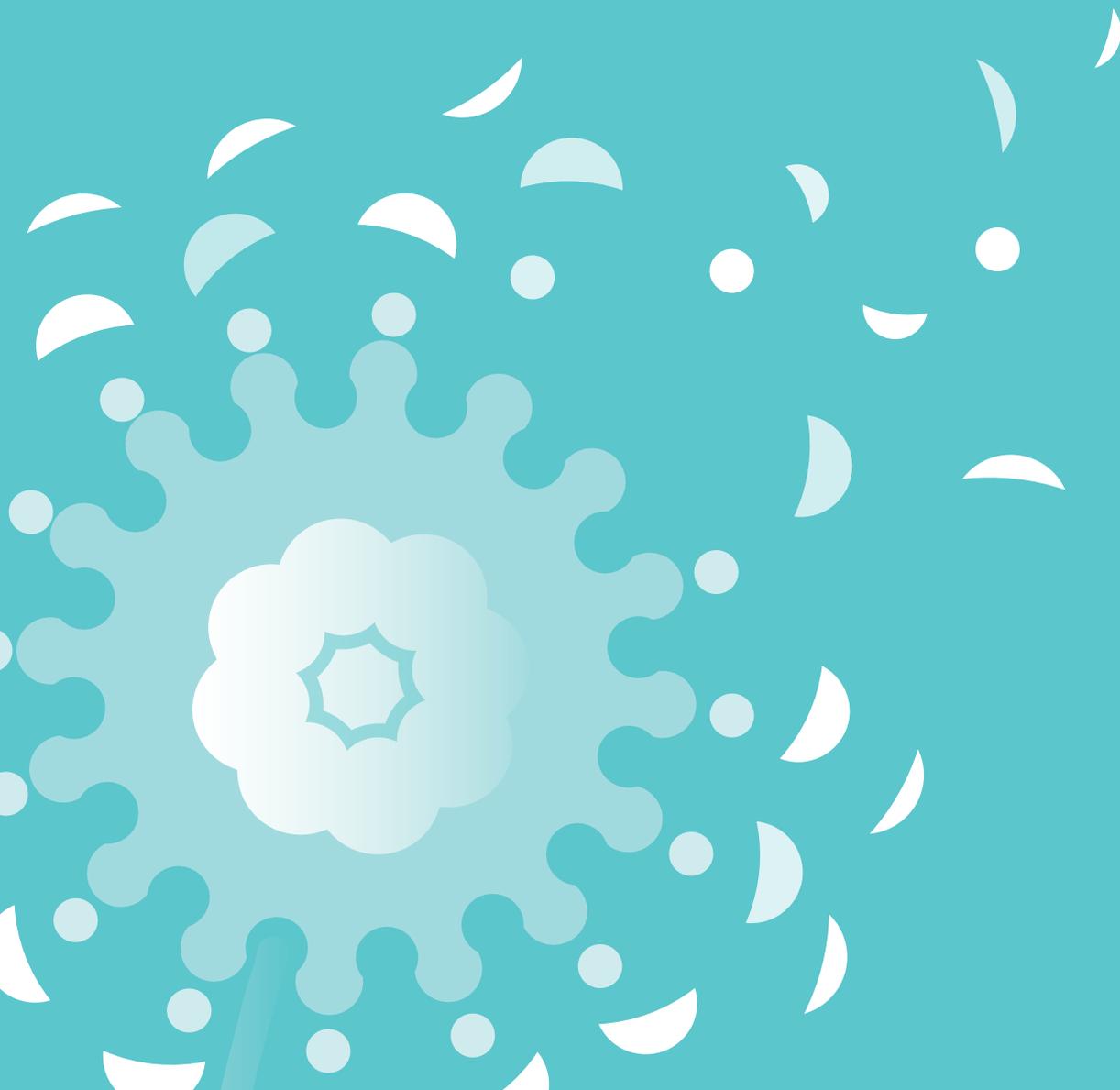


# *Justice or Judgement?*

The impact of Victorian homicide law reforms on  
responses to women who kill intimate partners



**DISCUSSION PAPER**

Domestic Violence Resource Centre Victoria

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# Contents

<b>CHAPTER 1</b>	
<b>INTRODUCTION</b>	3
Overview of the discussion paper	4
Background	4
Family violence	4
Domestic homicide in Australia	5
The reforms in Victoria	5
<b>CHAPTER 2</b>	
<b>HOMICIDES IN VICTORIA 2005–13</b>	9
Research approach	9
Domestic homicide prosecutions in Victoria	10
Defensive homicide cases	11
Women who killed their intimate partners	12
<b>CHAPTER 3</b>	
<b>THE RECOGNITION OF FAMILY VIOLENCE IN CASES OF WOMEN WHO KILL</b>	17
Karen Black	17
Jemma Edwards	21
Eileen Creamer	24
Jade Kells	29
Melissa Kulla Kulla	33
Veronica Hudson	35
Elizabeth Downie	38
Conclusion	39
<b>CHAPTER 4</b>	
<b>DISCUSSION: LEGAL RESPONSES TO WOMEN WHO KILL</b>	41
Outcomes and plea bargaining	42
Self-defence vs. defensive homicide: what is ‘reasonable’?	44
Proportionality	46
Expert witness evidence	46
Shifting legal cultures: family violence awareness and education	48
Concerns about defensive homicide	49
Conclusion	51
<b>APPENDIX</b>	
<b>CASES SINCE 2005</b>	52
<b>REFERENCES</b>	55



## CHAPTER 1

# Introduction

Over the past decade in Australia, reviews of homicide laws have been undertaken in most jurisdictions with the aim of addressing concerns about legal responses to intimate partner homicides. In Victoria, problems were identified with the application of the partial defence of provocation, particularly in the case of men who kill their female intimate partners, 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 a systemic failure to recognise the nature and impact of family violence.

Significant changes to homicide laws were enacted in Victoria in 2005 which have been held up as a 'trendsetting' example of feminist-inspired reforms to remediate gender imbalances in legal responses (Ramsey 2010; Forell 2006). The rationale for key aspects of the reforms was to better accommodate the experiences of victims who kill violent family members (Victorian Law Reform Commission [VLRC] 2002<sup>1</sup>; Australian Law Reform Commission [ALRC] and New South Wales Law Reform Commission [NSWLRC] 2010, p. 622).

This discussion paper examines legal outcomes in the cases of women who have killed their intimate partners in the eight years since the reforms were implemented in Victoria. The focus of this paper is on whether, and to what extent, the reforms have improved the recognition of family violence and legal understandings of the circumstances in which women kill in response to violence by an intimate partner.

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<sup>1</sup> The VLRC set out to address the concerns raised by the case of Heather Osland (2002, pp. 7–8), who was convicted of murder for the killing of her violent husband in 1996. The case highlighted gender bias in homicide laws and the inability of these laws to accommodate the experiences of victims of family violence. At Heather Osland's trial, both self-defence and provocation were raised unsuccessfully.

## OVERVIEW OF THE DISCUSSION PAPER

This chapter outlines the specific reforms designed to improve legal responses in cases of domestic homicide in Victoria.

Chapter 2 provides an overview of the outcomes of intimate partner homicide cases between 23 November 2005 and 1 October 2013.<sup>2</sup> A snapshot of cases resulting in a conviction for defensive homicide during that period is also included to provide a background context for our discussion of defensive homicide. We then provide a summary of key factors in cases of women who killed their intimate partners during that period.

Chapter 3 provides a detailed analysis of seven cases involving women who killed an intimate partner following the implementation of the 2005 reforms to the law of homicide in Victoria.

Chapter 4 identifies common themes in the cases and in legal responses to women who kill. It discusses the impacts of the reforms, and considers what further steps need to be taken to ensure that family violence is adequately recognised in legal responses to women who kill.

## BACKGROUND

In 1994, the Women's Coalition Against Family Violence (WCAFV) produced a ground-breaking book, *Blood on whose hands? The killing of women and children in domestic homicides*. The Victorian Women's Trust (VWT) provided the funds to carry out the project and publish the book. It brought together 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. The book had a wide-reaching impact on the community and was used as an advocacy tool to raise awareness about the need for legal and social change in how we respond to domestic homicides.

The project underpinning this paper, also funded by the VWT, has been undertaken by the Domestic Violence Resource Centre Victoria (DVRCV), one of the key agencies originally involved in the Women's Coalition Against Family Violence, in collaboration with Monash University Criminology Department. It sought to build on earlier work that has explored the criminal justice system's response to women who kill their intimate partners and the understanding and awareness of the impact of family violence in those cases.

## FAMILY VIOLENCE

For the purposes of this paper, we adopt the definition of family violence provided in the Victorian *Family Violence Protection Act 2008*. According to the Act, family violence is behaviour that controls or dominates a family member in any way, and causes them to feel fear for their own, or another family member's, safety or wellbeing. It can include physical, sexual, psychological, emotional or economic abuse, as well as any behaviour that causes a child to hear, witness or otherwise be exposed to the effects of that behaviour.

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<sup>2</sup> The analysis for this paper was finalised in October 2013.

## DOMESTIC HOMICIDE IN AUSTRALIA

Approximately a quarter of all homicides in Australia involve intimate partners (Chan & Payne 2013; Mouzos & Rushforth 2003). The majority of these homicides involve men killing female partners (Chan & Payne 2013). For example, a 13-year review of family homicides in Australia found that 75 per cent involved males killing their female partners (Mouzos & Rushforth 2003). In most cases when men kill their female intimate partners, this is part of a continuum of ongoing violence against the partner (Mouzos & Houliaras 2006; World Health Organization [WHO] 2002).

In contrast, when women kill they almost never kill their intimate partners for the same reasons as men do (Wallace 1986). When women kill an intimate partner, they are far more likely to do so in order to protect themselves or their children from their partner's violence (Polk 1994; Morgan 2002; VLRC 2002).

Indigenous Australians are overrepresented as victims of homicide. For example, between 2008 and 2010, Indigenous women were five times more likely to be victims of homicide than were non-Indigenous women (Chan & Payne 2013, p. 30). The majority of Indigenous homicides were domestic homicides, with intimate partner homicides being the main sub-category. Between 2008 and 2010, approximately 20 per cent of victims of intimate partner homicides were Indigenous (Chan & Payne 2013).<sup>3</sup>

## THE REFORMS IN VICTORIA

In Victoria, over recent decades, there has been a growing body of research and community campaigning in the area of gender bias in legal responses to intimate partner homicides.<sup>4</sup> Specifically, this work has focused on 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 violence.

The two key strands of concern have focused on:

- men utilising the partial defence of provocation to excuse their actions in killing their intimate partners (Cleary 2002, 2005; Howe 1994, 1999, 2002, 2010; Scutt 1997; WCAFFV 1994; Morgan 2002; VLRC 2002; Department of Justice, Victoria [DOJ] 2010; Tyson 1999, 2013)
- 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 (Tolmie 1991; Kirkwood 2006; Sheehy, Stubbs & Tolmie 2012). (The most significant recent campaign in Victoria was 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.)

After a lengthy process of consultation undertaken by the VLRC, as outlined in its *Defences to homicide: final report* (VLRC 2004), the Victorian legislature implemented a comprehensive package of reforms through the *Crimes (Homicide) Act 2005* (Vic).

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3 Chan and Payne do not give a gender breakdown for this figure. However, Mouzos reports that Indigenous women are significantly more likely than non-Indigenous women to be both victims and perpetrators in homicides (Mouzos 2001).

4 It is beyond the scope of this paper to outline all of the issues of concern that have been raised in regard to defences to homicide in Australian jurisdictions (for further information see, for example, Morgan 2002; VLRC 2002; Tyson, Capper & Kirkwood 2010; Tyson 2011; Douglas 2012; Fitz-Gibbon & Stubbs 2012; Morgan 2012; Sheehy, Stubbs & Tolmie 2012; Tyson 2013).

The amendments included:

- repealing the controversial partial defence of provocation
- codification of self-defence to clarify the requirements of the defence and to better accommodate the experiences of abused women who kill in 'non-confrontational' circumstances (s 9AC)
- the recognition of 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).

### Self-defence

The reforms recommended by the VLRC were intended to address the barriers women face in establishing their actions as self-defence. Notions of self-defence have traditionally been based on conceptualisations of 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 violent fight with another man – usually a friend, acquaintance or stranger (VLRC 2003, 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, where men may use their bare hands. Therefore, the actions of a woman in killing an abusive partner may appear 'disproportionate' to the threat, and consequently 'unreasonable'. However, this understanding reflects a fundamental 'failure to recognise the nature of violent relationships' (VLRC 2003, p. xix).

