-defence and lack of intent. He argued that his partner was attacking him, and he strangled her to stop her. The defence argued that the killing was unintentional and occurred while he was defending himself from the deceased. See Chapter 9 for a discussion of this case.

⁷¹ One man’s defence was ‘intended to be one of mental impairment’ however he pleaded guilty to murder on the fourth day of the trial (*R v Dutton* [2010] VSC 107, para. 18). His case is not included in the table of defences raised at trial.

TABLE 4
DEFENCES RAISED AT TRIAL BY MALE ACCUSED ⁷²

Defences raised ⁷³	Number of cases	Percentage of total ⁷⁴
Lack of intention	11	55%
Self-defence/defensive response to deceased	7	35%
Denial of participation	6	30%
Mental impairment	1	0.5%
Intoxication	1	0.5%
Total defences	26	

In an analysis of homicides from 1997 to 2001, the VLRC (2003) found that almost half (15 cases or 44 per cent) of men convicted of killing in the context of sexual intimacy used the defence of provocation at trial, though only four men were successful. Compared to the study by the VLRC, and in the absence of that defence, a higher number of male accused in our study raised lack of intent and/or self-defence (or the two defences in combination).⁷⁵

Successful partial defences

Over half of the men in our study (12 men) who pleaded not guilty to murder were convicted of murder after a trial. However, six men were convicted of manslaughter,⁷⁶ and one of defensive homicide. These men raised lack of intent or self-defence, or the two defences in combination.

In one case, the defence presented evidence that the accused's female partner had previously perpetrated psychological and physical family violence towards him. He argued that he shot her in self-defence after she confronted him in a public street. He was acquitted on the grounds of self-defence (*R v Bracken* [2014] VSC 94; see Russell 2014).

⁷² The information in this table was based on information in the trial transcripts, particularly from the parties' closing addresses or the judge's charge to the jury (see Chapter 3).

⁷³ The method for identifying data described in this table follows from the VLRC (2003, p. 43). The base is all homicide accused who went to trial. The defences raised at trial could be gleaned from the trial transcript, particularly from the closing address by the defence or judge's charge to the jury, or from the sentencing judgment. Some accused raised more than one defence, e.g. self-defence together with lack of intent.

⁷⁴ Percentages are based on total of accused. Thus, 55 per cent of male accused (11 of 20 who raised a defence at trial) raised lack of intention as a defence at trial. However due to multiple possible defences for each accused, percentages add up to more than 100 per cent.

⁷⁵ For example, in the VLRC study of sexual intimacy homicides, 44 per cent of the men raised lack of intent (15 cases), 11 per cent raised self-defence (3 cases), 15 per cent raised denial of participation (4 cases), 4 per cent (1 case) raised intoxication, and none raised mental impairment (VLRC 2003, p. 273, Table 11). The VLRC noted that provocation and lack of intention were often raised in conjunction with each other. It should be noted that the numbers in our study and in the VLRC study are small, so it is not possible to draw a definitive conclusion about the effects of the reforms.

⁷⁶ Five men were convicted of manslaughter by the verdict of a jury. In one case, the jury's murder conviction was overturned by the Court of Appeal.

SENTENCE LENGTHS

Murder

The 36 men who received a sentence of imprisonment for murder received maximum terms of imprisonment that ranged from eleven years to life imprisonment. Two were sentenced to life imprisonment. Excluding these two cases, the median principal sentence⁷⁷ for men convicted of murder was 18.25 years.⁷⁸ This is slightly lower than the median principal sentence reported by the VLRC (2003, p. 276, Table 13, sample of 27 cases) for men convicted of murder in sexual intimacy homicides, which was 19 years.⁷⁹

The average principal sentence for men convicted of murder in our study was 18.5 years.⁸⁰ For those sentenced for murder after a trial, the average length of sentence was 20 years.⁸¹ For those sentenced after a plea of guilty the average length of sentence was 17.1 years.⁸²

The average principal sentence for murder for male offenders in our study is slightly lower than that in data from the Victorian Sentencing Advisory Council (2013, p. 4) on principal sentences for murder for men who killed in any context (not just sexual intimacy) between 2007–08 and 2011–12.⁸³ In that study, men who were serving non-life sentences for murder had an average term of imprisonment of 19 years and 4 months.

In our study, the median total effective non-life sentence for men was 18.75 years.⁸⁴ This is lower than the median total effective non-life sentence in a recent study of sentences for murder in Victoria between 2009–10 and 2013–14 (Sentencing Advisory Council 2015b). In that study the median total effective sentence for people convicted of murder was 20 years.

The median non-parole period for murder in our study was 15 years.

Over the past decade there has been an overall increase in the length of murder sentences in Victorian courts (Freiberg, Gelb & Stewart 2015, p. 72). Our data suggests that men who kill in the context of sexual intimacy may receive slightly lower sentences than the overall population of men sentenced for murder in Victoria.

77 We have adopted the method used by VLRC (2003, p. 39). The data excludes life sentences (2 men) and one man who was acquitted. Figures are based on the maximum sentence for murder for those who received a custodial sentence, whether at trial or after pleading guilty. Sentences are those at first instance unless there was a retrial, in which case the retrial sentence was used. In the case of an appeal, the sentence imposed on appeal was used. The principal sentence is the individual sentence imposed for the charge that is the principal offence (e.g. murder).

78 This means that half of the non-life imprisonment terms were shorter than 18.25 years and half were longer.

79 It is also slightly lower than the median length of non-life sentences in a recent study of people sentenced for murder in Victoria between 2009 and 2014 (Sentencing Advisory Council 2015b). In that study (which does not provide a breakdown according to gender), of the 114 people who received a principal sentence of imprisonment for murder, the median length was 20 years.

80 18.5 years is the same as 18 years 6 months. Note that the VLRC did not calculate average principal sentence, so we cannot compare this data.

81 This is based on a total of 11 men; it excludes one man who received a life sentence.

82 This is based on a total of 23 men; it excludes one man who received a life sentence.

83 The Victorian Sentencing Advisory Council data (2013) is for all men who kill and is not limited to sexual intimacy cases. The Sentencing Advisory Council has a more recent report (2015b) which shows that the most common non-life sentence for murder between 2009–10 and 2013–14 was 20 years to less than 21 years; however, this does not provide a gender breakdown.

84 In a case with multiple charges, the total effective sentence is the sentence that results from the court ordering the individual sentences for each charge to be served concurrently or cumulatively. In three cases in our study, the male accused faced multiple charges (armed robbery in one case of murder, and recklessly causing injury in one case of murder and also in one case of manslaughter), which were finalised at the same hearing as the murder or manslaughter charge.

Manslaughter

In our study there were 13 men sentenced for manslaughter, and the maximum terms of imprisonment ranged from 5 years to 14 years.

The average sentence for men convicted of manslaughter was 9.5 years.⁸⁵ For those sentenced for manslaughter after a trial the average sentence was 9.5 years, which was slightly longer than that for those sentenced after a plea of guilty (9.1 years).

The median sentence for men convicted of manslaughter was 9.5 years (9 years and six months). This was considerably higher than the median reported by the VLRC for men convicted of manslaughter in sexual intimacy homicides, which was six years (VLRC 2003, p. 276, Table 13). The higher manslaughter sentences in our data may reflect an overall increase in manslaughter sentences in general in Victoria,⁸⁶ as well as the abolition of provocation.

The median sentence for manslaughter for men in our study was also higher than in recent data for all offenders who received a principal sentence for manslaughter in Victoria between 2009–10 and 2013–14. The Sentencing Advisory Council (2015c, p. 3) reports that the median length of imprisonment for manslaughter sentences (for men and women) during this period was 8 years. The median non-parole period for manslaughter in our study was 6.5 years.

Defensive homicide

One man was convicted of defensive homicide. His maximum sentence was 12 years with a minimum of 8 years.

CONCLUSION

The data discussed in this chapter identifies that the main context for intimate partner homicides by male accused was separation and/or possessiveness. These factors were the context in over two-thirds of the total (29 cases of separation and six cases of possessiveness or jealousy). Prior violence was also a common factor, with more than half of the men having previously been violent, threatening or controlling towards their female partner. The findings confirm the literature outlined in Chapter 1 which shows that sexual intimacy homicides by men frequently occur in the context of prior family violence and separation.

The majority of the accused were diagnosed as having a history of mental health disorders, particularly depression; however, in most cases these disorders had not been diagnosed prior to the homicide. Over half of the accused were identified as having had a history of alcohol or drug abuse. The findings are also consistent with other studies, as discussed in Chapter 1.

The victims were most commonly stabbed or strangled in their home. In over a quarter of cases children were present at the time of the homicide and the deaths left many children without a mother.

Most of the men were charged with murder and the majority of those men were convicted for murder (36 men, with almost two-thirds pleading guilty). This is a slightly higher rate of murder

⁸⁵ The data on total effective sentences and principal sentences for manslaughter is the same. There was one case in which the offender was sentenced for another offence (reckless injury) at the same time as the manslaughter sentence. In that case, the sentences on the two counts were to run concurrently with each other, producing a total effective sentence of five years.

⁸⁶ The maximum penalty for manslaughter in Victoria was increased from 10 to 20 years in 1998, and manslaughter sentences have increased gradually overtime since that amendment.

convictions than that in an earlier study of sexual intimacy homicides prior to the abolition of provocation (VLRC 2003).

Of those men in our study who pleaded not guilty to murder and went to trial, the most common assertions at trial were that they had not intended to cause the death and/or they had acted in self-defence, or they denied any participation in the death.

On average, the men convicted of murder in our study were sentenced to 18 years and 6 months. The sentence lengths for murder for men in our study were slightly lower than in recent Victorian data on murder sentences for men who kill in all contexts.

Six men were found not guilty of murder but guilty of manslaughter, while seven men were convicted of manslaughter after a plea of guilty. The average sentence for manslaughter was 9 years and 6 months.

The following chapter looks in more detail at the presence of factors that have been identified as risk indicators for serious injury and lethal violence in the family violence context.

CHAPTER 6

Risk factors

Unfortunately the story of somebody (usually, but not always, a male) who refuses to accept that a relationship is over, and who harasses, pursues or assaults a former partner, ultimately ending in their death, is all too common.

Sentencing remarks, *R v McDonald* [2011] VSC 235

International research on family violence and homicide has identified factors that are associated with an increased level of risk of serious injury and death (Campbell et al. 2007; Dawson, Bunge & Balde 2009; Dobash et al. 2007; Garcia, Soria & Hurwitz 2007). These studies have informed the development of risk identification tools that identify the factors that increase the likelihood of lethal violence.

It is widely recognised that previous family violence is the number one risk factor for intimate partner homicide by men (Campbell et al 2007) and that certain characteristics or forms of family violence have strong associations with homicide (Weizmann-Henelius et al. 2012; Sheehan et al. 2014; Campbell, Webster & Glass 2009). Contrary to common perceptions, non-physical forms of violence can be ‘red flag’ indicators of high risk. These include controlling behaviour, obsessive jealousy, stalking, and sexual assault, as well as threats to kill the victim, children or pets, trying to choke the victim, and abuse during pregnancy. Other key risk factors relating to the individual circumstances of the perpetrator are unemployment, substance abuse, suicidality and access to weapons. Separation is a relationship factor that is consistently found to be associated with higher risk of lethal violence.⁸⁷

This chapter will explore in more depth the risk indicators evident in the cases we examined of sexual intimacy homicides perpetrated by men.

Given that much of the research literature on risk factors is based on studies of intimate partner homicide by men, it is not surprising that many risk indicators were present in the homicide cases we examined. However, what is surprising is that often the factors that are associated with higher

⁸⁷ For example, the Victorian Systemic Review of Family Violence Deaths’ findings from a thematic analysis of 28 cases of family violence-related deaths between 2007 and 2011 found that these deaths involved a range of risk factors indicative of increased risk of lethal violence such as relationship separation, a history of family violence, threats of harm, alcohol abuse, mental illness and sexual violence (Walsh et al. 2012).

risk received relatively little recognition in the homicide prosecution. While some of these factors, such as threats to kill and controlling behaviour were mentioned during the trials or pleas, their significance was minimised. In some cases where there were a number of ‘red flag’ indicators that the offender was at a high risk of killing his partner, the homicide was described by the court as an inexplicable event that occurred ‘out of the blue’. As discussed in chapters 7 to 10, this was partly due to the constraints of the legal process and evidentiary requirements, in addition to the understandings of legal professionals.

The primary purpose of identifying family violence risk factors is so that police, courts and other service providers can intervene to prevent further serious or lethal violence. Our discussion of risk factors in this chapter highlights that behaviours that may appear relatively benign (in comparison to physical assaults) – such as controlling behaviour or obsessive jealousy – are often significant and frequently part of a pattern of family violence prior to a homicide. Service providers need to be alert to such risk indicators *before* a fatal outcome. For the present purposes, our focus is on clarifying the types of behaviour that may potentially be relevant in a homicide trial or sentence.

RISK ASSESSMENT

In Victoria, the Family Violence Risk Assessment and Risk Management Framework (also known as common risk assessment framework [CRAF]) is a key component of the Victorian family violence system.⁸⁸ A range of services, such as family violence services, police, courts and child protection, undertake family violence risk assessment in Victoria. The CRAF model provides a tool for assessing the risks to victims of family violence in order to provide appropriate responses. It incorporates three elements:

- the victim’s own assessment of risk
- evidence-based risk factors
- the practitioner’s professional judgement (DHS 2012).

An aide-mémoire accompanies the framework that lists evidence-based risk indicators that should be explored with the family violence victim. The 26 risk factors for family violence included in the CRAF are based on the research evidence, and are listed below. Some indicators are asterisked or ‘flagged’ to indicate that they are associated with an increased risk of the victim being seriously injured or killed.

Perpetrator-related risk factors

- Use of weapon in most recent event*
- Access to weapons*
- Has ever harmed or threatened to harm victim
- Has ever tried to choke the victim*
- Has ever threatened to kill victim*
- Has ever harmed or threatened to harm or kill children*
- Has ever harmed or threatened to harm or kill other family members
- Has ever harmed or threatened to harm or kill pets or other animals*

⁸⁸ There is, however, a need for further developmental work on the model itself as well as improvements in its implementation, data collection, and information sharing across the services system, monitoring and accountability (DVRCV 2015).

- Has ever threatened or tried to commit suicide*
- Stalking of victim*
- Sexual assault of victim*
- Previous or current breach of intervention order
- Drug and/or alcohol misuse/abuse*
- Obsession/jealous behaviour toward victim*
- Controlling behaviours*
- Unemployed*
- Depression/mental health issue
- History of violent behaviour (not family violence)

Relationship-related risk factors

- Recent separation*
- Escalation – increase in severity and/or frequency of violence*
- Financial difficulties

Victim-related risk factors

- Pregnancy/new birth*
- Depression/mental health issue
- Drug and/or alcohol misuse/abuse
- Verbalised or suicidal ideas or attempted suicide
- Isolation

RISK FACTORS EVIDENT IN HOMICIDES IN THIS STUDY

This study demonstrates the relevance of prior family violence as a risk factor for lethal violence: as outlined in Chapter 5, at least half of the male offenders had a history of perpetrating family violence. Many of the risk indicators included in the CRAF were evident, though the lack of detail about the history of violence in the relationship in the court documents makes it difficult to reliably quantify risk indicators. Factors that relate to the perpetrator were more readily available in the material than factors that relate to the relationship or the victim. Risk assessment is usually undertaken by obtaining information from the victim about the history of the violence, the perpetrator and the relationship. However, the sources we used only provided a limited amount of information from the victim (through statements the victim had made about family violence to police, service providers, friends, family or other people). We will outline the findings for those we were able to quantify, which include separation, controlling behaviour, obsession/jealousy, mental illness, substance abuse, unemployment, suicide threats by perpetrator and pregnancy in partner. With the exception of mental illness, these are all key risk factors that have been flagged as potentially indicative of a risk of lethal or potentially lethal violence in the CRAF. While we are not able to quantify most of the other risk factors, we will provide some illustrative examples.

It should be noted that risk factors are not held to be causal but rather that they might indicate an increased risk. They should therefore inform service responses.

Separation

As shown in Chapter 5, actual or pending separation was a feature in the majority of sexual intimacy homicides in this study. In 29 cases (57 per cent)⁸⁹ the victim had expressed a desire to separate, had previously attempted to leave, had commenced leaving the relationship, or had separated from the accused some time before the homicide. In the majority of these cases (18 cases), there was evidence that the accused's partner had expressed a desire to separate or had commenced arrangements in relation to separation within six months of the killing, and in many of these cases the killing occurred just days after the deceased had confirmed she wanted to end the relationship. Additionally, in six cases, the deceased had previously attempted to leave the relationship but had apparently been persuaded or forced back into the relationship by the accused.⁹⁰ The breakdown in the relationship or the family unit was frequently described by defence counsel and accepted by the judge as being the primary reason for the perpetrator's actions.

The finding that separation or threatened separation was often a recent event has also been found in other research. For example, a review of domestic violence deaths in NSW found that in most cases the homicide occurred within three months of separation (NSWDVDRT 2015). However, it should be noted that five homicides in our study occurred many months or years after separation. In those cases the separation was still a central feature of the perpetrator's motive. What appears to have been significant was not the length of time since separation, but rather the perpetrator's ongoing attitude of anger and blame directed at the ex-partner. In most of these cases, the accused had continued stalking, harassing or threatening his ex-partner after separation. In some of these cases, there was a triggering event that preceded the homicide, such as the pursuit of legal intervention by the ex-partner. In two cases, the victim was killed just after she successfully applied for a Family or Federal Court ruling to enable her to take their children overseas. For example, in the case of Bradley Carolus, the homicide occurred five years after the separation. Bradley Carolus had continued to stalk his ex-partner. The deceased had remarried, and in the days before she was killed she had successfully applied to the Federal Court for permission for a passport to take their son overseas. The deceased's eldest son witnessed her being stabbed to death, and gave evidence that Bradley Carolus had said his actions were 'payback' and that he had taunted the deceased about her new partner (*R v Carolus* [2011] VSC 583, para. 35).⁹¹

Some studies have shown that the most dangerous time is the point at which the offender realises that the relationship will not resume or he has finally lost control over his partner or ex-partner (Johnson 2008; Sheehan et al. 2015). In some cases this risk of lethal violence may extend to the children (Kirkwood 2012; Jaffe et al. 2014).

89 As outlined in Chapter 5, this is likely to be an underestimate as perpetrators often denied their involvement in the killing or refused to disclose their reason for the argument that preceded the homicide.

90 In most of these cases, the victim had previously left the accused and had sought an intervention order to prohibit the accused from contacting her. For example, in the case of David Hopkins (discussed in this chapter), his partner Nicole Millar had previously told a counsellor he had been violent and she had attempted to leave him. A witness gave evidence that in the week prior to the killing David Hopkins said he would be 'chasing' Nicole Millar for 'the rest of her f**ing life'. It appears he was living with her at the time of the killing.

91 The witness, who was the deceased's eldest son, recounted that during the killing Carolus 'was yelling to my mother, asking if it was worth it, asking, "Where's [her new partner] now, ah? Where is he?"' (plea p.32).

Obsession/jealousy

In many cases there was an indication of obsessive jealousy and possessiveness by the perpetrator towards his partner or ex-partner either during the relationship and/or in the lead up to the homicide. Possessiveness and a sense of 'ownership' of the victim appears to have been a factor in some of the 29 cases where the victim was killed after she had separated or attempted to separate from the offender. Additionally, possessiveness and jealousy were also factors in six of the intact relationships. In these cases, the men were extremely jealous of any contact their partner had with other men, even when there was no evidence that she was having an intimate relationship with another man. In some instances it appears that accusations of infidelity were used as a way of controlling the woman's contact with others. For example, Sukhmander Singh stabbed his wife to death after she left India to stay with her daughter in Australia. The daughter gave evidence that while they were living together in India during their marriage, if her mother 'even spoke to another man there would be physical consequences' (*R v Singh* [2010] VSC 299, para. 4).

Prior controlling or abusive behaviour

As outlined in Chapter 5, in over half of the cases (27 cases), there was evidence that the accused had a history of family violence towards his partner or ex-partner.⁹² The CRAF framework identifies that particular forms of family violence can be indicators of a risk of lethal violence.

Controlling behaviours

In 12 cases the accused was described as having been 'controlling'⁹³ or 'dominating' towards his partner. In two of these cases there was no evidence that he had physically assaulted his partner, however there was evidence that he had been psychologically controlling during the relationship.

In several cases it was alleged that the accused had attempted to prevent his partner from participating in work or social activities. For example, Robert Baxter's behaviour towards his wife, Linda, was described by her mother as 'mental bullying': he was 'controlling', he 'wouldn't allow her to go to work until it suited him', he 'resented' her going to social functions, and 'just wanted Linda and the children there at home when he got there' (*Baxter*, Transcript of trial, 18 February 2009, p. 86–87).

Some men appear to have monitored their partner's movements. For example, a witness observed that at social functions Stephen McPhee would follow his wife to the toilet and wait outside for her (*McPhee*, Transcript of plea, 21 October 2013, p. 4).

There was evidence of physical violence or threats by the accused in 25 cases. Physical violence and threats to harm, in addition to psychological abuse, are typically an attempt to control and dominate a partner, and this was recognised in some of the sentencing remarks we examined.

Threats to harm or kill the victim or others

In 12 cases there was evidence that the accused had made verbal threats to kill his partner or ex-partner or had previously threatened her with a weapon. In some cases the accused threatened to kill other people, including the deceased's children, her work colleagues, her new partner or men who had been socialising with her.

⁹² It should be noted that prior family violence is likely to be underestimated in our data. For further discussion see Chapter 5.

⁹³ Based on descriptions used by witnesses, and/or descriptions by the Crown or the judge.

CASE STUDY: DAVID HOPKINS

On 1 June 2010 David Hopkins stabbed his partner, Nicole Millar, and then set her alight while she was seated in her car at a petrol station. She died soon afterwards. He pleaded guilty to murder. He was sentenced to life imprisonment with a minimum non-parole period of 30 years (*R v Hopkins* [2011] VSC 517).

David Hopkins began a relationship with Nicole Millar in 2008. Between 2008 and 2010, Nicole was in contact with a number of support services for counselling. During counselling sessions, she disclosed incidents of violence by David. Her children and work colleagues observed cuts and bruises on her.

A week prior to the homicide, David Hopkins went to Nicole Millar's workplace. He shouted abuse at her and threatened her. He then attempted to use his car to force her car into a stack of rocks. When she exited the car, he pinned her down with his arm across her chest and said 'Don't think you're gonna be safe tonight because I'll come round and kill you' (Transcript of plea, 7 September 2011, pp.7–9). When a work colleague attempted to intervene, David Hopkins also threatened to harm him, and punched and kicked him before leaving. Her colleague advised her to contact police, but she said she was too scared to do so (Transcript of plea, 7 September 2011, pp. 7–9).

Other forms of violence

As identified in the Victorian risk assessment framework, other forms of violence that indicate a high risk of lethal violence include attempts to choke the victim, sexual assault and stalking, and threats with weapons. In three cases there was evidence that the accused had previously tried to choke or strangle his partner. For example, there was evidence that Luke Middendorp had tried to choke the deceased, Jade Bowndes, on two previous occasions. On one occasion she reported to police that Luke Middendorp had attempted to strangle her after she refused to have sex with him (Transcript of trial, 11 March 2010, p. 322). Attempted strangulation was also a factor in *R v Mulhall*, discussed later in this chapter).

Stalking was also evident in some cases. For instance, there was evidence that John McDonald had a 'spiteful obsession' with his ex-wife, Marlene McDonald, and he 'would follow her to or from work' and had left threatening notes on the window of her car (*R v McDonald* [2011] VSC 235, para. 4).

In several cases men had threatened their partners or ex-partners with a gun, knife or other weapon prior to the homicide. In some cases the accused made his partner aware that he had access to a weapon. For example, there was evidence that Mehmet Torun had previously threatened the deceased, Kara Doyle, with a blowtorch when she had attempted to leave him, and had also threatened her by holding a knife to her throat. In the days before the killing he had obtained a gun and had threatened her and other people with it (*The Queen v Torun* [2014] VSC 146, paras. 4, 18, 19, 51).

Breach of intervention orders

In 12 cases there had been an intervention order in place to protect the accused's partner or ex-partner, either during the relationship or at the time of the homicide. In eight cases the homicide involved a breach of an intervention order.

Threats to commit suicide

In 12 cases the men had attempted suicide or threatened to commit suicide at some time prior to the homicide, and in some cases this appears to have been part of an attempt to control the victim. This frequently took the form of threatening to suicide if the woman left the relationship or did not return to the relationship. For example, during a marriage counselling session, Stephen McPhee allegedly became 'aggressive' and threatened to throw himself under a truck when his wife spoke about wanting to separate (*The Queen v McPhee* [2013] VSC 581, para. 3).

Drug or alcohol abuse

Over half of the accused in the study (28 men) had a history of alcohol and/or drug abuse. Alcohol was the most commonly reported substance used; however, some men also used cannabis or other substances such as the drug 'ice' (four cases). For example, in the case of David Hopkins, the accused had used drugs for a long period of time and in the weeks prior to the homicide had taken large quantities of a variety of drugs including steroids, amphetamines and 'ice' (*R v Hopkins* [2011] VSC 517, paras. 37, 44).

Mental illness

The CRAF highlights that the perpetrator's mental illness or depression is a risk factor for family violence; however, it also notes that depression or mental illness has not been found to be a factor associated with a risk of *lethal* violence. In our study, in the majority of cases (39 cases) the men were described as having had a mental illness (most often depression) prior to or at the time of the homicide. However, these figures should be interpreted cautiously, considering that the assessments of the accused's mental health were frequently undertaken by forensic psychiatrists or psychologists engaged by the defence some time after the killing. Relatively few of the men (19 of the 39 men who had an apparent mental health disorder) had sought assistance for mental health problems prior to the homicide. Nonetheless, depression and anxiety appeared to be a factor in many cases. In most instances a breakdown of the relationship or the man's partner's desire to separate were identified as having caused or contributed to the depression or mental health condition. The role of mental illness in explanations for homicides is discussed further in Chapter 9 (regarding mental impairment as a defence) and Chapter 10 (mental illness in sentencing).⁹⁴

Unemployment

Male unemployment is a factor linked to an increased risk of lethal violence. In our study, just under half of the homicide offenders were not engaged in employment at the time of the homicide, and were receiving unemployment or disability benefits.

Some research suggests that it may not be the perpetrator's unemployment per se that is a risk factor for family violence, but rather the impact unemployment has on some men's views of their masculinity and entitlement to power in families, in the context of traditional expectations that men should be the main breadwinner in families. Research has found that inequalities in income in relationships between men and women can create an increased risk of men perpetrating intimate partner homicide (see for example, Bailey & Peterson 1995) or family violence (Atkinson,

⁹⁴ The men in the study often also had physical health problems such as chronic pain from accidents and injuries.

Greenstein & Lang 2005).⁹⁵ In a number of cases in our study, the accused had recently become unemployed or had suffered a workplace injury, and there appeared to be indications that he was unhappy about his partner being employed while he was not.

Pregnancy

In two cases the woman who was killed was identified as being pregnant at the time of the homicide.

CO-EXISTING RISK FACTORS

Research has identified the co-existence of certain risk factors in intimate partner homicides. Controlling behaviour and separation are commonly associated factors. For example, Campbell et al. (2003) found a nine-fold increase in the risk of homicide when women attempted to separate from highly controlling men. Abusers were significantly more likely to perpetrate homicide if their partner was leaving them for a different partner (p. 1092; also Garcia, Soria & Hurwitz 2007).

There were similar patterns in our study. Twenty-one homicides (41 per cent of total) occurred after women left or tried to leave men who had previously been controlling and/or had perpetrated family violence.

Research has also found that a history of substance abuse increases the risk of homicide when a man has a history of perpetrating family violence (Campbell et al. 2003; Garcia, Soria & Hurwitz 2007). In our study, there were 16 cases in which the accused had a history of substance abuse as well as perpetrating family violence.

As noted, mental health disorders were also associated with other risk factors in our study. In 16 cases the accused had a mental health disorder (such as depression) as well as a history of perpetrating family violence.

In over a third of cases (19 cases) there was the co-existence of three or more factors: the perpetrator's history of family violence, separation, and the perpetrator's mental health issues or drug/alcohol abuse.⁹⁶

Our research indicates that it may be useful for risk assessment frameworks to highlight the significance of the existence of a cluster of risk factors: separation, prior family violence, and mental health issues or drug/alcohol abuse.

Recent research has identified that the level of risk may change over time, and that intimate partner homicides are often preceded by 'acute' risk factors – certain triggers or events that lead to changes in the perpetrator's behaviour, culminating in the homicide (Sheehan et al. 2015). In the intimate partner homicides studied by Sheehan et al., these were events that 'challenged the perpetrator's sense of control over the victim and the relationship' (p. 284), such as the victim's decision to end the relationship, or a change in child custody. While 'static' risk factors (Cattaneo & Goodman 2005; Sheehan et al. 2015) – such as the perpetrator's history of alcohol abuse or

⁹⁵ In one of a few studies of inequality and intimate partner homicide, based on data from 138 US cities, there was a higher rate of women being killed by their husbands when there was greater male–female inequality in education and employment (Bailey & Peterson 1995). Another study in the USA has identified that in relationships where wives earned a greater share of household income, there was an increased likelihood of men with traditional attitudes perpetrating family violence (Atkinson, Greenstein & Lang 2005). See also *Our Watch, ANROWS & VicHealth* (2015), which identifies that 'backlash factors' such as changes in relative incomes of men and women are contributing factors in rates of gendered violence.

⁹⁶ Reviews of domestic homicide deaths in which children have died have identified the existence of a cluster of risk factors, in particular, prior family violence, mental illness and substance abuse by the homicide perpetrator (Frederico, Jackson & Dwyer 2014; Brown, Tyson & Fernandez Arias 2014).

ongoing family violence – have been the focus of research on risk indicators, acute or dynamic risk factors have had less recognition. Sheehan et al. identify that these acute factors are important areas for consideration, as they can assist in identifying the ‘chain of events’ that elevates the level of danger from ‘static’ to ‘acute’ (Sheehan et al. 2015, p. 284).

This pattern was clearly evident in our study. In many of the cases there were ‘static’ risk factors – the accused’s ongoing abusive or controlling behaviour and/or obsessive jealousy, alcohol use, depression, or unemployment. The level of risk appears to have become acute as the accused’s partner attempted to resist his control and to increase her independence. This appears to have signalled to the accused that he had finally lost control over his ex-partner. These risk factors are illustrated in the following case study.

CASE STUDY: DENIS DELICH

In November 2011, Denis Delich (aged 60 years) shot his ex-wife, Almasa Locic (55), outside her home. Denis Delich pleaded guilty to murder and was sentenced to 20 years’ imprisonment with a minimum non-parole period of 16 years (*The Queen v Delich* [2013] VSC 309).

Denis Delich and Almasa Locic were married for 23 years and had two sons together. They separated in 1997 and were divorced in 2002. It was suggested that the marriage ended because of Denis Delich’s gambling (para. 3). Denis also claimed that his wife behaved in a sexually provocative way with another man early in their relationship, although this claim was rejected by the prosecution.

There was evidence that after Almasa had left Denis, he would ‘turn up [at her home] on a regular basis to see that she was not socialising with other men’ (Transcript of plea, 27 March 2013, p. 3). There was conflict over financial matters for many years after the divorce. Conflict also arose between Denis Delich and his adult sons. At one point Denis threatened to shoot the sons and kill himself. He later went to the family home with a loaded gun. He was arrested and placed on a 12-month community based order in May 2009 for making threats to kill his ex-wife and his sons. He was also convicted for possessing an unregistered firearm. As a result of that incident the police applied for an intervention order to protect Almasa and their two sons.

Denis Delich continued to monitor his ex-wife’s movements and was seen watching her in September 2010 outside her home. In October Almasa applied for another intervention order, which was consented to by Denis and granted by the court. In September 2011 Denis Delich breached the order when he again approached and threatened her. This was reported to police. Following that incident she was too scared to stay at her home and stayed with family for several nights. Denis was again observed by a neighbour, driving past Almasa’s home in October 2011, and the intervention order was extended. It was still current when he killed her.

Denis Delich planned to kill his ex-wife and had thought about this for ‘a quite significant period of time’ (para. 21). He went to Almasa Locic’s premises and waited for her behind the garage. He chased her, shooting her in the back as she fled (para. 11). He then stood over her and shot her at close range. He then drove directly to the police station and confessed, stating that the reason he did it was ‘[b]ecause she got everything from me, she ripped me off’ (para. 10). He said, ‘I want her to die because ... she destroyed my life totally, she’s evil woman’. Denis said that he did not believe what he did was wrong and that he ‘would feel sorry for an animal, not for her’ (para. 29) and ‘only I feel sorry for myself because I have to rot in gaol for my things.