Under the new legislation, the statutory definition of self-defence provides that:

*[a] person is not guilty of murder if he or she carries out the conduct that would otherwise constitute murder while believing the conduct to be necessary to defend himself or herself or another person from the infliction of death or really serious injury. (s 9AC)*

The most significant amendment to the common law is that the test (s 9AC) is entirely subjective. However, if the jury accepts that a defendant held a subjective belief that their conduct was necessary, an acquittal will not automatically result. The jury still needs to consider whether that person's subjective belief was reasonable, under s 9AD. If the jury concludes that the belief was reasonable, that person must be acquitted; but if it concludes that the belief was not reasonable, the defendant may be found guilty of the offence of defensive homicide (discussed below).<sup>5</sup> The 2005 amendments also make it clear that, in cases of family violence, self-defence may be raised even if the accused person is responding to a harm that is not immediate, or his or her response involves the use of force in excess of the force involved in the harm or threatened harm (see discussion of family violence evidence [s 9AH] below).

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<sup>5</sup> Alternatively, the jury may find the defendant guilty of the lesser offence of manslaughter by unlawful and dangerous act.

## **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). The new offence of defensive homicide was intended to fulfil this role. In introducing defensive homicide in parliament, then Attorney-General, Rob Hulls, commented that both self-defence and provocation had 'evolved from a bygone era when the law was concerned with violent confrontations between two males of roughly equal strength where a threat of death or serious injury was immediate' (Office of the Attorney-General Victoria, Media Release, 4 October 2005).

Section 9AD of the *Crimes Act 1958* (Vic) provides that defensive homicide is relevant where:

*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.<sup>6</sup>*

Thus, where a defendant can demonstrate that they had a *genuine belief* in the need to kill in self-defence, but is found to have had no reasonable grounds for that belief, they may be acquitted of murder and found guilty of defensive homicide. The new offence was intended to apply to situations where 'a killing occurs in the context of family violence' and where the accused person genuinely held the subjective belief that their actions taken in self-defence were necessary, but where that belief was ultimately *unreasonable* (Office of the Attorney-General Victoria, Media Release, 4 October 2005). Defensive homicide operates not only as an alternative verdict to murder, but also as an offence in itself. The maximum term of imprisonment for defensive homicide is 20 years.

## **Family violence evidence**

A key new provision in the homicide legislation is s 9AH which provides for the admission of evidence highlighting the relationship and social context of family violence to be admitted in cases of homicide. Section 9AH provides that:

*Without limiting section 9AC, 9AD or 9AE, for the purposes of murder, defensive homicide or manslaughter, in circumstances where family violence is alleged a person may believe, and may have reasonable grounds for believing, that his or her conduct is necessary*

- (a) to defend himself or herself or another person; or*
- (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person –*  
*even if –*
- (c) he or she is responding to a harm that is not immediate; or*
- (d) his or her response involves the use of force in excess of the force involved in the harm or threatened harm.*

---

<sup>6</sup> See s 9AH as to the reasonable grounds for the belief in circumstances where family violence is alleged.

The definition of family violence includes 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]). Prior to the introduction of s 9AH, the evidence that could be admitted was narrower and did not include a discussion of the broader social context of family violence. Under the new definition, the evidence that may be admitted relates to 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]).

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 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 because the jury still has to consider s 9AD, which creates the offence of defensive homicide’ (Toole 2012, p. 264).

Social context evidence, which provides a broader understanding of the context of family violence and challenges common misconceptions, was developed in 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, Stubbs & Tolmie 1992; Stubbs 1992; Stubbs & Tolmie 1999, 2005, 2008; Wells 2000). In particular, the use of ‘battered women syndrome’, which stereotypes female defendants as helpless, has 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).

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 (2004, p. 160). The VLRC was of the view 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 (2004, p. 141). The VLRC also pointed out that expert evidence is useful not only during trials, but also in sentencing: ‘judges may benefit from receiving information that will assist them to make sense of what has occurred when deciding on what sentence should be imposed’ (VLRC 2004, p. 187).

This chapter has outlined the changes to homicide laws in Victoria which were intended to improve legal responses to women who kill in the context of family violence. The key reforms were amendments to self-defence, the creation of the new offence of defensive homicide and the introduction of specific family violence social context evidence provisions. The following chapter gives an overview of intimate partner homicide cases that have occurred since the reforms were implemented and the numbers of men and women utilising defensive homicide. It also outlines the circumstances and outcomes of cases involving women who killed their intimate partners during this period.

## CHAPTER 2

# Homicides in Victoria 2005–13

This chapter provides a brief overview the approach we took in researching homicide cases for this discussion paper. It then provides a summary of homicides in Victoria that occurred after the homicide law reforms were implemented, including:

- domestic homicide prosecutions in Victoria
- defensive homicide cases
- cases of women who killed intimate partners.

### RESEARCH APPROACH

The *Crimes (Homicide) Act 2005 (Vic)* was introduced in Victoria to improve legal responses to family violence homicides.<sup>7</sup> This discussion paper examines the extent to which family violence is being recognised in legal responses through an analysis of intimate partner homicide cases between 23 November 2005 and 1 October 2013. This period was selected in order to explore the ways in which the 2005 reforms are operating in practice. Our research for this paper draws on all cases (n=61) that we have been able to locate using media reports, sentencing judgments and transcripts of plea hearings and trials, and provides a snapshot of outcomes in these cases.

To develop a broader picture of how the reforms are working in practice, we examined all cases of intimate partner homicide by men and women since the reforms were implemented, and

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<sup>7</sup> The Act came into effect on 23 November 2005.

the outcomes in these cases<sup>8</sup> (see Appendix). We also identified all cases of defensive homicide (whether intimate partner killings or not), to provide background contextual information for our analysis of women's use of defensive homicide post-reform (see Table 1).

We identified eight cases involving women who killed an intimate partner since the implementation of the 2005 reforms to the laws of homicide in Victoria.<sup>9</sup> These cases are outlined in Table 2. Of these, detailed case studies of seven cases involving women who went to trial or pleaded guilty in relation to the killing are provided (see Chapter 3).<sup>10</sup> Our focus is on whether and in what ways family violence was recognised and discussed in these cases, whether gendered stereotypes were apparent, what defences were relied upon, what the outcomes were, and what factors were seen as relevant to the sentencing of women who kill their intimate partners in the context of family violence.<sup>11</sup>

## DOMESTIC HOMICIDE PROSECUTIONS IN VICTORIA

Consistent with Australian and international research, we found that the majority of intimate partner homicides in Victoria in the period we examined were committed by males against female partners. At the time of writing, we identified a total of 31 men who were prosecuted for killing an intimate partner or ex-partner.

Of the men who killed intimate partners:

- 14 were sentenced for murder based on a guilty plea
- 10 were sentenced for murder after a trial
- four were sentenced for manslaughter after a trial
- two were sentenced for manslaughter as the result of a guilty plea
- one was sentenced for defensive homicide after a trial.

A list of these cases is provided in the Appendix. A summary of cases of women who killed their intimate partners during this period is provided in Table 2 on page 14.

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**8** On 4 March 2006, Claire MacDonald was acquitted of the murder of her husband. The killing occurred in September 2004. Claire MacDonald suffered physical, psychological and sexual abuse during her 17-year marriage to Warren MacDonald (Gregory 2006). The case was widely reported in the media. Cases such as that of Claire MacDonald were not included because the offence was committed prior to 23 November 2005; therefore, the reforms did not apply. The case of *R v Charles* [2013] VSC 470 was also not included in our analysis as the killing occurred in 2002 when the reforms did not apply. However, her plea hearing occurred in August 2013.

**9** Ethics clearance for this research was granted by the Monash University Human Research Ethics Committee (Reference Number CF12/0758 – 2012000334) on 21 May 2012. Access to transcripts was facilitated by the Office of Public Prosecutions, Melbourne, Victoria, and the Victorian Government Reporting Service.

**10** The case of Freda Dimitrovski was excluded from our detailed analysis because the case was dismissed and did not proceed beyond the committal stage of the Magistrates' Court hearing. There was insufficient information available because there was no transcript of plea or trial. The case is briefly discussed on page 13.

**11** Our analysis of family violence in these cases is limited to the information that was contained in the transcripts of legal proceedings. Given the hidden nature of family violence, it is likely that other forms and instances of family violence occurred in these cases.

## DEFENSIVE HOMICIDE CASES

As previously discussed, defensive homicide was introduced primarily to provide a partial defence for women who are charged with murdering their abusive intimate partners. Table 1 on page 11 summarises the cases of defensive homicide since the defence was introduced in 2005 up until 1 October 2013, revealing that it is predominantly men who are being convicted of this offence. Only three women have been convicted of defensive homicide since the reforms – two as the result of a guilty plea (see *R v Edwards* and *R v Black*, discussed in Chapter 3) and one after a trial (see *R v Creamer*, discussed in Chapter 3).

Since the *Crimes (Homicide) Act 2005 (Vic)* was implemented (and at the time of writing this paper), there have been 22 cases involving male defendants who have been sentenced on the basis of defensive homicide for killing a male victim, 16 of which were the result of a decision by the Office of Public Prosecutions (OPP) to accept a plea of guilty (see Table 1 below).<sup>12</sup>

**TABLE 1**

SUMMARY OF CASES RESULTING IN A CONVICTION FOR DEFENSIVE HOMICIDE,  
VICTORIA 2005–13

	Gender of defendant	
	Male	Female
<b>Gender of victim</b>		
Male	22	3
Female	1	0
<b>Total</b>	<b>23</b>	<b>3</b>
<b>Relationship</b>		
Stranger	3	0
Friend	4	0
Acquaintance	9	0
Prison inmate	1	0
Family member	4	0
Intimate partner	1	3
<b>Outcomes</b>		
Plea	16	2
Verdict	7	1

As shown in Table 1, of the 23 men convicted of defensive homicide, 22 involved men killing other men. The most common type of relationship between the defendant and victim in these cases is that they were young men who were strangers (three out of 22), friends (four out of 22) or acquaintances (nine out of 22) in one-on-one, ‘spontaneous’, violent confrontations. Most of the men convicted of defensive homicide also had a history of drug use and prior convictions for either

<sup>12</sup> See Appendix at the end of the paper.

drug offences or violent crimes (DOJ 2010, pp. 5, 10). These cases involved violent confrontations between males of approximately equal strength, reflecting the traditional understanding of self-defence, rather than contexts of deaths following a history of family violence committed by the defendant against the victim (DOJ 2010, pp. 36–7).<sup>13</sup>

There is only one case to date in which a man has been convicted of defensive homicide after killing a female intimate partner (*R v Middendorp*). While there has been some community concern about the decisions of the Director of Public Prosecutions (DPP) to accept guilty pleas to defensive homicides (see, for example, Evans 2010; Fyfe 2010; MacDonald 2010), the case of *R v Middendorp*<sup>14</sup> provoked widespread expressions of outrage in response to a Victorian Supreme Court jury's decision to find the defendant not guilty of murder but guilty of defensive homicide (Anderson 2010; Capper & Crooks 2010; Howe 2010; Murphy 2010). There was evidence that Luke Middendorp had a prior history of violence against his partner and that he stabbed her in the back by reaching over her shoulder. Family members and some commentators have argued in the media that the outcome in this case was unjust and that defensive homicide had been used by the defendant as a 'provocation-style defence' (Capper & Crooks 2010; Howe 2010). These claims led to a review of defensive homicide by the Department of Justice (DOJ 2010). A consultation paper which proposes the abolition of defensive homicide was released by DOJ during the writing of this paper (DOJ 2013).<sup>15</sup>

## WOMEN WHO KILLED THEIR INTIMATE PARTNERS

Since the reforms were implemented, eight women have been charged with murder for killing an intimate partner (or ex-partner). Table 2 gives a summary of the cases. Chapter 3 provides a detailed analysis of seven of these cases.<sup>16</sup>

Our study focuses on women who kill intimate partners and does not include cases of women who kill other family members and who might have raised family violence issues to support a defence – such as the case of 'SB' who killed her stepfather in 2008 after he had sexually abused her, and another case (details have been suppressed) in which a woman killed her father who had sexually abused her child (his grandchild). 'SB' was the first case involving a female defendant to which the new legislation applied. She was an 18-year-old woman who shot her 34-year-old stepfather in the back of the head after he threatened her with a shotgun and forced her to perform a sexual act. He had sexually abused her, sometimes daily, from the age of 14.<sup>17</sup> At the committal hearing in 2009, the DPP, Jeremy Rapke, QC, entered a *nolle prosequi*<sup>18</sup> before trial, on the basis that there was no reasonable prospect that a jury would convict the defendant of any offence.

<sup>13</sup> Alternatively, in the past these situations may have been dealt with as provocation manslaughter cases (Tyson 2011, p. 212).

<sup>14</sup> [2010] VSC 202.