You know ... even now I feel even more relaxed because of what I done.' (Transcript of plea, 27 March 2013, p. 34).

Denis Delich's defence counsel argued that the divorce resulted in him having depression which is 'a significant mental health condition' (p. 25) and that he had been distressed for 10 years about an alleged incident of infidelity by his wife early in the relationship. Counsel for the defence submitted that, 'He suffered the loss of everything important in his life. His family, his wife and his sons in terms of the breakdown of those three relationships. His home, his work.' (p. 15).

Many factors that indicate a high risk of lethal violence were apparent in this case: separation, the offender's obsessive/jealous behaviour, repeated threats to kill the victim and their children, threats of suicide, access to a weapon, ongoing stalking, repeated breaches of an intervention order, depression, unemployment, financial difficulties and an escalation in the offender's violence. A risk assessment of Almasa Locic would also have taken into account her high level of fear for her safety.

Service providers need to be aware of such risk indicators in helping to prevent a fatal outcome. But for the present discussion, understanding and clarifying common patterns of behaviour may assist legal professionals in homicide cases to interpret the significance of these behaviours in relation to a trial and at sentence.

OTHER POTENTIAL RISK FACTORS

Other factors that frequently occurred in the cases may also be important considerations in relation to the level of risk for victims of violence. As in the case of *Delich*, many of the men in our study expressed blaming and angry attitudes towards their partners or ex-partners, and several stated that they believed they were justified in killing them.

Gender-stereotypical attitudes regarding expectations of female partners were apparent in some cases. For example, Mark Budimir told the police that he had believed that by setting up her own business, his wife had 'neglected the welfare and development of their children' and that because he was earning good money, she 'did not need to work' (*Budimir*, Transcript of plea, 6 February 2013, p. 26). (See also the example of Robert Baxter, discussed on page 53 in this chapter.)

Many of the men who killed in our study used derogatory gendered terms to refer to their female partners during the relationship, at the time of the killing or afterwards. For example, the term 'slut' or 'bitch' was used by nine men to refer to their partners.⁹⁷ A witness heard Brian Andrew say to his partner, 'shut up bitch, I am talking' before he began punching and kicking her (*R v Andrew* [2008] VSC 138, para. 18). In the case of Luke Middendorp, witnesses stated that he had 'shouted towards her as she was in the street, bleeding, words to the effect that she got what she deserved and that she was a filthy slut' (*R v Middendorp* [2010] VSC 202, para. 9). In John McDonald's case, there was evidence adduced at the trial that he had 'procured' his children to write 'offensive' notes to their mother after contact visits. The notes described her as a 'whore' or 'slut' and were written in the children's handwriting (*R v McDonald*, paras. 64, 67, 70).

⁹⁷ In a few cases in the study the homicide appeared to involve elements of sexual humiliation or sexualised violence, which could also be considered to be an indication of negative attitudes towards women.

In seven cases it was apparent that the accused had also been violent towards a previous intimate partner (see for example, *Mulhall*, discussed on page 59). In one case the accused had also murdered his previous partner many years earlier (*Robinson*).

Problematic attitudes towards women also featured heavily in a recent study of over 100 men in the UK who had murdered a female intimate partner. Dobash and Dobash (2015) found that the majority (75 per cent) of men were considered by prison professionals to have had 'problematic orientations towards women' (see also Dobash, Dobash & Cavanagh 2009). The authors report that the men's case files were 'filled with men's expressions of negative notions about women and especially about women partners who were either explicitly or implicitly deemed to be subordinate to them, expected to provide them with domestic services, and required to remain in residence with them and faithful to them as long as the men so desired' (Dobash & Dobash 2015, p. 81).

In other studies on risks of intimate partner violence, attitudes that condone violence and traditional ideas about gender roles have been identified as potentially significant (for example, Schumacher et al. 2001; Stith et al. 2004; Kropp 2008). Future researchers could further consider the relevance of such attitudes as an indicator that may be included in risk assessment tools. The potential relevance of 'acute' risk factors – such as events that signal a shift in women's power in the relationship or her increasing independence – could also be considered.

PREVENTING HOMICIDES BY RECOGNISING RISK

It was apparent in several cases, such as the following, that when the victim had sought police or court intervention, there had been inadequate recognition of the risks she faced.

CASE STUDY: JAMES MULHALL

On 14 October 2011, Joy Rowley (aged 60 years) was strangled and killed by her partner James Mulhall (57) at her home. James Mulhall confessed to the police several days later. He pleaded guilty to murder. On 10 October 2012 he was sentenced to 19 years' imprisonment with a minimum non-parole period of 16 years (*R v Mulhall* [2012] VSC 471).

Joy Rowley met James Mulhall in November 2010. He moved in to her house soon afterwards and they began a relationship. In February 2011 (eight months before the killing) James Mulhall seriously assaulted and attempted to strangle Joy Rowley. According to the sentencing judge, Joy had told police:

... that you [Mulhall] had strangled her as she slept, having assaulted her with your fists and a large hunting style knife. As a result of the alleged assault, she had a dislocated shoulder and severe bruising to her torso and face. Ultimately you were arrested on 10 March 2011 and subsequently charged with this assault. An intervention order was put in place at Frankston Magistrates' Court on 21 March 2011 which was supposed to ensure that you did not approach within 200 metres of her residence or contact, assault or intimidate the deceased. You were bailed in respect of the charges to 22 October 2011 (para. 13).

In their victim impact statements read out in court during the plea, Joy Rowley's two daughters and son spoke about their mother's fear of James Mulhall and how the system had not protected her. Her eldest daughter stated:

My mum told me of the time Mulhall strangled her for the first time. Her face was bashed and she had strangulation marks on her neck ... Mum called an ambulance and was admitted to hospital. She laid there by herself; she didn't call us; she didn't want us to see her like that ... The intervention order that was in place after the attack meant nothing. Mum was so scared of him. Mulhall didn't respect the orders and returned. Mum knew the violence would continue if she challenged him to stay away. The horrible thing for me is I know how bad the first attack was for my mum and it's hard for me not to imagine the attack that ended her life was so much worse (Transcript of plea, 5 October 2012, p. 28).

It appears that the attack in February occurred after Joy had tried to end the relationship. Joy Rowley's youngest daughter said:

[My] Aunty ... told me that Mum had attempted to end the relationship with Mulhall. Mum had described to my auntie that he had snapped and said if I can't have you no one else can (Transcript of plea, 5 October 2012, p.51).

The comments by Joy Rowley's family highlight her fear of James Mulhall. Her eldest daughter said, 'Considering the seriousness of the initial crime, where was my mother's protection at the ... Court at such an exposed and vulnerable time? I don't understand why a woman in such a position was not protected [from] her attacker' (Transcript of plea, 5 October 2012, victim impact statement, p. 32). She added, 'Mulhall is a big tall man and my mum ... was so little'. She also said her mother was 'lonely and vulnerable and her generous heart of gold was at risk of being taken advantage of'. Joy Rowley's son said Joy didn't want her children to worry about her, and was 'ashamed of the predicament she found herself in' and this prevented her from asking for help (Transcript of plea, 5 October 2012, p. 71).

As outlined earlier, strangulation is a key risk indicator for lethal violence. James Mulhall was released on bail in March pending a hearing in October 2011, subject to an intervention order. This appears to have been a lost opportunity for intervention.

Other risk factors were also evident in this case – isolation of the victim, attempted separation, the perpetrator's jealousy and possessiveness, and the use of a weapon in the previous incident. As in the case of Denis Delich, the victim also appears to have had a high level of fear.

Discussion of how the legal system could better recognise risk in preventing intimate partner homicide is outside the scope of this report. However, as the case of James Mulhall and others suggest, this clearly requires further work. Meanwhile this study has highlighted that in many cases there is a recognisable pattern of abusive behaviour preceding the homicide.

A DISJUNCTURE IN UNDERSTANDING RISK

In recent years there has been a growing recognition that many domestic homicides are preventable (Johnson & Dawson 2011). There are frequently warning signs, and victims and perpetrators often have contact with services that may be able to assist and/or intervene. In many cases the system is inadequate in assessing and responding to risk effectively (Coroners Court of Victoria 2015).

Services within the Victorian criminal justice and broader social service system are required to undertake family violence risk assessment in order to identify victims at risk and to implement effective interventions and supports (DHS 2012). For instance, police undertake family violence risk assessments when attending a family violence incident. However, even if risk is identified as

high, the question remains how the justice system will then recognise risk indicators and interpret them in light of a subsequent homicide.

After reviewing intimate partner homicide prosecutions in New Zealand, Buckingham identified that the application of a standard risk assessment tool to the facts of such cases can reveal numerous 'red flags' that signalled a risk of a potentially lethal assault. However, in prosecutions, the cases were frequently presented as the result of 'spontaneous, and by implication largely unforeseeable violence' that occurred in response to provocation by the victim (Buckingham 2010, p. 94). Buckingham argues that since courtroom constructions of family violence in homicide prosecutions send powerful public messages about its nature and causes, the reconstruction or misrepresentation of red flags in the courts may result in public misunderstandings of risk and the social reality of family violence.

Similarly, in the intimate partner homicide cases we examined, there was often a lack of recognition of key risk factors and a readiness to accept narratives that these homicides were a spontaneous, out-of-the-blue 'loss of control'. The recognition of a history of family violence is the focus of discussion in Chapters 7–10.

CONCLUSION

In the intimate partner homicides in this study, there was evidence of many of the factors identified as potentially indicative of a risk of serious or lethal violence by the Victorian risk assessment framework, CRAF. Although the sources for our analysis were limited, there was evidence of relationship separation, controlling behaviour and obsessive jealousy, mental illness, substance abuse, unemployment, and suicide threats by the perpetrator. Negative attitudes and stereotypical expectations about the roles of women were also apparent in a proportion of cases, though these are not consistently identified in current risk assessment tools.

In at least a third of the cases in this study, risk factors co-occurred: the accused had a history of controlling or abusive behaviour towards his partner, as well as substance abuse or mental health problems, and killed his partner in the context of separation.

In some homicide prosecutions, an understanding of family violence risk factors may be relevant. For example, the prosecution could call an expert in family violence to highlight the significance of obsessive jealousy, threats or controlling behaviour by referring to accepted risk frameworks. This could be used to counter defence narratives that the homicide was a spontaneous, 'hot-blooded' killing. Risk factor information may be useful in explaining why the victim had not left the relationship, disclosed the violence to others, or pursued legal protection. However, this information may also be viewed as highly prejudicial to the accused and there may therefore be a number of obstacles to this approach. For example, evidence of a risk factor, such as a history of controlling behaviour by the accused, does not necessarily prove that the accused had an intention to kill.

It does, however, appear inconsistent that currently the criminal justice system undertakes family violence risk assessment via the police and Magistrates' courts, yet if a victim is eventually killed by her partner, the factors that may have been identified as indicative of risk may not be recognised as significant in the legal process in relation to the homicide prosecution.

CHAPTER 7

Depictions of family violence

Although the marriage had its strains and you had reacted aggressively in the presence of the psychologist, the marriage was not marked by violence ... this conduct was totally out of character for you and, apart from 'snapping', as you describe it, is otherwise inexplicable.

Sentencing remarks, *The Queen v McPhee* [2013] VSC 581, para. 25

Prior family violence is a key feature of many intimate partner homicides. However, the nature and dynamics of family violence are not well understood in the general community. Many in the Australian community perceive physical violence as more serious than other forms, and many struggle to understand why a victim would not leave the abuser, or believe that in some circumstances victims bear some responsibility for the violence (VicHealth 2014).

Legal professionals, like many in the community, are influenced by common stereotypes and perceptions about family violence. In the homicide prosecutions we examined in our study, legal professionals tended to use descriptions and assertions about family violence that drew on these common misunderstandings. This chapter provides case examples that illustrate the common conceptions of family violence that formed part of the narrative and discussions between legal professionals – defence and prosecuting counsel and judges – throughout the trial, plea and sentencing processes.

Significant narratives discussed in this chapter present 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'. Other narratives imply an expectation that the victim should leave the perpetrator or seek legal protection.

The way in which family violence is depicted by legal professionals is not necessarily an indication of their personal understanding of family violence. Judges and counsel for the defence and the prosecution have different roles to play. The adversarial nature of the legal system, legal rules in relation to proof and evidence, the instructions and individual characteristics of the accused, and the explanations provided in forensic psychiatric assessments may all have an influence on the narratives chosen. However, we argue that these narratives often draw on and maintain community misconceptions about family violence.

FAMILY VIOLENCE PRESENTED AS PRIMARILY PHYSICAL VIOLENCE

An emphasis on physical violence has typically been the focus of legal responses to family violence (Hunter 2006; Bettinson & Bishop 2015). As identified in Chapter 1, a comprehensive body of evidence now demonstrates that family violence commonly encompasses a broad pattern of physical and non-physical behaviour, and that non-physical forms of family violence have significant impacts on the victim. Research on risk factors identifies that particular forms of violence – such as threats to harm or kill, obsessive jealousy, stalking, sexual violence and controlling behaviour – are linked to a higher risk of lethal violence by the perpetrator (see Chapter 6).

A broader understanding is reflected in the definitions of family violence in the *Crimes Act 1958* (s. 322J) and the Family Violence Protection Act (see Chapter 2). However, in the cases in our study, more weight was given to physical forms of family violence than other forms of abuse.

There was some acknowledgement of the relevance of psychological abuse as a contextual factor in the relationship. However, if the prior abuse was not physical, it was not necessarily seen to be linked to the act of homicide.

A narrow understanding of family violence and an emphasis on physical violence was evident in the case of Ron Felicite, who pleaded guilty to murdering his wife.

CASE STUDY: RON FELICITE

On 30 August 2009, Ron Felicite (aged 26 years) killed his wife Marie Juliette Felicite (Juliette, aged 29 years) by stabbing her multiple times in the neck. He then went to the local police station and admitted he had killed his wife. Ron Felicite was charged and pleaded guilty to murder. In June 2010 he was sentenced to 19 years' imprisonment with a minimum non-parole period of 16 years (*R v Felicite* [2010] VSC 245).

In 2007, two years prior to the killing, the police had been called after Ron Felicite had threatened to kill Juliette (para. 3). An interim intervention order was granted, but a full order was not pursued. In early August 2009, Ron had threatened Juliette and their son, which resulted in Juliette going to her local police station and staying elsewhere for a few nights (para. 7). Afterwards Ron wrote a letter to her, in which he stated that he had been 'very aggressive' towards her during their relationship (para. 9).

On the day before the killing, Juliette had again called the police to their home after an argument about her communicating online with another man. She initially told police that Ron had threatened her with a knife. However, when the police arrived, both she and Ron denied he had done this.⁹⁸ She told the police that she was unhappy in the marriage and wanted to leave but was worried about her husband's welfare (para. 12). Juliette Felicite was stabbed to death the following day, after an argument about her wanting to separate. At least part of the attack was witnessed by their four-year-old son.

During the plea hearing, the legal professionals involved did not directly refer to Ron Felicite's prior behaviour as 'family violence', but instead referred to his 'anger management issues' (Transcript of plea, 2 May 2010, p. 4). The defence described the murder as a 'spontaneous outburst' in response to his wife's desire to separate, in the context of Ron's 'background of

⁹⁸ The judge remarked during sentencing that because of this, he was 'not satisfied' a knife was produced on that day (*R v Felicite*, para. 13).

depression and anger' (p. 59). Citing the evidence of a psychiatrist, the defence said Ron had been 'vulnerable to stressors' and the depression he was suffering at the time impaired his judgement and 'made him more prone to losing his temper' (p. 60). Although noting that Juliette 'didn't pursue an intervention order' (p. 5) against Ron Felicite, the prosecutor highlighted Ron's prior aggression to argue that the killing was 'not an isolated event', and pointed out that Ron had made only 'frugal' previous attempts to address his 'anger management issues' (pp. 66–68).

The sentencing judge described Ron Felicite's behaviour as 'verbal conflicts' without physical violence: 'There is no suggestion that you were ever physically violent to your wife before this event. Given the many verbal conflicts that are documented, this suggests you have at least some measure of self-control. Your employer speaks highly of your work ethic. I regard your prospects for rehabilitation as reasonably good' (para. 25). Additionally, Ron Felicite's lack of prior convictions and his 'passive, caring nature and ... concern for [his] immediate and extended family' were accepted as mitigating (para. 20).⁹⁹

FAMILY VIOLENCE PRESENTED AS AN 'ANGER MANAGEMENT PROBLEM' OR LOSS OF CONTROL

A study analysing judgements in sexual assault trials in Canada found that 'emotional attributions' for acts of violence were common (for example, 'he was angry', 'he lost his temper') (Coates & Wade 2004, 2007). Rather than viewing the accused as having chosen to be violent, legal professionals typically framed emotions as 'overwhelming' and the offender was seen to have 'difficulty controlling' them.

Similarly, in several cases in our study, anger was perceived to be a force beyond the control of the accused, which could be 'exacerbated' by stress. As discussed, in Ron Felicite's case, his history of abusive behaviour towards his wife was described by the various legal professionals involved in the case as an 'anger management problem'.¹⁰⁰ In the case of Bradley Carolus, who killed his ex-partner Sherry Robinson in 2010 after a court granted her permission to obtain a passport for their child, a forensic psychiatrist gave evidence that he 'has had difficulties with anger management ... his anger appears to have been exacerbated by his Family Court loss' (*R v Carolus*, para. 2).¹⁰¹ The sentencing judge accepted that Bradley Carolus had 'ongoing problems with alcohol abuse and anger management' (para. 48).

Along similar lines, in many cases the killing itself was described as the result of a momentary 'loss of control' in the context of emotional stress relating to separation. The use of these narratives is discussed further in Chapter 9.

⁹⁹ Where the evidence establishes that the offender is 'otherwise of good character', this mitigating circumstance must be taken into account in the sentence. We discuss understandings of 'good character' and how this relates to a history of family violence later in this chapter, and in Chapter 10.

¹⁰⁰ For example, in the majority judgment of the Court of Appeal, Redlich JA described the killing as being related to Ron Felicite's 'long running difficulties with controlling his anger' (*R v Felicite* [2010] VSC 245, para. 34).

¹⁰¹ In this case, as noted in Chapter 6, the deceased had just obtained permission from the Federal Magistrates' Court for a passport for their son, so that she could take him on an overseas trip.

FAMILY VIOLENCE PRESENTED AS BEING ‘CAUSED BY DRUG OR ALCOHOL CONSUMPTION’

Alcohol and drugs are frequently perceived to be the primary cause of family violence. Coates and Wade’s (2004) analysis of judgments in Canadian sexual assault trials found that alcohol and drugs were the most common causal attributions for the violence.

In 20 cases in our study, the defence argued that the killing was linked to the accused’s consumption of drugs or alcohol, and in many cases this argument was accepted by the prosecution and the sentencing judge.

In current sentencing practice in Victoria, if alcohol or drugs have been voluntarily consumed by the offender,¹⁰² this is not usually regarded as mitigating the seriousness of the offence or reducing the culpability of the offender. In such cases ‘they are regarded as morally responsible for their condition at the time of the offence’ (Freiberg 2014, p. 299). In the sentencing remarks in our study, judges commonly made clear that the consumption of alcohol or drugs was no excuse for the offence. However, in the explanatory narrative for the offence, the ingestion of alcohol or drugs was still identified as having been the primary cause of the offender’s violence towards his partner.

CASE STUDY: BRIAN ANDREW

In May 2007 Brian Andrew (aged 44 years) repeatedly punched and kicked his partner Janine Brockie (42). He failed to seek medical attention for her injuries, and she died the next day (*R v Andrew* [2008] VSC 138, para. 24). Brian Andrew was initially charged with murder but the Crown accepted his plea of guilty to manslaughter. He was sentenced 10 years’ imprisonment with a minimum non-parole period of 7 years.

The killing occurred at the house of a friend, who witnessed the attack. The friend gave evidence that prior to the assault, Brian Andrew was ‘inebriated’, and had told Janine Brockie: ‘shut up bitch I am talking’ and had accused her of seeing her old boyfriends (para. 18). After the assault, Brian Andrew was aware that she was ‘distraught’, had a swollen face and had been vomiting, but he left her at the friend’s house. He made several ‘desultory and feeble attempts’ to enquire about her welfare, but did not return to check on her until the next day (para. 24).

Janine Brockie was a ‘vulnerable woman’ who had intellectual disabilities, including an acquired brain injury, memory loss, and restriction of movement (para. 9). During the plea hearing the Crown prosecutor outlined evidence that Brian Andrews had repeatedly assaulted her during their relationship. This was based on evidence from multiple witnesses, and included evidence from a friend that Janine had stated she ‘was frightened of Mr Andrew as he hits her and she was scared “he’ll go off and kill me”’ (Transcript of plea, 17 March 2008, p. 4). Brian Andrew’s friends, family and a medical practitioner had observed bruises on the deceased, and some had warned him that ‘this behaviour was unacceptable’ (*R v Andrew*, para. 14). However, it appears he was never subject to any criminal charges for his behaviour.

The defence accepted that Brian Andrew had previously been violent, but argued that it was the result of his increasing problems with alcohol. The defence argued his violence towards Janine Brockie was ‘out of character’, and that he was essentially a ‘non-violent man ... a placid man’

102 This means that the person chose to consume the alcohol or drugs, rather than them being consumed by accident or as the result of drink spiking.

who had tried to ‘deal with his demons’ by seeking help for his alcohol abuse (Transcript of Plea, 17 March 2008, p. 53). The Crown submitted that the accused had known that his drinking was ‘a direct link to increased violence’, yet he had only made minimal attempts to address it. In sentencing Brian Andrew, the judge accepted that specific deterrence was warranted (*R v Andrew*, para. 53), and that this was a ‘serious’ case of manslaughter considering that he already knew that when ‘fuelled by alcohol’ he behaved in an ‘unacceptable manner’ towards his partner, and that his consumption of alcohol was ‘no excuse’ (paras. 38–40). However, the judge also concluded that Brian Andrew was ‘previously of good character’, considering that his sisters and his general practitioner said that his ‘violent behaviour towards the deceased, predating her death, was out of character’, and he had no prior convictions (paras. 44, 47).

Alcohol use was also described as a causal factor in the murder of Joanne Penglase by her husband in June 2010. Early in the relationship Graeme Penglase had assaulted Joanne. Not long before she was murdered, she told her husband she wanted to permanently separate from him. Graeme Penglase ‘did not want to accept her decision’ and contacted her often asserting his love for her (*R v Penglase* [2011] VSC 356, para. 4).

A psychiatrist engaged by the defence described Graeme Penglase as having a history of depression and ‘polysubstance dependence’ (para 25). He had been drinking alcohol on the day of the killing. The sentencing judge noted that Graeme Penglase had been ‘unable to advance any reason’ for his offending (para. 24), and commented ‘I do not doubt that you would not have done what you did if sober’ (para. 26).

In some cases the accused was described as being likely to perpetrate family violence in the future if he continued to misuse substances. For example, in the case of Dwaine Grant, who pleaded guilty to murdering Julie Simmonds in April 2011 by beating and strangling her, a forensic psychiatrist stated: ‘any further substance use [by Dwaine Grant] will likely be associated with escalated risk ... [of] potential violence, particularly in relationships’ (*DPP v Grant* [2013] VSC 52, para. 25). Dwaine Grant and the deceased had been involved in a sexual relationship for over a year.

While the research identifies that alcohol or substance abuse may increase the risk of serious violence (as outlined in Chapter 1), a focus on drugs or alcohol as the primary explanation for the violence obscures the role of other factors, such as the offender’s attitudes towards his partner. Alcohol or drug abuse is not the only relevant factor to address in the rehabilitation of an offender who has a history of family violence. It is striking to note that while legal professionals often commented on the need for the offender to participate in a drug or alcohol program, in no case was it suggested that the offender should participate in a men’s behaviour change program as part of their rehabilitation.

FAMILY VIOLENCE PRESENTED AS A MENTAL HEALTH PROBLEM

A common narrative in the cases in our study was that the killing was caused by the man’s mental health problems. In many cases this explanation emerged from forensic reports provided by psychologists and psychiatrists engaged by the defence.

A range of different terms or diagnoses for mental illnesses were attributed to the offenders in our study. Many were diagnosed as having suffered depression or anxiety disorders, in addition to other disorders such as borderline personality disorder, post-traumatic stress disorder, obsessive–compulsive disorder, and bipolar disorder. In six cases, offenders were diagnosed as having suffered

an ‘adjustment disorder’ at the time of the killing, and this disorder had developed as a result of relationship breakdown or infidelity – prior to this the offender did not appear to have suffered any mental illness. In addition to specific mental illnesses there were a range of descriptions used to explain the offenders’ mental state such as ‘immaturity’, ‘fragility’, ‘poor impulse control’, ‘emotional instability’ and ‘poor frustration tolerance’.

While clearly many people accused of crimes experience mental illnesses, some academics and practitioners who work with abusive men have expressed concern about the extensive reliance on mental illness to explain violence against women (for example, Bancroft 2002). For instance, a diagnosis of ‘anti-social and borderline personality disorders’ as well as ‘intermittent explosive disorder’ (which is an ‘inability to resist violent impulses’) was identified by a forensic psychologist in the plea hearing of Leigh Robinson. Robinson shot and killed his partner, Tracey Greenbury, in 2010 and had also killed a previous girlfriend in 1968 (*R v Robinson*, para. 22).¹⁰³ The Crown did not contest this evidence (Transcript of plea, 17 December 2009, p. 834). Intermittent explosive disorder has been critiqued by Edward Gondolf (2007), an American expert in batterer interventions, who has expressed concern about the growth in the application of neuroscience to explain men’s violent behaviour. While there may be an association between brain activity and violent behaviour, it is not necessarily causal. Gondolf emphasises the importance of recognising the influence of gender socialisation and social pressures that contribute to aggression and violence.

An emphasis on explanations that pathologise lethal violence has been identified by other researchers. For example, a small study of domestic homicide sentences in NSW and Victoria between 2002 and 2010, which included a small number of cases in our study sample, found that pathologising explanations were more often used for male offenders than for female (Hall, Whittle & Field 2015). The study found that ‘numerous psychological states were discussed, analysed and relied upon to explain a male offender’s behaviour’ particularly depression, stress or anxiety, or suicidality (p. 9). This was often linked to victim blaming: ‘wherein the decision by a wife to leave her husband was seen as the primary cause for the violence because it provoked a disturbed psychological response in him’ (p. 7). A focus on psychological concepts to explain intimate partner homicides was also identified in a Swedish study (Burman 2010); and in a Canadian study of criminal prosecutions for sexual violence (Coates & Wade 2004). Coates and Wade observe that this presents offenders as being ‘compelled by forces beyond their control’ (p. 514).¹⁰⁴

The use of mental health explanations is discussed in detail later (see Chapter 9 – the defence of mental impairment, and Chapter 10 – mental illness as a mitigating factor in sentencing.)

FAMILY VIOLENCE PRESENTED AS ‘MUTUAL’

In a study of Victorian Magistrates’ Courts, Hunter (2006) observed that family violence is often viewed as ‘a product of spousal conflict arising from the stresses of a marriage or de facto relationship’ and that ‘both parties [are perceived as] likely to be responsible for the violence’ (p. 758). To some extent this perception was evident in the homicides in our study.

¹⁰³ The defence argued Robinson’s mental health disorders were the result of his disturbed childhood and were relevant as a matter of mitigation (Transcript of plea, 17 December 2009, p. 834).

¹⁰⁴ Coates and Wade (2004) do not claim that judges use psychologising attributions deliberately to excuse men and promote violence against women and children; rather, that the language of psychological attributions for violence are used by academics, mental health professionals and journalists, and this in turn influences judicial decision-making.

In almost a quarter of the cases in our study (12 of 51 cases) the defence described the relationship between the accused and his partner as ‘volatile’ or ‘tempestuous’.¹⁰⁵ In some of these cases, the abuse in the relationship was presented as ‘mutual’ and the deceased as an equal contributor to problems in the relationship. In some trials this was linked to a defence argument that the accused acted in self-defence during a confrontation and/or that the death was not intended.

In recent years in Australia and internationally, there has been increasing attention drawn to men as victims of family violence. Indeed men’s rights groups have claimed that family violence rates by men and women are equal or ‘gender symmetrical’.¹⁰⁶ Arguably, this has contributed to an increase in the numbers of Australians who believe that women are ‘as violent as men’ (VicHealth 2010, p. 35; see also VicHealth 2014, p. 3). As outlined in Chapter 1, clearly some men are victims of family violence perpetrated by women, but there is little evidence to support broader claims of gender symmetry in rates of family violence or intimate partner homicide. However, these shifts in community attitudes, in addition to the removal of the provocation defence, may have contributed to an increase in the number of men arguing their actions were a response to aggression by the deceased.

Research shows that many female victims of violence attempt to protect themselves by fighting back (for example, see Fanslow et al. 2014),¹⁰⁷ and that often violence characterised as ‘mutual’ is in reality one-sided, and has a greater impact on the female partner. For example, Wangmann’s (2010) study of apparently ‘mutual abuse’ in cross-applications for protection orders in NSW courts revealed that the context, motivation and impact of violence was different for women and men. Women described controlling, abusive behaviours by male partners, but this was rarely described by men in relation to female partners (Wangmann 2010). This is likely to have been the case in many instances in our study. In each case where the relationship was characterised as ‘volatile’, while there was evidence that the deceased had been afraid of the accused and/or had sought police or court protection, there was no evidence that the accused had previously sought police protection or had told witnesses he was fearful of the deceased.

CASE STUDY: NASIR AHMADI

On 16 December 2011 Nasir Ahmadi (aged 46 years) killed his wife, Zara Rahimzadegan, also known as Mandy Ahmadi (46) by strangling her with a cord at their home in outer suburban Melbourne. He buried her in the backyard of their home and reported her missing. Almost a month later, the police found her body. Nasir Ahmadi admitted killing his wife and said it was because she was leaving to go away with another man. He was charged with murder, but later the Crown accepted an offer to plead guilty to manslaughter. He was sentenced to 11 years’ imprisonment with a minimum non-parole period of seven years (*The Queen v Ahmadi* [2013] VSC 293).

The defence counsel argued during the plea hearing that the ‘volatility came from both sides’ (Transcript of plea, 30 May 2013, p.23). To support this claim, the defence counsel cited evidence from neighbours who reported they often overheard Mandy Ahmadi shouting at Nasir during arguments, and one neighbour said it appeared Mandy ‘wore the pants’ in the relationship (p. 24).

¹⁰⁵ Relationships were described as ‘tempestuous’ (for example, Mulhall, Middendorp), ‘turbulent’ (Stoneham, Mahoney), ‘troubled’ (Lubik), ‘volatile’ (West, Robinson, Drummond, Ahmadi, Pennisi) and ‘argumentative’ (Piper, Wilson).

¹⁰⁶ For example, the ‘One in Three’ campaign in Australia (www.oneinthree.com.au).

¹⁰⁷ Fanslow et al.’s (2014) study of 843 New Zealand women who experienced physical violence by a partner found that 64 per cent reported fighting back, and of those women, 66 per cent said it had not stopped the violence.

An acquaintance stated that Mandy Ahmadi 'is the controlling party' in their relationship, and that she was emotionally manipulative, and 'verbally abuses and constantly nags her husband' (p. 30). The acquaintance also conceded that Nasir Ahmadi 'had a temper' (p. 30). The defence counsel argued during the plea hearing that Nasir did not intend to kill his wife and this was a 'spontaneous event' in the context of 'another verbal argument between the two of them which escalates out of control' (p. 65). Counsel for the defence commented that the 'unfortunate thing was that neither of them had taken the step to actually separate from each other and thereby avoid the calamitous events that ultimately happened' (p. 76).

These descriptions portrayed Mandy Ahmadi's behaviour as a contributing factor in the killing. There was considerable evidence that Nasir had previously been violent towards Mandy. There had been two prior intervention order applications in relation to Nasir Ahmadi's violence,¹⁰⁸ and Mandy had told friends and family that her husband had assaulted her, she was fearful of him and that he'd told her that he had killed his previous fiancée.¹⁰⁹ However, the defence counsel stated that 'whatever was the matter of conflict between the two' the intervention orders had been 'resolved' and the relationship had continued (Transcript of plea, 30 May 2013, p. 21). This construction of the violence in the relationship as 'mutual' did not appear to have been contested by the prosecution during the plea – indeed, the Crown prosecutor described the relationship as involving a history of 'ongoing marital disputes' (p. 8).

Mandy Ahmadi was obviously not able to respond to these claims. The sentencing judge appears to have accepted much of the defence argument, stating that they 'were both heard arguing with each other, and at other times your wife was heard to be angry with you' (*The Queen v Ahmadi*, para. 9). The judge noted that Mandy had complained to friends about her husband's violence and there were two recorded family violence incidents, but the intervention orders were subsequently 'resolved' or withdrawn (para. 9). The judge identified that those who had provided character references described him as a hard worker who had been 'striving to give [his] family the best life [he] could' (para. 23), and concluded that Nasir Ahmadi was 'otherwise a person of good character', and that 'specific deterrence may ... be given less weight' (para. 26).

FAMILY VIOLENCE PRESENTED AS 'OUT-OF-CHARACTER' BEHAVIOUR

In their examination of Canadian sexual assault trial judgments, Coates and Wade (2004, 2007) noted that violent acts were frequently described as being 'outside the man's character'. This description downplays 'the deliberateness entailed in the choice to be violent by portraying the man as somehow "not himself" when he committed the assaults' and constructs the assault as an 'inexplicable anomaly' with little chance of reoccurring (Coates & Wade 2004, p. 512).

In many of the cases in our study (such as those of Nasir Ahmadi, Ron Felicite, and Brian Andrew discussed above), the homicide was characterised as behaviour that was out of character and occurred in the context of emotional stress, mental health or alcohol problems. The effect is

108 The police took out an intervention order on Mandy Ahmadi's behalf in 2007, and it was revoked a month later. In 2010 Mandy Ahmadi applied for an intervention order but withdrew it on the same day (Transcript of plea, 30 May 2013, p. 21).

109 There is little detail about the nature of these assaults in the sentencing remarks or plea hearing transcripts. However, the *Age* reported that at the committal hearing in 2012, Mandy Ahmadi's brother gave evidence that Nasir had previously 'burnt [her] thigh with a hot iron and threatened to run her over with a car' (Russell 2012). According to the *Age* report, witnesses told the court that Mandy was 'scared' of her husband, and that she had told her mother that Nasir had told her he had 'suffocated his previous fiancée ... because she had been unfaithful to him and no one had found out that he did it' (Russell 2012).

to infer reduced likelihood of future risk of violence. The argument that the offence was out of character was often used when the accused had been controlling or abusive but not physically violent.

In the case of Stephen McPhee, there was evidence that he had been possessive and controlling towards his wife prior to the killing. McPhee's 'good character' was accepted as a mitigating factor by the sentencing judge (*The Queen v McPhee* [2013] VSC 581, para. 25). His sentence was further reduced following an appeal, to take greater account of his 'unblemished and honourable life', as well as other mitigating factors (*McPhee v The Queen* [2014] VSCA 156, paras. 3, 6, 14).

CASE STUDY: STEPHEN MCPHEE

On 3 January 2013, Stephen McPhee (aged 56 years) killed his wife Cathy (58) by stabbing her twice in the chest at their home in Mildura. He pleaded guilty to murder. In October 2013 he was sentenced to 20 years' imprisonment with a minimum non-parole period of 16 years (*The Queen v McPhee* [2013] VSC 581). He successfully appealed his sentence, and in July 2014 the joint judgment of the Court of Appeal reduced his sentence (*McPhee v The Queen* [2014] VSCA 156).

Stephen and Cathy McPhee married in 2008. The Crown prosecutor said that in 2011, Cathy McPhee had told a psychologist she was unsure if she wanted the marriage to continue because of her husband's 'alcohol consumption and verbal abuse', and his viewing of pornography (Transcript of plea, 21 October 2013, p. 4). Friends and family had noticed he 'was jealous and controlling' and that he was 'jealous of [Cathy's] relationship with her sons' (p. 3). According to the Crown, Cathy's close friend said that 'at social functions [Stephen McPhee] would even follow Mrs McPhee to the toilet and wait outside for her' (p. 4). Cathy disclosed to a counsellor that Stephen McPhee 'had pulled a knife' and threatened self harm on one occasion (p. 4). During a marriage counselling session in late 2012, Cathy confirmed that she wanted to separate. Stephen then became 'aggressive and agitated' and threatened to kill himself (p. 4).

In September 2012 the couple consulted a solicitor regarding their separation arrangements.

According to Stephen McPhee's version of events given to the police, on the day of the killing, Cathy had told him she did not trust him and no longer loved him, and rejected his attempt to kiss her (*The Queen v McPhee* 2013 VSC 581, para. 6). He told police he had 'seen red, grabbed the knife and stabbed her' (para. 8).

During sentencing, commenting on Stephen McPhee's previous 'possessive' behaviour, the judge rejected the idea that he had lost control, stating: 'Your explanation that you "snapped" masks the reality that you acted out of anger' (para. 25). However the judge went on to state that although the 'marriage had its strains and you had reacted aggressively in the presence of the psychologist, the marriage was not marked by violence' (para. 25). The judge referred to Stephen McPhee's lack of prior convictions, and testimonials from his family, friends and colleagues which described him as 'hard working and reliable' and, taking into account his guilty plea, she found that 'this conduct was totally out of character for you' and was, therefore, 'otherwise inexplicable' (paras. 25, 27).

Stephen McPhee successfully lodged an appeal against sentence on the ground that the sentence and minimum non-parole period were manifestly excessive and that the sentencing judge failed give to sufficient weight to a number of matters in mitigation (*McPhee v The Queen* [2014] VSCA 156). Part of the submission by the defence counsel contended that Stephen McPhee had

'no history of domestic violence', had led 'an unblemished and honourable life', had 'disclosed a lifetime of very hard work' and had no prior convictions. Additionally, in the lead up to their separation he had assisted his wife to renovate her new house (para. 6).

In challenging this, the prosecution argued that the 'objective gravity' of the offence justified the sentence imposed, considering the 'history of the relationship' which led to the events prior to the killing – particularly the evidence that Stephen McPhee had 'engaged in excessive drinking and had been perusing pornography' (para. 13). It is unclear whether the prosecution referred to McPhee's prior controlling behaviour in relation to the appeal.

In giving their reasons for allowing the appeal, the joint judgment of the Court of Appeal (per Redlich & Priest JJA) stated that Stephen McPhee's 'exemplary work record ... unblemished history ... [and] ... absence of ... aggravating features' meant that in their view the sentence 'not only fell within the lowest category of seriousness of the offence of murder, but at the lower end of that category' (para. 14) and re-sentenced him to 18 years' imprisonment with a minimum non-parole period of 13 years.

In this case, there were several 'red flag' indicators of a risk of lethal violence, including the accused's obsessive jealousy, controlling behaviour, alcohol misuse, and threats to suicide using a weapon, and the victim's desire to separate. The evidence also indicates that the deceased was increasingly concerned about the accused's escalating behaviour. The finding that the homicide was an 'inexplicable' out-of-character event sits at odds with an assessment of the risk indicators in this case.

It is not uncommon for someone who is abusive to behave differently in public than in private, and to those outside of the home he may appear charming, polite or caring (VLRC 2006, p. 29). As discussed in Chapter 10, evidence of the offender's good character can be considered in mitigation of their sentence, based on consideration of the offender's prior convictions, general reputation, and contributions to the community (*Sentencing Act 1991* [Vic], s. 6). However, ultimately, the outcome of the legal process is a narrative that obscures possessive and controlling behaviour within the relationship, and instead focuses on behaviour outside of the home.

EXPECTATIONS OF VICTIMS' RESPONSES TO FAMILY VIOLENCE

As Hanna (2009) has observed, based on her analysis of legal responses to family violence in the USA, the introduction of various legal protections for family violence victims over recent decades has had a paradoxical effect. With the growing emphasis on police and court intervention comes the expectation, however unrealistic, that women should 'willingly avail themselves to that intervention' (p. 1460). Courts typically operate on the assumption that legal interventions are effective in stopping the perpetrator and that a person who needs legal protection will therefore proceed to obtain it. As discussed in Chapter 1, the majority of victims do not pursue legal protection for a variety of reasons.

In many of the cases in our study, the fact that the victim had not fully pursued legal intervention was frequently noted, and meant that the violent incidents were accorded less significance. (See, for example, the cases of Nasir Ahmadi, Ron Felicite discussed earlier in this chapter, and Ralph Pennisi discussed in Chapter 9). To some extent, the focus on whether the victim had fully pursued legal intervention may relate to the standard of proof required in sentencing, as discussed in

Chapter 10. However, often these narratives were linked to additional comments that the victim had remained in the relationship, which appeared to indicate that the violent incidents could not have been significant or the victim would have left the offender.

There also appeared to be limited recognition of the difficulties women face in keeping themselves safe from abusive men, even if they have taken out an intervention order. In the case of James Mulhall (discussed in Chapter 6), the Crown prosecutor described the victim as having herself ‘breached’ the intervention order by letting him return to stay at her house after he had seriously assaulted her. The prosecutor stated in the plea hearing ‘the accused and the deceased both appeared to breach the intervention order’ by being together at Joy Rowley’s home (*Mulhall*, Transcript of plea, 5 October 2012, p. 10). Such a description implies that the victim was equally responsible for the breach.¹¹⁰

As discussed in Chapter 6, in their victim impact statements, Joy Rowley’s adult children described her vulnerability and her ongoing fear of James Mulhall, and said it was difficult for her to stop him from returning to her home, irrespective of any intervention order.

CONCLUSION

In this chapter we have argued that family violence or forms of harm that come under the definition of family violence in Victorian legislation are frequently discussed by legal professionals in a way that draws on common misconceptions about family violence. These misrepresentations, together with the constraints of legal rules and processes, result in a minimisation of the impact of family violence. As Hunter (2006) has observed ‘[e]ven when violence is in issue, legal descriptions still tend to deny or minimise domestic abuse. For example judgments ... tend to provide distanced, detached, dispassionate descriptions of the violence, to employ passive constructions, and otherwise to obscure male agency in perpetrating violence’ and in court narratives, violent men ‘are often presented as objects of pity, essentially gentle or quiet, but driven to extremes, to act out of character, by marital tension, or by their partner’s provocative act of leaving or becoming involved with another man’ (pp. 752–753).

While the adversarial nature of the criminal justice system and legal rules may promote the use of these narratives (by defence counsel, for example), the consequence is that misconceptions are perpetuated and condoned.

Our analysis points to a need for a comprehensive professional education program for legal professionals regarding the coercive controlling nature of family violence, the key determinants of violence, common narratives of perpetrators, and risk factors for lethal violence. This will be discussed further in Chapter 11.

¹¹⁰ A victim of family violence who is the ‘aggrieved family member’ or ‘protected person’ in an intervention order, cannot breach the order unless it is a mutual order. As noted in the Family Violence Protection Act, s. 125, a protected person can not be guilty as an ‘abettor’ in contravening the order. The Act highlights that a ‘protected person’ is ‘not punishable as a principal offender’ if they encourage, permit or authorise conduct by the respondent that contravenes the family violence intervention order or family violence safety notice (for example, if they invite the respondent to their residence, or spend time with the respondent, in contravention of the order).

CHAPTER 8

Family violence evidence

I rule that the evidence of the aggression and hostility displayed by the accused to the deceased during their marriage as outlined in the witnesses statements and the deceased's fearful reaction to that conduct, is relevant and admissible.

R v Lubik [2010] VSC 465 Ruling, para. 12

This chapter considers the extent to which evidence of a prior history of family violence is heard during the homicide prosecution process.

In more than half of the cases in this study, there was evidence that the accused had a history of abusive, controlling or violent behaviour towards his partner. In many of the cases, family members of the deceased were aware of this and held serious concerns about the women's safety. In some cases, family members spoke to the media to express their outrage when this history of violence was not recognised.¹¹¹

In this chapter we look at whether and how family violence evidence is identified by police investigators, how family violence evidence is currently being admitted in homicide trials by prosecutors, and whether additional strategies are needed to assist legal professionals, judges and juries to better understand and use family violence evidence.

IMPORTANCE OF FAMILY VIOLENCE EVIDENCE

In a homicide trial, the focus is the incident that causes the death rather than a history of prior violence and abuse that may have preceded it. Criminal investigations and prosecutions focus on 'conduct relevant to establishing each element of the offence', that is, proof that the accused caused

111 For example, it was reported that the mother of Kara Doyle, who was shot and killed by her partner Mehmet Torun in 2013 (see case discussion in this chapter), was angry with the Director of Public Prosecutions for accepting Torun's plea of guilty to manslaughter (Russell 2015). In another case, the mother of Rekihah O'Donnell, who was shot in 2013 by her partner Nelson Lai, told the media she was devastated by the jury's decision to convict the accused of manslaughter, despite evidence of Lai's prior physical violence and threats to kill having been presented in court. She told the *Herald Sun*: 'For what she went through for so long, and for the outcome to just be manslaughter ... I find it unbelievable he wasn't convicted of murder' (Doherty & Johnston 2015). (The case of Nelson Lai was not included in our report as the prosecution was outside of the date range of our sample.)

the death, and the mental elements such as an intention to kill. Thus, 'a broader history of abuse may be perceived as irrelevant to the immediate offence charged' (ALRC & NSWLRC 2010, p. 563).

However, as Linsky (1995) has argued, juries 'must hear about the history of domestic violence when determining the guilt or innocence of an abuser so that a miscarriage of justice does not occur' (p. 96). When a homicide is perpetrated against an intimate partner, the history of the relationship, in particular any pattern of controlling or abusive behaviour by the accused, is critical information that may be relevant in understanding why the killing occurred. Evidence about prior family violence by the accused can assist the prosecution to establish motive or the intention¹¹² of the accused, or to negate defences that the killing was accidental or in self-defence. It can also assist juries or judges to understand evidence that may otherwise seem implausible or disjointed, for example, evidence demonstrating the accused person's or victim's state of mind (ALRC & NSWLRC 2010, p. 574; see also VLRC 2004 p. 133). In sentencing, evidence of family violence ensures the broader context of the accused's behaviour is taken into account, and can help counter arguments by the defence that the killing was unintentional, unpremeditated or 'out of character'.

Public recognition of the seriousness of family violence and the harm done to the victim is important in intimate partner homicides. In one of the cases in our study (*The Queen v Ahmadi*, discussed in Chapter 7), the family of the deceased, Mandy Ahmadi, were upset that the Crown accepted her husband Nasir's plea of guilty to manslaughter. Family members had provided evidence of Nasir Ahmadi's violence towards Mandy Ahmadi. Mandy's sister-in-law asked, '[h]ow are we supposed to believe this was spontaneous?' (Hadfield 2013).

Statements made by legal counsel and the judge about family violence and its relevance to the case are important because they shape the narrative and understanding of what occurred. The victim's family is frequently present in court to hear these discussions, and the judge's acknowledgement of a history of abusive behaviour may reassure the victim's family members and friends that justice has been done and that the impact of the behaviour has been publicly recognised. Judges' comments can also play an important role in increasing community understandings of domestic homicides.

The potential relevance of family violence evidence in homicide prosecutions was identified by the VLRC in its 2004 review of homicide legislation, which identified that, at that time, the existing rules 'may unfairly limit the use of evidence and prevent evidence that may have a high degree of probative value from being considered' (VLRC 2004, p. 131). The barriers to the admission of evidence of prior violence included the hearsay rule, rules governing the admission of expert opinion evidence, and the rules controlling the admissibility of propensity evidence (now termed 'tendency evidence', discussed below) (pp. 142–143). The VLRC made a number of recommendations to reform the laws of evidence including legislative exceptions to the hearsay rule in criminal proceedings (pp. 157–159). The VLRC's recommendations were part of the policy context that underpinned the implementation of the new Evidence Act in 2008 (which is referred to as the Uniform Evidence Act [UEA] – discussed further below).¹¹³

Despite this, our research suggests that a history of family violence is not always fully recognised in homicide prosecutions. There are a variety of reasons for this. Evidence may not be available, or may not be adequately collected during the police homicide investigation. The prosecution may

¹¹² Motive must be distinguished from the intention to commit the offence and from the method by which it is executed. As Freiberg (2014) has explained, '[i]ntention is an element of an offence: the prosecution must prove both the mental element and the physical act. Motive is not an element but may clarify whether intention was present and why [footnotes omitted]' (p. 314).

¹¹³ The VLRC worked closely with the ALRC as part of its inquiry into the laws of evidence (VLRC 2006).

not seek to lead family violence evidence because the evidence may not be sufficient to meet the relevant standard of proof, or may be ruled as inadmissible by the presiding judge, or the judge may direct the jury that it is permitted to consider it for a particular purpose only, according to the laws of evidence. In some cases, evidence may be excluded during a plea negotiation. Misunderstandings about the nature, causes, dynamics and impact of family violence may also influence what evidence is considered relevant in a homicide prosecution.

POLICE INVESTIGATIONS AND EVIDENCE COLLECTION

The police investigation of homicides is critical in ensuring evidence of family violence is obtained and available for the prosecution. Local police may be the first to attend the homicide scene. The police generally take statements from witnesses and victims and collect evidence, which may be used in the prosecution. In a suspected homicide, detectives from the homicide squad conduct the investigation.

Family violence is often hidden from view, and uncovering evidence of it may take considerable police time and resources. As identified in Chapter 1, relatively few victims report family violence to police, however many talk to family members or friends. Family members, friends, neighbours, work colleagues and others may have also witnessed or heard the violence or seen physical evidence of it. Service providers and professionals – such as doctors, welfare workers, or counsellors – may have had contact with the victim or the accused, and may also be important witnesses.

Victoria Police has had an increased focus on family violence over the past 15 years.¹¹⁴ However, it appears that detectives receive limited specific training on evidence gathering in family violence cases, although family violence case examples are discussed during training.¹¹⁵

In this study we were unable to examine police investigations of prior family violence in homicide cases, as we had no access to police briefs or exhibits. Our research primarily relied on the information recorded in transcripts of criminal trials, plea hearings and sentencing and appellate judgments. However, by examining other sources available in relation to the cases in our study, such as Coroners Court investigations and media reports, it appears that there may be information about prior family violence that is not presented in court.

In some cases, such as the case of Lino Mamour below, police appear to have intervened in relation to prior family violence, however there was insufficient evidence available about this for it to be taken into account.

114 See Victoria Police submission to the Royal Commission into Family Violence, (Victoria Police 2015, p. 38). Changes introduced include the police *Code of Practice for the Investigation of Family Violence* in 2004, increased training, the use of family violence risk assessment and risk management (L17) forms for all reported incidents of family violence, and the introduction of family violence advisors, liaison officers and teams.

115 Detectives receive training in the general principles of evidence gathering across all serious crime types rather than specific training for crimes such as family violence, however family violence-related examples are used as part of the training for investigators, and students undertake a research paper on the topic of family violence as a serious crime. The homicide squad does not provide training in evidence gathering specific to family violence – their work is primarily focused on gathering evidence to be included in a brief of evidence to the Criminal Court and/or to the Coroners Court (personal communication, Family Violence Command, Victoria Police, 2015).

CASE STUDY: LINO MAMOUR

On 24 August 2010, Lino Mamour (aged 41 years) repeatedly stabbed and killed his wife, Juana Legge (29), in their home. Lino Mamour pleaded guilty to murder, and was sentenced to 18 years' imprisonment with a minimum non-parole period of 14 years (*R v Mamour* [2011] VSC 113).

Juana Legge had come to Australia two months prior to her death, although her husband had migrated here in 2002. In the weeks prior to the killing, Lino Mamour had become suspicious his wife was having an affair.

According to Lino Mamour's version of events, on the day of the killing Juana Legge told him she had slept with someone else. He said he told her to leave the flat but she refused. He claimed that she then said to him "If you are not a coward, kill me" (para. 2). He took the knife from the cupboard and stabbed her a number of times to the back and chest.

The defence argued that the killing was 'out of the blue' and occurred in the context of an 'adjustment disorder' Lino Mamour had developed (Transcript of plea, 25 March 2011, pp. 27–28). However, there was some indication that police had been called to the home in relation to an incident of family violence, but the circumstances were unclear. The only information about that incident was a brief mention of it in a report by a forensic psychiatrist, who stated that Lino Mamour had told him that he had 'only been arrested on one occasion and said the police had visited the house once for a matter of domestic violence but no charges or problems had followed from this' (para. 6).

Considering the circumstances of the police attendance were 'unknown' the sentencing judge said that he did not intend to have 'any regard to it' in sentencing (para. 7). The judge accepted as a mitigating factor that Lino Mamour had led 'a blameless life' and had 'actively assisted others' which was 'indicative of good character' (para. 30).

The death of Juana Legge was subject to a Coroners Court investigation into death without inquest, as part of the Victorian Systemic Review of Family Violence Deaths.¹¹⁶ A coronial investigation is inquisitorial in nature and different rules of evidence are applied than those in criminal prosecutions. The investigation revealed that Lino Mamour had been violent towards a previous partner, and in 2006 was subject to a family violence intervention order.¹¹⁷ The Coroner also found that he had a 'history of aggressive behaviour associated with alcohol' (*Finding without inquest into the death of Juana Legge*, 14 July 2014, para. 11). None of this history was mentioned in the transcript of Lino Mamour's plea hearing or sentence.

¹¹⁶ *Finding without inquest into the death of Juana Legge*, 14 July 2014 (para 32). The findings were reported on 14 July 2014, some years after Lino Mamour was sentenced.

¹¹⁷ In the case of James Mulhall, the sentencing judge does identify the accused's violence towards a previous partner. Based on a victim impact statement provided by James Mulhall's daughter, the judge identified that his last relationship 'was described as a violent one', (para. 12), and said that the 'import' of this is that it 'reinforces to a degree the difficulty that people have experienced in detaching themselves from you once a relationship has commenced. It also reinforces the violence that you demonstrated towards Joy Rowley in the period prior to her death, and it would not be permissible to use the statement for those purposes' (para. 7). Violence towards a previous partner was also identified in a Coroners Court investigation in the case of Peter Lubik (as discussed on p. 85).

USE OF FAMILY VIOLENCE EVIDENCE BY THE CROWN

In many of the cases that went to trial, the prosecution was successful in having evidence of a history of family violence admitted as relevant to the context in which the killing was committed. This evidence was most frequently admitted as being relevant in establishing the accused's motive or the nature of the relationship between the accused and the deceased. It was less likely to be admitted to demonstrate that the accused had a tendency to act in a particular way towards the deceased.

In some cases, however, evidence of prior family violence seems to have been available to the prosecution, but it did not appear to have been presented at the trial or the plea hearing. It is difficult to know why this was the case – it may be because the prosecution had insufficient information to draw upon from the police brief, or evidence did not meet the relevant standard of proof, was excluded for reasons of expediency or as part of a plea negotiation, or because it was seen to be not relevant to the case. Crown prosecutors play a particularly important role in this regard as their views may shape and inform what is considered relevant to present as evidence in a particular case (WCAFFV 1994, p. 108; Buckingham 2010).

Some cases are settled by negotiation between the prosecution and defence, on a plea of guilty to a lesser charge, such as manslaughter. In Victoria, plea negotiations are resolved on the basis of 'the strength of evidence including any admissions; any probable defences; the views of the victims and the informant; the accused's criminal history; and the likely length of a trial' (Champion 2014, p. 4). Those final decisions are not made public (pp. 4–5).¹¹⁸

In the case of Nasir Ahmadi (outlined in Chapter 7), members of the deceased's family were 'devastated' that the Crown had accepted the accused's plea of guilty to manslaughter by an unlawful and dangerous act, considering that he had admitted he had strangled his wife. At his plea hearing the prosecuting counsel described the unlawful and dangerous act as being the assault, which was the result of being strangled with the cord (*The Queen v Ahmadi*, Transcript of plea, p. 14). A difficulty establishing the cause of death may have been a factor in the Crown's decision to accept a plea of guilty to a lesser charge. Nasir Ahmadi had buried his wife's body in the backyard. By the time that Mandy Ahmadi's body was found, it was in a state of 'advanced decomposition' and therefore the cause of death could not be clearly determined (*The Queen v Ahmadi*, para. 17). The defence counsel's submission, in relation to the difficulty the Crown had in establishing cause of death, was that this was a factor that made Nasir Ahmadi's offer to plead guilty to manslaughter more 'significant' (Transcript of plea, p. 62).

There are various reasons why the Crown may accept a plea of guilty to manslaughter, including the limitations of the available evidence in proving the elements of murder. The Court of Appeal's decision in the case of Mehmet Torun, discussed below, illustrates that when a plea of guilty to manslaughter is accepted by the Crown on the basis that the killing was unintentional, the accused's history of family violence may have only limited relevance.

¹¹⁸ Commenting on the lack of information available about why the Crown might accept a plea in a particular case, Byrne (2015) explains that 'more information about its decision-making ... would assist the community in understanding more about the issues in homicide cases and the operation of the law'. However, Byrne also makes clear that '[n]ot disclosing reasons for plea agreements may ... be justified in some cases' as in some situations 'this could prejudice an accused's right to a fair trial'. Accordingly, Byrne argues that '[w]hile public information would be best, at the very least, the DPP should record its reasons for plea decisions and make this information available for research on homicide laws and plea agreements' (p. 155; see also Flynn 2011).

CASE STUDY: MEHMET TORUN

On 17 April 2013, Mehmet Torun (aged 24 years) shot his girlfriend Kara Doyle (24) at her home. She died of the injury several days later. The Crown accepted Mehmet Torun's plea of guilty to manslaughter. He was sentenced to 8 years' imprisonment with a minimum non-parole period of 5 years (*R v Torun* [2104] VSC 146). The Director of Public Prosecutions appealed the sentence; however, this was dismissed by the Court of Appeal.

According to the Crown summary, Mehmet Torun had 'exercised significant control over the deceased' (para. 19). Kara Doyle had attempted to leave Mehmet Torun on several occasions. Mehmet Torun had made threats towards her (including threatening her with a blowtorch and a knife), and other people. He had recently obtained a gun. On the day of the killing Kara Doyle had left the house with her belongings, but returned later after being followed by Mehmet Torun. A witness heard Mehmet Torun scream he wanted to 'kill her' (para. 18).

According to the accused's version of events, the gun went off accidentally while he was in a drug-affected state, and he had failed to recall that the gun was loaded. There was evidence that just before the killing he had 'uttered the words indicating the gun was not loaded' (para. 24). Witnesses gave differing accounts of the shooting. One said that Mehmet Torun had been facing Kara Doyle when he fired the gun, while another said he was not facing her and the gun had fired backwards over his shoulder.

The Director of Public Prosecutions (DPP) appealed the sentence on the ground that it was manifestly inadequate. Part of DPP's argument was that the sentencing judge 'failed to have sufficient or any regard to the fact that the offence was committed against a background of domestic violence directed by a male towards a female sexual partner' (*DPP v Torun* [2015] VSCA 15, para. 17). The DPP had submitted that the fact that Mehmet Torun had pointed the gun in the direction of Kara Doyle 'and not at someone else in the room showed that domestic violence was relevant' (para. 19). The applicant's leave to appeal was dismissed by the Court of Appeal (*DPP v Torun*, Ashley, Whelan & Beach JJA concurring).

When giving his reasons for rejecting the appeal, Ashley JA stated that when the Crown accepted a plea negotiation, they accepted that the fatal shot had been fired 'without murderous intent' (*DPP v Torun*, per Ashley JA, para. 10). Had the case proceeded on a charge of murder, 'much might have been made' of Mehmet Torun's previous conduct (para. 8). Ashley JA noted that, in the plea, the Crown had described 'a volatile relationship characterised by arguments and reconciliations, by controlling and jealous behaviour on the part of the respondent, and by brief and disputed accounts whether the respondent had ever inflicted physical violence on Ms Doyle' (para. 18). This was part of the summary of circumstances that might have supported a charge of murder; however, in the acceptance of a plea of manslaughter, this material 'was only of diminished relevance' (para. 21). His Honour also found that at the plea hearing, senior counsel for the Crown had not mentioned the term "'domestic violence'" at all' nor did he submit that the judge should have regard to the offence having been committed 'against a background of domestic violence' (para. 19). Accordingly, Ashley JA was of the view that the only use that could be made of the material in sentencing was to 'limit the weight' which would otherwise have been given to 'the mitigatory circumstance that the respondent was a relatively young man with a modest criminal history' (para. 15).

ADMISSION OF FAMILY VIOLENCE EVIDENCE IN TRIALS

In order to understand the way in which evidence of family violence is presented in trials of men who kill in the context of intimate relationships, it is necessary to have some understanding of the laws of evidence, widely regarded as one of the most complex areas of law. We will not go into detail here, but will provide a brief outline of the key types of evidence and the rules of admissibility that govern their relevance in intimate partner homicide trials.¹¹⁹

The rules of admissibility of evidence in Victoria are determined according to the Evidence Act 2008 (Vic) (referred to as the Uniform Evidence Act [UEA]),¹²⁰ which commenced on 1 January 2010. Under the UEA, evidence is only admissible in a criminal trial if it is 'relevant' (s. 55).¹²¹ Evidence may have more than one 'use', so it is important for legal counsel to identify the basis upon which the evidence is sought to be led. The key section in the UEA is s. 56, which provides that evidence is relevant if it is admissible subject to other provisions of the Act (see Chapter 3 of the UEA).¹²² There are, however, numerous rules relating to the exclusion of certain evidence.¹²³ Admissible evidence may be excluded subject to discretionary or mandatory exclusions under ss. 135 and 137.¹²⁴ While s. 135 is the general exclusionary rule that applies to both civil and criminal matters and both prosecuting and defence counsel,¹²⁵ s. 137 is the more relevant provision for our study as it applies specifically to prosecuting counsel and provides that:

*In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.*¹²⁶

When a person is charged with an offence alleged to have been committed as part of a broader course of family violence, family violence-related evidence may be admissible, provided that it is relevant to a fact in issue (ALRC & NSWLRC 2010, p. 574). Certain family violence-related evidence may be admissible to prove motive or to establish the intent of the accused, or to negative a defence of accident, self-defence or provocation (p. 574). Family violence-related evidence may also 'assist the trier of fact to understand evidence that may otherwise be disjointed or implausible' (p. 574). In addition, family violence evidence can be admitted to 'establish a tendency on the part of an accused person to resort to violence in specific circumstances, in support of a contention he did not act in self-defence' (p. 574).¹²⁷

119 Much of the existing literature about these types of evidence concerns sexual offence trials; however relationship evidence is not confined to sexual offence cases (Flatman & Bagaric 2001, p. 194; *Wilson v The Queen* (1970) 123 CLR 334; Hamer 2008).

120 This is similar to other jurisdictions that adopt this model (e.g. New South Wales and Tasmania).

121 All section references are to the UEA unless otherwise stated.

122 For our purposes, Part 3.1 sets out the general inclusionary rule that relevant evidence is admissible.

123 Part 3.2 is about the exclusion of hearsay evidence, and exceptions to the hearsay rule. Part 3.3 is about the exclusion of opinion evidence, and exceptions to the opinion rule. Part 3.6 is about exclusion of evidence of tendency or coincidence, and exceptions to the tendency rule and the coincidence rule.

124 Part 3.11 provides for the discretionary and mandatory exclusion of evidence even if it would otherwise be admissible.

125 Section 135 provides that: The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might— be unfairly prejudicial to a party; or (b) be misleading or confusing; or (c) cause or result in undue waste of time.

126 'Probative value' is defined in the UEA dictionary as 'the extent to which the evidence could rationally affect the assessment of the probability of a fact in issue'.

127 The approach to what is discussed below as tendency and coincidence evidence has developed along divergent paths in New South Wales and Victoria. The current test for the admissibility of tendency and coincidence evidence is to be found in the VSCA decision of *Velkoski v The Queen* [2014] VSCA 121, paras. 164–65.

Evidence that commonly arises in intimate partner homicide cases includes evidence of previous violence (sometimes referred to as ‘uncharged acts’ if these incidents have not resulted in criminal charges); evidence of threats; evidence that the deceased previously spoke with family members, friends or others about violence or that the deceased had reported violence to others (for example, police, family violence workers, interpreters).

The different types of evidence that are of concern for our purposes are tendency and coincidence evidence, relationship or context evidence, and hearsay evidence.¹²⁸ As indicated above, evidence of family violence may only be admitted if it is relevant and, if relevant, the basis upon which the evidence is sought to be led must be clearly identified. Evidence may also be led for different purposes: it is possible to lead evidence for tendency and/or coincidence purposes, for hearsay purposes, and/or to provide ‘essential background information that allows the jury to assess and evaluate the other evidence in the case in a true and realistic context’ (as ‘context evidence’) or to demonstrate ‘the nature of a relationship between two relevant people in a case’ (‘relationship evidence’) (DPP 2014, p. 23). It is important to note that the purpose(s) for which the evidence is led may be crucial to whether it is admissible under the various exclusionary rules discussed above.