<sup>15</sup> A discussion paper on defensive homicide was released by DOJ in 2010. There was a change of government shortly after the paper was released. The department then conducted a further review, and released a consultation paper seeking submissions by 27 November 2013 (DOJ 2013). A submission to the consultation paper is being prepared by the authors of this report in collaboration with a range of women's and community legal organisations.

<sup>16</sup> As outlined earlier in the research approach section, we undertook detailed analysis of the seven cases that proceeded beyond the committal hearing.

<sup>17</sup> The evidence included 10,000 photographic images of the abuse of the teenager, taken by her stepfather on a digital camera and seized by police at the time of the young woman's arrest (DOJ 2010, p. 30).

<sup>18</sup> Prosecution did not proceed.

Following this verdict, the defendant's defence lawyer said outside the court: '[t]he legal defence in these cases have always taken the view that a jury would find this to be a legally justifiable homicide' (Johnson 2009a).

The first case under the new laws of a woman who killed an intimate partner was that of Freda Dimitrovski, a 57-year-old woman from regional Victoria who killed her abusive male partner in July 2008. This case, like that of 'SB', did not proceed beyond committal proceedings (Johnson 2009b, 2009c). Freda Dimitrovski stabbed and killed her husband Sava Dimitrovski in response to an immediate, violent attack. Her husband hit her in the face and knocked her to the ground in the presence of her daughter and grandson. He then attempted to attack her daughter. In response, Freda Dimitrovski stabbed her husband with a pocket knife. At the committal hearing in May 2009, evidence was submitted regarding the 30-year history of family violence to which Freda Dimitrovski had been subjected by her husband. The magistrate concluded that the evidence 'overwhelmingly' supported a history of family violence (Stevens 2009). In support of Freda Dimitrovski's claim to self-defence, and with respect to the reforms introduced by the *Crimes (Homicide) Act* (2005) (Vic), her defence counsel, in his closing submissions, said that:

*the provisions in the (Crimes) Act make it plain a wife is entitled to defend herself, even if she's responding to harm that's not immediate ... in the context of family violence, the accused is not required to wait until an attack is in progress, as long as the accused believes it necessary to protect themselves or a family member. (DOJ 2010, p. 31)*

Magistrate Hawkins discharged Freda Dimitrovski, stating that she was not satisfied that there was sufficient evidence to negate the issue of self-defence, or for a jury to convict Freda Dimitrovski of murder or of the lesser charges of defensive homicide or manslaughter (Stevens 2009).

In the course of its review of defensive homicide in 2010, DOJ was optimistic about what the decisions not to proceed to trial in the cases of 'SB' and Freda Dimitrovski demonstrated about the capacity of the reforms to lead to significant improvement in legal responses to women who kill in response to long-term family violence (DOJ 2010, p. 32).

Arguably, the reason why these two cases did not proceed to trial is that both occurred shortly after the reforms were implemented, when decision-makers in the legal process were particularly aware of the intentions behind the reforms and the significance of family violence for understanding women's self-defensive actions.

As shown in Table 2 on the following page, eight women were charged with murder of an intimate partner in the post-reform period. As outlined above, one case was dismissed (Freda Dimitrovski). In the remaining seven cases, two of the women (Karen Black and Jemma Edwards) pleaded guilty to defensive homicide<sup>19</sup>, and three (Melissa Kulla Kulla, Elizabeth Downie and Veronica Hudson) pleaded guilty to manslaughter.<sup>20</sup> One woman (Eileen Creamer) was found guilty at trial of defensive homicide and another (Jade Kells) was found guilty of manslaughter (by unlawful and dangerous act) at trial.<sup>21</sup>

In the next chapter we will consider in detail the cases of these seven women to gain insight into how family violence is being recognised in cases that proceeded to a plea hearing or trial since the implementation of the new legislation.

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<sup>19</sup> *R v Black* [2011] VSC 152; *R v Edwards* [2012] VSC 138.

<sup>20</sup> *R v Kulla Kulla* [2010] VSC 60; *R v Downie* [2012] VSC 27; *R v Hudson* [2013] VSC 184.

<sup>21</sup> *R v Creamer* [2011] VSC 196; *R v Kells* [2012] VSC 53.

DISCUSSION PAPER

**TABLE 2**

CASES OF WOMEN WHO HAVE KILLED THEIR INTIMATE PARTNERS, 2005–13

Case citation	Plea/trial	Immediate circumstances of killing
<i>DPP v Freda Dimitrovski</i> (2009)	N/A	Deceased physically attacked the defendant and her daughter, in the presence of her four-year-old grandson.
<i>R v Kulla Kulla Melissa</i> [2010] VSC 60	Plea to manslaughter by an unlawful and dangerous act (UDA)	Deceased made threats to kill, threw an oven tray and picked up a kitchen knife.
<i>R v Black Karen</i> [2011] VSC 152	Plea to defensive homicide	Verbal argument, deceased cornered defendant in kitchen and repeatedly jabbed her with his finger. Defendant said that she believed deceased was going to sexually assault her.
<i>R v Creamer Eileen</i> [2011] VSC 196	Trial – found guilty defensive homicide	Verbal argument, defendant believed the deceased was arranging for her to have sex with other men in his presence. Defendant also alleged the deceased verbally abused her, hit her vagina with a stick and threatened her with a knife; however, the accuracy of this account was questioned by sentencing judge.
<i>R v Downie Elizabeth</i> [2012] VSC 27	Plea to manslaughter UDA	Defendant organised two men to assault her ex-husband, in response to him allegedly indecently assaulting her daughter. Defendant was present during the killing.
<i>R v Kells Jade</i> [2012] VSC 53	Trial – found guilty manslaughter UDA	Verbal argument over mobile phone and money allegedly stolen by deceased. Defendant also alleged the deceased had earlier pushed her against a wall and choked her.
<i>R v Edwards Jemma</i> [2012] VSC 138	Plea to defensive homicide	Deceased made threats to kill and disfigure. Defendant also alleged the deceased attacked her with a knife; however, the accuracy of this account was questioned by sentencing judge.
<i>R v Hudson Veronica</i> [2013] VSC 184	Plea to manslaughter UDA	Verbal argument. Deceased accused defendant of sleeping with other men.

*Justice or Judgement?*

Relationship context	Method of killing	History of family violence	Result/sentence
Married	Stabbed with pocket knife	A 30-year history of physical and psychological abuse by the deceased.	Magistrate dismissed the charges in May 2009
De facto relationship (four months)	Stabbed once with kitchen knife	Deceased had previously been observed acting in a threatening manner towards the defendant.	6 yrs with non-parole of 3 yrs
De facto relationship (five years)	Stabbed twice with kitchen knife	Defendant described a history of sexual demands, intimidation and threats by the deceased.	9 yrs/6 yrs. Appeal in 2012 – dismissed
Married (10 years)	Struck multiple times with stick and stabbed with knife	Defendant described prior sexual coercion, rape and psychological abuse by the deceased.	Guilty Defensive homicide 11 yrs/7 yrs Appeal in 2012 – dismissed
Ex-partners (divorced five years prior to killing)	Co-accused male stabbed deceased multiple times	Prior intervention orders against each other. Defendant described the deceased as 'intimidating and controlling'.	6 years/4 years
De facto relationship (five months)	Stabbed once with kitchen knife	Defendant described history of verbal and physical violence by the deceased (according to prosecution, violence was mutual).	Guilty Manslaughter 8 yrs/5 yrs
Married (12 years)	Stabbed more than 30 times with kitchen knife. Minor wound also inflicted by spear gun.	Lengthy and well-documented history of the deceased's physical violence from 1999 onwards. Police called to intervene multiple times. Deceased also violent towards his daughter and mother. Intervention order in June 2010 to protect defendant against deceased. Defendant had one prior conviction for violence towards deceased in 2005 (pleaded guilty to assault).	7 yrs/4 yrs 9 mths
De facto relationship (six years)	Stabbed once with knife	History of threats, repeated physical violence and controlling behaviour by the deceased. In 2006, a domestic violence order was taken out against the deceased. He seriously assaulted the defendant in breach of the order, and was sentenced to five years' imprisonment for causing grievous bodily harm.	6 yrs/3 yrs



## CHAPTER 3

# The recognition of family violence in cases of women who kill

**T**his chapter examines the cases of seven women who killed their partners or ex-partners between 23 November 2005 and 1 October 2013. It considers whether and in what ways family violence was identified, whether gendered stereotypes were apparent, what defences were relied upon, and what the outcomes were in these cases.

In the first two cases, Karen Black (2009) and Jemma Edwards (2011) pleaded guilty to the new offence of defensive homicide. In both cases the women had experienced forms of violence from their partners during the relationship and stated that they were responding to threatening behaviour at the time of the killing. Both women used a knife to kill their partner.

### **KAREN BLACK**

On 30 October 2009, Karen Black (53 years) stabbed and killed her de facto partner Wayne Clarke in their home in Corio, near Geelong in Victoria. On the morning of that day, Karen Black had returned home from working a night shift. She and Wayne Clarke went shopping and to a hotel. He repeatedly criticised her and was ‘niggling ... with respect to the prospect of sexual intimacy on the weekend’ (*R v Black* [2011] VSC 152, para 17). After they returned home, they argued and he followed her into the kitchen, sticking his chest out and pinning her into a corner.

She said she grabbed a kitchen knife, while he continued to corner her and ‘egg her on’ (*R v Black* [2011] VSC 152, para 3). She then stabbed Wayne Clarke twice in the chest. She went to her son who was also at home. He put Mr Clarke in his car and drove him to Geelong Hospital, calling ‘000’ on his phone on the way. However, Wayne Clarke died before he reached the hospital.

Meanwhile, Karen Black went to the police station and confessed to the killing. She initially told police that she did not mean to kill Wayne Clarke, but later in the same interview said that, during the incident, 'I wanted to kill him' (*R v Black* [2011] VSC 152, para 6).

In an interview with a clinical and forensic psychologist, she said:

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

*R v Black* [2011] VSC 152, para 18

She went on to say that this situation reminded her of being sexually abused by her father (*R v Black* [2011] VSC 152, para 18).

Karen Black was charged with murder, but the Crown later accepted her plea of guilty of defensive homicide. On 12 April 2011, she was sentenced to nine years with a non-custodial period of six years, a sentence which was described by the sentencing judge as in the 'middle of the range' for defensive homicide (*R v Black* [2011] VSC 152, para 3). Her defence counsel later appealed against the sentence on the grounds that it was manifestly excessive and that inadequate weight was given to the impact of family violence; however, the appeal was dismissed (see *Black v The Queen* [2012] VSCA 75).

### **Recognition of family violence**

The prosecuting counsel accepted that Karen Black was subjected to prior family violence (as defined by s 9AH of the *Crimes Act 1958* (Vic)). However, he submitted that the level of family violence she had experienced, both in the past and on the night of the killing, was 'limited to threats, intimidation, harassment and jabbing and prodding' (Transcript of plea, p. 5). Therefore, the prosecutor held that her belief that 'the knife could've been turned on her or that she had to get him first or was herself at risk of really serious harm' was unreasonable (Transcript of plea, p. 5).

In contrast, Karen Black's defence counsel affirmed that the difference between the prosecution and the defence was not about the 'factual matrix' of it, but 'what the implications of it are' (Transcript of plea, p. 30). Her defence accepted that Karen Black's 'subjective belief' that it was necessary to defend herself during the confrontation with Wayne Clarke was unreasonable, but argued that it was triggered by a 'serious background' of family violence (Transcript of plea, p. 35). This reduced her moral culpability and meant that her offending lay at the 'lower end of the spectrum' for this type of offence (Transcript of plea, p. 46).

Karen Black told a clinical and forensic psychologist:

*He was never physically violent towards me, but he'd poke me with his finger and he'd point at me and jab me in the chest and on the forehead. He would sometimes force himself upon me sexually. The thing is I got to the stage where I wasn't sure what he'd do to me. When he got past that point with his drinking, I'd just go and lock myself in my room.*

*R v Black* [2011] VSC 152, para 12

Karen Black had also described to the psychologist an incident that occurred about a year prior to the killing, when she found a gold coin and knife placed on her pillow after she had been out with

a girlfriend (*R v Black* [2011] VSC 152, para 14). Wayne Clarke did not explain what he meant by leaving these items on her pillow, but after that time she did not go out without him, and did not feel able to bring friends to the house (Transcript of plea, p. 27).

Her son's deposition supported his mother's account. He said that when Wayne Clarke was drinking he treated his mother 'like shit' and was 'like a tormentor' (*R v Black* [2011] VSC 152, para 7). Her son also described occasions when he had to intervene to stop Wayne Clarke 'because it was getting a bit out of hand. I don't know what he would've done. I've never seen him hit her but I have seen bruises on her' (*R v Black* [2011] VSC 152, para 7).