Tendency and coincidence evidence

Tendency evidence is defined in the UEA Dictionary and s. 97 of the UEA as evidence used to prove that a person has or has had a tendency to act in a particular way or had a particular state of mind. It is a link in the process of proving that a person did behave in a particular way on the occasion in question (DPP 2014, p. 9).

The DPP’s policy ‘Tendency and coincidence evidence’¹²⁹ explains that ‘[w]hile the evidence that constitutes “tendency evidence” and “coincidence evidence” may seem similar, the type of inferential reasoning used by the jury differs for each type of evidence’ (DPP 2014, p. 1). In relation to coincidence evidence, the jury relies on the *improbability of events occurring other than in the way suggested* to infer the fact in issue; while in relation to tendency evidence, the jury relies on the fact that a person *has a tendency to act in a certain way*.¹³⁰

While it is possible to lead evidence for both tendency and coincidence purposes, the type of inferential reasoning differs according to the purpose intended. In intimate partner homicide cases, for example, the prosecution may seek to adduce evidence of the accused’s previous acts of violence or threats towards others to show his ‘tendency’ to be violent in the relationship.

Where such evidence is adduced as tendency evidence by the prosecution, then it must overcome the high hurdle of admissibility (under s. 101),¹³¹ as the probative value of the evidence must substantially outweigh its prejudicial effect.

It is important to bear in mind that even if evidence is not admissible for a tendency use, it may be relevant and admissible for another purpose, as long as it is not excluded on the grounds that it

¹²⁸ The descriptions of these terms are usefully set out in the *Victorian Criminal Charge Book* published by the Judicial College of Victoria (2015a).

¹²⁹ The tendency rule is set out in s. 97 of the UEA and the coincidence rule is set out in s. 98 of the UEA; in the DPP’s policy on tendency and coincidence evidence, they are discussed together.

¹³⁰ Coincidence evidence, subject to s. 101, is defined in the Dictionary and s. 98 of the UEA as evidence of two or more events adduced to prove that the accused thought or acted in a particular way and which, by reason of the similarities in the events, make it improbable that those events were mere coincidence (DPP 2014, p. 17). See *R v Nassif* [2004] NSWCCA 433; JCV 2015a, s. 4.15 – Other Misconduct Evidence (Including Tendency and Coincidence Evidence).

¹³¹ This is because any party can adduce tendency evidence and have to satisfy s. 97. It is only where such evidence is led by the prosecution that it must satisfy s. 101.

is unfairly prejudicial to the accused (under s. 137). It is for the defence to raise s. 137, but the test is relatively low.¹³²

Relationship or context evidence

In a homicide trial, without evidence about the context of the incident or the relationship between the parties, the homicide may seem otherwise inexplicable.

Relationship evidence demonstrates the nature of a relationship between two relevant people, and may be used as circumstantial evidence or as evidence of the accused's guilt, or both.¹³³ In contrast, context evidence 'merely helps the jury to understand evidence that may otherwise appear disjointed or implausible – it is not otherwise probative of the accused's guilt' (DPP 2014, p. 24), but provides 'essential background information, which may help the jury to assess and evaluate the other evidence in the case in a true and realistic context' (DPP 2014, p. 2).¹³⁴ But both relationship evidence and context evidence must pass the test of relevance.

Additionally, the jury must be told that they cannot use relationship or context of evidence as tendency evidence; that is, the jury cannot engage in tendency reasoning. Therefore, there must be a clear articulation to the jury of the precise way in which the evidence is relevant (DPP 2014, p. 24).

Hearsay evidence

In a homicide trial, the victim is obviously unavailable to give evidence about a history of family violence because she/he is deceased. In some cases, there may have been people who directly witnessed incidents of prior violence – such as those who saw physical signs of the abuse, or directly witnessed the violence – and evidence from these witnesses is generally admissible in court. However, given the hidden nature of family violence, in many cases the only evidence supporting allegations of violence may be statements ('representations') that the victim previously made to friends, neighbours, relatives or others. As Hudders (2000) has pointed out, '[i]n these situations, a victim's hearsay statements can become the only opportunity for the prosecutor to bring in the victim's "voice" at trial' (p. 1044).

The hearsay rule applies in both civil and criminal trials and is intended to ensure that only reliable evidence is presented at court where it can be tested through cross-examination. It usually means that a witness will not be allowed to report what the deceased person told them in order to prove the truth of that statement (e.g. for a hearsay purpose).¹³⁵ There are, however, some exceptions to the hearsay rule, and these can be particularly important in a homicide trial where the victim is obviously unavailable to give evidence. In intimate partner homicides, it may be crucial for the prosecution to persuade the court that specific hearsay statements¹³⁶ should be allowed to be presented, as coming within these exceptions.

For instance, statements the victim previously made to other people may fall within the exceptions for firsthand statements where the maker is unavailable to give evidence (s. 65[1]).

132 If the prejudicial effect merely outweighs its probative value, it must be excluded. For example, at least theoretically, raising evidence of the accused's prior violence to demonstrate a 'tendency' to be violent in the relationship may be a challenge for the prosecution as such evidence may be highly prejudicial, particularly because of the danger that the jury may engage in impermissible tendency reasoning.

133 See *R v BJC* [2005] 13 VR 407; *Gipp v R* [1998] 194 CLR 106; *R v Vonarx* [1999] 3 VR 618.

134 See *R v AH* [1997] 42 NSWLR 702; *R v Camilleri* [1999] VSC 159; *R v Sadler* [2008] VSCA 198.

135 For example, there is a difference between the fact it is said and the fact it is true.

136 Hearsay statements are referred to as 'previous representations' which 'means a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced' (Odgers 2014, p. 250).

These exceptions apply if the statement ‘was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication’ (s. 65[2][b]) or ‘was made in circumstances that make it highly probable that the representation is reliable’ (s. 65[2][c]). For example, an exception to hearsay rules may apply if the deceased victim told a family member about a violent incident at the time, or soon after, the violent incident occurred. If the hearsay evidence is admissible, it may be used to prove the truth of the asserted fact (i.e. that the violence occurred).

Family violence evidence in trials

In our study, it was common for relationship evidence to be raised, however tendency and/or hearsay evidence was less often raised as an issue. In the trial transcripts that we were able to analyse in detail, there were only five cases in which tendency evidence and/or hearsay evidence was raised as an issue. In most of these cases, much of the evidence related to the accused’s history of perpetrating family violence. In three of these cases, the judge ruled that the evidence was admissible. In the other two cases, the tendency evidence was ruled inadmissible for proving tendency, but held to be admissible as relationship evidence.

In many trials the prosecution successfully sought to adduce relationship evidence to demonstrate a prior history of family violence and/or possible intent or motive for the murder, particularly in cases where the accused claimed the killing was an accident or denied any involvement. In several cases, the defence also raised relationship evidence to demonstrate that the relationship was a happy or non-violent one.¹³⁷

CASE STUDY: JOHN McDONALD

John McDonald killed his ex-wife Marlene McDonald (aged 36 years) on or about 14 December 1986. In April 2011, almost 25 years after Marlene McDonald disappeared, a jury found John McDonald guilty of her murder. He was sentenced to 19 years’ imprisonment with a minimum non-parole period of 13 years (R v McDonald [2011] VSC 235). He was 70 years old when sentenced. His applications for leave to appeal against conviction and sentence were unsuccessful (McDonald v The Queen [2013] VSCA 128; McDonald v The Queen [2013] VSCA 89).

John McDonald paid three young men to abduct Marlene McDonald in a van. After the abduction, the three men met with John McDonald, who was seen driving off with the van. Marlene McDonald’s body was never found and the cause of her death remains unknown. Her disappearance was initially treated as a missing person’s case. It was not until the police cold-case unit reopened the investigation in 2007 that sufficient evidence was gathered for the police to charge John McDonald with Marlene McDonald’s murder.

While it was not contested at trial that the accused had paid three other men to abduct the deceased, his defence counsel alleged that he was not involved in her killing, and that she may not necessarily be dead as her body had never been found.

¹³⁷ For example, in *R v Ellis* [2008] VSC 372, the defence counsel alleged that the accused was not involved in the death of his partner. The defence counsel led evidence from the deceased’s family members to show that the relationship was a ‘good and loving’ one, while the prosecution led relationship evidence from a witness who had seen injuries and physical violence by the accused towards the deceased to allege the opposite (Transcript of trial, 23 June 2008, p. 568).

The prosecuting counsel sought to adduce tendency evidence which, it was submitted, 'showed that the accused had been violent towards Ms McDonald on past occasions, both before and after their separation' (*R v McDonald* [Ruling] [2011] VSC 241, para. 55), and which demonstrated he 'had a tendency to be violent towards Ms McDonald' (para. 22). The submission by the prosecuting counsel included evidence of violence, stalking, and notes left on the deceased's car or given to their children, which the deceased had told witnesses were written by the accused (paras. 30, 44). Summing up the tendency evidence on behalf of the Crown, the judge said that:

'the injuries said to have been inflicted by him included black eyes, bruising and a broken finger or fingers. There was also some evidence that the accused had threatened to kill Ms McDonald, although those threats appeared to have been made a considerable period of time before the disappearance' (para. 27).

The prosecution also sought to adduce relationship evidence, arguing it was relevant to the identity of the killer (as someone who bore antipathy towards the deceased) and the accused's intent and motive.

The judge rejected the Crown's application to lead tendency evidence on the basis that:

'No body having been found, Marlene McDonald's cause of death was completely unknown. And the Crown case was that Marlene McDonald had been killed either by the accused, or by a person or persons acting at his behest. In those circumstances, I ruled that I would not allow the evidence of violence to be led as tendency evidence. I was not persuaded that the evidence had "significant probative value". Alternatively, even if it had significant probative value, I was satisfied that the evidence should be excluded under s 135 and/or s 137' [i.e. as being more prejudicial than probative] (para. 28).

However, the judge said she was satisfied that the evidence was admissible as evidence of the relationship of the accused and deceased (para. 29).¹³⁸

Arguably, relationship evidence of prior family violence in this case provided the jury with useful background information which, along with other evidence (including McDonald's 'soliloquies' in which he mused to himself about matters linked to the killing, which were recorded by police listening devices), enabled the jury to reach its verdict in relation to the identity of the killer and his potential motive.

The court's evaluation of tendency and hearsay evidence in the trial of Soltan Azizi, the subsequent appeal and re-trial, illustrates both the limits of the prosecution's strategy of seeking to adduce tendency evidence and the strategic use to which evidence of the relationship between an accused and deceased can instead be put.

¹³⁸ This included, for example, opinion evidence that witnesses saw what they described as 'derogatory' notes written by the accused about the deceased; hearsay evidence from witnesses who saw bruising on the deceased and were told by the deceased that it was caused by the accused; and evidence of violence that the deceased described in a family court affidavit. However some of this hearsay evidence was rejected. For example, evidence which the Crown alleged showed the accused had burgled the deceased's house was excluded, as the police had not pressed criminal charges against him for this. The judge ruled its probative value was outweighed by a danger of unfair prejudice.

CASE STUDY: SOLTAN AZIZI

On 20 November 2007, Soltan Azizi (aged 48 years) killed his wife, Marzieh Rahimi (33) by strangling her with a scarf. Soltan Azizi confessed to police that he had killed his wife. He was prosecuted for murder. He was found guilty in 2010 and sentenced to 22 years' imprisonment with a non-parole period of 17 years and 6 months (*R v Azizi* [2010] VSC 112). He successfully lodged an appeal against conviction and was granted a retrial (*Azizi v The Queen* [2012] VSCA 205). In 2013, Soltan Azizi was again found guilty of murder and sentenced to 20 years' imprisonment with a minimum non-parole period of 16 years (*DPP v Azizi* [2013] VSC 16).

At Soltan Azizi's first trial, he claimed he did not intend to kill, or cause really serious injury to Marzieh Rahimi when he pulled on the scarf. Rather, he maintained that he had acted in self-defence and her death was an accident (Transcript of trial, 20 January 2010, pp. 155–156). Soltan Azizi's version of events was that he pulled on the scarf to stop his wife from biting him, and that she had thrown their young child onto the floor. The defence counsel alleged that since the birth of her last child, the deceased had become 'depressed and difficult' (Closing address, Transcript of trial, 29 January 2010 p. 541).

The prosecuting counsel sought to adduce hearsay evidence from four witnesses (a coordinator from a Maternal Health Service, a family violence case worker, an interpreter and Marzieh Rahimi's sister) to show that Soltan Azizi had a tendency to 'inflict physical violence on or to act in an abusive manner towards the deceased during their marital relationship, particularly during times of conflict' and that 'his mindset was such that it was permissible and appropriate' to act in such a way (p. 514). The prosecution argued that statements Marzieh Rahimi made to the witnesses showed that there had been occasions when Soltan Azizi had thrown his wife out of the house, had been beating her, that she was scared of him and was seriously considering leaving him (pp. 148–149; see also pp. 210–220, 220–236, pp. 516–518).

At the first trial, the defence counsel sought unsuccessfully to have the hearsay evidence excluded. The evidence in the trial included evidence from Marzieh Rahimi's sister that Marzieh had told her that Soltan had 'abused her over the period of the marriage, commencing from the first night of the marriage', and that a week before her sister's death, he had asked her to speak to his wife because she 'had become too Australian and changed and was saying things such as, she wanted a divorce' (*R v Azizi*, para. 8).

Soltan Azizi was found guilty of murder and sentenced to 22 years' imprisonment with a non-parole period of 17 years and 6 months (*R v Azizi*). In the sentencing remarks, the judge held that the hearsay evidence demonstrated that 'your wife had significant concerns, about the marriage and the relationship and the violence that was demonstrated towards her, by you' (para. 10). The judge also said that she rejected Soltan Azizi's claim that Marzieh Rahimi had attacked him first (para. 22).

Soltan Azizi lodged an appeal against his conviction for murder on several grounds including that the trial judge erred in admitting evidence of the deceased's statements to the witnesses about previous abuse as it was (i) not relevant; (ii) hearsay; and/or (iii) should have been excluded because of its limited probative value and significant prejudicial effect (*Azizi v The Queen*). Buchanan and Bongiorno JJA and Hollingworth AJA delivered a majority judgment in which they ruled that some of the evidence about the history of family violence,¹³⁹ which had been admitted during the trial

139 This evidence included 15 separate statements made by the deceased to others about previous physical, psychological and emotional abuse by the accused.

as hearsay ('to show that Soltan Azizi had a tendency to behave in a particular way'), should have been ruled as inadmissible (*Azizi v The Queen*, paras. 99, 100, 101).¹⁴⁰ The matter was then sent for retrial.

At the commencement of Soltan Azizi's retrial, the prosecution submitted that the deceased's state of mind was a relevant factor in the case, and in particular, it was relevant for the prosecution to prove that the deceased was fearful of her husband, and thus she would have been unlikely to have instigated any physical confrontation with him. In addition it was submitted that the evidence as to the deceased's state of mind was relevant to proving that, in the period leading up to her death, the deceased was unhappy with her marriage and was contemplating separation (*DPP v Azizi* (Ruling No 1), para. 8). In accordance with the principles stated by the Court of Appeal, the judge ruled that while that evidence was inadmissible as proof that the accused had in fact assaulted his wife, it was relevant as 'relationship evidence' to show the nature of the relationship which he had with Marzieh Rahimi, and her feelings concerning him (para. 35).

In Soltan Azizi's retrial we can see how similar evidence of family violence can be adduced in a homicide case for a different purpose. Whereas at Soltan Azizi's first trial the evidence was adduced to show that the accused had a tendency for animosity towards the deceased (e.g. for a tendency purpose), at his retrial it is used to show the victim's state of mind; that is, that the deceased was unhappy in the relationship and was fearful of the accused, and that she was unlikely to have initiated a physical confrontation with him.

Another example of the different purposes that evidence of family violence can be adduced in a homicide case can be found in the case of Peter Lubik.

CASE STUDY: PETER LUBIK

On 25 January 2009, Peter Lubik (aged 40 years) killed his wife, Barbara (also known as Basia) Lubik (35). Peter Lubik was charged with murder and pleaded not guilty. The jury found him guilty of manslaughter, and he was sentenced to 9 years and 6 months imprisonment with a minimum non-parole period of 6 years and 6 months (*R v Lubik* [2011] VSC 137).

Peter Lubik's version of events was that it was the deceased who initiated the confrontation by approaching him with a knife. A struggle then ensued, during which the deceased accidentally fell on the knife and was stabbed in the throat by the knife. In contrast, the prosecution alleged that it was the accused who initiated a physical confrontation with the deceased and that he intentionally stabbed her in the throat, which resulted in her death (*R v Lubik* [Ruling No 1] [2010] VSC 465, para. 15). The prosecution gave notice of an intention to adduce relationship evidence, including evidence of the 'prior aggressive and hostile conduct by the accused towards the deceased' (para. 2).¹⁴¹ The prosecuting counsel contended that this evidence was relevant to

140 For example, the Court of Appeal judgment referred to s. 65 of the UEA and stated that during cross-examination of Mazieh Ramani's sister, some of the questioning resulted in 'the witness interpreting her sister's words and mediating the information provided to the Court'. The Court of Appeal noted that, in relation to hearsay evidence, 'it is important that the representation deposed to for the purposes of s. 65 of the Act be the "previous representation" of the unavailable witness, not an interpretation of that representation or a summary of it' (*Azizi v The Queen* [2012] VSCA 205, para. 37).

141 The prosecution's submission also gave notice of tendency evidence but this was not pursued. The prosecution's submission also included approximately 33 representations under a hearsay notice, some of which overlapped and some of which were part of the relationship evidence sought to be tendered that was admitted by the presiding judge (*R v Lubik* (Ruling No 1), paras. 10–14).

establishing that the accused's 'animosity and antipathy' towards the deceased and was therefore relevant to establishing that he intended to kill or seriously injure her (para. 7). The relationship evidence was relevant to establishing the accused's state of mind, demonstrating that he 'bore animus to the deceased throughout their volatile relationship such that when intoxicated, the accused was physically violent and abusive towards the deceased' (para. 15).

It was further contended by the prosecution that the relationship evidence was relevant to show that Barbara Lubik was fearful of her husband. According to the prosecutor:

'[t]ensions ... existed in the marriage over the accused's drinking and gambling and the fact that he didn't like Barbara having any contact with any males. On occasions their arguments about such matters ... escalated to such a point that the accused hit Barbara Lubik or damaged her property ... on other occasions he became aggressive and abusive towards his wife ... at least two ... occasions ... the accused threw out her clothes and other belongings on to the front patio ... he cut up her clothes and damaged some of the sentimental belongings' (Transcript of trial, 18 October 2010, p. 395).

The prosecution also sought to lead evidence that Barbara Lubik had contacted police in relation to her husband's behaviour, and police had sought an intervention order on her behalf. Peter Lubik had breached the order a year later (Transcript of trial, 22 October 2010, pp. 771–777).

The prosecution submitted that the relationship evidence was also relevant to negate the accused's claim that his wife had approached him with a knife and he had acted in self-defence: the jury were entitled to draw the '[i]nference – if a person is fearful of another, they are unlikely to approach them with a knife' (*R v Lubik* (Ruling No 1) [2010], para. 15). The defence counsel objected to the admission of the evidence about Peter Lubik's prior abuse towards his wife, claiming that, '[t]he danger in much of the relationship evidence particularly if it refers to uncharged acts of physical aggression, is that it can have a very seductive effect on a jury ...' (Transcript of trial, 7 October 2010, p. 153). The defence counsel further claimed that the relationship evidence in relation to the history of family violence was not relevant, because much of the evidence did not involve allegations of physical injuries or weapons (*R v Lubik* (Ruling No 1) [2010] VSC 465, paras. 61, 62). The defence counsel also claimed that Barbara Lubik was no longer scared of Peter Lubik at the time she was killed, and a witness who had seen them earlier on the day of the killing had described them 'as looking happy like they hadn't been fighting' (*R v Lubik* [Ruling No 1] [2010] VSC 465, paras. 50, 51).

The presiding judge, however, did not accept the defence counsel's submission (*R v Lubik* [Ruling No 1], para. 51) and ruled that the relationship evidence showed that 'during their whole marriage the deceased had been scared of the accused, especially when he was affected by alcohol' (para. 52), and that even though he accepted that 'there were periods of harmony', the evidence of their 'tempestuous relationship' and 'the deceased's reaction to her husband's aggressive and hostile behaviour when affected by alcohol is relevant to the issue of the state of mind of the deceased on the evening of 25 January 2009 and whether she would approach the accused with a knife' (para. 53).

Based on the judge's ruling, the jury in the trial of Peter Lubik was able to hear evidence from witnesses regarding the history of the relationship, including aggressive behaviour and other family violence by the accused. However the prosecution was unable to prove to the jury's satisfaction that Peter Lubik intentionally killed his wife.

USE OF EXPERT EVIDENCE BY THE PROSECUTION

In its review of defences to homicide, the VLRC argued that misunderstandings about family violence are common in the community, and ‘expert evidence provided by researchers, family violence workers and others with expertise in this area can assist jurors to identify their own biases and reconsider what may be reasonable from the perspective of a victim of abuse’ (VLRC 2004, p. 183). The VLRC noted that in cases where there is evidence of prior family violence by the accused, expert evidence could be introduced by the prosecution ‘to challenge claims by the defendant that the harm caused was unintentional or due to a loss of self-control’ (p. 184). The VLRC also identified that this evidence may be useful in sentencing, to assist judges: ‘to make sense of what has occurred when deciding on what sentence should be imposed’ (VLRC 2004, pp. 186–187, see also p. 283).

Despite concluding that such evidence was already admissible, the VLRC recommended a legislative statement clarifying its use in supporting a plea of self-defence to ‘resolve any doubts’ about its relevance and admissibility, and to ‘encourage greater recognition by judges, lawyers and jurors’ of the implications of a background of prior abuse (p. 184). This recommendation was reflected in s. 9AH of the *Crimes Act 1958* (now s. 322J).

The Director’s Policy on Family Violence provides instructions for Office of Public Prosecutions’ solicitors and counsel about preparing and prosecuting cases involving family violence and also the use of expert evidence in trials (DPP 2011). Despite this policy and the existence of legislative guidance on family violence and the provision for use of expert social context evidence in Victoria, it would appear these provisions were not utilised by the prosecution in the cases we analysed. Expert family violence evidence was potentially relevant in many of the cases we analysed, as at least half of the men accused had a history of abusive or violent behaviour towards their intimate partners. In our study, the only cases in which expert evidence was used was where the accused claimed to be a victim of family violence, and expert family violence evidence was introduced by the defence.¹⁴² This is perhaps not surprising, given that a key intent of the 2005 reforms was to improve access to self-defence for those who kill in response to family violence, usually a female accused who kills her abusive male partner.¹⁴³

Commentators in the USA have identified the potential value of expert witness testimony on family violence for the prosecution in domestic homicide cases (Hartley 2001; Raeder 1997; Linsky 1995; Dempsey 2004). For example, Linsky (1995) has pointed out that expert witnesses for the prosecution can testify about issues such as why the victim behaved in ways that may appear ‘irrational’ – for example, why the victim did not leave the relationship and the nature of the threat under which the victim lived, considering that the ‘psychological and societal aspects of a relationship involving DV are not within the understanding of the average jury’ (p. 83). Hartley also

142 See for example, the case of Phillip Bracken (*DPP v Bracken* [2014] VSC 94). In that case, the defence claimed that Phillip Bracken had shot his partner in self-defence, and that he had been the victim of family violence from his partner. The defence introduced family violence social framework evidence. The defence in the case of Angela Williams (discussed in Chapter 4) also used an expert witness to provide family violence social framework evidence.

143 An additional strategy that has been introduced in Victoria to address potential juror misconceptions about family violence evidence in trials is the use of jury directions, provided by the trial judge. The recent amendments to the *Jury Directions Act 2013* (Vic) in ss. 32(6) and 32(7) respectively (now ss. 59 and 60 of the *Jury Directions Act 2015* [Vic]) provide for the trial judge to give 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 (including, for example, that it is not uncommon for a victim to stay with an abusive partner or to not report violence to police). However these directions only apply to criminal proceedings in which self-defence or duress in the context of family violence is in issue, which was not the context of many of the trials discussed in our study.

notes that expert witnesses can also explain how ‘batterers can seem like “good guys” to outsiders but be violent in their home’ (Hartley 2001, p. 540).

CONCLUSION

Evidence about previous abuse or controlling behaviour by the accused towards his ex-partner may play a critical role in a plea hearing or trial, as it can assist judges and juries to reach a view about why the accused killed his or her intimate partner. Evidence of prior family violence by the accused does not necessarily prove that the homicide was intentional. However, it is critical for juries to understand the history of the relationship, rather than seeing the homicide as an isolated, decontextualised incident.

This chapter has identified that a history of family violence is not always fully presented in homicide prosecutions, for a variety of reasons. This may be because evidence is not adequately collected or recorded by police investigators, or is excluded by the rules of evidence. Even when the prosecution has considerable evidence of prior family violence perpetrated by the accused, accepting a plea of guilty to manslaughter may limit the use of this evidence.

In many of the cases that went to trial, the prosecution was often successful in having evidence of a history of family violence admitted as relevant to the accused’s motive and the nature of the relationship between the accused and the deceased. It was less likely to be admitted to demonstrate that the accused had a tendency to act in a particular way towards the deceased.

Arguably, the evidence relating to the history of the relationship and abuse by the accused played some role in the jury’s decisions in the cases of *McDonald* and *Azizi*. In the case of *Lubik*, on the other hand, the jury found the accused not guilty of murder, but guilty of manslaughter. In that case, the prosecution led evidence to show that the deceased was fearful of the accused and was therefore unlikely to have initiated a physical confrontation with him. Had the prosecution sought to lead expert social context evidence about family violence, this may have assisted the jury to assess how a victim may act in the context of a history of family violence.

CHAPTER 9

Defence narratives

... the vehement attack concerning peripheral matters which was waged on your wife in cross-examination – left no doubt that you still regard her as the cause of the evil which has befallen you and that she alone is to blame.

R v Budimir [2013] VSC 149, para. 48

In the adversarial criminal justice system, the role of the prosecutor at trial is to prove to the jury, beyond reasonable doubt, every element of the offence. The accused's lawyer can seek to raise doubts about the proof of an element of the offence – for example, about whether the accused intended to kill the victim – and can call witnesses and can cross-examine witnesses called by the prosecutor. Defence counsel are required to act in accordance with their client's instructions and seek to put the best case forward for their client, within the parameters of evidence law and rules.

This chapter identifies common defences that were raised¹⁴⁴ at trial in the cases in our study, and the approaches used by defence counsel when presenting their client's case. Our focus is on the picture presented of family violence and the use of any victim-blaming narratives during the legal process.¹⁴⁵

In the trials in our study, the main themes raised by the defence were that the accused did not intend to kill, that they acted in self-defence, or that they were affected by a mental impairment at the time of the homicide. Provocation-type narratives also featured in some of the trials we examined.

The defence narratives we identify in this chapter are similar to those found in other studies of domestic homicide prosecutions (such as Buckingham's 2010 analysis of prosecutions in New Zealand, and Hartley's 2001 analysis of 40 domestic violence felony cases in the United States). These studies find that defence counsel use a variety of additional strategies to support their main arguments, such as negating any evidence of a history of family violence by focusing on a lack of witnesses to the violence or the victim's failure to report it to police, presenting evidence to show that

¹⁴⁴ As noted in Chapter 5, an argument that the accused did not intend to kill or cause serious harm, for example, is not, strictly speaking, a defence. It is aimed at negating the prosecution argument that there was the intention to kill or cause serious injury, which is required for murder. See further discussion about 'defences raised' in Chapter 5, pp. 44–45.

¹⁴⁵ It is important to recognise that the narratives or 'story' presented by defence counsel to explain the killing may not necessarily reflect their personal views or understandings.

the relationship was a happy one, or arguing that there was no connection between the past violence and the homicide. Other strategies were enhancing the character of the abuser, and attacking the character of the victim in general or using her behaviour against her (for example, her failure to leave the abuser). This chapter shows that these themes were also apparent in the trials in our study.

LACK OF INTENT

Buckingham has argued, based on her analysis of domestic homicide cases in New Zealand, that the 'no intent' defence appears set to supplant the now discredited (and in many jurisdictions abolished) provocation defence as the 'defence du jour' for men who kill in the context of family violence (Buckingham 2010, p.146).¹⁴⁶ This was supported by the findings from our study.

A considerable number of the homicides in our study involved a claim (either during a trial or in relation to a plea of guilty to manslaughter) that the death was the result of an accident. In over one-third (21) of cases the accused appears to have told police that the killing was unintentional or accidental. In several of these cases the men claimed that they were defending themselves against an attack from the deceased when the accidental killing occurred.

For example, one accused claimed his wife fell on a knife, which accidentally cut her throat, another claimed he didn't know the gun he fired at his partner was loaded, and another said that his gun went off accidentally. Several strangulation cases were claimed to be accidental. In three cases, the accused claimed he didn't intend to kill his partner when he pulled a rope, cord or scarf around her neck. In two other cases, the accused argued strangulation occurred accidentally during a sex act or when he had tried to restrain and cuddle his partner during an argument.

In several cases, these arguments were successful. Seven men claimed the homicide was an accident and/or that they had no intention to kill, and the Crown accepted their plea of guilty to manslaughter. Five men were found guilty of manslaughter by a jury after a trial. In an additional case, a manslaughter conviction was recorded after an appeal. In most of the successful cases, the accused had raised lack of intent in combination with self-defence.¹⁴⁷

The jury were clearly unconvinced that the killing was an accident in several cases.¹⁴⁸ For example, Leigh Robinson chased his partner, Tracey Greenbury, from his car, parked in the street, and followed her up to the front door of the neighbour's house with a loaded and cocked shotgun (*R v Robinson* [2010] VSC 10).¹⁴⁹ As she tried to enter the door, the neighbour witnessed Leigh Robinson shoot his partner in the head at close range. At his trial Leigh Robinson claimed the gun went off accidentally. The prosecution argued this was not possible, particularly given forensic evidence that the gun would not discharge a bullet unless the trigger was pulled. There was also evidence that he had previously behaved in a threatening manner towards his partner.

¹⁴⁶ Considering that intent is rarely a matter of direct evidence and is often inferential, it is unsurprising that this is a common argument.

¹⁴⁷ Additionally, two men pleaded guilty to murder, but raised a lack of specific intent to kill during the plea hearing, and this was accepted by the sentencing judge. Wentholt pleaded guilty to 'reckless murder' of a sexual rival, on the basis that he hadn't actually intended to kill but that his actions had been reckless in that he did foresee that they were likely to cause really serious injury [*R v Wentholt* [2013] VSC 540]. James Stoneham was sentenced on the basis that he had pleaded guilty to an intention to cause really serious injury, rather than an intention to kill (considering that there had only been a single stab wound) (*R v Stoneham* [2013] VSC 661).

¹⁴⁸ In six cases the accused went to trial for murder and argued a lack of intent to kill, but the jury convicted them of murder.

¹⁴⁹ Leigh Robinson had been convicted and served a prison sentence for killing a previous partner in 1969, but this was not known to the jury at the trial in 2009.

In Leigh Robinson's case the jury did not accept that the killing was an accident and he was convicted of murder. However, in other cases, the jury found the accused guilty of the lesser crime of manslaughter.

For instance, in Peter Lubik's case (discussed in Chapter 8), the defence case was that the death was a 'tragic accident', when his wife slipped and fell onto the knife (*R v Lubik*, para. 400). Peter Lubik was found not guilty of murder by the jury and convicted of manslaughter, by an unlawful and dangerous act.

As Buckingham's study in New Zealand has highlighted, many cases of intimate partner homicide by men involve a history of family violence, including 'red flag' warning signs indicating a risk of lethal violence. However the defence may describe the homicide as unforeseeable, accidental and disconnected from the history of prior violence. In these narratives women's deaths are constructed as 'unlucky' and repeat victimisation then becomes unremarkable, or a 'mundane aspect of certain relationships' (Buckingham 2010, pp. 125–126) rather than indicative of homicidal risk.¹⁵⁰

SELF-DEFENCE

Based on the limited evidence available, our findings regarding defences raised in Chapter 5 suggest that, in comparison to an earlier Victorian study by the VLRC (2003), there appears to have been an increase in the numbers of men claiming at trial that the killing occurred in the context of defending themselves from an attack by the deceased.

In the cases we examined, two men argued that they were the primary victims of family violence. Phillip Bracken argued that he shot his partner in self-defence as she came towards him in a public street, and that she had subjected him to physical and emotional family violence during their relationship. He was acquitted by the jury.¹⁵¹ Anthony Sherna argued that his partner had been extremely controlling, domineering and verbally abusive during their relationship. He claimed that he 'lost control' and strangled her after she taunted him during an argument, in the context of the cumulative effects of 'years of abuse' from her (*DPP v Sherna* [2009] VSC 526, para. 2), however he did not intend to kill her. The jury found him guilty of manslaughter (*DPP v Sherna*).