The defence argued that Karen Black had 'downplayed' the level of violence she had experienced because she found it difficult to talk about (Transcript of plea, p. 27). Further, the sexual abuse to which she had been subjected as a child 'dovetailed with the abuse in the more recent relationship' and was relevant to an assessment of her moral culpability (Transcript of plea, p. 66).

### **Reasonableness**

Although the sentencing judge, Justice Curtain, accepted that Karen Black had been subjected to family violence (pursuant to s 9AH), she stated that the level of violence Karen Black had been subjected to in the past, and on the night of the killing, was 'limited' and not sufficiently serious to warrant stabbing Wayne Clarke. Justice Curtain said that, although Wayne Clarke had cornered Karen Black and was verbally intimidating her, 'he was not armed, and ... to have stabbed him twice may be said to be disproportionate to the threat he then posed to you' (*R v Black* [2011] VSC 152, para 22). The majority judgment supported this assessment in Karen Black's appeal (*Black v The Queen* [2012] VSCA 75, para 29).

However, the fact that Wayne Clarke had 'sexually forced himself upon her' in the past, and that Karen Black feared that he would do so again on the night of the killing, was not disputed by the judge when sentencing. Referring to her record of interview with the police, Justice Curtain recounted how Wayne Clarke had pinned Karen Black in the corner of the kitchen (*Black v The Queen* [2012] VSCA 75, para 2), and that he was 'a lot taller' than she was (*R v Black* [2011] VSC 152, para 2). She said that he was 'coming closer and closer' to her and 'was pointing his finger' at her, and that she was 'just thinking well what else could he do to me' (*Black v The Queen* [2012] VSCA 75, para 18). In the context of Wayne Clarke's prior implied threat to kill her, his repeated use of physical and verbal intimidation, and the fact that she was cornered in the kitchen and afraid that she might be seriously physically harmed or sexually assaulted by him, we contend that Karen Black's response in stabbing Wayne Clarke could be seen as 'reasonable' (we note that this argument is also made by Toole 2012).

Yet it would appear that, in Karen Black's case, being forced into sex was not conceived as rape; indeed, the word 'rape' was not used during the plea hearing (Transcript of plea, p. 55). The sentencing judge and the majority judgment in her appeal noted that she would 'give in' to Wayne Clarke's demands (*R v Black* [2011] VSC, para 13; *Black v The Queen* [2012] VSCA 75, para 8).

Being physically intimidated or forced into sex by a partner is often not seen as 'real rape' (see, for example, Ehrlich 2001). Yet research shows that the experience of sexual violence by an intimate partner may have greater negative psychological effects than physical violence alone (Parkinson 2008; Taft et al. 2007; Bennice et al. 2003). Many women are also physically injured during rape (Tjaden & Thoennes 2000). However, the impact of rape as a serious psychological – and potentially physical – injury did not appear to be recognised in Karen Black's case.

Section 9AC of the Crimes Act states that a person is not guilty of murder if they kill while believing that it is necessary to do so to defend themselves from death or ‘really serious injury’. The *Victorian Criminal Charge Book* (which provides guidance to Victorian judges and legal practitioners) notes that the Act does not define ‘really serious injury’. However, the bench book states that:

*Although it has not been determined, it seems likely that it can include psychological injuries as well as physical injuries. It will be for the jury to decide whether what the accused was threatened with was an ‘injury’, as well as whether that threatened injury was ‘really serious’.*

8.9.2.1 – line 21, *Bench Notes: Statutory Self-Defence and Defensive Homicide*<sup>22</sup>

At the trial of Eileen Creamer, discussed later, which occurred around the same time that Karen Black was sentenced, the sentencing judge appears to have accepted that being coerced or forced into group sex may be considered a ‘really serious injury’ under the Act. After being prompted by Eileen Creamer’s defence counsel, Justice Coghlan directed the jury that the definition could include psychological injuries, leaving it open for the jury to decide.<sup>23</sup>

In Karen Black’s case, the implications of the failure to recognise the serious nature of the sexual violence that she had experienced were that her belief in the necessity of her defensive response was perceived to be unreasonable, and her stabbing him twice as ‘disproportionate to the threat’ (*R v Black* [2011] VSC 152, para 22).

In this regard, we concur with Toole’s assessment of this case: that the reasoning was ‘reminiscent of the pathologising arguments involving battered women syndrome’ (2012, p. 278). The dominant narrative mobilised at sentencing was one based on the assumption that, because of the ‘cumulative impact’ of prior abuse (as described by the forensic psychologist, Transcript of plea, p. 52), Karen Black had ‘overreacted’ when she was cornered by Wayne Clarke in the kitchen.

It is conceivable that, had the case gone to trial, Karen Black’s defence counsel could have argued on the basis of the provisions in ss 9AC and 9AH that their client had formed a reasonable fear for her safety. It could also have been argued that Karen Black had reasonable grounds to believe that she would be raped by her partner, and that a jury should consider rape to be a ‘really serious injury’.<sup>24</sup>

In the case outlined next, Jemma Edwards was subjected to physical assaults and threats by her husband over many years that were well documented and readily understood as ‘serious’ family violence. However, like Karen Black, she pleaded guilty to defensive homicide. As in the case of Karen Black, Jemma Edwards’s actions were perceived by the sentencing judge to be ‘disproportionate’ to the threat she faced.

<sup>22</sup> Online at <http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19107.htm>.

<sup>23</sup> The jury convicted Eileen Creamer of defensive homicide. She was sentenced in the Supreme Court one week after the trial of Karen Black (*R v Creamer* [2011] VSC 196, discussed on pages 24–29).

<sup>24</sup> It appears that the sexual violence inflicted by Wayne Clarke was not spoken about until Karen Black met with a forensic psychologist in the weeks before the plea hearing (Transcript of plea, p. 51). It is unclear whether this evidence was available to the defence or prosecution before the plea bargain was struck.

## **JEMMA EDWARDS**

On 18 January 2011, Jemma Edwards (aged 44 years) killed her husband James Edwards by stabbing him multiple times at their home in Highett, Victoria. She initially told police that he had been killed by two male offenders. Jemma Edwards was assessed as being unfit for interview and was taken to a psychiatric unit as an involuntary patient. When interviewed by police after her release two weeks later, she confessed to the killing, but said that she had acted in self-defence. She said that, on the night before he died, James Edwards had been up all night drinking and making threats towards her. She recalled: 'this has been going on for – really badly for the last few months. He ... strangled me and kicked me and ... punched me' (*R v Edwards* [2012] VSC 138, para 28). Jemma Edwards told them that over 'the last couple of nights he's been saying a lot that he's going to kill me'. She stated that when she woke up in the morning, he was still drunk and punched, pushed and kicked her. She said:

*first he said he was going to cut my eyes out and cut my ears off. And disfigure me.  
And then he said he was going to get some petrol from out the back and he was going  
to set me on fire and ruin my pretty face so no-one would ever look at me ever again.  
And I panicked.*

*R v Edwards* [2012] VSC 138, para 28

Jemma Edwards claimed that it was at this point that she grabbed the spear gun, which he had fired at her in the past, and shot it at him to 'stop him, because I was so petrified'. She further claimed that the spear bounced off. She said:

*he got really wild and angry so he grabbed a kitchen knife and came towards me with it,  
and I struggled with him, and he lost his balance and fell. And I grabbed the knife and  
I stabbed him 'cos I was so – I was so frightened ... I'm sorry it happened, but I was really  
afraid for my life ... it was self-defence 'cos I was really, really terrified of him.*

*R v Edwards* [2012] VSC 138, para 28

Jemma Edwards was charged with murder. She offered to plead guilty to defensive homicide, which was accepted by the prosecution. The Crown acknowledged, and the sentencing judge agreed, that Jemma Edwards's culpability was less than in the case of Karen Black (*R v Edwards* [2012] VSC 138, para 48). In April 2012, she was sentenced to seven years with a non-parole period of four and a half years.

### **Recognition of family violence**

Both the prosecution and defence conceded that there had been a well-documented history of James Edwards being physically violent towards Jemma Edwards. It was also accepted that Jemma Edwards had made repeated disclosures of her experiences of this violence 'to police, friends, family and medical practitioners between 2000 and 18 January 2011' (Transcript of plea, p. 5). The prosecution also noted that police had been called several times to intervene, and in 2010 an intervention order was taken out against James Edwards, prohibiting him from committing an act of family violence against her. James Edwards had also been violent towards his mother and his daughter (*R v Edwards* [2012] VSC 138, para 11).

Although it was accepted that Jemma Edwards's relationship with James Edwards was characterised by 'a lengthy history' of abuse, we would argue that in this case family violence social context evidence could have been used to show that she had reasonable grounds for believing that she was at risk of really serious injury on the day of the killing.<sup>25</sup>

### Credibility

The prosecution argued that Jemma Edwards's account of the killing was inconsistent with the forensic evidence. For example, it was contended by the prosecution that she had initially lied to police, in saying that James Edwards had been killed by two men. Further, there was limited forensic evidence to support her later account of having struggled with James Edwards prior to stabbing him (*R v Edwards* [2012] VSC 138, para 31). The prosecution concluded that there had been no struggle and that she should be sentenced on the basis that she had 'apprehended an attack' upon her based on threats James Edwards had made that morning and the night before, and also based on his past conduct towards her. The prosecution claimed that she stabbed him during a non-confrontational moment, possibly while he was asleep at the table (Transcript of plea, p. 15). It was on this basis that the prosecuting counsel accepted the plea of defensive homicide.

In contrast, Jemma Edwards's defence counsel submitted that Justice Weinberg should sentence on the basis that what Jemma Edwards told police in her record of interview 'was basically truthful and accurate' (*R v Edwards* [2012] VSC 138, para 30). In particular, the defence submitted that although she believed her actions were necessary to defend herself from death or really serious injury, it was conceded (on the basis of her having pleaded guilty to defensive homicide) that there were 'no reasonable grounds for any such belief' (*R v Edwards* [2012] VSC 138, para 30).

The defence also noted that, since 2005, Jemma Edwards had suffered from psychiatric illnesses, including anxiety, depression and bipolar disorder, which had led her to be involuntarily admitted to psychiatric institutions on several occasions (Transcript of plea, p. 40). However, the defence did not submit that her mental state at the time of the killing would require a consideration of the principles set out in *R v Verdins* (2007) 16 VR 269, in relation to sentencing offenders with impaired mental functioning (Transcript of plea, p. 38).

Justice Weinberg expressed the view that, like the prosecution, he was uncertain as to 'the question whether the deceased attacked [her] with the knife before [she] turned it upon him' and whether this involved a 'mitigating factor ... at least in the ordinary sense of the term' (*R v Edwards* [2012] VSC 138, para 34). He also stated that 'he had serious reservations about the accuracy of the account she gave in her record of interview' (*R v Edwards* [2012] VSC 138, para 35). He reasoned: 'Your account of having been attacked by the deceased whilst he was armed with a knife, and having disarmed him in the way you described, itself strikes me as somewhat improbable, at least in the circumstances of this case' (*R v Edwards* [2012] VSC 138, para 35). Justice Weinberg nevertheless sentenced her on the basis that she genuinely believed that she was in danger of being killed or seriously injured when she stabbed James Edwards to death (*R v Edwards* [2012] VSC 138, para 36).

The issue of Jemma Edwards's credibility was also raised in the court proceedings in relation to an earlier incident. Jemma Edwards had one prior conviction for an incident involving violence that occurred in September 2005, when she was living with James Edwards in NSW. On this occasion, Jemma Edwards received a suspended sentence after pleading guilty to stabbing her husband with a corkscrew knife. She alleged at the time that he had attacked and threatened her,

<sup>25</sup> The potential use of expert evidence in Jemma Edwards's case is further discussed in Chapter 4.

and so she had stabbed him in self-defence. However, the police did not believe her account that she had been repeatedly punched over a period of some 30 minutes as she had no visible injuries of any kind. Reflecting on this prior incident, Justice Weinberg said that he, too, regarded 'that particular claim as far-fetched' (*R v Edwards* [2012] VSC 138, para 13). Describing this account as 'fanciful', Justice Weinberg referred to this incident as one of the matters identified in the Crown summary 'as casting doubt' upon what Jemma Edwards told police in relation to her account of the killing of James Edwards (*R v Edwards* [2012] VSC 138, para 31).