Five other men argued that they were defending themselves during a verbal or physical confrontation initiated by the deceased, and accidentally killed them. Four of these men were convicted of lesser offences (manslaughter or defensive homicide). Though none of these men argued that they were the primary victim of family violence, many argued that the aggression in the relationship had been mutual.

The trial of Luke Middendorp, discussed below, attracted considerable media criticism (Capper & Crooks 2010; Howe 2010; Petrie 2012) and was the catalyst for a review of defensive homicide by the Victorian Department of Justice (DOJ 2010).¹⁵²

¹⁵⁰ It is important to note that we are not claiming that it is inconceivable that an accused who has previously perpetrated family violence could have accidentally killed his partner. Evidence of a history of family violence does not necessarily prove that an accused intentionally killed his partner.

¹⁵¹ Phillip Bracken is the only person to date who has been acquitted at trial on the grounds of self-defence in the context of family violence since the 2005 Victorian law reforms (see Russell 2014). In this case, the defence relied on evidence of family violence perpetrated by the deceased woman, in addition to expert social context evidence in relation to family violence. While the majority of the women who killed intimate partners stated that they killed to defend themselves from their abusive partner and a small number attempted to argue self-defence during a trial, none was acquitted on the grounds of self-defence (as outlined in Chapter 4).

¹⁵² For a more detailed discussion of this case see Tyson (2011) and Maher (2014).

CASE STUDY: LUKE MIDDENDORP

Luke Middendorp (aged 25 years) fatally stabbed his ex-partner, Jade Bowndes (22), on 1 September 2008. At his trial he pleaded not guilty to the murder charge and argued that Jade had come towards him with the knife and he had acted in self-defence. The jury found him not guilty of murder but guilty of defensive homicide. He was sentenced to 12 years' imprisonment with a non-parole period of 8 years (*R v Middendorp* [2010] VSC 202).

The jury's decision to find Luke Middendorp not guilty of murder but guilty of defensive homicide meant that the jury accepted that he genuinely (but unreasonably) believed that it was necessary to defend himself from his former female partner. There was a considerable disparity in their sizes. Luke was more than 'twice her size' (186 cm tall) and weighed 90 kg, whereas Jade weighed just 50 kg. After the killing, as Jade Bowndes lay dying in the street, Luke Middendorp was heard by witnesses to have said 'you had it coming, you got what you deserved, you filthy slut' (Crown opening address, Transcript of trial, 1 March 2010, p. 81).

There was also considerable evidence of Luke Middendorp's prior family violence. Jade had called police on previous occasions in relation to Luke's aggression. At the time of the killing, Luke was in breach of bail conditions and an intervention order (*R v Middendorp*, para. 20). During the trial, the defence accepted that Luke Middendorp had injured Jade Bowndes on several occasions, but argued that the relationship was 'tempestuous' (para. 3) and Luke gave evidence that Jade was always the one who 'came at' him first (para. 6).

Similarly, in the case of Ralph Pennisi, the defence argued that the relationship had been mutually violent, and that the killing occurred in the context of aggression by the deceased woman.

CASE STUDY: RALPH PENNISI

Ralph Pennisi (aged 35 years) killed Michelle Bishop (39), his partner of six years, on 25 February 2007. After the killing, he concealed the body and told her children, family and friends that she had disappeared. A week later, when interviewed by police, he admitted to killing her. At trial he pleaded not guilty to the murder charge. The jury found him guilty of manslaughter. He was sentenced to 10 years' imprisonment with a minimum non-parole period of 7 years (*DPP v Pennisi* [2008] VSC 498).

Ralph Pennisi and Michelle Bishop lived together in Melbourne's inner north with their children. Ralph Pennisi's defence counsel alleged that Michelle Bishop tended to be the aggressor in the relationship. To rebut this, the prosecution sought to introduce evidence that early in their relationship, Ralph Pennisi had been subject to an interim intervention order for a previous incident when he tried to run her down in his car. The judge refused to admit this evidence as it was 'an isolated incident' (Transcript of trial, 8 September 2008, p. 4), and further, it had only been an interim order and 'no attempt had been made to extend it' (p. 9).¹⁵³ However the judge did allow the deceased's son to describe witnessing this incident.

According to defence counsel, on the night of the killing 'things just got out of hand' (p. 465) while Ralph Pennisi was defending himself. Ralph told the police he and Michelle had argued and that she became physically aggressive (p. 419). He put a rope over her head to

¹⁵³ This case occurred prior to the introduction of the *Evidence Act 2008* (Vic).

'stop her', but because she was still 'attacking' him he grabbed her by the throat and squeezed (p. 392). According to him, she died unexpectedly.

The defence relied on forensic evidence from the autopsy which suggested there were some 'unusual features' for a deliberate strangulation, which raised the possibility that a relatively brief 'stimulation of the carotid artery in this case ... caused instantaneous death during a strangling process' (p. 455). This was unintended and a 'shock' to Ralph Pennisi. The defence further alleged that Michelle Bishop was 'a person if she's hit, hits back twice ... She is not shy in coming forward' (p. 456). The prosecution argued that 'the accused has gone to great lengths to paint Michelle Bishop as an out of control drug dependent person' who was the aggressor in the relationship (p. 385).

As Hartley has identified in her study of domestic violence homicides in the USA, attacking the character of the victim and turning her behaviour against her (for example, the fact that she hadn't pursued legal intervention) is a common defence strategy. It is often used to establish that the victim was aggressive or a troublemaker and may have provoked the offender's actions (Hartley 2001, p. 533). There were elements of this in Ralph Pennisi's case.

Ralph Pennisi's defence counsel also relied on medical evidence to establish that the killing was unintentional. A focus on medical evidence of strangulation was a feature in another case in our study in which the offender argued the killing was accidental (*R v Wilson* [2009] VSC 431).¹⁵⁴ Buckingham's research on domestic homicides also identified that medical evidence regarding the cause of death was commonly used by the defence to argue lack of intent. Buckingham observed that there was an almost 'macabre preoccupation' with issues such as the extent of pressure to the victim's neck, and the number and type of blows struck (Buckingham 2010, p. 144). This narrow focus on the autopsy evidence regarding levels of force obscures intent and minimises size and strength differences between men and women, and enables the defence to disconnect the women's deaths from the offender's abusive history. The portrayal of women and men as 'equally matched warring parties' means that male violence towards women is 'stripped of its lethality potential'. The homicide is constructed as an unforeseeable accident in which the man unintentionally went 'too far' (p. 125).

MENTAL IMPAIRMENT

In most of the pleas and trials in this study, the defence counsel presented information on, or drew on evidence about, the psychological and emotional difficulties of the accused. The stress, anxiety or depression experienced by the accused formed part of the narrative framing of the events leading up to and involving the homicide. The accused's poor mental state was often described as having resulted from relationship breakdown or other relationship 'difficulties', and in some cases it was said to be compounded by negative experiences in childhood or adulthood.

154 A similar focus on autopsy evidence in relation to strangulation was used in the case of Michael Wilson. Michael Wilson claimed that the killing occurred accidentally while he was 'trying to cuddle' his partner during an argument (*R v Wilson* [2011] VSC 123, para. 16). In relation to Michael Wilson's 'application of force' to the deceased's neck, the defence alleged (notably, using gender neutral language) that: 'If someone's upset with someone and is angry with someone for some reason and they apply force when they've got no right to apply force it doesn't mean that they always intend to kill' (Transcript of trial, 17 March 2011, p. 388). There were lengthy debates about the degree and duration of force used in the 'neck compression'.

Evidence about mental impairment can be used by the defence counsel to establish a mental impairment defence and/or to mitigate the accused's sentence. In our study, mental impairment was raised as a defence in only one jury trial.¹⁵⁵ However, the accused's mental illness was frequently raised in sentencing, with the defence arguing its relevance as a mitigating factor in over half of the cases.¹⁵⁶

In this section we limit our discussion to the defence of mental impairment in trials. In Chapter 10 we discuss the ways in which mental illness is used in sentencing.

Historically, people with mental disorders who lack the ability to reason have been excused from criminal liability. To be liable for a crime a person has to be shown to be morally culpable: if they have a mental illness that results in their not understanding what they are doing, or that it is wrong, they cannot be convicted of the crime. This is the common law definition of insanity, which was reformulated in Victoria as 'mental impairment' in the Crimes (Mental Impairment and Unfitness to be Tried) Act.

The test required to establish the statutory defence of mental impairment under s. 20 of the Crimes (Mental Impairment and Unfitness to be Tried) Act is that, at the time of engaging in conduct constituting an offence, a person had a mental impairment¹⁵⁷ that had the effect that they did not know the nature and quality of what they were doing, or that they did not know that what they were doing was wrong.

If an accused is found not guilty on the ground of mental impairment, the court must declare that the accused is liable to a supervision order, or should be released unconditionally (s. 26). The result may be a mental health care disposition such as involuntary detention in a psychiatric institution.

Previous research has shown that it is relatively rare for homicide offenders to successfully raise the mental impairment defence (Polk 1994; VLRC 2002, 2014). Those who are successful generally have a major psychotic illness such as schizophrenia as, to date, those with non-psychotic illnesses such as depression do not reach the threshold for 'mental impairment' in Victoria (Wondemaghen 2014).

Robert Baxter was the only person in our study to have argued at trial that he suffered a mental impairment at the time he killed his wife. His defence counsel submitted that he was not guilty of murder, but was a 'mentally ill, emotionally vulnerable man, who, under ongoing and increasing stresses, lost his grip on reality to the point where he ended up doing things without comprehending what it was he was actually doing' (Transcript of trial, 18 February 2009, p. 65). This was rejected by the jury.

155 For the purposes of this study, we excluded cases in which the prosecution and defence agreed that the evidence established mental impairment, and the judge found the accused not guilty on the basis of mental impairment. There was only one such case.

156 An accused does not need to have a serious psychiatric illness for it to be a relevant consideration in sentencing (Freiberg 2014, p. 290). In *R v Verdins* [2007] 16 VR 269, the Court of Appeal outlined the ways in which mental impairment is relevant to sentencing. See Chapter 10 for discussion.

157 'Mental impairment' is not defined in the legislation. A recent review of the Crimes (Mental Impairment and Unfitness to be Tried) Act by the VLRC recommends the inclusion of a definition of mental impairment in the Act as a condition that 'includes, but is not limited to, mental illness, intellectual disability and cognitive impairment' (VLRC 2014, p. xliii).

CASE STUDY: ROBERT BAXTER

On 2 August 2006, Robert Baxter (aged 48 years) killed his wife Linda (42) by stabbing her 30 times at their home near Geelong. Their children were in the adjacent bedrooms and their 11-year-old daughter overheard the killing. Police charged him with murder. The jury found Robert guilty of murder and he was sentenced to 20 years' imprisonment with a non-parole period of 16 years (*R v Baxter* [2009] VSC 180).

Robert and Linda Baxter had been married for 21 years. Linda became increasingly unhappy in the relationship and sought support from a family friend, Brian Stevens. In 2003, their relationship became intimate. Neither she nor Brian Stevens had disclosed this to anyone.

In early 2006, Linda Baxter told Robert that she was unhappy in the marriage and wanted to separate. Robert became suicidal and was admitted to a psychiatric clinic for two weeks. He was diagnosed as suffering from severe depression. He returned to live at the family home but agreed to a trial separation. In the days before the killing he found Linda's phone records, which included details of contact between her and Brian Stevens. On the evening of the killing he visited friends. In his conversation with them, he called his wife a 'slut' and stated 'I should kill her' (para. 17).

After the killing Robert Baxter gave his daughter a note, in which he wrote that he had 'murdered' the children's mother for her 'adultery' (Transcript of trial, 18 February 2009, p. 46). After the killing he attempted suicide by driving his car off a freeway but survived the crash.

As the sentencing judge noted, Robert appeared to 'continue to blame' his wife and Brian Stevens for his 'predicament' (*R v Baxter*, para. 34). While giving evidence in the trial, Robert Baxter repeatedly described the actions of his wife and Brian Stevens in the lead up to the killing as 'provocative' (for example, Transcript of trial, 2 March 2009, p. 691; 4 March 2009, p. 751), which included leaving a book about separation 'clearly visible' in the house (Transcript of trial, 4 March 2009, p. 756).

Given that the partial defence of provocation had been abolished, Robert Baxter was not able to rely on that defence. Instead, the defence alleged that the cumulative effects of a major depressive disorder, an obsessive-compulsive personality disorder, recent stresses and the 'collapse of all hope' of a relationship with Linda 'triggered a mental state in which he temporarily lost the capacity for rational thought and action' (Transcript of trial, 6 March 2009, p. 937).

The defence counsel relied primarily on the evidence of one psychiatrist, who had conducted a mental state examination of Robert Baxter in August 2008, two years after the killing. The psychiatrist reported that on the night of the killing, Robert had 'a snap ... a nervous breakdown' (Transcript of trial, 4 March 2009, p. 786) and it was 'highly probable that he experienced psychosis although he appeared to behave in a rational, logical way after the killing' (p. 790).

In contrast, the prosecution submitted that the killing was intentional, and pointed to evidence from two psychiatrists who had seen the accused immediately before and after the killing, who 'saw no features that indicated that Robert Baxter had a break with reality' (Transcript of trial, 5 March 2009, p. 889).

The prosecution described Robert Baxter as a 'controlling, dominating, perfectionist' (Transcript of trial, 5 March 2009, p. 871) in the relationship, and referred to the evidence of Linda Baxter's mother, who described Robert's treatment of her daughter as 'mental bullying' (Transcript of trial, 18 February 2009, p. 84).

In this case, Robert Baxter was unable to convince the jury that he was not guilty of murder. The judge also did not accept the arguments from his defence counsel that his mental state at the time of the offence was a mitigating factor in sentencing, and rejected any implication that Linda Baxter was responsible for his actions (*R v Baxter*, para. 35). However, in many other cases, mental illness was accepted as a mitigating factor in sentencing. This is discussed at length in Chapter 10.

Robert Baxter argued that the mental impairment he suffered at the time of the killing was, at least in part, linked to the conduct of his wife, as well as his own pre-existing psychological problems. As the sentencing judge noted, Robert blamed his wife and Brian Stevens for his actions, and '[t]hat approach did not change when [he] gave evidence before the jury' (*R v Baxter*, para. 24). As the next section highlights, victim-blaming arguments were also apparent in other cases.

PROVOCATION-TYPE ARGUMENTS

In their initial interviews with police, or with forensic experts, many men explained their actions as a 'loss of control'. Eighteen of the men in our study described themselves as having been out of control: they either 'lost control', 'snapped', 'saw red' or suffered an 'inexplicable surge of emotion' in the moments prior to the killing.¹⁵⁸ Many of the men appear to have directly blamed their partner or ex-partner for triggering the loss of control, and portrayed their partner's behaviour as having been unreasonable or unfair. For example, in six cases the accused attributed his actions to his partner's (actual or suspected) infidelity, in two cases the accused said his partner had asked him to leave the house, in one case the accused said his partner had rejected his attempt to be affectionate, and in six cases the killing was because the accused became angry in response to his partner's behaviour in an argument or after separation.¹⁵⁹

Prior to the abolition of provocation as a partial defence to murder in 2005, commentators argued that trials in intimate partner homicides often became a 'slander fest' (Naylor 2002) in which the behaviour or character of the deceased woman was the focus of the defence attack. Many have voiced concerns that, even if it is abolished, the gendered assumptions underpinning provocation's victim-blaming narratives are likely to re-emerge in the guise of other types of manslaughter, such as unlawful and dangerous act manslaughter or negligent manslaughter (Morgan 1997, pp. 275–276; Tyson 2011), or at the sentencing process. This prediction is perhaps not all that surprising as the traditional 'narrative of a woman "asking for it" has, historically, been difficult to dislodge' (Tyson 2013, p. 57).

In our study, although those accused of murder were no longer able to explicitly rely on the defence that they lost control in response to the deceased's 'provocative' conduct, provocation-type arguments continued to be themes in defence narratives in some plea hearings and trials we analysed. In some cases the defence argued that the loss of self-control occurred after a cumulative

¹⁵⁸ See *R v Diver* [2008]; *R v Piper* [2008]; *DPP v Sherna* [2009]; *R v Baxter* [2009]; *R v Foster* [2009]; *R v Robinson* [2010]; *R v Felicite* [2010]; *R v Bayram* [2011]; *R v Ahmadi* [2013]; *R v Delich* [2013]; *R v Grant* [2013]; *DPP v Mahoney* [2009] VSC 249; *R v McPhee* [2013]; *R v Borthwick* [2010]; *DPP v Kelly* [2012]; *R v Neacsu* [2012]; *R v Budimir* [2013]; *R v Sengoz* [2011]. The claim to have loss of control was made in some cases however it was not always central to the defence argument. For instance, Leigh Robinson shot his partner at close range and claimed that the gun went off accidentally. He told police 'I saw red' and later that 'he just lost it' (Transcript of trial, 16 September 2009, p. 170). However, the claim that he 'lost it' was not central to the defence argument.

¹⁵⁹ These attributions of blame were made in the accused's comments during the killing (as heard by witnesses), or in their explanations to the police or to forensic psychologists or psychiatrists.

build-up of stress due to the behaviour of the deceased over a period of time. Frequently in plea hearings the accused's defence counsel argued that the killing was the result of 'loss of control' in response to his partner or ex-partner's actions, in the context of the accused's mental impairment or emotional stress. The use of provocation as a mitigating factor in sentencing, and the links with arguments relating to mental illness, is discussed further in Chapter 10.

In two cases in our study in which the accused pleaded not guilty to murder for killing a male sexual rival, his female ex-partner was effectively put on trial during cross-examination. In both of these cases, the woman had tried to leave the accused and had begun a relationship with another man, and the accused had killed the man.

In these cases, the defence argued that the killing was unintentional, and implied that the women's actions had contributed to a disturbed mental state in the accused, which resulted in the homicide. In both of these trials, the women's sexually explicit text messages were read out in court.

In the case of Mark Budimir, the presiding judge observed (during the plea hearing) that 'but for the change of law, this would have been a provocation case almost certainly' (Transcript of plea, 23 March 2013, p. 102).

CASE STUDY: MARK BUDIMIR

On 30 October 2011, Mark Budimir (aged 42 years) killed Dino Moresco (35) at a factory in Melbourne's west by 'pummelling' him to death (*R v Budimir* [2013] VSC 149, para. 36). Mark Budimir pleaded not guilty to murder. He was found guilty by a jury, and was sentenced to 18 years' imprisonment with a minimum non-parole period of 16 years.¹⁶⁰

Mark and Jana Budimir had been married for almost twenty years, and had four children. Their relationship had deteriorated in recent years. Jana gave evidence during the trial that during their relationship her husband had often 'stood over' her and on two or three occasions there had been a 'push/shove kind of thing' (Transcript of trial, 7 February 2013, p. 182). Mark had told police in his interview that his wife had 'neglected the welfare and development of their children' because she was working in her own business, and that 'she did not need to work' because he was working (Transcript of trial, 6 February 2013, p. 26).

Jana met Dino Moresco through her work and they began a sexual relationship in August 2011. In September 2011, Mark obtained his wife's phone records and confronted her with his suspicion that she was having an affair. She told him she no longer loved him and wanted him to leave the house, which he refused to do.

In the weeks before the killing, Jana twice called police after her husband had physically assaulted her. He was charged with assault and she obtained an intervention order, which prohibited him from returning home.

Mark Budimir argued that on the day of the killing, he went to confront Dino Moresco because he believed he and Jana were moving his personal possessions without his consent. His defence counsel argued that Mark Budimir did not intend to kill Dino Moresco during the confrontation, but had 'reacted instinctively, in a mental state compromised by the breakup of [his] marriage, to what [he] perceived to be a danger of really serious injury' (Transcript of trial, 18 February 2013, p. 752). On that basis, his defence counsel claimed that he had reacted in self-defence and urged

160 This is less than the average principal sentence for men convicted of murder between 2007 and 2012, which was 19 years, 4 months (Victorian Sentencing Council statistics 2013).

the jury to find him not guilty of murder. The defence said if he was guilty of any offence, 'it may be defensive homicide, it may be manslaughter' (p. 780).

The defence counsel alleged that Jana Budimir's behaviour was the 'catalyst' for the killing (Transcript of trial, 6 February 2013, p. 54). Jana spent three days in the witness box being cross-examined. The defence counsel accused her of exaggerating her claims of Mark's violence towards her before the killing: 'you stacked on a turn deliberately and called the police because you wanted to have him kicked out' to 'give you a clear run' to have Dino Moresco sleep at the house (Transcript of trial, 7 February 2013, p. 188). The implication of the picture presented of Jana Budimir was that she was a deceitful wife and a poor mother, who had 'no reflection ... on the impact this might have on her four young children' because she was obsessed with her secret affair with Dino Moresco (Transcript of trial, 15 February 2013 p. 700). The defence counsel read out Jana Budimir's sexually explicit text messages, and informed the jury that she had also sent a photo of her breast to Dino Moresco.

In his closing address the defence counsel told the jury: '[h]ow frustrated must [Mark Budimir] have been with her refusal to release the children from the intervention order and to allow him access to his own property, this hard working business man who has worked his butt off all his life, and now she is literally rubbing his face in it' (Transcript of trial, 15 February 2013, p. 717). The defence counsel suggested that Jana was 'a woman who is quite prepared, as we now know, to bring a new man into the house and sleep with him under the noses of those four young children' (p. 718). The defence asked the jury 'who could blame him' [Mark Budimir] for going to the factory to confront Dino Moresco (p. 718). Because of his wife's deceitful behaviour, Mark was in 'a state of considerable shock, not thinking rationally' (Transcript of trial, 18 February 2013, p. 927) when the killing occurred.

Ultimately this line of defence was unsuccessful and the jury convicted Mark Budimir of murder. At his plea hearing, however, his defence counsel submitted that provocation was a mitigating factor and that his client's moral culpability was reduced: 'because of his moral values and the religious and cultural setting in which he was brought up, the breakdown of his marriage was an assault on the very fabric of his being. He's then had an emotional response to that, which has been characterised by the chronic adjustment disorder, which has led to the breakdown of his behavioural controls' (Transcript of plea, 27 March 2013, pp. 108–109). This was only partially accepted by the sentencing judge (see discussion on page 109).

There were some similarities between the defence argument in Mark Budimir's case and the case of Leon Borthwick. As in Mark Budimir's case, Leon Borthwick killed a sexual rival and his ex-girlfriend, Nicola Martin, was criticised by the defence during cross-examination.

CASE STUDY: LEON BORTHWICK

On 16 November 2008, Leon Borthwick (aged 18 years) drove a car onto the wrong side of the road, hitting and killing Mark Zimmer (19) who was standing on the roadside. After a trial the jury found him not guilty of murder but guilty of manslaughter. The judge ruled that he had committed manslaughter by criminal negligence, accepting the defence argument that he had not recognised Mark Zimmer before hitting him with his car. Leon Borthwick was sentenced to 7.5 years' imprisonment with a minimum non-parole period of 5 years (*R v Borthwick* [2010] VSC 613). His appeal against the minimum non-parole period was unsuccessful (*Borthwick v The Queen* [2012] VSCA 180).

Mark Zimmer had recently begun a relationship with Leon Borthwick's girlfriend, Nicola Martin. She had told Leon Borthwick several times that she wanted to end their relationship. Leon was jealous and had threatened to harm and kill Mark Zimmer with guns and knives on several occasions (*R v Borthwick*, paras. 6–7).

The defence counsel argued that Mark Zimmer's death was an accident that occurred when Leon Borthwick had panicked when he saw a group of young men on the roadside near his home, and that he hadn't recognised that one of them was Mark Zimmer. His defence counsel criticised Nicola Martin during cross-examination, accusing her of 'stringing' both men along (Transcript of trial, 29 June 2010, p. 2879) and 'lying' about having ended her relationship with Leon Borthwick (p. 2876). The counsel for the defence told the jury that Nicola and Leon were like 'Romeo and Juliet ... except that this Juliet found a new Romeo but she wasn't getting rid of the old one just yet just in case the new one didn't turn out to be the one she wanted' (p. 2877). The defence counsel said it was 'natural' that Leon was upset about this (p. 2877), and though Nicola 'did not cause' Mark Zimmer's death, she was 'instrumental in bringing these two young teenage boys together' (p. 2880).¹⁶¹

During the plea hearing, Leon Borthwick's defence counsel argued that when he struck Mark Zimmer with his car, he was affected by an 'adjustment disorder' triggered by the end of the relationship, which resulted in him feeling 'intimidated, threatened and confused' (*R v Borthwick*, para. 39).

The judge appears to have accepted this argument to a limited extent, stating that while he took the forensic psychologist's opinion about Leon Borthwick's mental state 'into account' when considering his moral culpability, the 'strength of his conclusions is significantly reduced' by Leon Borthwick's 'misleading, inaccurate and self serving account of events' (para. 42).

¹⁶¹ The defence counsel later conceded that Ms Martin was not responsible for the death of Mark Zimmer (Transcript of trial, 29 June 2010, p. 2880).

In both the cases of Leon Borthwick and Mark Budimir, the style of the defence counsel's cross-examination of the men's ex-partners differed from the cross-examination of any other witness in the trial. For example, Mark Budimir's defence counsel repeatedly accused Jana Budimir of 'inventing' things, 'histrionics' and 'putting on an act', constantly reprimanded her for avoiding answering questions, and accused her of trying to frame her ex-husband in a negative light. In both cases, the counsel for the defence shared with the jury their own personal reflections, which were critical of the women's behaviour.¹⁶²

The cases of Budimir and Borthwick were two of seven cases in our study where the men killed a sexual rival. In some of these cases, though the accused killed another man, it appeared that part of his motivation was to inflict harm on his ex-partner. Effectively, the accused's ex-partner is also a victim of the homicide, even though she was not killed.¹⁶³

The Evidence Act gives the trial judge the power to ensure that the questioning of all witnesses, including victims, is respectful and proper. 'Improper' questions are those which are misleading or confusing, unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, which use a tone that is belittling, insulting or inappropriate, or which are based on a stereotype (such as the witness's sex or culture) (Evidence Act 2008, s. 41). In recognition of community concern that in some homicide trials the victim is effectively blamed for their own death, in 2014 the Victorian government introduced changes to the Evidence Act (s. 135 [d]) that allows the court to refuse to admit evidence that unnecessarily demeans the deceased in a criminal proceeding for a homicide offence. However, these laws focus on demeaning evidence in relation to the deceased victim, and as they are currently framed, would not exclude evidence that demeans the accused's ex-partner or blames them for a homicide in which they were not the direct victim.

In the cases of Mark Budimir and Leon Borthwick, there appeared to be some intervention from the judge regarding the nature of the defence questioning.¹⁶⁴ It is important to note that in sentencing Mark Budimir, the judge clearly denounced the way in which Budimir's defence was conducted at trial (see the quotation from this case at the beginning of this chapter). The judge stated this indicated a lack of remorse on Mark Budimir's part.¹⁶⁵ These comments are important as they communicate an alternative narrative, and challenge the offender's blaming attitude.

162 In Borthwick's case, the counsel for the defence told the jury in her closing address 'I will let you in on a little secret ... I hated every minute' of cross-examining Nicola Martin. The defence counsel said her 'sympathy was sorely tested', because Nicola Martin 'should have told both of them she didn't want either of them instead of throwing them into this relationship' (Transcript of trial, 29 June 2010, p. 2880). In Budimir's case, the defence counsel reflected to the jury that, while his lawyer friends tell him they find cases about 'people sleeping with each other and infidelity' exciting, he himself gets 'no joy out of it at all' (Transcript of trial, 15 February 2013, p. 705).

163 These kinds of killings have been described as 'intimate partner collateral murders' (Dobash & Dobash 2012) where the ex-partner is the primary target and the deceased are 'corollary victims' (Smith, Fowler & Niolon 2014).

164 The judge intervened on a number of occasions. For example, when Mark Budimir's defence counsel repeatedly criticised Jana Budimir during cross-examination for 'volunteering' extra information rather than directly answering the question, the judge told him to stop: 'Enough. Let her answer the question' (Transcript of trial, 7 February 2013, p. 185). In Borthwick's trial, the judge questioned the relevance of the defence's questions of Nicola Martin regarding when she was sexually intimate with the deceased (Transcript of trial, 18 June 2010, p. 2040).

165 The judge noted the comments relate to s. 5(2C) of the Sentencing Act, which states: 'In sentencing an offender a court may have regard to the conduct of the offender on or in connection with the trial or hearing as an indication of remorse or lack of remorse on his or her part.'

CONCLUSION

In our study, it was common for the defence to present an explanation for the homicide that suggested that it was accidental, due to a loss of self-control, a response to an attack by the deceased or caused by mental illness and/or intense emotional distress. These factors were frequently intertwined, and often the actions of the accused's female partner or ex-partner were at the core of these arguments.

Commentators have observed that courtroom narratives tend to 'mirror batterers' beliefs that women of all ages provoke men's violence' (Buckingham 2010, p. 148), and tend to reflect batterers' 'common denial or minimization tactics' (Hartley 2001, p. 534). This was apparent in our study. Although the partial defence of provocation has been abolished, elements of provocation continue to permeate the explanatory narratives about the men's actions in intimate partner homicide cases. While the word 'provoked' is rarely used directly, the men's female partners are still ultimately presented as having contributed to a mental state in the offender that resulted in his homicidal actions.

Defence lawyers are expected to present the best case for their client. The instructions of their client are shaped into legal narrative according to the rules of evidence and the lawyer's duty to the court. In this process, they may draw on popular myths and misconceptions about family violence in order to make a compelling case and to show that the offender is not to blame for the homicide or is worthy of sympathy and mitigation in sentence. However, the consequence is that this further perpetuates the misconceptions in the broader community about men's violence against women. These narratives 'inappropriately role-model' (Buckingham 2010, p. 148) the very beliefs that law reformers are trying to eliminate.

CHAPTER 10

Sentencing

... the principles of general deterrence, denunciation and just punishment will ordinarily be given primacy in sentencing for the murder of a partner in a domestic setting even where there are present, circumstances of provocation or great emotional stress.

Felicite v The Queen [2011] VSCA 274, para. 20

When an offender in a homicide case pleads guilty to an offence or is found guilty by a jury at trial, they are sentenced accordingly by a judge.¹⁶⁶ The process of sentencing is shaped by legislation and the common law. There is a range of factors that can be taken into consideration by a judge when sentencing offenders.

This chapter identifies the factors that may be taken into account when a homicide occurs in the context of sexual intimacy and/or prior family violence. The focus of our analysis is how intimate partner homicides are explained and understood in sentencing remarks rather than on the length and determinants of the sentence ultimately imposed. We examine whether the sentencing remarks reflect an explanatory narrative that recognises any relevant history of family violence and the contribution of gender-based attitudes in these homicides.

We first consider whether an offender's history of perpetrating family violence was seen as a relevant factor in the sentencing remarks. We examine how the standard of proof required, in addition to understandings of family violence, affects whether 'uncharged' acts of prior violence are recognised in the sentencing process. We also look at how the assessment of an offender's character is affected by a history of family violence, and whether the offence is characterised as an 'isolated incident' in the context of emotional stress or as part of a broader course of conduct.

While provocation was abolished as a defence in Victoria in 2005, it continues to be a relevant factor that the judge may consider in sentencing. This chapter explores the ways in which key elements of provocation – such as a loss of control and provocative conduct by the victim – were considered in the sentencing of men who killed in the context of sexual intimacy. We also examine the extent to which claims that the killing was influenced by the offender's mental illness were

166 Which means, for example, if the jury finds the accused guilty of manslaughter, the judge must sentence them on that basis.

accepted in sentencing. This chapter concludes by considering the opportunity for sentencing remarks to affirm women's equality rights.

THE SENTENCING PROCESS

The purposes of sentencing and the relevant considerations have an impact on how the homicide is explained by defence counsel, prosecutors and the judge.

In Victoria, the Sentencing Act sets out in s. 5 the purposes of sentencing, which are:

- just punishment – to punish the offender to an extent and in a way that is just in all the circumstances
- deterrence – to deter the offender (specific deterrence) or other people (general deterrence) from committing offences of the same or a similar character
- rehabilitation – to establish conditions that the court considers will enable the offender's rehabilitation
- denunciation – to denounce, condemn, or censure the type of conduct engaged in by the offender
- community protection – to protect the community from the offender.

Factors that have to be taken into account in sentencing include the nature and gravity of the offence, the offender's blameworthiness, the impact of the offence on the victim, the offender's previous character, and any aggravating or mitigating factors.