### **Reasonableness**

The implication of Jemma Edwards pleading guilty to defensive homicide was that, although she believed that she was under threat of death or really serious injury, she accepted that her actions in killing James Edwards were objectively not reasonable (Transcript of plea, pp. 17–18). Her defence counsel argued that on the day of the killing James Edwards had threatened Jemma with a knife, but had dropped the knife during a struggle between them. Her defence stated that 'once he was disarmed' there was then 'no reasonable basis' for her belief that she needed to defend herself (Transcript of plea, p. 24). This was followed by a discussion between the defence counsel and Justice Weinberg as to the question of whether her belief that she was under threat of death or really serious injury was caused by a knife being 'presented' to her (Transcript of plea, defence counsel, p. 18), by 'threats' or by 'something less than that' (Transcript of plea, p. 19). In order to assist Justice Weinberg to determine 'precisely how unreasonable her belief was', defence counsel submitted that not only should she be sentenced on the basis that James Edwards posed 'a particularly high level of threat' to Jemma Edwards (Transcript of plea, p. 34), but also that she should therefore be sentenced at the 'lower end of the scale of defensive homicide' (Transcript of plea, p. 35). Justice Weinberg then asked whether defence counsel was inviting him to conclude that Jemma Edwards happened to fit the profile of a 'battered' woman, to which the defence counsel responded that, although he 'didn't want to throw that word around as a diagnosis so easily' (Transcript of plea, p. 38), this was basically the thrust of a report by a psychiatrist who had interviewed her, and this is 'essentially the concept we are talking about here' (Transcript of plea, p. 39). The defence counsel further argued that, while defensive homicide was intended to fit such cases, 'we do have a very well documented history of domestic violence that fits precisely the circumstances in which it was perceived this offence would apply'. Justice Weinberg agreed, adding: 'I hesitate to use the term "battered woman" or "battered woman syndrome", but it's the first case, it seems to me, of its kind under this legislation' (Transcript of plea, p. 45).

It is interesting to note Jemma Edwards's defence counsel's reasoning here. He submitted that, as a battered woman, Jemma Edwards was 'deeply entrained in the alternative reality of an abusive relationship' and this affected her capacity to make 'what appears to the outside to be objectively rational decisions' (Transcript of plea, p. 39).<sup>26</sup> It appears that, according to her defence counsel, the 'rational' decision for Jemma Edwards was to leave her abusive husband. The perception here appears to be that the reason why she had failed to leave her husband, and why she was unreasonably fearful for her life and had retaliated with violence on the day of the killing, was that the history of abuse had adversely affected her judgement.

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<sup>26</sup> Her defence counsel explained that she did not possess the 'strength of character or health that one might think was required to objectively recognise the situation she was in and take action about it' (Transcript of plea, p. 39), though it was noted that she had tried to leave on at least two previous occasions, once staying in a women's refuge (Transcript of plea, p. 39).

According to the report of a psychiatrist, this history of abuse:

*is likely to have impaired her judgment and prevented her from thinking clearly or making calm or rational choices. People who stay in violent or abusive relationships may tolerate abuse for long periods of time before retaliating with violence. At the time of the alleged offence it is possible, although not clearly made out, that intoxication was somewhat dis-inhibiting to her.*

Transcript of plea, p. 38

In agreement with this assessment, her defence counsel argued that the fact that Jemma Edwards said that ‘90 per cent of the relationship was okay’ apart from those times when her husband was drinking was ‘telling’ because it suggested that:

*she tolerated matters within this relationship that were simply intolerable and that it's in that context that Your Honour can view her as being a sick and vulnerable person who is to some extent emotionally, [and] through her own actions financially, dependent upon someone of such deep flaws as Mr Edwards.*

Transcript of plea, p. 40

Jemma Edwards’s perceived irrationality as a ‘battered woman’ obscured the alternative perspective on this case: that her belief on the day of the killing that she might be seriously injured or killed by her husband was reasonable in the context of the family violence to which she had been subjected. She stated that his violence and threats were escalating, and the intervention order that was meant to protect her from further violence appears to have had no effect on James Edwards’s behaviour. In the weeks prior to the killing, she appears to have been increasingly distressed and had left twice to stay with her mother, who noticed bruises on her.

In the case outlined in the section below, Eileen Creamer also offered to plead guilty to defensive homicide. However, unlike the cases of Karen Black and Jemma Edwards, her offer was rejected by the prosecution and the case went to trial.

## **EILEEN CREAMER**

In February 2008, Eileen Creamer (aged 51 years) killed her husband David Creamer<sup>27</sup> at their home in Moe, by beating him repeatedly with a stick and stabbing him once in the abdomen. Eileen Creamer denied killing her husband until shortly before her trial in 2011. According to the evidence she provided during the trial, she arrived at her home on Saturday, after spending the previous evening with a lover, to find two men talking to David Creamer and she believed that he was organising group sex between the men and herself. She said that when she told her husband that she was not going to have group sex, he became ‘nasty’ and started ‘abusing’ and ‘swearing’ at her, calling her a ‘drunken whore’, a ‘bitch’ and a ‘cunt’, pinching her and smacking her across the face (Transcript of trial, p. 1224). Eileen Creamer stated that she later woke to find her husband hitting her vagina with a stick. He asked her to smell his semen-stained sheets and followed her around the house, telling her about the women he slept with, and accusing her of sleeping with

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<sup>27</sup> Eileen and David Creamer migrated from South Africa to New Zealand and then to Australia.

his brother. She tried to leave the house but he 'grabbed the purse from me and said I wasn't going anywhere' (Transcript of trial, p. 1229). David Creamer swore at her and called her a 'half-caste white bastard' (Transcript of trial, p. 1229). She said that she saw the stick and 'snapped' and started hitting him (Transcript of trial, p. 1229). She claimed that her husband became extremely angry with her for striking him. She ran out of the room and he chased her and dragged her back inside where he grabbed a knife from the kitchen. They struggled, and he tried to put his penis in her mouth and urinated on her. She told the court that he then threatened to 'finish me off' (Transcript of trial, p. 1230). She stabbed him and ran and hid in the school opposite the house. She said that when she returned she initially thought he was asleep, but found him dead the next morning.

Eileen Creamer offered to plead guilty to manslaughter but this offer was rejected by the prosecution. She was subsequently found guilty of defensive homicide at trial and sentenced to 11 years, with a non-parole period of seven years.<sup>28</sup> An appeal against the sentence on the ground that it was manifestly excessive was unsuccessful.<sup>29</sup>

### **Prosecution case at trial**

Eileen and David Creamer had an open relationship, each engaging in sexual relationships outside the marriage. The prosecution argued that David Creamer had told his wife that he was going to leave the marriage and resume a relationship with his ex-wife. On a visit to South Africa in December 2007, David Creamer met with his ex-wife and their two sons from whom he had been estranged for many years, and made a commitment to his ex-wife to reunite with her and the boys.

In its opening address, the prosecution claimed that Eileen Creamer's motive in killing her husband was to stop him from leaving her. 'Her attitude was if she could not have him nobody could' (Transcript of trial, p. 1423). The prosecution claimed that she was jealous of the other women with whom he had affairs, and noted that she had previously sent abusive emails and a used condom to 'warn off' women with whom he was having relationships. In the weeks prior to the killing, Eileen Creamer sent an email to a psychic asking for a spell to stop her husband from going back to his first wife.

The prosecution also argued that the 'lies' Eileen Creamer told in denying that she had killed her husband demonstrated that she 'really had no excuse for killing him' (Transcript of trial, p. 196). Moreover, they submitted that she attempted to cover up and minimise her involvement in the murder by washing and hiding her bloodstained clothes and disposing of the weapons. The prosecution said that this was not a case of self-defence or defensive homicide, and that there was no domestic violence in the relationship (Transcript of trial, p. 199) – 'it had nothing to do with domestic violence and had everything to do with her obsession to keep David Creamer living with her' (Transcript of trial, p. 1435).

The prosecution pointed to inconsistencies in Eileen Creamer's evidence and disputed her claim that she was afraid of her husband. It also argued that the forensic evidence did not entirely match her version of the events that preceded the death of her husband.

### **Defence case at trial**

Eileen Creamer's defence was that her actions were a direct response to her husband's abuse and her fear about being forced into unwanted sexual activity with strangers. David Creamer was sexually abusive towards his wife. He used her to live out his sexual fantasies (Transcript of trial, p. 1508):

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<sup>28</sup> *R v Creamer* [2011] VSC 196.

<sup>29</sup> *Creamer v The Queen* [2012] VSCA 182.

'he used sex as a way of maintaining control and power in the relationship' (Transcript of trial, p. 1507). He forced her into sexual acts she did not want to engage in. On one occasion, at a time when Eileen Creamer was living in New Zealand, David Creamer came over from Australia, broke into her home and anally raped her. He encouraged her to have sexual relationships with other men and wanted her to tell him about the details of her sexual encounters for his own 'titillation' (Transcript of trial, p. 211). He constantly pressured her to have sex with other men in his presence. He had been attempting to organise group sex through an online service. While this had not taken place, Eileen Creamer believed that it might happen at any time. In the week leading up to the killing, he had placed a photo of her on an adult dating website without her consent. Evidence showed that David Creamer had attempted to make bookings for them at a group sex party that was cancelled due to an insufficient number of women attending (Transcript of trial, p. 1198).

The defence pointed to the 'deep psychological damage' (Transcript of trial, p. 1505) that Eileen Creamer experienced in her relationship with David Creamer. Throughout their marriage he had affairs with a number of women. He boasted about the details of his sexual encounters to his wife, comparing her to the other women and telling her that she was 'boring' in comparison (Transcript of trial, pp. 1168, 1164). In the weeks preceding his death, he left Eileen each weekend in an isolated rural town to be with his lover. According to the defence, he also caused psychological 'damage' to his first wife and to a number of his lovers (Transcript of trial, p. 1505). David Creamer's first wife separated from him because of his affairs with other women and he physically assaulted her during an argument after their separation. He also failed to pay the child support required for his two children, moving overseas to avoid this obligation.

The defence highlighted that Eileen Creamer was a hard-working woman and a good mother who was afraid of her husband's sexual demands on her – 'he held the threat of leaving her over her head ... to sexually coerce her ... it was frightening to her, what he wanted of her ... in her mind his plans for her' (Transcript of trial, p. 1523). In relation to the constant demands for group sex she said, 'I couldn't control it. I had no control over the situation. The more I told David how I felt it didn't seem to bother him' (Transcript of trial, p. 1196).

According to her defence counsel, Eileen Creamer lost control and attacked her husband in a 'violent outpouring of anger and grief and shame and despair ... She had no plan, she just lost it ... she lost control of her senses' (Transcript of trial, p. 1508). While acknowledging that she did attack him with a stick, the defence said that she then became engaged in a struggle in which she became afraid for her life. As noted in the defence counsel's opening address, 'She was very fearful of her husband in the end ... and particularly fearful of him in respect of his desire to get her to have sex with other men in his presence' (Transcript of trial, p. 220). Eileen Creamer told the court:

*I didn't intend to hurt David. I don't know what happened. I can't explain it. But I just wasn't going to get another hiding. David kept on threatening me. I don't know what happened. I snapped. I just lost control.*

Transcript of trial, p. 1233

The defence case was that Eileen Creamer should be convicted of manslaughter or defensive homicide. The case was not run on the basis of self-defence<sup>30</sup> (Transcript of trial, pp. 1560).

<sup>30</sup> In a discussion of the matters the judge should take into account when formulating his charge to the jury, Eileen Creamer's defence counsel affirmed that the case was not being run on the basis of self-defence. This discussion took place in the absence of the jury.

## Recognition of family violence

*I learnt to keep quiet early in the marriage.'*

Transcript of trial, p. 1240

There was substantial debate throughout Eileen Creamer's trial about whether or not she was a victim of family violence. This discussion was linked to consideration of the relevance of s 9AH of the Crimes Act. The presiding judge, Justice Coghlan, stated: 'at the end the real divide is going to be about the question really of the existence of family violence as it's defined' (Transcript of trial, p. 61).

When giving evidence, Eileen Creamer described being subjected to a range of abusive behaviours by the deceased towards her over a number of years, including rape, being forced into unwanted sexual acts, pinching, hitting with a stick, slapping, degradation, being called abusive names, taunting about sexual relationships with other women, and pressure to engage in group sex.

The defence, drawing on Eileen Creamer's evidence and the evidence of a psychologist, Mr Cummins, who assessed Eileen Creamer, described her as a victim of family violence, highlighting in particular the psychological and sexual abuse she suffered. Eileen Creamer told the psychologist, 'I couldn't stand up to David. David was always in control. If I ever stood up to David and said no, there were always consequences, he would get angry with me, he wouldn't talk to me for days, some days he would just pretend I wasn't even there' (Transcript of trial, p. 1198). The psychologist's report stated that David Creamer used threats to leave his wife as a way of manipulating her (Transcript of trial, pp. 1338–76).

Eileen Creamer's defence counsel pointed out that she did not recognise herself as a victim of family violence – she thought that was only when you got 'beaten up' (Transcript of trial, p. 1334). Her defence counsel said: 'Like all victims she blamed herself. She blamed herself for not being able to please him sexually' (Transcript of trial, p. 1510).

The defence argued that the trigger for the fatal episode was the tension in the relationship and the domestic violence 'interpreted in the widest context ... which includes sexual intimidation and some physical abuse ... and some psychological and emotional abuse' (Transcript of trial, p. 28). Her defence counsel also argued that being coerced into group sex could be considered a 'really serious injury' under s 9AC of the Crimes Act (Transcript of trial, p. 1651).

A significant problem for the defence was that some of the evidence of abuse was not corroborated or was seen to conflict with some of the facts of the case. For example, Justice Coghlan stated that he did not accept Eileen Creamer's evidence of her husband breaking into her home in New Zealand and anally raping her because she did not tell anyone about it at the time and she still chose to live with her husband in Australia several weeks later (*R v Creamer* [2011] VSC 176, para 32). However, research on sexual assault and family violence reveals that victims often do not tell others because of a deep sense of shame and self-blame (see, for example, Enander 2010). Indeed, Eileen Creamer explained at the trial that she was too ashamed to tell anyone about what went on in the relationship (Transcript of trial, p. 1167). Research also demonstrates that there are a range of reasons why women stay in relationships with abusive partners (for instance see Meyer 2012). In Eileen Creamer's case, she said that she loved her husband and hoped that their marriage would improve (Transcript of trial, p. 1351). She also commented that, 'as much as I would say no, David would say that I was still his wife and I had to provide whatever sex he wanted' (Transcript of trial, p. 1281).

Misconceptions and confusion around family violence were evident throughout the trial. There appeared to be a lack of understanding about how psychological manipulation, sexual degradation and coercive control (see, for example, Stark 2007) are forms of family violence. David Creamer's encouragement of his wife to have affairs was seen as an indication that she was not a victim of family violence. For instance, Justice Coghlan said, 'the ability to have with the consent of your husband ... extramarital relationships would not be regarded by ordinary people as a feature of control' (Transcript of trial, p. 1665). However, David Creamer's encouragement of his wife's affairs could be understood to be an aspect of his control over her. Eileen Creamer spoke of how he posted photos of her online without her consent, and pressured her to have affairs to 'prove' her worth and attractiveness. She described how he also appeared to have found pleasure in hearing about the sexual details – 'he always said to me that I must talk openly about it because it would make him horny' (Transcript of trial, p. 1163).

The prosecution disputed whether Eileen Creamer was a victim of domestic violence because 'she had enough control not to accede to group sex. She had a job, money, friends to mix with, others outside the marriage' (Transcript of trials, p. 1491). To support this claim, they drew on the evidence of a psychiatrist, Dr Ruth Vine, who also assessed Eileen Creamer:

*Mrs Creamer was free to have associations with whomsoever she pleased and almost encouraged to have associations with whomsoever she pleased. It also appeared that Mrs Creamer had access to her own money ... had freedom of movement and of association ... She did not describe feeling helpless or unable to leave the house or the relationship.*

Transcript of trial, p. 1058

Eileen Creamer's credibility was questioned during her trial. Inconsistencies in her evidence were used to demonstrate that she was a liar and that the jury should not rely on her evidence. It was argued that because her evidence in court differed from her statement to the police and to the evidence provided by the two expert witnesses (psychologist Dr Cummins and psychiatrist Dr Vine) who interviewed her it was not reliable (Transcript of trial, pp. 1439, 1462). However, Eileen Creamer said that she originally denied her involvement in the killing because she panicked and was scared of what she had done. As stated by her defence: 'she tried to disassociate herself from any possible motive for killing him' (Transcript of trial, p. 18). It is therefore not surprising that she did not initially disclose to police exactly what happened or the extent of abuse in the relationship. She did, however, tell the police that her husband 'treated her like a dog' (Transcript of trial, p. 150).

While the prosecution cast doubt over much of Eileen Creamer's evidence, in our view there was consistency between her evidence at the trial and what she told the police and expert witnesses about her fear that, in the face of his constant psychological coercion, she would be unable to stand up to her husband to prevent the group sex from occurring.

Legal commentator Kellie Toole (2012) agrees with the assessment of the prosecution in this case that the general features that characterise family violence cases that warrant lethal violence were clearly absent from the Creamer marriage. She points to the 'freedom of movement and a significant support person, being located a significant distance away from the matrimonial home, with her lover, only the day before the homicide' as indication of this (Toole 2012, p. 283). According to Toole's analysis, rather than being obsessive, jealous and controlling, David Creamer encouraged and facilitated Eileen Creamer's affairs (2012, p. 283). Describing Eileen Creamer's conviction for defensive homicide and 11-year sentence as a generous outcome, Toole argues that it was one

based on traditional stereotypical conceptions of female subservience, emotional lability and lack of coping skills (2012, p. 285). For Toole, a conviction for murder would have been appropriate in this case.

However, we argue that this characterisation fails to take into account the dynamics of coercive control in abusive relationships (see, for example, Hanna 2009). While the definition of family violence in the new legislation includes psychological abuse, Eileen Creamer's case was still seen to be at the 'lowest end of the spectrum'.<sup>31</sup> As noted by Justice Weinberg in Eileen Creamer's appeal, this was '[so] much so that the defence, in this trial, "did not even try to convince the jury" that the appellant might reasonably have believed that she needed to do what she did because she was at risk of being seriously injured or worse' (*Creamer v The Queen* [2012] VSCA 182, para 41).

In the case analysed below, Jade Kells also offered to plead guilty to manslaughter, although at a later stage in the proceedings. Like Eileen Creamer, her plea was rejected by the Crown and she went to trial. At the trial she was found guilty of manslaughter.

## **JADE KELLS**

In the early morning of 26 January 2010, Jade Kells (aged 28 years) stabbed her de facto partner, Dean Pye, once in the chest in the doorway of a bedroom in their home in Tootgarook, in Victoria. The neighbours reported hearing loud and violent arguments between Jade Kells and Dean Pye the previous night. During the night, numerous calls were made by the neighbours, as well as by Dean Pye and Jade Kells to '000' and several police officers attended the house and vicinity, on a number of occasions to investigate. The dispute centred on Jade Kells's concern that Dean Pye had stolen \$1000 and some mobile phones from her and had refused to return them. During the course of the argument, she threw one or more objects including a plant pot through a large front window of the house, smashing it. She left the house in the early hours of the following morning, to stay at a friend's house in Rye. She returned between 6:00am and 7:00am. Dean Pye was not at the house when she returned, but arrived shortly after. Jade Kells claimed that they resumed arguing about the money and the mobile phones. She then called '000' and told the operator that Dean Pye would not give her 'stuff back', that he had been smashing windows and that he had choked her and pushed her up against a wall.

Jade Kells said that, when she returned home between 6:00am and 7:00am, she started cleaning up all the glass from the window. She claimed that when Dean Pye returned home he started pushing her around again. She said that he came into the bedroom and, fearing that he was going to really seriously injure or even kill her, she armed herself with a knife from the kitchen. She claimed that she pushed open the door of the bedroom, and was unexpectedly confronted by Dean Pye, who was coming at her. She said that it was at this point that she thrust at him once with the knife to the chest. Upon stabbing Dean Pye, she immediately called '000', telling the operator that she had stabbed her partner in the chest. Dean Pye died at the scene.

Jade Kells was charged with murder. During her record of interview with the police, when accused of murder, she said: 'It's more like manslaughter, I didn't mean to hurt him.' At the committal proceeding, she pleaded not guilty to murder. She later offered to plead guilty to manslaughter. The offer was refused by the prosecution and she defended the murder charge before a jury on the basis that she should either be acquitted on the ground of self-defence or be found guilty of defensive

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<sup>31</sup> *Creamer v The Queen* [2012] VSCA 182, para 41.

homicide or manslaughter.<sup>32</sup> The jury convicted Jade Kells of manslaughter by an unlawful and dangerous act. She was sentenced to eight years' imprisonment, with a non-parole period of five years.<sup>33</sup> She later lodged an appeal on the ground that the sentence was manifestly excessive; but the appeal was dismissed.<sup>34</sup>

### **Prosecution case at trial**

Jade Kells and Dean Pye had been in a relationship for approximately five months before the fatal stabbing. The prosecution relied on evidence of the nature of their relationship to show that it was 'a fractious one', characterised by 'frequent arguments', 'aggression' and violence (Transcript of trial, p. 49). The prosecution also led 'evidence of the accused woman's tendency to act aggressively and to resort to the use of weapons when confronted by, or angry with, partners'. It was contended on this basis that the violence between them was 'mutual' and that she was the 'aggressor' on the night in question. According to the toxicology report, Dean Pye had various sedatives in his system, and was described by the prosecuting counsel as 'a sitting duck' who was trying to defend himself (Transcript of trial, pp. 58–9, 502, 508, 510, 568). Specifically, the prosecution relied on testimony from a former intimate partner to demonstrate that Jade Kells 'had a tendency to become violent and use weapons during domestic arguments' (Transcript of trial, p. 82). Further, throughout the night of the killing she exhibited a similar pattern of behaviour to that she had displayed on numerous occasions with previous partners. The prosecution case was that, on the night of Dean Pye's death, Jade Kells was 'angry' and 'agitated' (Transcript of trial, p. 54) and 'ranting' and 'raving' about 'the phone and the money' (Transcript of trial, pp. 52, 516), but was 'determined to sort things out' with Dean Pye (Transcript of trial, pp. 53, 504). The prosecution also drew on evidence to show that 'there wasn't just a single stab wound in this case' (Transcript of trial, p. 544). Rather, it was a 'pattern of erratic, violent, aggressive behaviour' (Transcript of trial, p. 499). Jade Kells had gone into the house and inflicted approximately 30 superficial injuries to Dean Pye 'in the course of a violent assault that preceded his death' (Transcript of trial, p. 544). The prosecution contended that 'the remarkable lack of injuries or serious injuries' on Jade Kells supported the prosecution case that she was exaggerating and fabricating events in claiming that Dean Pye had assaulted her (Transcript of trial, p. 535). The prosecution argued that it could be concluded from all of the evidence 'that the stab wound was inflicted by Ms Kells in [an] angry, violent response to a domestic argument' (Transcript of trial, p. 76). In her closing address, the prosecuting counsel submitted to the judge and jury that: 'we say to you very clearly that this is a very strong case of murder ... That the evidence when you look at it, and analyse it properly, [is] that she was erratic all night, violent and aggressive' (Transcript of trial, p. 552).

### **Defence case at trial**

Jade Kells's version of events was that she stabbed Dean Pye once in the chest after a struggle during which he had physically assaulted her (pushed her up against a wall by her throat) (Transcript of trial, p. 589). She agreed that the relationship was characterised by frequent arguments and mutual abuse. She told a psychologist that she and Dean Pye had 'fought most days' and that these fights regularly included physical violence. She told the police, in her record of interview, that she and Dean Pye had threatened to stab one another 'millions of times'. The couple had separated on

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<sup>32</sup> *R v Kells* [2012] VSC 53, para 19-20.

<sup>33</sup> *R v Kells* [2012] VSC 53.

<sup>34</sup> *Kells v The Queen* [2013] VSCA 7.

several occasions but had always managed to reconcile (*R v Kells* [2012] VSC 53, para 44). The defence case was that Jade Kells's 'persistent' and overriding concern throughout the night was to retrieve the money and mobile phones Dean Pye had stolen from her. He not only had a history of telling 'various untruths' (Transcript of trial, p. 566), but also a prior criminal history of quite serious violent offences which revealed that it was he, not she, who was the aggressor on the morning in question (Transcript of trial, p. 569). Dean Pye also had a history of being verbally abusive and aggressive, and was acting in an aggressive manner when he was seen by a neighbour earlier on the night of his death (Transcript of trial, p. 592).

The defence also relied on the evidence provided by a friend of Jade Kells to demonstrate that Dean Pye had previously been verbally abusive towards Jade Kells, had previously threatened to kill her and other people, and was very controlling and possessive of her, objecting to her having friends and telling her what to wear. This witness also testified that she saw visible injuries on Jade Kells and that Jade had previously told her that she feared what Dean Pye might do to her, her friend and her friend's son if he got angry or did not know where she was (Transcript of trial, pp. 569–70, 592, 596).<sup>35</sup> There were other witnesses who testified that they heard Jade Kells saying, 'Get off me, leave me alone, someone help me' in the early hours of the morning (Transcript of trial, pp. 570–1). It was under these 'hyper-stressful circumstances' (Transcript of trial, p. 564), the defence argued, that 'when she resorted to using the knife, she believed her action was necessary to defend herself from being really seriously injured or even perhaps killed' (Transcript of trial, p. 82). The defence concluded 'that the confrontation was one in which Ms Kells was acting purely defensively; that her actions were solely for the purpose of what the law calls self-defence' (Transcript of trial, pp. 82–3, 610).