When weighing up the nature and gravity of the offence, the considerations a judge might take into account include the offender's intention, the consequences of the offence, the use of weapons, any breach of trust, the offender's history of offending and response to previous court orders, and alcohol or drug addiction.

These factors can be considered to be aggravating or mitigating. Aggravating factors are factors that are adverse to the accused, and they increase the harm caused by the offence or the offender's culpability (Freiberg 2014). These factors must be proved beyond reasonable doubt by the prosecution (see *R v Storey* [1998] 1 VR 359). In contrast, mitigating factors are those that are favourable to the accused. The defence has the onus of proving these on the balance of probabilities.¹⁶⁷ Courts are also permitted to reduce a sentence if a person pleads guilty.

Sentencing is an 'intuitive synthesis of all the relevant factors', and other than the legislative requirement that the court state the extent of any discount for pleading guilty (Sentencing Act, s. 6AAA), there is no requirement that the judge must identify the effect of any factor on the final sentence imposed (Freiberg, Gelb & Stewart 2015, p. 60).

RECOGNITION OF PRIOR FAMILY VIOLENCE

The recognition of a history of family violence in sentencing raises complex issues, particularly considering that most of the previous acts of violence may never have been subject to criminal charges (ALRC & NSWLRC 2010). However, as many commentators have argued, when the focus of prosecution is on a discrete incident and a course of abusive behaviour is not recognised,

¹⁶⁷ There are also factors that may not be related to the offence or the offender's culpability that may be aggravating or mitigating. For instance, the fact that the accused is the sole carer of children may have a mitigatory effect, but is irrelevant to the offender's culpability for the offence.

the law ‘fails to punish adequately the harm done to the victim and does not publicly recognise and condemn the seriousness of family violence’ (ALRC/NSWLRC 2010, p. 564).

In their national examination of family violence laws, the ALRC/NSWLRC found that the dynamics of family violence can be recognised to some extent in the sentencing process. The offence may be seen to have been committed ‘as part of a broader course of family-violence related conduct’ and ‘aggravating or non-mitigating circumstances relevant to the family violence context’ can be acknowledged (ALRC & NSWLRC 2010, p. 594).

In a number of recent (non-homicide) cases,¹⁶⁸ the Victorian Court of Appeal has highlighted the need to denounce crimes committed in the context of family violence (for example, *Pasinis v R* [2014] VSCA 97; *Marrab v The Queen* [2014] VSCA 119; *DPP v Meyers* [2014] VSCA 314). The *Victorian Sentencing Manual* (JCV 2015b) provides a summary of the law in relation to the sentencing of offenders in Victoria. Specific sections in the manual provide information about ‘relationship killings’ (s. 26.6.7) and ‘offences involving family violence’ (s. 9.15), by identifying relevant cases. The *Victorian Sentencing Manual* highlights that the Court of Appeal has identified that a murder or attempted murder is ‘not to be regarded as any the less heinous because it was committed against the background of an emotional domestic dispute’ (*R v Yaldiz* [1998] 2 VR 376; JCV 2015b, s. 26.6.7 – Relationship killings). It states that the serious impacts of family violence on victims means that ‘general deterrence looms large’ in sentencing for violent crimes in a family context’ (JCV 2015b, s. 9.15 – Offences involving family violence), citing the observations of the majority judgment of the Court of Appeal in *Pasinis v R* [2014] VSCA 97, that ‘women who are killed by their husband, boyfriend or de facto partner have frequently been assaulted by them many times previously. This makes both specific and general deterrence very important factors in sentencing men who assault their partner’ (per Neave JA & Kyrrou AJA: para 53; JCV 2015b, s. 29.3.14 – Causing injury in a family violence context).¹⁶⁹

The *Victorian Sentencing Manual* also identifies that a breach of trust and an assault on a comparatively defenceless victim are relevant sentencing factors in family violence offences (*DPP v Smeaton* [2007] VSCA 256 [13] (Nettle JA); *DPP v Muliaina* [2005] VSCA 13 [21] (Chernov JA); *Earl v R* [2008] VSCA 162 [23] (Nettle JA); JCV 2015b, s. 9.15 – Offences involving family violence). Finally, contravention of an intervention order is identified as an important factor that ‘will exacerbate the objective seriousness of other offending’ (JCV 2015b, s. 9.15.1 – Contravention of intervention order as aggravating circumstance).¹⁷⁰

In the cases in our research, the fact that the killing was committed by individuals who were in an intimate relationship was frequently recognised by the sentencing judge as an aggravating circumstance of the offence. For example, in several cases the fact that the killing was a breach of trust or occurred in the deceased’s home was found by the judge to be an aggravating factor. Some judges also made reference to the defencelessness of the victim as an aggravating factor. For example, in sentencing David Piper, the sentencing judge stated that an aggravating circumstance was that the deceased ‘was entirely within your physical power, given the difference in your

¹⁶⁸ The cases cited were not homicide cases, but were in relation to other crimes in the context of family violence, including intentionally causing injury, aggravated burglary, rape and threats to kill.

¹⁶⁹ This point is also made by Farrell who recently examined sentencing principles arising in recent Victorian Court of Appeal judgments (Farrell 2015).

¹⁷⁰ The *Victorian Sentencing Manual’s* section on offences involving family violence (JCV 2015b, s. 9.15). In relation to intervention order breaches, it refers to *R v Marrab* [2014] VSCA 119, where the judge held that the gravity of a course of conduct including recklessly causing serious injury, rape and a threat to kill was aggravated by the fact the offender was subject to a family violence intervention order. See also the Judicial College of Victoria’s *Family Violence Bench Book* (JCV 2014).

respective physical sizes' (*R v Piper* [2008] VSC 569, para. 41). When homicides were committed in the presence of children this was also viewed as an aggravating factor.

However, there are limitations on the extent to which a history of family violence can be regarded as relevant to sentencing, and this relates to the requisite standard of proof for aggravating and mitigating circumstances.

In eight cases in our study, prior family violence was clearly recognised as an aggravating factor. In these cases, there was either an intervention order in place against the offender at the time of the killing or the offender had previously been charged with a family violence-related offence. For example, in sentencing Kenneth Mahoney, who pleaded guilty to manslaughter for killing his partner Selina Tilley in 2007, the judge identified his previous violence: '[t]his was not an isolated incident. Your counsel quite properly conceded that you had a history of violence towards Ms Tilley. Whilst I am mindful of the need not to sentence you for past conduct for which you have not been charged, the fact is that your behaviour cannot be dismissed as simply being out of character or arising from a spontaneous eruption of emotion' (*DPP v Mahoney* [2009] VSC 249, para. 20). The fact that the fatal assault was in breach of an existing intervention order was also an aggravating factor.

However, of the offenders in our study who had a history of perpetrating family violence (a total of 27 cases, as discussed in Chapter 5), most had never been charged in relation to this behaviour or subject to a finalised intervention order.¹⁷¹ In these cases, issues arise as to how this history can be used by the judge when imposing the sentence on the accused.

While uncharged acts are generally not taken into account in sentencing,¹⁷² there does appear to be some scope for a sentencer to refer to uncharged conduct 'to provide context for the offence' for which the offender is being punished (*R v Rankin* [2001] VSCA 158, para. 8; see also JCV 2015b, s. 9.3.3.4 – Uncharged offences relevant to offence context). A sentencer may also refer to uncharged conduct to counter a submission by defence counsel that the offence was out of character (*R v Dunne* [2003] VSCA 150, para. 17; see *Weininger v The Queen* [2003] HCA 14, 212 CLR 629, 196 ALR 451, 77 ALJR 872 (2 April 2003); see also JCV 2015b, s. 9.3.3.4 – Uncharged offences relevant to offence context). However, a sentencing judge 'may not take facts into account in a way that is *adverse* to the interests of the accused unless those facts have been established beyond reasonable doubt' (*R v Storey* [1998] 1 VR 359 at 369 per Winneke P, Brooking and Hayne JJA and Southwell AJA; *Olbrich v R* [1999] HCA 54, 199 CLR 270, 166 ALR 330, 73 ALJR 1550 (7 October 1999); *Weininger v The Queen* [2003] 212 CLR 629; see also JCV 2015b, s. 10.3.9 – Uncharged offences).

In our study, whether uncharged acts of family violence were argued or accepted as relevant to sentencing considerations depended on the nature of the available evidence, and the extent to which this was used by the prosecution and accepted by the judge. The ways in which family violence was understood by the legal professionals involved also played an important role in whether it was perceived as a relevant consideration in sentencing (for further discussion of understandings of family violence and sentencing see the cases of Ron Felicite, Nasir Ahmadi, Stephen McPhee, and Brian Andrew, discussed in Chapter 7).

¹⁷¹ Our study is consistent with other research that shows relatively few victims report family violence to police. See, for example, research cited in Chapter 1 such as the ABS 2012 *Personal Safety Survey*, and Birdsey & Snowball 2013.

¹⁷² It is a recognised sentencing principle that an offender can only be sentenced for the offence for which they were found guilty.

For example, in considerations of the character of the offender, the focus of sentencing is the offender's prior convictions, 'general reputation' and contributions to the community.¹⁷³ If the offender had no prior convictions for family violence, the defence frequently submitted that the offence was 'out of character'. This was supported by character evidence provided by the offender's work colleagues, friends, family, or other associates. Additionally, in these cases, the offender's prior family violence was often seen to be caused by his drug or alcohol problems or a mental illness, and therefore was not perceived to reflect his character overall. In 10 cases in our study in which there was evidence that the offender had previously been abusive or violent towards the deceased, the judge accepted the argument that the offender was 'otherwise of good character'.

In the case of James Stoneham the judge considered the potential relevance of prior controlling behaviour in his assessment of the offender's character. Additionally, the judge raised – and rejected – the possibility that Stoneham's previous behaviour might be considered an aggravating factor.

CASE STUDY: JAMES STONEHAM

On 23 August 2012 James Stoneham (aged 21 years) lured his ex-girlfriend Adriana Donato (20) away from a party and drove her to a river, where he stabbed her once in the neck and killed her. He pleaded guilty to murder. He was sentenced to 19 years' imprisonment with a minimum non-parole period of 14.5 years (*R v Stoneham* [2013] VSC 661).

James Stoneham had never been charged with a family-violence related offence, however the prosecution argued that he had previously attempted to 'control' Adriana Donato (Transcript of plea, 11 November 2013, p. 31). During the plea hearing, the prosecution cited excerpts from Adriana's diary in which she said she felt she was 'stuck under [James Stoneham's] rule, like he is in charge of me', and that she felt she had lost her independence (p. 96). She also stated that she believed that he monitored her social media accounts and her contact with other people (p. 96). In a victim impact statement, her friend described James Stoneham's behaviour as 'very difficult' and 'distressing' for Adriana (p. 26). The defence contested the description of the behaviour as 'controlling', arguing that there was no physical violence and James was 'a confused young man who got a mental illness and committed a terrible crime'; to describe this as a 'misogynist killing' would be to 'complicate' the explanation 'by social cliché' (p. 98).

Seven months before the killing, Adriana ended the relationship. James was 'distracted' after the break-up and became depressed and suicidal (*R v Stoneham* [2013] VSC 661, para. 9). In the weeks before the killing, he smashed Adriana Donato's car window and sent a threatening message, and also searched the internet for information relating to murder. About a week before the killing, he bought a skinning knife and told friends he was planning to kill Adriana with it. On the day of the killing he again searched the internet for information about Australian laws in relation to murder.

¹⁷³ According to the Victorian Sentencing Act (s. 6), the focus of the determination of character in sentencing is the nature of the accused's prior convictions, their 'general reputation' and their significant 'contributions' to the community. The Act notes that 'other things' may also be considered in relation to character. The *Victorian Sentencing Manual* identifies that, 'Amongst the "other things" that may be decisive of character is uncharged offending admitted by the offender' (citing *R v Fraser* [2004] VSCA 147, see JCV 2015b, s. 10.3.4).

In sentencing James Stoneham, the judge identified that 'a history of violent or controlling behaviour in the context of a relationship break-up' was potentially a relevant factor in establishing 'the seriousness of murder' (para. 49). However, he noted that James Stoneham had not been physically violent towards Adriana Donato (para. 50) and that although there was evidence that he had been controlling, Adriana 'was an intelligent, strong-willed and independent young woman well capable of dealing with such behaviour' (para. 51). Consequently, when considering 'all the circumstances' in the case, the sentencing judge said he was 'not satisfied to the requisite standard that the offence was aggravated by any previous controlling behaviour on the part of Mr Stoneham' (para. 54).

The sentencing judge said that, considering that he had no prior convictions and 'there is no suggestion that he was ever violent towards Ms Donato' (para. 64), he would sentence James Stoneham on the basis that he is 'a young man of otherwise good character' (para. 65).

Finally, the judge found that specific deterrence was relevant but to be given less weight 'on account of Mr Stoneham's plea of guilty, his remorse, his mental state prior to and at the time of offending, his previous good character, his youth and his good prospects of rehabilitation' (para. 84).¹⁷⁴

In one case, a history of family violence was found to have some relevance in the consideration of the offender's character, despite the fact that there had never been police intervention in relation to the violence.¹⁷⁵ In the case of Sukhmander Singh, the accused had never been charged for previous acts of physical abuse towards the deceased while the couple lived in India. The accused did not accept the evidence from his daughter that he had a history of violence.¹⁷⁶ The sentencing judge stated:

'You have no prior convictions and are entitled to some benefit for this. I have set out the unfortunate details of your prior relationship with your wife. It can hardly be said that your conduct of 7 May 2009 was an aberration in a prior exemplary life. Your long term history of physical abuse towards your wife tempers this aspect of mitigation, but does not eliminate it.'

R v Singh [2010] VSC 10, para. 25

Our analysis suggests that whether prior family violence is accepted as a sentencing consideration is limited by the extent to which the evidence available meets the relevant standard of proof in relation to aggravating and mitigating factors. The ways in which legal professionals understand family violence also appears to play a role in the weight it is given as a sentencing consideration. Considering this, in some cases judges simply noted evidence of prior violence without further

174 Further, James Stoneham was sentenced on the basis that he intended to cause serious injury when he stabbed Adriana Donato, but not that he intended to kill her, considering there was only one stab wound (*R v Stoneham*, paras. 45–47).

175 The joint judgment of the Court of Appeal in the case of Amitesh Jagroop provides an additional example of a case where prior physical violence affected the assessment of the offender's character. The deceased had previously obtained an interim intervention order to protect her from violence by the accused, however she withdrew it several weeks later. According to the Court of Appeal, Amitesh Jagroop's 'use of inappropriate force toward his wife, causing her to seek refuge and obtain an intervention order', in addition to his participation in a forgery, meant that he 'did not demonstrate good character' (*The Queen v Jagroop* [2009] VSCA 46, per Dodds-Streeton JA, para. 30).

176 Though it appears that during the plea the defence did not actively contest the evidence about his previous violence.

comment or denunciation.¹⁷⁷ The effect of this is that the impact of prior abuse, threats or controlling behaviour towards the deceased tends to fade from view in the sentencing process. The homicide offence may be inappropriately characterised as an isolated incident.

PROVOCATION AS A MITIGATING FACTOR

As outlined in Chapter 2, when recommending the abolition of provocation as a defence the VLRC stated that such issues of culpability were better dealt with in sentencing, which allows 'greater flexibility' and means that the sentencer 'can take provocation into account when it is appropriate to do so, and to ignore it when it is not' (VLRC 2004, p. 33).

Provocation has traditionally been referred to as an 'understandable' loss of control triggered by the 'provocative' conduct of the victim. In recommending the abolition of provocation, the VLRC expressed the view that 'a violent loss of self-control should not be excused' (VLRC 2004, p. 26). A number of submissions to the review were particularly concerned with the portrayal of men's violence as a result of an offender being unable to control his actions. For example, as one submission emphasised, this is misconceived: '[r]ather than a loss of self-control, the use of anger and violence by men against women is often instrumental – a deliberate and conscious process – intended to gain compliance and control. Those who inflict violence, including in the context of a relationship of sexual intimacy ... generally make a decision to act or not to act' (p. 31).

There has been little research examining how provocation has been applied in sentencing since the abolition of the partial defence of provocation in Victoria. One recent study by Freiberg, Gelb and Stewart (2015) could only find a small number of Victorian cases of sentencing for murder where provocation was overtly discussed (p. 59).¹⁷⁸ The authors found that sentencing judges continue to employ the language of loss of self-control, though this was often 'accompanied by a rights-based analysis that asks whether the offender was justifiably provoked by the alleged conduct of the victim' (p. 64).

In our study many men told police that the killing was a response to their partner's behaviour (as discussed in Chapter 9). However, in relation to sentencing, while the defence rarely explicitly argued that provocation was a mitigating factor, the accused's actions were often linked to a loss of control and/or his mental distress or illness. We found that the language of 'loss of control' in response to infidelity, arguments or separation was employed by judges in sentencing in five cases. However in some instances the sentencing judge decided that the evidence did not demonstrate a genuine loss of control because the killing took several minutes or multiple blows, or because the behaviour that was supposed to have triggered it was not sudden, but had occurred some time prior to the killing. For example, in *R v Neacsu*, the judge observed that the offender had been aware for several days that his wife wanted to leave him, so the murder was not a 'spontaneous' loss of control (*R v Neacsu* [2012] VSC 388, paras. 40, 42).

¹⁷⁷ There were some exceptions where the judge clearly criticised the offender's previous abuse, even where the offender had not been subject to criminal charges (see *R v Singh*, discussed earlier), and where the abuse was not physical. For example, in sentencing Robert Baxter (see case study in Chapter 9) the judge accepted the accused was otherwise of good character, but also commented on the impact of his controlling behaviour on the deceased: 'It is clear that your relationship with Linda became increasingly rocky ... I do not attribute this necessarily to Linda's relationship with Brian Stevens. Rather, that was part and parcel of Linda's unhappiness with a relationship that you controlled and dominated' (*R v Baxter*, para. 7, see also para. 34). Robert Baxter had been found guilty by the verdict of a jury, which meant that the judge heard evidence of his controlling behaviour, which was adduced during the trial.

¹⁷⁸ The study discussed *Azizi*, *Budimir*, *Felicite*, *Neacsu*, *McPhee*, which are all included in our analysis.

Like Freiberg, Gelb and Stewart (2015, p. 64), we found that judges tended to give ‘little weight to the alleged provocation in view of the victim’s rights and the disproportionality of the offender’s response’ (p. 64). For example, a small number of judges expressly stated that separation was not conduct that could justify violence. For example, when sentencing David Piper (see later discussion on p. 111), the judge said ‘[t]he termination of a relationship was an experience of a kind undergone by many, many adults. It was not a situation justifying or encouraging violence’ (*R v Piper* [2008] VSC 569, para. 39). In Ron Felicite’s case (cited at the beginning of this chapter), the Court of Appeal made clear that, even if a killing occurs in circumstances of provocation or emotional stress, for homicides in a domestic context, the primary focus of sentencing is punishment, denunciation and deterrence (*Felicite v The Queen*, para. 20).

In the case of Mark Budimir (see Chapter 9), when assessing the weight to be given to the conduct of the deceased and Budimir’s wife in provoking the killing, the sentencing judge said he accepted that the offender was ‘in some sense provoked by the deceased’s association with [his] wife and the deceitful way in which both he and she treated [him] concerning their affair’ (*R v Budimir*, para. 41), and that this had contributed to Budimir’s ‘compromised’ mental state (para. 55). However, the judge further remarked that while this reduced Mark Budimir’s moral culpability, ‘the reduction is not large. There is no longer much scope for the recognition of a reduction in moral culpability in crimes resulting from idiosyncratic (even if, in some quarters, still entrenched) psycho-social attitudes to the rights and roles of women’ (para. 56).

While some judges questioned the offender’s claims to have lost control in individual cases, they rarely questioned or challenged the notion that an offender could ‘lose control’ of their actions in the context of high emotion. The acceptance of the notion of a loss of self-control as part of the explanation for the homicide obscures the alternative explanation that the offender made a choice to inflict violence.

The ways in which the offender’s response to the victim’s behaviour was characterised varied across cases. In the case of Omer Bayram, the majority judgment of the Court of Appeal ruled that the sentencing judge had mischaracterised the offender’s motive for murdering his wife.

CASE STUDY: OMER BAYRAM

On 1 February 2010, Omer Bayram (aged 61 years) took a knife from the kitchen sink and stabbed his ex-wife, Sirin Bayram (50), five times. He pleaded guilty to murder. He was sentenced to 19 years’ imprisonment with a minimum non-parole period of 16 years (*R v Bayram* [2011] VSC 10). On appeal, this was reduced to 16.5 years’ imprisonment with a minimum non-parole period of 13.5 years (*Bayram v The Queen* [2012] VSCA 6).

Omer and Sirin Bayram had been married for 25 years but had separated the year prior to the killing. They were still living together in the same house with their adult children while divorce proceedings were being finalised. In his record of interview, the offender alleged that on the day of the killing, he and Sirin Bayram had argued about her desire to sell the family home as part of the divorce settlement. He said that Sirin made fun of him and said: ‘I want to sell everything, I’m going to take everything’ (*Bayram v The Queen*, para. 9). Omer said he had ‘worked hard for 26 years including 22 years on night shifts when he looked after the children in the daytime whilst his wife was at work. He said that “everything” meant the house, a taxi licence and a lot of money in the bank. He said he stood to lose half a million dollars. He said she wanted her life with *his*

money' (para. 9). Omer said his ex-wife's statements about taking 'everything' drove him crazy and he could not remember anything else. He said he was 'out of my mind' (para. 9). He said he just 'lost it' (Transcript of plea, 17 January 2011, p. 23).

The sentencing judge said that, effectively, Omer Bayram had killed his wife 'over a sum of money' (*R v Bayram*, para. 12). The judge therefore characterised it as a 'relatively serious form of murder', and further commented that Omer Bayram's wife's claims had been reasonable: 'Not surprisingly, your wife wanted what she was entitled to, which was at least half of the assets acquired during the marriage' (para. 5).

However, Omer Bayram successfully appealed against the sentence (*Bayram v The Queen*, Warren CJ, Ashley & Harper JJA). His defence counsel argued that the sentence was manifestly excessive and the seriousness of the offence was mischaracterised, and there was 'insufficient weight [given] to his age, previous good character and the diminished need for specific deterrence' (*Bayram v The Queen*, per Warren CJ, para. 26). The majority judgment found that the sentencing judge had incorrectly formed the view that the argument was about Omer Bayram not wanting to sell the house, when in fact, he had stated in his police interview that his intention was 'to keep the house for his children' (*Bayram v The Queen*, para. 17). Warren CJ observed that, 'there is considerable difference between a man killing his wife for money and a man who kills his wife because of a strong fear of losing the home for his children' (para. 27).

In this explanation, Omer Bayram's actions were linked to him being a caring father who was fearful that his wife's financial demands were going to put his (adult) children's welfare at risk. As the sentencing judge in another case observed, 'according to the Court of Appeal, [Omer Bayram had] a purer motivation for his actions, being the protection of property for his children rather than just one of ensuring his wife did not receive an appropriate share of the family assets through a divorce' (*R v Neacsu* [2012] VSC 388, para. 40).

This assessment ultimately gave little recognition to the potential significance of other statements made by Omer Bayram in relation to why he 'lost it'. These statements appear to express resentment that his wife had 'made fun' of him and had not adequately recognised his contributions as a provider.¹⁷⁹

In other cases, there appeared to be a link made between the offender's loss of control and his depression or fragile mental state. A common theme was that the deceased woman's behaviour triggered or exacerbated an emotional disturbance in the accused, which resulted in a loss of control. While most judges rejected any implication that the deceased women's actions had been 'provocative' or otherwise unreasonable, they accepted that it had caused strong emotions in the offender, in the context of the offender's mental health disorder.

In the case of David Piper, a cumulative build up of difficult life experiences and mental health problems, in addition to the 'rejection' by his partner, was accepted as having contributed to the murder.

179 The defence did not directly argue that provocation was relevant as a mitigating factor in this case. Additionally, it should be noted that there was no evidence of Omer Bayram having a history of perpetrating family violence.

CASE STUDY: DAVID PIPER

On 28 April 2008, David Piper (aged 36 years) killed his partner, Wendy Chow (35), then went to the police and confessed. David Piper pleaded guilty to murder and was sentenced to 16 years' imprisonment with a minimum non-parole period of 15 years (*R v Piper* [2008] VSC 569).¹⁸⁰

Several months prior to the killing David Piper had assaulted Wendy Chow and she had obtained an intervention order preventing him from approaching her home (paras. 22–23). However, they had apparently reconciled and he had moved back in.

The day before the murder, they argued and Wendy had asked David to move out of her house. David Piper told police that on that night he had 'wished her dead' (para. 27). During an argument the next day, they struggled, and David pushed Wendy to the ground, and strangled her. He then stuffed her underpants down her throat. He told police that he said to himself, '[s]erve yourself right for treatin' me like a cunt' (para. 32).

At David Piper's plea hearing, the defence relied on the evidence of a forensic psychologist to show that at the time of the 'final confrontation with Ms Chow' he was 'stressed at the prospect of losing the relationship and by the practical consequences of being put out on the streets with limited resources' (para. 53). The psychologist also submitted that David Piper suffered a personality disorder 'with mixed borderline, anti social and avoidant features' (para. 51), and that 'the fragility and general level of inadequate functioning' that the offender had experienced made the 'impact of the stress more intense than would be the case in a robust or psychologically stable individual' (para. 53). During the plea, the counsel for the defence submitted that David Piper's early experiences had 'left him deeply troubled and flawed. He faced rejection and abandonment on this particular day by the woman that he loved ... and, faced with the loss of that relationship and the loss of control over his life ... [to use Piper's words from his record of interview], "he snapped"' (para. 41).

The sentencing judge held that he didn't accept defence counsel's submission that what occurred was 'some momentary loss of control' and said it was a deliberate and sustained attack (para. 53). However, he accepted as mitigating David Piper's 'childhood experiences, subsequent history of failed relationships as an adult, and personality traits contributed to strong emotions when confronted with the breakdown of the relationship with Ms Chow' (para. 63).

While accepting this explanation, the judge also made clear that separation was not conduct that could justify violence (as discussed earlier).

¹⁸⁰ David Piper was also sentenced at the same time for armed robbery, resulting in a total effective sentence of 19 years' imprisonment.

MENTAL ILLNESS AS A MITIGATING FACTOR

As outlined in Chapter 9, mental impairment is rarely accepted as the basis of a defence to murder in Victoria. However, mental illness is frequently raised in plea hearings. Under the Sentencing Act s. 5(2)(d), the court when sentencing must take account of the offender's 'culpability and degree of responsibility for the offence'. The offender's culpability and responsibility may be found to be reduced as a result of a mental disorder or intellectual disability.

In *R v Verdins* [2007] 16 VR 269, the Court of Appeal (Maxwell P, Buchanan and Vincent JJA) outlined the ways in which mental impairment is relevant to sentencing. It can:

- reduce the offender's moral culpability
- influence the type of sentence that can be imposed and the conditions in which the sentence can be served
- reduce the weight given to deterrence as a purpose of sentencing
- increase the hardship experienced by an offender in prison
- justify a less severe sentence where there is a serious risk that imprisonment could have a significant adverse effect on the offender's mental health.

According to Freiberg (2014, p. 290), the *Verdins* principles apply to 'impaired mental functioning, whether temporary or permanent' which will 'encompass the recognised psychiatric categories'¹⁸¹ as well as intellectual disability and acquired brain injury. However 'it need not amount to a serious psychiatric illness for sentencing purposes' (p. 290). The categories of mental disorder are not important: 'what is important is what the evidence shows about the "nature, extent and effect of the mental impairment experienced by the offender at the relevant time"' (p. 290).

In at least half of the cases in the study, defence counsel relied on the expert opinion of one or more forensic psychologists or psychiatrists to support the contention that the offender's mental condition at the time of the homicide should be accepted as mitigating the sentence imposed. In 12 cases (approximately one-quarter of the total in this study), the sentencing judge appears to have accepted that the offender's mental illness or disorder contributed to the offence to some extent, and that this reduced the need for general or specific deterrence.¹⁸²

For instance a forensic psychologist described Thy Sok as having a 'chronic dysthymic disorder' which was the result of rejection by previous partners and which 'skewed' his judgement in relation to intimate relationships (*R v Sok* [2012] VSC 299, para. 12). The judge in this case was sceptical of some of the claims made by the forensic expert in relation to this evidence, stating that he was 'unimpressed by (and reject[s])' the forensic psychologist's evidence 'that there is "an elevated risk of someone committing a crime when they suffer from a dysthymic mood disorder"' (*R v Sok*, para. 14, footnote 2). However, despite this he was 'prepared to conclude that there should be some limited moderation of both general deterrence and specific deterrence' as a result of a 'limited reduction in [Sok's] moral culpability arising from [his] dysthymic disorder' (para. 14).

¹⁸¹ This may include, for example, depression and dysthymia, schizophrenia, bipolar disorder, postnatal depression and post-traumatic stress disorder, though a disorder such as borderline personality disorder may not be included as 'this has not been regarded as an illness that affects the person's capacity to perceive the surrounding world and respond to it' (Freiberg 2014, p. 291).

¹⁸² In these cases, the judge accepted that the offender's mental condition was causally linked to his offending to some extent and reduced his moral culpability. For example, in *Felicite*, the offender's depressive disorder was accepted as having a 'weak' causal link to the killing (*R v Felicite* [2010] VSC 245, para. 19), and the judge said he made 'a modest allowance for it insofar as it impacts upon [Felicite's] moral culpability and aspects of general and specific deterrence' (para. 24). See also the cases of *Stoneham* (Chapter 10), *Budimir* and *Borthwick* (Chapter 9). In some cases it was unclear whether the offender's mental illness was accepted as a factor that reduced his moral culpability for the offence.

In other cases, sentencing judges found that the offender's personal background, depression or other mental illness, was relevant in explaining their response to relationship difficulties or separation, though this was not necessarily accepted as mitigating the sentence. For example, in the case of Nasir Ahmadi, the judge stated that there was 'no causal connection' between his depression, anxiety and the offence, 'other than that posed by [his] history, including the difficulties [he had] endured since arriving in this country' and his 'depression and anxiety, all of which would have contributed to and affected [his] ability to cope when confronted with a situation of conflict' (in relation to his wife's desire to separate) (*The Queen v Ahmadi*, para. 22).

In Glenn Diver's case, the focus of the expert evidence was the cumulative build-up of psychological damage over his lifetime, which caused him to lose control when his partner said she wanted to leave him. While this was accepted as part of the explanatory narrative for the offence, it was not seen to have reduced his culpability.

CASE STUDY: GLENN DIVER

On 29 May 2007, Glenn Diver (aged 40 years) killed his partner of two years, Cheryl Ann Haynes (45). He strangled her with his hands until she was unconscious and then tied the cord from his dressing gown tightly around her neck. He pleaded guilty to murder. He was sentenced to 17 years' imprisonment with a minimum non-parole period of 14 years (*R v Diver* [2008] VSC 399).

Cheryl Haynes had wanted to end the relationship. On the day of the killing she phoned her brother and told him that she and Glenn had been arguing, and she wanted to ask him to leave but was 'frightened of what he might do' (Transcript of plea, 7 May 2008, p. 6). Glenn secretly listened in on the call and confronted Cheryl before killing her.

Glenn Diver's defence counsel argued that there was no previous family violence in the relationship (p. 27). However, the prosecution presented evidence during the plea hearing that Cheryl had told a friend that Glenn had become 'very nasty' towards her in the months before the killing (p. 26). There was also evidence presented in the plea hearing that a previous partner had an intervention order against him (p. 48).

Based on the reports of a forensic psychologist and a psychiatrist, Glenn Diver's defence counsel argued that he had suffered a sudden loss of self-control in relation to a build-up of emotions and this was linked to his disordered personality and adverse family circumstances as a child. The psychiatrist stated that the likely diagnosis was 'recurrent depressive disorder', and concluded that Glenn Diver's actions were likely to have been the 'cumulative effect of a lifetime of psychological damage that left him with very limited emotional resources to cope with the deterioration of the relationship' (p. 35). The psychiatrist said Glenn Diver 'is clearly a vulnerable man ... and was undoubtedly very upset about the state of the relationship and in the context of an argument "just lost it"' (*R v Diver* [2008] VSC 399, para. 47).

The sentencing judge took Diver's 'general psychiatric background into account' in the way that it 'helps explain, although not excuse, your behaviour' (para. 61). He said that the accused's offending 'was not premeditated, that for reasons to do with your make up, you just "lost it"' (para. 50). However, the judge also made clear that he did not find that Glenn Diver's depressive disorder 'operates to reduce [his] moral culpability or to make [him] an inappropriate vehicle for general or specific deterrence' (para. 62).