### **Recognition of family violence**

There was limited reference to 'family violence' or the 'family violence provision' (s 9AH) in this case. The prosecution ran the case on the basis that the violence between the couple was 'mutual', that Jade Kells had a tendency to become angry and aggressive in domestic disputes and that she was the aggressor on the night in question. It was not until the ninth day of the trial that a reference to 'family violence' and s 9AH was made by the defence counsel. However, by then, presentation of the evidence had concluded, and both the prosecution and defence had completed their closing addresses to the jury. In the absence of the jury, the defence submitted to the sentencing judge, Justice Macaulay, that although neither counsel had 'actually discussed s 9AH of the *Crimes Act*', he 'assumed' that 'it applied in the case' and that he should include a reference to the provision in his charge to the jury (Transcript of trial, p. 666).

Justice Macaulay was initially reluctant to mention the family violence provision because he said that it tended to 'introduce a measure of complexity in these sorts of cases' (Transcript of trial, p. 667). The prosecuting counsel also complained on the basis that 'the case hadn't been run that way' and if it had she 'would've run the case a different way' (Transcript of trial, p. 667). Further, the prosecution argued that the history of the relationship was one in which both sides had been

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<sup>35</sup> According to the testimony of a friend of Jade Kells (Transcript of trial, pp. 423–31), Dean Pye was verbally abusive towards Jade during their relationship. The friend gave evidence about a particular incident that occurred on November 2009 which resulted in the police being called, when Dean Pye was threatening to kill people with knives, and threatening her and Jade's life and also her son's. She also gave evidence that she heard Dean Pye threatening Jade Kells with a knife over the phone and that Jade Kells frequently told her that she was frightened of Dean Pye. She described his behaviour in the relationship as controlling in that he did not like Jade Kells to leave the house, and raised objections at times to her having friends and to the sort of clothes she wore. And during the two-month period when Jade Kells was living with her, she saw visible injuries on Jade Kells.

'fractious' and was therefore not such that Ms Kells was 'the victim of family violence' (Transcript of trial, p. 669). Justice Macaulay concurred, and then clarified that if he were going to deal with family violence in this case he would 'probably need to deal with it' in the context of defensive homicide (Transcript of trial, p. 671). Justice Macaulay then decided to give a direction in relation to s 9AH (Transcript of trial, p. 672). He stated that although family violence had not previously been raised in this case, this did not relieve him of the obligation to consider it. Justice Macaulay reflected:

*It seems to me that in the circumstances of the case, the definition of 'family member', 'family violence' and 'violence' which all appear in s. 9A(H) can be satisfied. Whether it is contentious or not that Ms Kells was the target of family violence or might've been the other way around, or both, that is a matter for the jury.*

Transcript of trial, p. 672

In ruling on the matter, Justice Macaulay argued that while it was 'true that the defence response does not ... use the terminology "family violence" ... it does say this: "[t]he accused does not dispute that her relationship with Dean Pye was characterised by frequent argument and acts of aggression. The accused says that Dean Pye had threatened and assaulted her on many occasions during the course of their relationship"' (*R v Kells* (Ruling) [2011] VSC 679, para 24). Accordingly, Justice Macaulay resolved that '[t]he response also squarely raises the defence of lawful self-defence' (*R v Kells* (Ruling) [2011] VSC 679, para 25).

The jury found Jade Kells guilty of manslaughter by a deliberate, dangerous and unlawful act. In sentencing Jade Kells, Justice Macaulay noted that the verdict demonstrates that the jury rejected her claim that she had reasonable grounds to believe that stabbing Dean Pye was necessary to defend herself (*R v Kells* [2012] VSC 53, para 7). Accordingly, Justice Macaulay held that while the stabbing incident:

*occurred after a long night of frustration and angry conflict, and was possibly attended ... by intense emotional feeling, sleep deprivation and, possibly, a weakened physical state ... the evidence also demonstrated that there were options available to [her] to escape the confrontation, options [she] did not pursue.*

*R v Kells* [2012] VSC 53, para 11<sup>36</sup>

It appears in this case that violence and threats had previously been made by both Jade Kells and Dean Pye. Jade Kells's admission that the violence between her and Dean Pye was 'mutual' was used by the prosecution to discount her claim to have been acting in self-defence. The defence, however, argued that she was a victim of family violence, and led evidence by witnesses that Pye had been controlling and threatening towards her in the past.

There is now a significant body of research that cautions against making simple determinations of 'mutual abuse' based on the existence of acts of physical violence perpetrated by both partners in a relationship (Kelly & Johnson 2008; Stark 2007; Wangmann 2008, 2010, 2011). This research

<sup>36</sup> This is a reiteration of the argument put by the prosecution: 'Now, when you're thinking about self-defence, what options did she have? She had many. She had the option not to go into the house in the first place. She had the option to leave, not pick up the knife. She had the option to ring the police again; in other words, leave the house altogether, ring them. She had many options. The option she picked was to go and get the knife and stab him' (Transcript of trial, p. 534).

highlights that determining whether violence is mutual or one-sided is a complex matter, and requires an understanding of the context and impacts of violence, and a focus on processes and power in relationships, rather than on incidents. For example, Wangmann (2010) examined cases of apparently ‘mutual abuse’ in NSW courts, where women and men had made cross-applications for domestic violence protection orders against each other. This in-depth study found that the context, meaning, motivation and impact of violence are different for women and men. Women tended to describe a context of ongoing, controlling, abusive behaviours by their male partners, but this was rarely described by men in relation to their female partners (Wangmann 2010). An understanding of the broader social context of gender-based inequality, as well as an acknowledgement of the size and strength disparities between men and women, is critical in recognising the impact of violence in intimate relationships.

In the case of Jade Kells, regardless of whether the previous violence in the relationship was mutual or not, the fact remains that, based on Dean Pye’s prior violence and abuse, Jade Kells had reason to fear being harmed by him as he came towards her. Even if he were unarmed, his greater size may have meant that he posed a danger to her. She told police that earlier that day he had attempted to choke her and had pushed her against a wall. However, her reaction by stabbing him was determined by Justice Macaulay when sentencing to be ‘out of any reasonable proportion to that threat’ posed by Pye (*R v Kells* [2012] VSC 53, para 14).

In the three cases discussed next, the women also received manslaughter convictions; however, unlike Jade Kells, the prosecution accepted these women’s guilty pleas and the cases did not go to trial. The first two cases involved Indigenous women who had been subjected to severe violence from multiple partners throughout their lives. In the third case, the woman was involved in the killing of her ex-partner after he had allegedly committed a sexual act in front of one of their daughters. Two men were also involved in the killing.

## **MELISSA KULLA KULLA**

On the morning of 10 September 2008, in Reservoir, Victoria, Melissa Kulla Kulla (aged 23 years) killed Hussein Mumin by stabbing him once in the chest. They had been in an on-and-off relationship for the past few months. The killing occurred in the kitchen of his supported accommodation unit, where she was living with him at the time. After the stabbing, she flagged down assistance from passers-by who were on the street outside the unit.

Initially Melissa Kulla Kulla told the police that Hussein Mumin had committed suicide. However, she later admitted that she had stabbed him during an argument. She and Hussein Mumin had been drinking all through the previous night. The next morning, when she was cooking in the kitchen, he started to argue with her. He threw the oven tray at her and threatened to kill her. She said that he was pushing her around, and then picked up a kitchen knife and said that he would kill her. She claimed that she then attempted to disarm him and, during the ensuing struggle, the knife plunged into his chest. Melissa Kulla Kulla pleaded guilty to manslaughter. On 9 April 2010, she was sentenced to six years in prison, with a non-parole period of three years.<sup>37</sup>

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<sup>37</sup> *R v Kulla Kulla* [2010] VSC 60. Note: we were unable to obtain the transcript of the plea hearing in this case.

### Recognition of family violence

Melissa Kulla Kulla is an Indigenous woman from Far North Queensland.<sup>38</sup> She was the daughter of an Aboriginal mother and a Torres Strait Islander father. She was homeless in Melbourne when she met Hussein Mumin. She moved in with him to a supported accommodation unit, and cooked and cleaned for him.

Hussein Mumin migrated to Australia from Somalia as a teenager. He suffered from a mild intellectual disability, as well as an alcohol-related brain injury. According to the support staff who cared for him, in the week before the killing his behaviour had become increasingly 'erratic, threatening and intimidatory' towards the carers. The sentencing judge noted that on one occasion a carer observed him chase Melissa Kulla Kulla in a 'threatening manner, whereupon he grabbed you and pulled off all your clothes' (*R v Kulla Kulla* [2010] VSC 60, para 16). The police were called, and initially Melissa Kulla Kulla packed her bags, but then later changed her mind and stayed.

In this case, although Melissa Kulla Kulla's history of violent domestic relationships was discussed and taken into account in sentencing, her relationship with Hussein Mumin appears to have been essentially perceived as one in which there was mutual abuse. The prosecution argued that 'these were two very troubled people both with disabilities' (*R v Kulla Kulla* [2010] VSC 60, para 32). When sentencing, Justice King stated that both Hussein Mumin and Melissa Kulla Kulla had significant problems with alcohol, and 'violent fights would occur between you both' when drinking (*R v Kulla Kulla* [2010] VSC 60, para 15). Justice King said, 'It was clearly a highly dysfunctional, threatening and damaging relationship to both you and Mr Mumin' (*R v Kulla Kulla* [2010] VSC 60, para 16). The judge noted, however, that while Hussein Mumin had the support of a range of services, Melissa Kulla Kulla 'had no such support from anyone – a matter which is really quite significant and of some concern' (*R v Kulla Kulla* [2010] VSC 60, para 16).

In sentencing Melissa Kulla Kulla, Justice King took into account the fact that she was a youthful offender, had a 'significant cognitive impairment ... an exceedingly deprived background ... and a lengthy alcohol and drug abuse history' (*R v Kulla Kulla* [2010] VSC 60, para 64). As a child, Melissa had lived in northern Queensland, but was removed from her mother's care due to 'severe neglect' (*R v Kulla Kulla* [2010] VSC 60, para 38). Justice King commented that Melissa Kulla Kulla had suffered abuse 'virtually from the time you were born' (*R v Kulla Kulla* [2010] VSC 60, para 35), including neglect, sexual assaults and multiple other assaults. As a teenager she made repeated suicide attempts. Justice King also took into account that she had been subjected to domestic violence from multiple men:

*Your life has been a tragedy, nothing less than a tragedy. In relation to various men in your life, you seem to have been a consistent victim of domestic abuse. You have been stabbed in the chest. You have been stabbed elsewhere, with a screwdriver. You have been assaulted with a hammer. You have been abducted and beaten with a stock whip, on a very regular basis, by the man who abducted you. You had a star picket crashed into your hand, and every time you escaped from this man, he tracked you down, and took you back. You have scars all over your body from the various injuries inflicted upon you, by men, over these years.*

*R v Kulla Kulla* [2010] VSC 60, para 54

<sup>38</sup> Her 'native lands are Lama Lama' (*R v Kulla Kulla* [2010] VSC 60, para 33).

In her final remarks, Justice King stated that:

*[I]t is exceedingly distressing that in this country, where we pride ourselves on quality, tolerance and fairness, you could be so neglected, so abused and yet we, as a society, did nothing to stop it. When you were living with a 40 year old man in a park at the age of 12, we as a society did not stop that, we did not come in and protect you, which clearly we should have done ... This is not about your Aboriginality, this is about your childhood, which was taken from you, while we, as a society, did not make any of the difficult decisions that may have prevented this terrible harm, that was done to you.*

*R v Kulla Kulla* [2010] VSC 60, para 51

The case of Veronica Hudson discussed below was compared to that of Melissa Kulla Kulla by Justice King, who observed that ‘your tragedies are remarkably similar’ (Hudson [2013] VSC 184, para 40).

## **VERONICA HUDSON**

On 26 December 2011, Veronica Hudson (aged 41 years) killed her partner Edward ‘Woody’ Heron by stabbing him at a caravan park in Bendigo. She and Edward Heron had been living in a makeshift tent in the caravan park. They had both been drinking all day, and were arguing that afternoon because he had accused her of sleeping with other men.<sup>39</sup> Witnesses saw her push him and he fell to the ground. Veronica Hudson then jumped on top of him and stabbed him once in the chest.<sup>40</sup> Witnesses said that she became ‘frantic’ and said, ‘I’ve killed him and I want him to live’.<sup>41</sup> She called ‘000’. She was too distraught to be interviewed by the police that day.