Some judges raised concerns about the frequent reliance on arguments about mental impairment in sentencing offenders. For example, in George Misalis's case, while the sentencing judge accepted that the offender had a degree of depression, she was not satisfied, on the balance of probabilities, that his depression 'was of such a level as to impair your ability to make calm and rational choices or to think clearly or to impair your ability to appreciate the wrongfulness of your conduct' (*The Queen v Misalis* [2014] VSC 617, para. 68). The sentencing judge stated:

There has been a tendency to argue and urge the court to permit any form of mental health issue to enliven the different categories of Verdins, particularly general and specific deterrence, as well as difficulties in dealing with incarceration. I am of the opinion that those matters require careful consideration, and not just an easy and general acceptance (paras. 65–68).¹⁸³

Accordingly, the sentencing judge held that common conditions, like depression and anxiety, should not automatically reduce an offender's sentence:

Whilst Verdins permits the courts to ameliorate sentences if someone is suffering from a mental illness, it could not ever have been meant to extend that leniency to someone who is just a little anxious, or has some mild depression ... Anti-depression medication is recognised as one of the most commonly prescribed medications in our community. We live in more stressful times, more people are anxious, more people are stressed, more people are sad, unhappy and depressed, or at the least more people are being treated for those condition (para. 65).

For Verdins to apply in categories such as reducing moral culpability, reducing the need for general deterrence and the like, the situation is one where the link between the mental illness and the commission of the offence must be one that is demonstrable, clear, obvious or at the least comprehensible of a reasonable explanation as to the connection, and certainly not tenuous ... (para. 66).

The judge also raised an important point regarding the reliability of expert psychiatric or psychological evidence about mental impairment provided to the court:

The reconstruction by experts of what the mental state of a criminal must have been, based upon what they are told by the person charged and limited other sources, must, at times, impose some very severe limitations on the reliability and dependability of those assessments.

The Queen v Misalis [2014] VSC 617, para. 62

183 The use of *Verdins* was the focus of a recent case in the Court of Appeal. The joint judgment of the Court of Appeal in the case of *DPP v O'Neill* [2015] VSCA 325 (Warren CJ, Redlich & Kaye JJA) has observed 'the frequency with which the principles in *Verdins* are relied upon during a plea in mitigation' and highlighted that such claims need to be carefully assessed (*DPP v O'Neill*, paras. 36, 74).

Considering how frequently mental disorders are accepted in sentencing as the primary explanatory narrative for why men perpetrate these homicides, on the surface, it may appear that mental illness is a key causal factor in intimate partner homicides. There was less recognition of the blaming attitudes and justifications expressed by the offender – for example, his belief that the killing was justified in the light of the victim’s actions, which he perceived to be unreasonable or unacceptable.

In our study, it was often argued that the offender’s mental disorder at the time of the homicide was triggered or exacerbated by the victim’s desire to separate or other problems in the relationship. Some researchers have identified that, in explanatory narratives for men’s lethal violence, mental disorders are often linked to the victim’s behaviour, and may contribute to victim-blaming. For example, Hall, Whittle and Field’s (2015) analysis of sentencing remarks in domestic homicides ‘provided evidence for victim blaming wherein the decision by a wife to leave her husband was seen as the primary cause for the violence because it provoked a disturbed psychological response in him’ (p. 7). A study of intimate partner homicide prosecutions in Sweden also identified that, while the victim’s behaviour was seldom explicitly defined as provocative, it was often perceived as having contributed to the man’s unstable psychological condition or to a temporary or permanent mental illness (Burman 2010). Burman notes that these narratives reflect the excuses used by abusive men themselves: ‘violent men refer to anger and emotions inside themselves as causing the violence and blame the woman for getting them into such a state of mind. Their unstable psychological condition is thus used as an excuse and the behaviour of the woman as a justification for the violence’ (p. 183).

Mental health problems and adverse life experiences are part of the explanation for these killings. However, what is obscured by the focus on mental illness is the role of the offender’s attitude towards his partner and the relationship. In the next section, we examine cases in which judges challenged the underlying gendered attitudes that are a key factor in these homicides.

RECOGNITION OF WOMEN’S RIGHTS

As discussed earlier, in several cases sentencing judges rejected any suggestion by the offender that the deceased’s conduct had been provocative.¹⁸⁴ In nine of the cases in our study,¹⁸⁵ judges made implicit or explicit comments affirming the woman’s right to leave a relationship, to commence a new relationship or to otherwise act autonomously.

The sentencing judge in the case of Marin Neacsu made lengthy comments about attitudes towards women. She rejected Neacsu’s claim that he had acted spontaneously or that the crime was linked to his depression, and was critical of attitudes of masculine entitlement that underlie such killings.

184 A similar finding was made by Freiberg, Gelb and Stewart (2015) who argued that the approach to murder sentences taken in *Felicite*, *McPhee*, *Azizi*, *Budimir* and *Neacsu* ‘shows that conduct by the victim such as ending the relationship or commencing a new relationship (even if it causes the offender to feel anger, loss or grief) is unlikely to be found to be “mitigating provocation”, or if it is, is likely to be given little weight’ (p. 68).

185 Note that 29 of the homicides by men in our study occurred in the context of separation – in 18 of these cases the victim had attempted to leave in the days or weeks prior to the killing (see Chapters 5 and 6). A further five homicides occurred in the context of jealousy or possessiveness.

CASE STUDY: MARIN NEACSU

On 23 February 2011, Marin Neacsu (aged 56 years) killed Ionel Coca by stabbing him 16 times outside his flat. Marin Neacsu confessed to the police, pleaded guilty to murder and was sentenced to 17.5 years' imprisonment with a minimum non-parole period of 14.5 years (*R v Neacsu* [2012] VSC 388).

Marin Neacsu's wife, Dida Neacsu, had left him one week prior to the killing, and had gone to live with Ionel Coca, with whom she had commenced a relationship. During the plea hearing, defence counsel argued that Marin Neacsu 'didn't for a second suspect [his wife] was living with the deceased' (Transcript of plea, 24 February 2012, p. 28). It was also submitted that it was the deceased man who 'was the initial aggressor' when Marin arrived at the flat (*R v Neacsu*, para. 19). Defence counsel submitted that these should be seen as mitigating factors, and that there should be a reduction in his moral culpability because he was 'suffering from a diagnosable depressive disorder at the time of the offending' (para. 33). Defence counsel also relied on a report by a forensic psychiatrist, which stated that:

While it is the case that Mr Neacsu likely was suffering from a diagnosable depressive disorder prior to the killing, essentially what he describes is a crime of passion. That he has been cuckolded was finally definitively confirmed to him and he was further inflamed by what he perceived to be the aggressivity exhibited by the deceased. Depressive illnesses certainly can erode a person's capacity for exercising proper social judgment and such a disorder may also disinhibit aggressive urges (para. 33).

When sentencing Marin Neacsu, the judge said she rejected the defence version of events and did not accept that Marin Neacsu's mental health should be considered a mitigating factor. The judge reasoned that: 'the evidence contained in [the psychiatrist's] report does not establish that necessary relationship between your depressive illness and the offending. If anything, it makes it clear they are not necessarily causally related' (*R v Neacsu*, para. 34).

The judge also rejected the characterisation by defence counsel of the killing as a spontaneous 'crime of passion' and stated that anger and rage do not reduce a person's moral culpability to any great degree (para. 38). The judge further observed that the case fell within the broader context of law reforms to address violence against women in the context of separation and to prevent men from relying on provocation as an excuse.

Finally, the judge made a strong statement affirming that women are entitled to act independently or to leave a partner:

Our community, parliament and the courts have repeatedly said that women are not chattels, they are not something that is owned by a man, any man. Your wife was entitled to leave you. You may not have liked that, but she had the right to do so. She did not have to tell you where she was going, or if she was pursuing a relationship with another man. You had no right to know this, and you had no right to control what she did, but particularly you had no right to kill the man with whom she had formed a relationship because of your anger as being, as it was described, 'cuckolded'. Your relationship had been well and truly over and our society has moved forward and does not excuse any person on the basis of the crime being a 'crime of passion'. Provocation has been abolished in this State, and rightly so. But the fact that a crime is a crime of passion can mitigate, to a limited extent, the gravity of the offence. What that means is that it may demonstrate that the offence was not in any way premeditated, pre-planned, but came about as a loss of self control, due to circumstances that were not of your

making. Here you have chosen to pursue the issue of whom your wife was living with, and decided to pursue it whilst armed with a knife, you wanted to know, and you clearly believed you had a right to know. Accordingly, whilst this may be a crime of anger or rage, I do not accept that it was a crime of passion in the ordinary mitigatory sense (para. 43).

Similar comments were made by the same judge in *R v Azizi*, *R v Mulhall* and *R v Misalis*. In condemning men's attempts to dominate and control their current or former partners, the judge provides a forceful counter-narrative to the exculpatory narratives that were operating before the abolition of the controversial partial defence of provocation.¹⁸⁶

It is important to also note that many other judges condemned homicides in a domestic setting (often without any reference to the gendered nature of these homicides), while a smaller number made direct comments about attitudes towards women (for example, in *R v Budimir*) or the need for the law to protect women from family violence (in *R v Carolus*).

It is heartening that some judges and other legal professionals demonstrate an understanding of the complex dynamics of family violence and make statements that challenge the gender-based attitudes that underlie many intimate partner homicides. As identified in Chapter 1, promoting gender equality and addressing attitudes towards women has been identified as a critical strategy for preventing family violence and intimate partner homicides (Our Watch, VicHealth & ANROWS 2015). Judicial sentencing remarks are an opportunity to communicate these messages, as part of a shared or whole-of-system approach to prevention.

CONCLUSION

Sentencing constitutes a 'highly symbolic and public declaration of how society regards the offence, the offender, and society's formal reaction' (Findlay, Odgers and Yeo 2005, p. 253). Given the public nature of sentencing, and that sentencing remarks in intimate partner homicides are often reported in the media, they may play a role in shaping and informing understandings and attitudes towards violence against women. Sentencing remarks in intimate homicide cases can send a message to the broader community about social expectations of men and women in relationships.

In the sentencing remarks in our study, judges clearly identified the need to denounce crimes that occur in the context of previous family violence, and that the seriousness of an offence is increased when there is evidence of contravention of an intervention order or prior criminal charges for family violence-related offences. This is consistent with the guidance of the Victorian Court of Appeal in recent cases where an offence has been committed in the context of family violence (Farrell 2015).

However, a difficulty arises in cases where there is evidence of a history of family violence or controlling behaviour but it is not sufficient to meet the relevant standard of proof. The ways in which family violence is understood by legal professionals also has an influence on the weight given to it as a sentencing consideration. Frequently, despite evidence of the offender's previous controlling or abusive behaviour, the defence argued that the offence was 'out of character' or an isolated incident that arose in the context of relationship breakdown, and this was accepted by the sentencing judge.

¹⁸⁶ For a full discussion of provocation's victim-blaming narratives prior to the abolition of the partial defence in Victoria, see Tyson (2013).

Family violence is a central feature of many intimate partner homicides – it is the context in which these deaths frequently occur. It is not our intention to argue that offenders should automatically receive harsher sentences for killings that occur in family violence–related contexts. We acknowledge that sentencing is a complex task that must take a range of factors into consideration, including the relevant standard of proof, and the requirement that the offender is not punished for previous conduct for which he has not been charged. However, if sentencing remarks do not recognise the significance of prior family violence in intimate partner homicides, this affects not only the legal response to individual homicide offenders and the perceptions of the friends and family of the deceased, but also community perceptions of why these homicides occur and how they should be dealt with.

In its review of homicide laws, the VLRC pointed out that ‘in some cases it would be useful for the prosecution to lead at sentencing both case-specific and general social context evidence relating to the dynamics of family violence’ (VLRC 2004, p. 283).¹⁸⁷ This may assist judges ‘to make sense of what has occurred when deciding on what sentence should be imposed’ (p. 187). In our study, there were no cases in which expert evidence on family violence was provided in plea hearings. There may be scope for expert social context evidence to improve the recognition of prior family violence in sentencing. Whether there are additional strategies that could be used by prosecutors to lead such evidence to counter submissions by defence counsel – for example, that the homicide is ‘out of character’ – is an area requiring further research.

This chapter has also identified that provocation was rarely explicitly accepted as a mitigating factor in sentencing in these cases. In several cases where provocation was raised by the defence, judges highlighted that separation and infidelity was not conduct that could justify homicide. These comments are consistent with the approach proposed in a report *Provocation in Sentencing* (Stewart & Freiberg 2008a, 2008b, 2009) published by the Sentencing Advisory Council. Stewart and Freiberg argue that rather than focusing on the accused’s ‘loss of control’, the focus should be on the *reasons* for the accused’s emotions at the time of the killing, and ‘whether the provocation gave the offender a justifiable sense of being wronged’ (2009, p. 198). Stewart and Freiberg propose that the victim exercising her right to equality and autonomy (such as by leaving a relationship or choosing to work) should not be conduct that justifies an offender’s claim to have been wronged (p. 94). The authors pointed out that ‘although the personal characteristics of an offender will generally be relevant to assessing the nature and degree of provocation and whether it justified the offender’s aggrievement, this assessment should be consistent with equality rights’ (p. 94).

We agree that a reasons-based approach to provocation should apply in sentencing, and that judges should make clear that separation and infidelity do not justify homicide. This approach was apparent in the cases in our study where provocation was raised. However, our study has also identified that the notion that lethal violence results from a ‘loss of control’ (rather than from a deliberate choice) remains a problematic part of sentencing narratives in intimate partner homicides by men.

Frequently, judges accepted the argument that the offender suffered a mental health disorder, which caused him to lose control in response to his partner’s desire to separate, her (apparent or imagined) infidelity, or her arguing with him.¹⁸⁸ While women’s actions were not defined as

187 The VLRC stated that this may assist the judge to understand ‘the reasons why, for example, the deceased had reacted violently or abusively to the offender before the killing. Absence of such evidence could lead the court to conclude that the offender’s culpability is to some extent reduced by the alleged behaviour of the deceased, even though the deceased’s behaviour was the response to the offender’s prior violence’ (VLRC 2004, p. 283).

188 We note that arguments that the offender was suffering from a mental health disorder at the time of the offence are not unique to intimate partner homicides but are common across the criminal justice system.

'provocative', they were, as Burman (2010) has described, 'linked to an unstable psychological condition in the violent man' (p. 182), and were seen to have contributed to his losing control. Therefore, to some extent, narratives that may lead to victim blaming continue to be present in the sentencing process for male offenders.

At the same time, it is significant that some judges questioned these narratives and the contribution of a mental health disorder to the homicide. In a small number of cases judges highlighted the offender's blaming attitudes and challenged the underlying sense of masculine entitlement on which these attitudes may be based. As we discuss in our concluding chapter, these progressive 'public declarations' (Findlay, Odgers & Yeo, 2005, p. 253) from the Supreme Court are important statements that form the public explanations of homicides in the context of family violence.

CHAPTER 11

Conclusion: Recognising the social context

Whilst I accept that you were in a low mood and had a degree of frustration about your wife's failure to respond to your questions ... none of this provides even a glimmer of an explanation for your behaviour. I think that your actions flowed not only from your rage about your wife's affair, but more importantly from the fact that you could not control the unfolding of the impending separation.

Sentencing remarks in *R v Baxter*, para. 33

This research project examined the recognition of family violence in legal responses to intimate partner homicides since the 2005 Victorian law reforms. The reforms resulted from the Victorian Law Reform Commission's review of defences to homicide. A driving rationale for the review and the subsequent reforms was the need to address the gendered operation of the law and improve the understanding and recognition of family violence.

The research sought to explore the impact of the reforms, in particular the abolition of the defence of provocation, changes to self-defence and the introduction of specific family violence evidence provisions. The aim was to determine if the social context of intimate partner homicides – their gendered nature and the relevance of family violence – was recognised in the criminal justice processes and reflected in the prosecution outcomes.

We analysed all cases we could identify through publicly available sources in which offenders were prosecuted in Victoria for an intimate partner homicide between 2005 and 2014.¹⁸⁹ We identified the cases of 51 men and 13 women who killed in the context of sexual intimacy.

The focus of this report is on male perpetrators of these homicides.¹⁹⁰ The data provides important information about the characteristics of the male perpetrators and their victims, and the circumstances in which the homicides occurred.

189 As discussed in Chapter 3, our study included killings of intimate partners, ex-partners, and sexual rivals. There were seven sexual rivalry killings in our study – where men killed other men who had been associating with, or had begun a relationship with, the man's partner or ex-partner.

190 Chapter 4 provides a brief summary of intimate partner homicides perpetrated by women between 2005 and 2014. Our previous report also provides a discussion of female perpetrated homicides (Kirkwood, McKenzie & Tyson 2013).

A GENDERED PICTURE

Little has changed in the last decade in Victoria in terms of the gendered nature of intimate partner homicides. As in the earlier study by the VLRC (2003), the majority of the offenders continue to be men. In our study, 51 of the total of 64 offenders (80%) were male. Regardless of whether the woman was the person accused in the homicide or the person killed in the homicide, in the majority of cases, she had been the primary victim of family violence prior to the homicide. In the majority of homicides by men, anger, jealousy and a desire to control the female partner or ex-partner appeared to be motivating factors. These findings echo those of other studies in Australia (for example, Polk 1994; Cussen & Bryant 2015a; VLRC 2003) and internationally (for example, Stockl et al. 2013; Dobash & Dobash 2015).

Our research highlights that any reforms to law and legal responses to homicide in Victoria must continue to take into account the gendered nature of intimate partner homicides.

HOMICIDES BY MALE OFFENDERS

History of family violence

Though our sources provide limited information about prior family violence, our data indicates that key family violence risk factors were apparent in many cases, as reported in the court documents. At least half (27) of the 51 male offenders in our study had a history of perpetrating family violence. In 13 of these cases, the police or courts had intervened in relation to the violence.

In some cases there was no clear evidence of the offender having used physical violence towards his partner or ex-partner; however, there was evidence of controlling behaviour, obsessive jealousy, threats to kill and threats to suicide. These are all recognised as ‘red flag’ indicators of a risk of lethal violence, as identified in family violence risk assessment tools (see Chapter 6).

Separation

Separation was another key risk factor clearly evident in our study. In over half of the homicides by male offenders (29 cases), the homicide occurred after the man’s partner had tried to leave, or had left, the relationship. In 21 cases, the accused had previously been abusive towards his partner during the relationship, and when she attempted to leave or had left the relationship, he killed her (in three cases the offender killed the man his partner had commenced a new relationship with).

Most of these homicides occurred within six months of the woman’s attempt to separate; however, five took place months or years after separation. In four of those cases, the men continued to stalk or threaten their ex-partner, and in three cases the homicide occurred when the men became enraged at their ex-partner for criticising them, or in relation to conflict about their children or financial arrangements.

An additional six homicides did not involve separation but occurred in the context of the accused’s jealousy and possessiveness. The accused became angry because his partner was talking to another man, or because he suspected her of having a relationship with another man.

Mental illness and substance abuse

In many cases (39 cases), the offender was described as having had mental health problems – frequently depression – and/or a history of substance abuse (28 cases). Typically these factors co-existed with separation and prior family violence. In over a third of the cases in our study (19 cases), the offender had previously perpetrated family violence, had a history of mental health or substance abuse problems, and killed in the context of the breakdown of the relationship.

According to research, substance abuse by a family violence perpetrator is a factor that indicates an increased risk of lethal violence, while mental health problems have been linked to ongoing perpetration of violence, but not to an increased risk of lethal violence. Research on violence against women also identifies that mental health and substance abuse are contributing factors that play a role in family violence when combined with key determinants such as gender, beliefs about masculinity and attitudes towards women and relationships (Our Watch, VicHealth & ANROWS 2015, see Chapter 1 for further discussion).

PROSECUTION OUTCOMES

Of the 51 men in this study, only one was acquitted (see Table 3, p. 44 for a detailed breakdown of prosecution outcomes). Thirty-six men (71 per cent) were convicted of murder, with almost two-thirds pleading guilty. The median total effective sentence for murder for men in our study was 18.75 years, with a median non-parole period of 15 years.¹⁹¹

A quarter of the men in this study (13 men) were convicted of manslaughter. For these men the median sentence was approximately 9.5 years with a non-parole period of 6.5 years.¹⁹² Of these 13 men, seven pleaded guilty. Five were found guilty of manslaughter by a jury after a trial, and most of these men claimed at trial that the homicide was unintentional and/or a defensive response to aggression by their partner. One man was initially convicted of murder by a jury, but this was overturned by the Court of Appeal and he was convicted of manslaughter. Additionally, one man was convicted of defensive homicide after a trial.

Based on the limited comparisons we can make with an earlier study (VLRC 2003), our data on intimate partner homicide suggests that since the abolition of the partial defence of provocation in 2005, there has been a small increase in murder convictions and a reduction in manslaughter convictions. This suggests that some men who were convicted of murder may, under the previous laws, have been convicted of the lesser crime of manslaughter on the basis of provocation.

¹⁹¹ The average principal sentence for men convicted of murder in our study is 18 years and 6 months. This is slightly shorter than the average for all men in Victoria convicted of murder between 2007 and 2012, which was 19 years and 4 months (Sentencing Advisory Council 2013).

¹⁹² The average sentence for manslaughter was 9.5 years.

RECOGNITION OF FAMILY VIOLENCE IN HOMICIDE PROSECUTIONS

Information about the history of the relationship between the deceased and the accused can be critical in understanding why the homicide occurred. Evidence about previous acts of violent, controlling or possessive behaviour by the accused can assist the prosecution to establish an intent or motive. It may also be relevant to counter arguments made by the defence in plea hearings that the homicide was spontaneous and ‘out of character’.

A history of family violence and risk factors for lethal family violence – such as threats, obsessive jealousy and controlling behaviour – were present in many of the cases in our study. The degree of recognition of this evidence was mixed, and often depended upon whether the offender had been subject to criminal charges or an intervention order for his prior behaviour, and also how the evidence was used and understood by the legal professionals involved.

Our research indicates that in trials, the prosecution was frequently successful in arguing that evidence of prior family violence was relevant, and should be admitted as ‘relationship evidence’. This often included evidence of out-of-court statements made by the deceased – such as where the deceased victim had told her friends or family about incidents of violence by the accused. Prior to reforms to the rules of evidence, these statements may have been inadmissible under the hearsay rule. The inclusion of this evidence is particularly important in an intimate partner homicide as it assists the jury to understand the nature of the relationship between the accused and deceased, enabling the jury to evaluate other evidence relating to the homicide in this context. However, the prosecution was rarely successful in having this evidence admitted as ‘tendency evidence’ to demonstrate that the offender had a tendency to act in a particular way or have a particular state of mind. In not one case did the prosecution use expert social context evidence to help the jury better understand the family violence evidence. In some cases the prosecution made only limited use of the available evidence of prior family violence, particularly when it had accepted a plea of guilty to manslaughter.

Common defence narratives suggested that the accused’s history of family violence was irrelevant because the homicide occurred accidentally, the deceased had physically or verbally attacked the accused and he had reacted defensively, or his mental state was impaired due to the stress of the relationship breakdown or the deceased’s infidelity and he lost control. In some cases the behaviour of the accused’s partner or ex-partner was implicated as a trigger for the homicide, although the defence did not explicitly argue that her behaviour had been ‘provocative’. The fact that a victim had not left an abuser or pursued legal intervention was often argued to indicate that the family violence could not have been significant.

In sentencing, judges frequently highlighted the importance of general deterrence of domestic homicides. A prior history of family violence was clearly recognised as aggravating the seriousness of the homicide if the offender had been subject to criminal charges for family violence-related conduct, or had contravened an intervention order. If the offender had previously been charged in relation to family violence, judges often referred to this in rejecting any claim that the offence was a spontaneous one-off event.

However, in most of the cases where the offender had previously been abusive towards the deceased, he had never been charged with a family violence-related offence. In some cases, the victim had sought police intervention or an interim intervention order, but the order had not been finalised. This meant that the evidence relating to the history of violence did not meet the requisite standard of proof in relation to aggravating considerations in sentencing. In these cases, while the

previous abusive behaviour was often mentioned in sentencing remarks, it had little impact on other sentencing considerations such as whether the offence was considered to be ‘out of character’, or whether there was a need for specific deterrence. For example, in over a third of the cases in which the sentencing remarks noted evidence of the offender’s previous threats, violence or abusive behaviour towards his partner or ex-partner, the judge accepted the offender was otherwise of good character.

The complex dynamics and nature of family violence were not always well recognised in legal discussions. In part, this was due to the restrictions of the legal framework and whether the evidence met the relevant standard of proof, in addition to limited understandings among legal professionals. While there were some notable exceptions, judges, prosecution and defence counsel typically discussed family violence in ways that reflect misconceptions that continue to be common in the wider Victorian community. The construction of family violence was primarily focused on acts of physical violence. Controlling behaviour, threats to harm or threats to suicide, obsessive jealousy and other non-physical forms of violence by the offender were often mentioned in legal discussions, but they were rarely perceived to be as serious as physical violence. Despite these being recognised as ‘red flags’ for lethal violence in family violence risk assessment tools, there was only limited recognition of their significance in homicide prosecutions.

Family violence was often discussed as a problem of ‘anger management’, or as being primarily caused by substance abuse or mental illness. Relationships were often described as ‘volatile’ or ‘tempestuous’. In several cases where the deceased had frequently argued or been involved in physical confrontations with the accused, she was portrayed as having been mutually abusive, despite evidence that she had been injured or had sought police protection because she was afraid of the accused.

When men kill intimate partners after having subjected them to threatening, possessive or controlling behaviour, this history tends to fade from view in the sentencing process. As a result, often the explanatory narrative reflected in sentencing remarks is that the homicide was an isolated event that occurred in the context of the stress of separation.

PROVOCATION

In our modern society persons frequently leave relationships and form new ones. Whilst this behaviour may cause a former partner to feel hurt, disappointment and anger, there is nothing abnormal about it. What is abnormal is the reaction to this conduct ... where that former partner (almost inevitably a male) loses self control and perpetuates fatal violence ...

Coldrey J in *R v Yasso* [2002] 6 VR 239, para. 31–32

Our study demonstrates that despite the abolition of provocation as a murder defence, men continue to kill their female partners out of anger and claim that they lost control of their actions. They frequently claim to have killed the deceased because they ‘snapped’ during an intense episode of anger or rage when they ‘saw red’ in response to their partner’s behaviour – her infidelity, separation, or arguing about money or children – and believe that their actions were justified.

It has now been a decade since the abolition of provocation as a defence to murder, but provocation can still be raised as a mitigating factor in sentencing. However, in the few cases in this study in

which men argued provocation in mitigation of their sentence, judges gave relatively little weight to arguments that infidelity or separation could be considered 'provocative'. Encouragingly, some judges clearly affirmed the man's partner's right to leave a relationship or to act independently of her partner. These remarks reflect the intention of the 2005 law reforms. However, few commented more broadly about the gendered attitudes that contribute to separation killings.

While the language of provocation was not explicit in the majority of cases, the women's behaviour – ending the relationship or beginning a new one, or arguing with the offender – was still at the centre of the explanations for the men's actions. Her behaviour was said to have caused the offender great emotional distress and exacerbated his fragile mental state, which resulted in him losing control. In these narratives, separation or infidelity by the offender's partner is framed as having contributed to or triggered his mental illness or disorder, leading him to act in a way that he would not normally act. Elements of this explanation parallel the provocation narrative.

PATHOLOGISING A SOCIAL PROBLEM?

Now that Victoria lacks a partial defence to murder, there may be a greater emphasis on mental illness as an avenue for offenders to argue for reduced culpability and/or mitigation in sentence. While mental illness is rarely grounds for arguing for a formal mental impairment defence, it often reduces the sentence received by the offender.

In over three-quarters of the cases in this study the offender was assessed as having suffered from a mental illness or condition at the time of the killing. Almost invariably, the defence argument was that the offender's actions were the result of extreme mental distress or mental illness. These arguments were based on the assessments of forensic psychologists or psychiatrists, who were engaged by the defence after the killing. In some cases the offender was said to have developed an 'adjustment disorder' in response to the separation from their partner, and in one case the offender was said to have suffered an 'intermittent explosive disorder'. Most of these diagnoses were made retrospectively and the offender had not been diagnosed with a mental illness prior to the homicide.

In over half of the plea hearings, the defence argued that the offender's mental impairment at the time of the homicide contributed to the homicide. While judges were sceptical about some of these claims, in 12 cases the judge appears to have accepted this as a mitigating consideration in sentencing.

The focus of the criminal justice system is on the individual accused. When an offender is assessed as having suffered mental health problems that contributed to the offence, the defence will use this to argue for a reduction in the offender's culpability. Even where the mental health problem is not accepted as a mitigating factor, it is often highlighted in the explanatory narrative for the homicide in sentencing remarks. The consequence is that intimate partner homicides, which are a prevalent social problem with predictable patterns and risk factors, come to be identified as a problem of individual pathology.

Mental health problems then become the dominant explanation for intimate partner homicides in the media, and this shapes community perceptions about this issue. The recently reported homicide by Parminder Singh illustrates this. Singh told police he killed his wife, Nikita Chalwa, because she 'cheated on him' (Flower 2015). It was widely reported in the media that Singh had 'suffered from anxiety and anger issues' when he found photographs of his wife and another man on her phone (Farnsworth 2015; see also Flower 2015).

The use of mental illnesses as the primary explanatory narrative has the effect of pathologising the man's behaviour. As Mathews, Jewkes and Abrahams (2014) observe, factors such as mental illness or drug and alcohol use may assist us to understand why men are able to kill, but it does not explain why they kill these women in particular, nor why homicides by men in the context of separation are so common and share particular patterns and risk factors.

Men's poor mental health or drug and alcohol addictions contribute to these homicides, but they are only part of the explanation. Both women and men suffer depression and mental illness – for example, a national survey has found that women are more likely to experience mental disorders – particularly anxiety disorders and affective disorders, such as depression – while men were more likely to have substance use disorders (ABS 2007) – yet women rarely kill in the context of separation. Psychological and emotional states do not occur in a vacuum: they cannot easily be separated from attitudes, expectations and beliefs about relationships and appropriate feminine and masculine behaviour. As noted by the VLRC, '[e]motion is not an uncontrollable, irrational force. Our emotions embody judgments and ways of seeing the world for which we can and should be held to account' (VLRC 2003, p. 246).

When intimate partner homicides by men are examined together, a pattern becomes apparent: the offenders have responded in similar ways to their partner's attempts to leave the relationship or to live autonomously. The present study suggests that what underlies the actions of many male perpetrators are their attitudes towards women and beliefs about masculine entitlement, which enable them to blame their partners and to feel justified in their use of violence.

This research confirms that legislative reform is not sufficient on its own to change fundamental understandings of gendered relationships and the impact of violence. Further action is needed to change legal culture and processes to ensure greater recognition of family violence.

DIRECTIONS FOR FURTHER REFORMS

Promoting a consistent response

This perpetrator has researched and systematically planned the slaying of my innocent and defenceless young daughter with military precision and without any compassion, thus it is my wish that you send a clear message that violence against women will not be tolerated as it's our moral obligation.

Victim impact statement, father of deceased¹⁹³

Homicide law focuses on individual offenders; it is not necessarily designed to address social problems. Nonetheless many in the broader community expect that the law can and should play a role in responding to social issues. This was the intention of the changes to the homicide laws in 2005, based on the recognition that 'social problems rather than legal categories best inform our thinking about reform of defences to homicide' (VLRC 2004, p. xxv).

¹⁹³ The case name is withheld for this quote to protect the identity of the father. The source of the quote is a victim impact statement from one of the cases in this study.

Both state and federal policy directions for improving system responses to family violence point to the need for a comprehensive whole-of-system response across a variety of settings and sectors.¹⁹⁴ Additionally, the national framework for the primary prevention of violence against women identifies that all sectors of the legal system need to be involved in supporting a comprehensive and shared national approach to addressing the drivers of violence against women (Our Watch, VicHealth & ANROWS 2015).

A key aspect of a whole-of-system approach is a shared understanding of family violence, which draws on the available research evidence (Our Watch VicHealth & ANROWS 2015). Australian and international research identifies that gender inequality, rigid gender roles and attitudes that condone violence against women are key drivers of family violence – including intimate partner homicides (Webster & Flood 2015; Our Watch VicHealth & ANROWS 2015; VicHealth 2007; World Health Organization & London School of Hygiene and Tropical Medicine 2010).

The justice system plays a key role in responding to violence against women when it occurs. It promotes the safety of victims and the accountability of perpetrators, and additionally, it has a role in promoting equality and respect in daily practice (Our Watch VicHealth & ANROWS 2015, p. 42). While Magistrates' Courts have been identified as a part of the integrated system response, the Supreme Court has largely sat outside of this coordinated response in Victoria.

We argue that the justice system – including the Magistrates' Courts, County Court and the Supreme Court – can extend its role in prevention by ensuring that, where relevant, the narratives and messages that arise from criminal proceedings and judgments are aligned with those identified in Australia's shared framework for the primary prevention of violence against women and children (see Our Watch, VicHealth & ANROWS 2015). The prevention framework identifies a range of actions to address the drivers of violence against women including:

- challenge the condoning of violence against women
- promote gender equality and women's independence and decision-making in public life and relationships
- challenge gender stereotypes and roles, and the normalisation of violence as an expression of masculinity or male dominance
- address the intersection between social norms relating to alcohol and gender (Our Watch, VicHealth & ANROWS 2015).

These actions or messages may be relevant in homicide prosecutions.

Shifting legal culture to ensure it more effectively recognises and addresses family violence requires a concerted commitment by legal professionals and organisations. As identified in the national prevention framework (Our Watch 2015, p. 67), it also requires organisational leadership, including whole-of-organisation plans to improve responses to family violence and to promote accountability.¹⁹⁵

¹⁹⁴ See Victorian government policy documents, *A right to safety and justice – strategic framework to guide continuing family violence reform in Victoria 2010–2020* (Office of Women's Policy 2010); *A right to respect – Victoria's plan to prevent violence against women 2010–2020* (Office of Women's Policy 2009); and federal policy *The national plan to reduce violence against women and their children 2010–2022* (Council of Australian Governments 2011).

¹⁹⁵ For example, an important step in this direction was the introduction of a policy on family violence in prosecutions, developed in 2011 by the Victorian Director of Public Prosecutions (DPP 2010), in addition to training.

Providing education about family violence

The effectiveness of legal reforms depends on ‘how the legal profession interprets and applies’ them (Stubbs in NSWSCPD 2013, p. 188). Directions for further change should therefore include reforms to improve legal understandings of the social context of intimate partner homicide. Education and training play a critical role in shaping legal culture (ALRC 1999), and without it, the spirit and intention of the homicide law reforms may not be realised.

It is imperative that those involved in homicide investigations and prosecutions receive training about family violence and about its relevance to their roles. This was identified in the review of defences to homicide by the VLRC (2004, p. 194), which recommended education for legal professionals about family violence and its interrelationship with the use of fatal force. The VLRC identified a number of stages in the legal process at which this would have a significant impact.

- Police preliminary interview and investigation: considering that ‘investigators who understand the relationship between family violence and homicide are more likely to identify the relevance of a prior history of abuse between the accused and the deceased, ask the accused relevant questions, and ensure proper supporting evidence is gathered, including statements from those who have witnessed, or been told about the violence’.
- Pre trial: to assist both defence counsel and prosecutors in the preparation of matters for trial and to support the making of decisions by the OPP relating to charges and pleas.
- At trial: to ensure evidence of prior abuse and other relevant uses is introduced, that appropriate rulings are made by the trial judge concerning its admissibility and use, and that the relevance of this evidence is properly communicated to this jury.
- At sentencing: to allow the judge to better assess how a history of abuse and the circumstances of the killing may affect the accused’s level of culpability, and take this into account in setting the appropriate penalty (p. 195).

The VLRC recommended that bodies that offer continuing professional development or judicial education (such as Victoria Legal Aid, the Law Institute of Victoria, the Office of Public Prosecutions, the Victorian Bar and the Judicial College of Victoria) should include sessions on family violence (p. 202), and also identified that ideally, training should be ongoing rather than ad hoc (p. 201).

The importance of training was acknowledged in the Supreme Court of Victoria’s (2015) submission to the Royal Commission into Family Violence. The Court identified the ‘importance of judges having an understanding of social issues in general and family violence in particular’, and stated that there remains a need ‘for specialist programs to allow all judges to be fully informed about the relevant law and broader issues of family violence, as well as developing “court craft” skills in dealing with family violence cases’ (p. 9). The Supreme Court identified that an ongoing education program, similar to that provided for magistrates by the Judicial College of Victoria, would be ‘very valuable’ (p. 9).

However, while some progress appears to have been made, our analysis highlights the need for more extensive and ongoing professional development on family violence to be provided to defence and prosecution legal practitioners, judges, expert witnesses, police and other legal professionals. Such training should include discussion of forms of violence, common myths, the key drivers of family violence, risk factors, barriers to seeking assistance, and the role of family violence evidence.

Adequate resourcing and consultation is needed to ensure that the training is relevant and targeted to the audience. As the United Nations Entity for Gender Equality and the Empowerment of Women suggests, careful planning is required in order to ‘create programmes that are useful

and interesting to judges' (cited in Wakefield & Taylor 2015). The training should be developed by professionals with expertise in family violence, domestic homicide and the criminal justice system and, to ensure the training is relevant, it should be developed in consultation with legal professionals, including the judiciary.

Court Services Victoria (CSV) is an independent statutory body that provides services and facilities to Victoria's courts, the Victorian Civil and Administrative Tribunal and the Judicial College of Victoria (JCV). Considering that CSV has a key multi-jurisdictional coordinating role, CSV could support the JCV to develop a professional development program for the judiciary across jurisdictions – including the Magistrates', County and Supreme Courts and the Court of Appeal.

This training should be ongoing and draw on the latest research evidence and current Australian frameworks (such as the national primary prevention framework *Change the story*, developed by Our Watch, VicHealth & ANROWS 2015, and the *Victorian family violence risk assessment and risk management framework* [Department of Human Services 2012]). This would help to build shared understandings of family violence across the legal system.

Specialised training for homicide investigators is also important. Intimate partner homicides differ from other types of homicide and police require specific training on family violence evidence collection. Without such training, previous incidents that indicate a pattern of abusive and controlling behaviour, which provides vital context to the killing, may not be recognised as relevant evidence.

Using expert social framework evidence

Without additional information, jurors are likely to draw inferences ... based on their own limited understanding of the nature and dynamics of family violence.

VLRC 2004, p. 159

Providing expert evidence on the social context of family violence is an important strategy to help redress the misunderstandings of family violence in the general community. In 2004, the VLRC asserted that in cases where the offender has a history of perpetrating family violence, or has been a victim of violence, social context evidence may be useful in trials. For example, such evidence might usefully be introduced by the prosecution to challenge defence claims that the killing was unintentional or due to a loss of self-control (p. 184).

Additionally, the VLRC identified that 'both case-specific and general social context evidence on the dynamics of violence' could be useful for the prosecution to lead at sentencing (p. 283).

Provision for the use of expert social context evidence has been introduced in Victoria (s 322J of the *Crimes Act 1958*), however the focus of these provisions was to improve access to self-defence for those who kill in response to family violence. To date, there has been limited use of these provisions by defence counsel and none by prosecutors.

Consideration should be given to whether there is scope for expert evidence to be adduced to provide context in trials where family violence is alleged to have been perpetrated by the accused prior to the homicide. This could assist juries to evaluate the evidence in a trial, by providing an understanding of common behaviours of perpetrators and the impact of family violence on victims.

Recognising family violence in sentencing

In current sentencing practice, only prior family violence that resulted in criminal convictions or breaches of intervention orders is accepted as an aggravating factor. While evidence of uncharged acts of family violence may be mentioned in sentencing remarks, it rarely has an impact on potentially mitigating considerations, such as arguments that the offender is of 'good character'. This appears to be influenced by the nature and extent of the evidence available, in addition to how family violence is understood by legal professionals. Education programs may be an important strategy in improving how family violence evidence is used in sentencing.

Judicial comments can have a powerful influence on community perceptions of family violence and homicide. A substantial amount of media reporting on violence against women relates to homicides (Morgan & Politoff 2012). As the Supreme Court of Victoria (2015) observes, an important role of sentencing is to deter others from committing offences of family violence (p. 8). The Supreme Court's submission to Victoria's Royal Commission into Family Violence notes the contribution of prior family violence and separation in homicides, and identifies that prevention requires attention to 'male attitudes and behaviour' (p. 5).

In our study, while it was common for sentencing remarks to recognise the prevalence of domestic homicides and to denounce homicides that occur in a domestic context, few judges commented on the gendered nature of these homicides. We would argue that there may be greater potential for judges to emphasise the damaging impact of family violence, where it has been accepted as part of the facts of the case, as well as the role of attitudes towards women in intimate partner homicides.

It would also be valuable in appropriate cases for judges to highlight the potential role of prison-based men's behaviour change programs in rehabilitation, in addition to programs that address mental health problems or substance abuse.

Opportunity for specialisation

It is widely accepted that family violence responses require specialist expertise and training (see for example, DVRCV 2015; ALRC & NSWLRC 2010). The ALRC and NSWLRC's national review of the legal response to family violence argues that specialisation can promote attitudinal change across the legal system, improve consistency and efficiency in the interpretation and application of laws, promote best practice, and make the system more efficient (ALRC & NSWLRC 2010, p. 34).

The recognition that specialised knowledge is required has led to the establishment of specialist units or court lists in key response settings. For instance, Victoria Police has established family violence units and the Magistrates' Courts have established family violence lists.

Considering that family violence is a factor in many homicides in Victoria, it may also be effective to consider it a special area of expertise for legal responses. This should be reflected in policies that require all professionals who are involved with domestic homicides – from the investigation stage to the point of appeal – to have undertaken specialist education and to have developed expertise in family violence and its links with domestic homicide.

Monitoring to review the impact of reforms

When laws are changed it is important that the application of those changes be monitored to ensure that law reforms have the intended effect. The need for regular reviews and monitoring by states and territories was identified by the ALRC and NSWLRC (2010, recommendation 14-2), and also by the VLRC (2004).

Monitoring the implementation of reforms would involve collecting quantitative data on intimate partner homicides and the use of defences and the outcomes in these prosecutions. It should also involve an in-depth qualitative data analysis on how legal responses are operating in practice.

Analysing legal cases, plea and trial transcripts and sentencing remarks takes considerable time and needs to be adequately resourced.

Future research on risk factors and the use of family violence evidence

This research project has shown that key risk factors for lethal family violence were often present in sexual intimacy homicides. Considering that our data is primarily based on court documents, there was limited information available about the history of the relationship in these documents.

The Victorian Systemic Response to Family Violence Deaths at the Coroners Court plays an important role in identifying risk factors that were present prior to a homicide, and changes required in the system response.

Additionally, as Sheehan et al. (2015) have observed, research on ‘covictims’ – family members and close friends who have lost loved ones to intimate partner homicide – is a ‘neglected area of study’ (p. 269). Future researchers could interview surviving family and friends or other witnesses in order to obtain greater insight into the history of violence in intimate partner homicides, the degree of risk and the presence of static and acute risk factors, and the extent of the potential evidence that could be collected by investigators, used in the prosecution, and/or admitted by trial judges.

CHAPTER 12

Recommendations

This research has found that women continue to be killed by their intimate partners in the context of prior family violence and separation. Despite increased community awareness and efforts to reform laws, men continue to minimise their responsibility for violence and blame women for their actions. The family violence that often precedes the killings tends to disappear from view in legal narratives.

All professionals working in the criminal justice system require a comprehensive understanding of the social context of these homicides. Judges can play an important role in efforts to prevent family violence and further deaths, by recognising the nature and dynamics of family violence and the role of gender and social attitudes in domestic homicides.

Based on the findings of our research, we recommend the following:

The role of education and training

1. Legal professionals – including police, legal practitioners acting for the prosecution and defence, judges, and forensic experts – be required to have ongoing training and professional development to promote consistent understandings of family violence across the justice system. Bodies which offer law graduate programs and traineeships for admission to practice, and those that offer judicial education or continuing professional development for legal professionals to provide comprehensive family violence training programs. The content of training should be targeted to the audience, and include:
 - common myths and misconceptions about family violence
 - the nature, dynamics and impact of abusive relationships
 - key drivers of family violence and contributing factors
 - factors that increase the risk of a victim being seriously injured or killed, as recognised in the Victorian Family Violence Risk Assessment and Risk Management Framework
 - the social context in which family violence occurs
 - barriers that prevent victims leaving the relationship and seeking assistance from police or other services

- the additional barriers faced by persons who are Indigenous, from a culturally and linguistically diverse background, who live in a rural or remote area, who are in a same-sex relationship, who have a disability and/or have a child with a disability
 - the link between violence against women and risks of harm to children
 - perpetrator behaviour patterns and men's behaviour change programs
 - the relationship between family violence and other offences, including murder and manslaughter
 - the use of jury directions on family violence
 - the role of expert evidence about family violence and how this relates to the elements of homicide offences and defences
 - the relevance of family violence and use of expert reports on family violence in sentencing.
2. Legal stakeholders to collaborate with the family violence sector and other relevant service providers to develop and deliver training and information that is targeted to their needs. For example, the Judicial College of Victoria, in collaboration with the family violence sector and in consultation with the judiciary, should develop training that meets the specific needs of judges.
 3. Victoria Police Academy to provide specific training for police investigators on the relevance and collection of family violence evidence in homicide cases.
 4. Bodies which offer continuing professional development for legal professionals or judicial education to provide cultural awareness training to enable police, prosecutors, defence counsel and judges to better understand the specific experiences of individuals involved in legal proceedings who are Indigenous, and those from diverse cultural backgrounds.
 5. The Victorian Government to provide additional funding to the relevant bodies to provide the training and professional development outlined in the above recommendations.

Family violence risk assessment framework

1. The Victorian Government to revise the Victorian Family Violence Risk Assessment and Risk Management Framework (CRAF) in the light of current research evidence on risk factors (for example, by including evidence on co-existing factors as discussed in this study). This should include the importance of organisational policies and processes for undertaking risk assessment and sharing risk information, including in homicide prosecutions. The Victorian Government should also establish a schedule of regular reviews of the revised framework.
2. The Victorian Government to create an authorising environment to ensure that all professionals who have contact with victims and perpetrators of family violence – including police, courts, legal practitioners, general practitioners, mental health services and drug and alcohol services – have mandatory training in the use of family violence risk assessment frameworks, with the degree of training specialisation to be matched to their role.

Family violence in legal proceedings

1. The Department of Justice and Regulation to ensure consistent definitions of family violence across the legal system, by amending the family violence evidence provisions (*Crimes Act 1958* [Vic] s. 322J) in line with definition of family violence in the *Family Violence Protection Act 2008* (Vic), including information from the preamble about the gendered nature of family violence and reference to family violence evidence-based risk factors.

2. State and federal policy frameworks and action plans in relation to a whole-of-system response to family violence to articulate that the Supreme Court of Victoria is part of the whole-of-system response.
3. The Supreme Court of Victoria to examine the role of the Court as part of a whole-of-system approach to addressing family violence in Victoria, and apply the shared national framework for the primary prevention of violence against women across the organisations (Our Watch, VicHealth & ANROWS 2015) to its work.
4. The Supreme Court of Victoria and the Office of Public Prosecutions to recognise domestic homicides as a specialised area of expertise and ensure that all prosecutors and judiciary involved in these cases have specialised knowledge of family violence.
5. Legal stakeholders such as the Law Institute of Victoria or Victoria Legal Aid to establish a panel of suitably trained experts for use by defence lawyers when representing defendants who killed a primary aggressor of family violence. This panel should include academic experts, and professionals who have extensive experience in working with family violence victims and offenders (including social workers, family violence workers, psychiatrists and psychologists).
6. The Office of Public Prosecutions to utilise a panel of suitably trained experts to facilitate the ways in which expert social framework evidence can be adduced in trials where family violence is alleged to have been perpetrated by the accused. This panel should include academic experts, and professionals who have extensive experience in working with family violence victims and offenders (including social workers, family violence workers, psychiatrists and psychologists).

Recognising family violence in sentencing

1. Supreme Court judges to consider the potential for sentencing remarks to highlight the gendered nature of intimate partner homicides and women's equality rights, for example, the right to be independent and to exercise their autonomy, such as by leaving an intimate relationship, forming or continuing other relationships, or engaging in employment or an education.

Monitoring of reforms

1. The Department of Justice and Regulation, in consultation with stakeholders, to review the impact of changes in the law on a five-yearly basis, to identify whether reforms are having the intended effects of improving appropriate access to the defence of self-defence by family violence victims who kill, the recognition of family violence, and reducing gender bias in the law.
2. The Coroners Court to maintain the Victorian Systemic Review of Family Violence Deaths and share information with researchers and the family violence sector to enhance understanding of family violence deaths in the community.
3. The VLRC to be commissioned to undertake a review of defences to homicide relevant to family violence victims who kill, following from and drawing on the data from the five-year review, including whether a partial defence, such as excessive self-defence, should be reintroduced, and whether additional strategies are needed to improve the use of evidence of family violence.

Future research

1. The Victorian Government to fund the establishment of a Victorian database of domestic homicides that draws on police, courts and Coroners Court data. The database should record and report on detailed information about all family violence-related homicides such as the gender of accused and deceased, Indigeneity, circumstances of the killing, history and nature of family violence, and contextual factors including separation. This information should be available to researchers.
2. The Victorian Government to authorise the Victorian Government Reporting Service to make available plea hearing and trial transcripts in electronic formats free or at a reduced cost, to enable and promote future research and monitoring.
3. Researchers to continue to monitor the impact of the reforms on legal practice, through examining transcripts and other material from intimate partner homicide prosecutions.
4. Future researchers to incorporate the experiences of family and friends of the primary victim of family violence in intimate partner homicide cases, to develop a more complete picture of a history of family violence, relevant risk factors, and how family violence evidence is collected by police, drawn on by prosecutors and admitted by trial judges. This research should be undertaken sensitively and in collaboration with family violence workers who can provide support and assistance to research participants.

APPENDIX 1

List of cases

TABLE 5

CASES OF WOMEN WHO KILLED INTIMATE PARTNERS, 2005–14 (N=13)

Name	Case citation	Plea/trial
Karen Diane Black	<i>R v Black</i> [2011] VSC 152	Plea to defensive homicide
Kelly Blackwell	<i>R v Blackwell</i> [2013] VSC 499	Plea to manslaughter by negligence
Eileen Mary Creamer	<i>R v Creamer</i> [2011] VSC 196	Trial – found guilty of defensive homicide
Elizabeth Downie	<i>R v Downie</i> [2012] VSC 27	Plea to manslaughter by an unlawful and dangerous act (UDA)
Jemma Elizabeth Edwards	<i>R v Edwards</i> [2012] VSC 138	Plea to defensive homicide
Amanda Felsbourg	<i>DPP v Felsbourg</i> [2008] VSC 20	Trial – found guilty of manslaughter
Veronica Hudson	<i>R v Hudson</i> [2013] VSC 184	Plea to manslaughter (UDA)
Jade Melissa Kells	<i>R v Kells</i> [2012] VSC 53	Trial – found guilty of manslaughter (UDA)
Tracey Kerr	<i>DPP v Kerr</i> [2014] VSC 374	Trial – found guilty of manslaughter
Melissa Kulla Kulla	<i>R v Kulla Kulla</i> [2010] VSC 60	Plea to manslaughter (UDA)
Josina Pitt	<i>R v Pitt</i> [2012] VSC 591	Plea to manslaughter
Raegan Turner	<i>DPP v Turner</i> [2009] VSC 409	Trial – found guilty of manslaughter
Angela Maree Williams	<i>DPP v Williams</i> [2014] VSC 304	Trial – found guilty of defensive homicide

Out of Character?

Relationship	Method of killing	Sentence
De facto relationship (5 years)	Stabbed twice with kitchen knife	9 years/6 years non-parole period
De facto relationship (12 months)	Deceased was physically attacked by another male, accused witnessed but did not intervene	4 years/2 years and 6 months non-parole period
Married (10 years)	Struck multiple times with stick and stabbed with knife	11 years/7 years non-parole period
Ex-partners (divorced 5 years prior to killing)	Co-accused male stabbed deceased multiple times, accused was present during the attack	6 years/4 years non-parole period
Married (12 years)	Stabbed more than 30 times with kitchen knife. Minor wound also inflicted by spear gun.	7 years/4 years and 9 months non-parole period
On-and-off de facto relationship (2 years)	Stabbed multiple times	9 years/6 years non-parole period
De facto relationship (6 years)	Stabbed once with knife	6 years/3 years non-parole period
De facto relationship (5 months)	Stabbed once with kitchen knife	8 years/5 years non-parole period
Sexual relationship for several months (deceased was married to another woman)	Stabbed with knife, deceased died from heart attack resulting from injuries	7 years/4 years and 6 months non-parole period
De facto relationship (4 months)	Stabbed once with kitchen knife	6 years/3 years non-parole period
De facto relationship (6 years)	Stabbed once with kitchen knife	7 years/4 years and 6 months non-parole period
Former de facto relationship (10 years)	Stabbed once with scissors. A fungal infection later developed in the wound, deceased died 2 weeks later from a stroke.	4 years/2 years non-parole period
De facto relationship (23 years)	Hit multiple times with pickaxe	8 years/5 years non-parole period

TABLE 6

CASES OF MEN WHO KILLED IN THE CONTEXT OF SEXUAL INTIMACY, 2005–14 (N=51)

Name	Case citation	Plea/trial
Nasir Ahmadi	<i>R v Ahmadi</i> [2013] VSC 293	Plea to manslaughter by an unlawful and dangerous act (UDA)
Brian Andrew	<i>R v Andrew</i> [2008] VSC 138	Plea to manslaughter (UDA)
Soltan Azizi	<i>R v Azizi</i> [2010] VSC 112	Trial – found guilty of murder
	<i>Azizi v The Queen</i> [2012] VSCA 205	Appeal against conviction upheld
	<i>DPP v Azizi</i> [2013] VSC 16	Retrial – found guilty of murder
Robert Baxter	<i>R v Baxter</i> [2009] VSC 180	Trial – found guilty of murder
Omer Bayram	<i>R v Bayram</i> [2011] VSC 10	Plea to murder
	<i>Bayram v The Queen</i> [2012] VSCA 6	Appeal against sentence upheld
Donovan Blaauw	<i>R v Blaauw</i> [2008] VSC 129	Plea to murder
Leon Borthwick	<i>DPP v Borthwick</i> [2010] VSC 613	Trial – found guilty of manslaughter by criminal negligence
Phillip Bracken	<i>R v Bracken</i> [2014] VSC 94	Trial – acquitted
Matthew Brooks	<i>R v Brooks</i> [2008] VSC 70	Trial – found guilty of murder
Mark Budimir	<i>R v Budimir</i> [2013] VSC 149	Trial – found guilty of murder
Bradley Carolus	<i>R v Carolus</i> [2011] VSC 583	Plea to murder
Peter Caruso	<i>R v Caruso</i> [2010] VSC 354	Trial – found guilty of murder
Neil Chalmers	<i>R v Chalmers</i> [2009] VSC 251	Trial - found guilty of murder
Denis Delich	<i>R v Delich</i> [2013] VSC 309	Plea to murder
Glenn Diver	<i>R v Diver</i> [2008] VSC 399	Plea to murder
Scott Drummond	<i>R v Drummond</i> [2012] VSC 505	Plea to manslaughter (UDA)
Anthony Dutton	<i>R v Dutton</i> [2010] VSC 107	Plea to murder
Darren Ellis	<i>R v Ellis</i> [2008] VSC 372	Trial – found guilty of murder

Out of Character?

Relationship	Method of killing	Sentence
Married	Strangulation with cord	11 years/7 years non-parole period
De facto relationship	Punched and kicked, causing blunt head trauma	10 years/7 years non-parole period
Married	Strangulation with deceased's scarf	22 years/17 years and 6 months non-parole period
		20 years/16 years non-parole period after retrial
Married	Knife (30 wounds to her face, neck and chest)	20 years/16 years non-parole period
Married	Knife (5 wounds to the chest and thigh)	19 years/16 years non-parole period 16 years and 6 months/13 years and 6 months non-parole period after appeal
Married	Knife (1 wound to throat)	11 years/7 years non-parole period
Male sexual rival	Deceased struck by a motor vehicle driven by the accused	7 years and 6 months/5 years non-parole period
De facto relationship	Gunshots (1 wound to head, 1 wound to hand, 2 wounds to back)	
De facto relationship	Knife (1 wound to upper left chest and shoulder)	17 years/13 years non-parole period
Male sexual rival	Hit, kicked and beaten causing death	18 years/16 years non-parole period
De facto relationship	Knife (25 wounds to the chest and abdomen)	21 years/17 years non-parole period
Married	Blows to the head with sharp implement	18 years/13 years non-parole period
De facto relationship	Manual strangulation	22 years/18 years non-parole period
Divorced	Gunshot (1 wound to the back)	20 years/16 years non-parole period
De facto relationship	Strangulation with dressing-gown cord	17 years/14 years non-parole period
De facto relationship	Blunt head trauma with sharp instrument	10 years/7 years non-parole period
Work colleagues having a sexual relationship	Knife (38 wounds), hit with lamp, strangled with cord from lamp	16 years/12 years non-parole period
Separated	Knife wounds to the chest and gunshot wound	21 years/17 years non-parole period

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Name	Case citation	Plea/trial
Ron Felicite	<i>R v Felicite</i> [2010] VSC 245	Plea to murder
Clayton Foster	<i>R v Foster</i> [2009] VSC 124	Plea to murder
Dwayne Grant	<i>R v Grant</i> [2013] VSC 13	Plea to murder
David Hopkins	<i>R v Hopkins</i> [2011] VSC 517	Plea to murder
Amitesh Jagroop	<i>DPP v Jagroop</i> [2008] VSC 25	Plea to manslaughter by criminal negligence
	<i>The Queen v Jagroop</i> [2009] VSCA 46	Appeal against sentence upheld
Kelvin Kelly	<i>DPP v Kelly</i> [2012] VSC 398	Plea to manslaughter
Hoa Boa Lam	<i>DPP v Lam</i> [2007] VSC 307	Plea to murder
Peter Lubik	<i>R v Lubik</i> [2010] VSC 465	Trial – found guilty of manslaughter (UDA)
John McDonald	<i>R v McDonald</i> [2011] VSC 235 (3 co-accused)	Trial – found guilty of murder
Stephen McPhee	<i>R v McPhee</i> [2013] VSC 581	Plea to murder
	<i>McPhee v R</i> [2014] VSCA 156	Appeal against sentence upheld
Kenneth Mahoney	<i>DPP v Mahoney</i> [2009] VSC 249	Plea to manslaughter (UDA)
Lino Mamour	<i>R v Mamour</i> [2011] VSC 113	Plea to murder
Robert Meade	<i>R v Meade</i> [2013] VSC 682	Trial – found guilty of murder
Luke Middendorp	<i>R v Middendorp</i> [2010] VSC 202	Trial – found guilty of defensive homicide
George Misalis	<i>R v Misalis</i> [2014] VSC 617	Plea to murder
Adam Mocenigo	<i>R v Mocenigo</i> [2012] VSC 599R	Trial – found guilty of murder
	<i>Mocenigo v R</i> [2013] VSCA 231	Appeal of conviction upheld; manslaughter verdict substituted
James Mulhall	<i>R v Mulhall</i> [2012] VSC 471	Plea to murder
Marin Neacsu	<i>R v Neacsu</i> [2013] VSC 388	Plea to murder
Graeme Penglase	<i>R v Penglase</i> [2011] VSC 356	Plea to murder
Ralph Pennisi	<i>DPP v Pennisi</i> [2008] VSC 498	Trial – found guilty of manslaughter (UDA)
David Piper	<i>R v Piper</i> [2008] VSC 569	Plea to murder (and to armed robbery)

Out of Character?

Relationship	Method of killing	Sentence
Married	Knife (12 wounds)	19 years/16 years non-parole period
De facto relationship	Knife (2 knives and 20 wounds)	14 years/10 years non-parole period
Sexual relationship	Manual strangulation, punches and kicks to entire body	20 years/16 years non-parole period
De facto relationship	Severe burns to entire body	Life/30 years non-parole period
Married	Head injury caused by being pushed onto footpath	10 years/7 years non-parole period 8 years/5 years and 6 months non-parole period after appeal
Male sexual rival	Severe beating with fists	7 years and 6 months/5 years non-parole period
Married	Knife wounds	18 years/13 years non-parole period
Married	Knife (1 wound to the neck)	9 years and 6 months/6 years and 6 months non-parole period
Estranged marriage	Unknown (no body found)	19 years/13 years non-parole period
Married	Knife (2 wounds to the chest)	20 years/16 years non-parole period 18 years/13 years non-parole period after appeal
De facto relationship	Hit, punched, multiple blunt force injuries to head, chest and abdomen	9 years/6 years non-parole period
Married	Knife (several wounds to the back and chest)	18 years/14 years non-parole period
Divorced	Blunt object (2 strikes to the head)	23 years/19 years non-parole period
De facto relationship	Knife (4 stab wounds to back)	12 years/8 years non-parole period
Married	Manual strangulation	18 years/14 years non-parole period
De facto relationship	Violent argument/ unclear	22 years/18 years non-parole period 11 years/8 years non-parole period after appeal
De facto relationship	Manual strangulation and pillow to smother	19 years/16 years non-parole period
Male sexual rival	Knife (16 wounds)	17 years and 6 months/14 years and 6 months non-parole period
Married	Fists, boots and hammer	22 years/18 years non-parole period
De facto relationship	Manual strangulation and with rope	10 years/7 years non-parole period
De facto relationship	Knife stab including initial manual strangulation	16 years (murder); total effective sentence 19 years/15 years non-parole period

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Name	Case citation	Plea/trial
David Reid	<i>R v Reid</i> [2009] VSC 326	Trial – found guilty of manslaughter by criminal negligence
Leigh Robinson	<i>R v Robinson</i> [2010] VSC 10	Trial – found guilty of murder
Umit Sengoz	<i>R v Sengoz</i> [2011] VSC 652	Plea to murder
Anthony Sherna	<i>DPP v Sherna</i> [2009] VSC 4	Trial found guilty of manslaughter (UDA)
Sukhmander Singh	<i>R v Singh</i> [2010] VSC 299	Plea to murder
Thy Sok	<i>R v Sok</i> [2012] VSC 229	Plea to murder
James Stoneham	<i>R v Stoneham</i> [2013] VSC 661	Plea to murder
Mehmet Torun	<i>R v Torun</i> [2014] VSC 146	Plea to manslaughter (UDA)
Glenn Weaven	<i>R v Weaven</i> [2011] VSC 508	Trial – found guilty of murder
Luke Wentholt	<i>R v Wentholt</i> [2013] VSC 540	Plea to reckless murder (and to recklessly causing serious injury)
Nathan West	<i>R v West</i> [2013] VSC 737	Plea to murder
Michael Wilson	<i>R v Wilson</i> [2011] VSC 123	Trial – found guilty of murder

Out of Character?

Relationship	Method of killing	Sentence
De facto relationship	Coffee cup to the head causing blood loss	5 years/3 years non-parole period
Estranged de facto partners	Gun (1 wound to head)	Life/no parole
Male sexual partner	Knife (123 wounds to the torso, chest, arms, limbs, back, neck and head)	18 years and 6 months/15 years non-parole period
De facto relationship	Strangulation with dressing-gown cord	14 years/10 years non-parole period
Married	Blows to the head and face with a wooden stick	17 years/13 years and 6 months non-parole period
Male sexual rival	Knife (single stab wound to the upper chest)	18 years/14 years non-parole period
Former boyfriend and girlfriend	Knife (1 wound to the neck)	19 years/14 years and 6 months non-parole period
De facto relationship	Gun (1 wound to the groin)	8 years/5 years non-parole period
De facto relationship	Knife (stab wounds to neck)	20 years/16 years non-parole period
Male sexual rival	Stomped on and kicked deceased's head multiple times	16 years and 6 months (reckless murder); total effective sentence 18 years and 6 months/15 years non-parole period
Male sexual rival	Knife wounds	20 years/16 years non-parole period
De facto relationship	Manual strangulation	22 years/18 years non-parole period

APPENDIX 2

List of legislation

Bail Act 2013 (Vic)

Crimes (Homicide) Act 2005 (Vic)

Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)

Crimes Act 1958 (Vic)

Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic)

Evidence Act 2008 (Vic)

Family Violence Protection Act 2008 (Vic)

Jury Directions Act 2013 (Vic)

Jury Directions Act 2015 (Vic)

Sentencing Act 1991 (Vic)

Uniform Evidence Act (UEA)

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- *Behind closed doors: family dispute resolution & family violence* (2007)
- *Violence-induced disability: the consequences of violence against women & children* (2006)
- *What is Child sexual abuse? Rethinking what we know* (2003)
- *Family violence & homelessness: removing the perpetrator from the home* (2002)
- *Men as victims of domestic violence: issues to consider* (2001)
- *What's in a name? definitions and domestic violence* (1998)

See www.dvrcv.org.au for more information.