The Crown initially charged Veronica Hudson with murder, and later accepted her plea of guilty to manslaughter. On 26 April 2013, Justice Betty King sentenced her to six years’ imprisonment, to become eligible for parole after three years.<sup>42</sup>

### **Recognition of family violence**

The prosecution readily accepted that Veronica Hudson had been subjected to family violence. Veronica Hudson and Edward Heron began their relationship in 2005 in Alice Springs. During the plea hearing the prosecutor described Edward Heron as a ‘jealous man’ who was ‘controlling of the accused’ (Transcript of plea, p. 3). The prosecuting counsel outlined multiple violent incidents perpetrated by Edward Heron against Veronica Hudson, including a serious assault in 2006, in which Heron hit her several times, kicked her on the ground, deliberately bit her above her breast, then stomped on her head, back and face. For this assault he was sentenced to five years’ imprisonment. The defence noted that this assault was in fact a breach of a domestic violence order that was in place at the time. After being released from gaol, he tracked her down and they resumed the relationship.

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<sup>39</sup> As described by her defence counsel (Transcript of plea, p. 17).

<sup>40</sup> As noted by Justice Betty King during the plea hearing, when Veronica Hudson was being assessed as to whether she was fit to be interviewed, she had said that Edward Heron originally had the knife that afternoon (Transcript of plea, p. 17). However, the defence claimed that it was ‘hard to know’ what to make of that because they were both very drunk (Transcript of plea, p. 17).

<sup>41</sup> *R v Hudson* [2013] VSC 184, para 10.

<sup>42</sup> *R v Hudson* [2013] VSC 184.

The prosecuting counsel said that after this time he ‘continued to threaten, intimidate and assault’ her, and that there was an allegation of rape; however, none of these incidents were reported to the police (Transcript of plea, pp. 3–4).

Edward Heron’s violence towards Veronica Hudson was well known among members of her family and his own family. It was also well known to those who lived near the couple in the caravan park. Family members stated that Edward Heron would not permit Veronica Hudson to look at another man (Transcript of plea, p. 11) and they believed that ‘something like this’ was bound to happen (Transcript of plea, p. 11). Veronica Hudson’s son stated that Edward Heron’s ‘obsessive jealousy’ was ‘a problem every day’ and he was ‘100 per cent sure’ that Edward Heron would kill his mother eventually (*R v Hudson* [2013] VSC 184, para 29).

Three days before the killing, Veronica Hudson had been taken to Bendigo Hospital with her throat ‘cut from ear to ear, although not deeply’ (*R v Hudson* [2013] VSC 184, para 24). Justice King noted that ‘it would appear that the deceased man may have been responsible for the infliction of that injury’ (*R v Hudson* [2013] VSC 184, para 25). Veronica Hudson initially told the hospital that it was a self-inflicted injury and was transferred to a psychiatric hospital. However, at a later time when Edward Heron and the police were not present, she told the hospital staff that Edward was responsible for cutting her throat. Veronica Hudson was released into his care the day before his death.

According to the defence, in the days prior to the killing, Veronica Hudson told staff at a local support service that she felt imprisoned by Edward Heron and that she was ‘never allowed to be alone for more than 10 minutes’. For example, often he did not let her go to the toilet. He took her phone and she was ‘terrified that he would slit her throat again’ (Transcript of plea, p. 18). She stated that she felt she could never get away from him (Transcript of plea, p. 18). Those living nearby in the caravan park witnessed his violence but were so afraid of him that they did not want to get involved (Transcript of plea, p. 18). Veronica Hudson, according to her defence counsel, was ‘basically being held hostage’ in the tent in which they lived (Transcript of plea, p. 16).

According to the prosecution, several days after the killing, Veronica Hudson told her sister that she ‘didn’t mean to kill the deceased and that the deceased was bashing her all the time and sticking things inside her and abusing her’ (Transcript of plea, p. 6).

It was accepted by the sentencing judge that Veronica Hudson had been subjected to severe violence and abuse by Edward Heron. Justice King stated that Heron was ‘appallingly violent’ towards her: ‘You described him as cutting your arms, hand, throat, pulling your teeth out with pliers, that he was incredibly jealous, very suspicious, always believed you were having sex with any male you met, including your son, your son’s friends, or any male in the area ... The more he drank the worse the jealousy was’ (*R v Hudson* [2013] VSC 184, para 19). When he tracked her down after his release from gaol for assaulting her, Veronica Hudson returned to him ‘out of a combination of love, fear, lack of choices and hopelessness’ (*R v Hudson* [2013] VSC 184, para 23).

Justice King commented that Veronica Hudson had endured over 40 years of sexual, physical and emotional abuse which society appeared powerless to have stopped. As a child she was removed from her family and became a ward of the state. By the age of 13, she was living as a sex worker in Kings Cross, Sydney. Veronica Hudson had been sexually abused by several people, and all of her relationships had been characterised by severe violence. A previous partner had pushed her in front of a four-wheel drive, resulting in her spending 16 months in hospital and having to learn to walk again. Justice King said: ‘Your life clearly has been one where you have lacked the power to do much to make it better or worth living’ (*R v Hudson* [2013] VSC 184, para 31). She further stated:

'You came to accept that you deserved to be punished by Edward Heron as well as the other men in your life ... You accepted punishment was appropriate because you made them angry, or upset them. In relation to Mr Heron, you believed to a large degree he protected you and this was just one of the prices you paid for that protection' (*R v Hudson* [2013] VSC 184, para 28).

Justice King noted that Veronica Hudson identified as an Indigenous woman.<sup>43</sup> During the plea hearing, family violence was discussed as a particular problem within Indigenous communities in Australia. The prosecutor, defence counsel and sentencing judge all noted the high levels of violence within Indigenous communities. Justice King commented: 'We cannot let this continue as a society. We must stop this appalling violence being inflicted one upon the other by members of the indigenous community. Whilst there have been so many attempts to alleviate these problems, we have had, as a community, such limited success' (*R v Hudson* [2013] VSC 184, para 32). She further reflected that: 'I certainly don't know the answer and I doubt if anyone really does at this point. But as a community it is horrific that this goes on within our caring, egalitarian society' (*R v Hudson* [2013] VSC 184, para 33).

The description of the violence in Veronica Hudson's case as 'being inflicted one upon the other by members of the indigenous community' (*R v Hudson* [2013] VSC 184, para 32), obscures the gendered nature of family violence whereby women and children are the primary victims, as well as the systemic factors that contribute to family violence in Indigenous communities (McGlade 2012). While Justice King's comments acknowledge that family violence is a significant problem in Indigenous communities, it should also be noted that family violence is prevalent across the broader Australian community.

The family violence in the case of Veronica Hudson was ongoing, severe and undisputed by the Crown. Multiple witnesses clearly described Edward Heron's violence, and he had served a five-year sentence for a previous severe assault upon Veronica Hudson. There was evidence that Veronica Hudson was being constantly monitored by Edward Heron, and that he was extremely possessive and jealous. Given that she faced an ongoing risk of severe violence, it is unclear why the case was not dismissed on the grounds of self-defence (as in the case of Freda Dimitrovski) or defended at trial on the grounds of self-defence.

It is possible that Veronica Hudson pleaded guilty because she felt extremely guilty and responsible for what she had done (as noted by her defence counsel). Indeed, she was suicidal after the incident (Transcript of plea, p. 45). However, during the plea hearing, it was implied that she somehow contributed to the abuse, as someone who was caught in a 'cycle' of making 'poor choices' in Indigenous men (Transcript of plea, p. 41). It was noted several times that Veronica Hudson said that she still loved Edward Heron, and went back to him 'even' after he had severely assaulted her (see, for example, Transcript of plea, p. 45). Justice King described her as 'a hostage to herself and a hostage to him, it's a hostage to a lifestyle' (Transcript of plea, p. 17), and wondered 'how do you give someone safe accommodation who becomes willingly involved in relationships that are ... deleterious?' (Transcript of plea, p. 38). Justice King reflected that, with support, Veronica Hudson could reduce her 'dependency on violent, aggressive, exploitative men' (*R v Hudson* [2013] VSC 184, para 37).

The case discussed below differs from those outlined above in that the killing occurred in response to behaviour allegedly directed towards a child rather than towards the woman, and it is the only case in which others were directly involved in the killing.

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<sup>43</sup> When sentencing Veronica Hudson, Justice King noted: 'Your father was Pintinjarra with a South Australian background and your mother's mother, your Nan, was also Pintinjarra' (*R v Hudson* [2013] VSC 184, para 22).

## ELIZABETH DOWNIE

On 30 August 2010, Elizabeth Downie (aged 36) went to the house of her ex-husband, Martin Dick, with two other men, Dean Maes and Callum Fitton. The two men pushed open the door, and punched and kicked Martin Dick. After he ran outside to the front of the house, Dean Maes stabbed him several times with a knife. Elizabeth Downie kicked him as he lay on the ground in the front yard. She later threw the knife down a drain. ‘Elizabeth Downie was initially charged with murder. The prosecution later accepted her plea of guilty to manslaughter. She was sentenced to six years, with a non-parole period of four years.’<sup>44</sup> Her co-accused, Dean Maes, pleaded guilty to murder and received a sentence of 18 years, with a non-parole period of 14 years and six months.<sup>45</sup> Callum Fitton pleaded guilty to manslaughter and was sentenced to five years, with a non-parole period of three years.<sup>46</sup>

In her opening remarks in sentencing, Justice Betty King described the attack as a ‘vigilante killing’ (*R v Downie* [2012] VSC 27, para 38). Martin Dick and Elizabeth Downie had six children together, before they divorced in 2005. Elizabeth Downie stated that she believed that several months before the killing Martin Dick had masturbated in front of their daughter. She had reported this to the police, who were investigating the incident and had interviewed Martin Dick, yet no charges had been laid by the time of his death. Apparently ‘furious’ about his alleged actions, Elizabeth Downie asked a number of people to take action against him (*R v Downie* [2012] VSC 27, para 6). She told a friend that she was going to get Dean Maes to ‘run through that child molester’s house’ as punishment (*R v Downie* [2012] VSC 27, para 8), and said she ‘wanted him dead’ (*R v Downie* [2012] VSC 27, para 9). Dean Maes was an ex-partner and had previously been violent towards her, but she had maintained ‘some sort of friendship’ with him (*R v Downie* [2012] VSC 27, para 30). On the day of the killing, she met with Dean Maes and Callum Fitton, and they agreed to go together to Martin Dick’s house.

According to the prosecution, she did not intend to have Martin Dick killed:

*It was her intention that Dick be injured or beaten up. She assisted Maes and Fitton in the assault on Dick even though she may not have been aware of Maes having at the relevant time possession of the knife. Downie acted in concert with Maes and Fitton in an assault on Dick by Maes and Fitton and the death was caused by Maes.*

*R v Downie* [2012] VSC 27, para 16

### Recognition of family violence

Elizabeth Downie told police that, during the relationship, Martin Dick had been ‘intimidating and controlling in that he was violent by way of smashing things in the house and ... [they] ... constantly fought’ (*R v Downie* [2012] VSC 27, para 25). Noting that after the divorce both parties had taken out ‘various intervention orders against each other’, Justice King described them as having behaved ‘badly towards the other’ (*R v Downie* [2012] VSC 27, para 4). Elizabeth Downie lost custody of her children in 2004 due to her substance abuse problems. Her children returned to live with Mr Dick. Elizabeth Downie said in her police interview that the Department of Human

<sup>44</sup> *R v Downie* [2012] VSC 27.

<sup>45</sup> *R v Maes* [2012] VSC 161.

<sup>46</sup> *R v Fitton* [2011] VSC 671.

Services had taken four of her children out of Martin Dick's care after the report was made of him masturbating in front of one of them, and that they were living with her at the time of the killing (Transcript of plea, p. 12).

After separating from Martin Dick, Elizabeth Downie had relationships with other men, and had been subjected to family violence by these men. One of the men with whom she had a relationship was Dean Maes, and 'after a particularly bad beating' she took out an intervention order against him (*R v Downie* [2102] VSC 27, para 30). Referring to Elizabeth Downie's past history of family violence, Justice King observed that she had 'a history of exceedingly poor choices in male companions' (*R v Downie* [2012] VSC 27, para 31). She also stated that by being involved in his killing, Elizabeth Downie had deprived her children of their father. Justice King said that 'Even if he had been found to have committed the indecent act in the presence of one of the children, it would not necessarily have followed that he could and would not have been a good father to the other children' (*R v Downie* [2012] VSC 27, para 18).<sup>47</sup>

## CONCLUSION

This chapter has explored seven case studies of women who have killed intimate partners since the implementation of the homicide law reforms in Victoria. Our analysis indicates that family violence was discussed in the majority of cases during plea hearings or trials. However, understandings of family violence among the judiciary and legal professionals remain limited. There continues to be a focus on physical forms of violence, and a lack of understanding of the serious impact of non-physical forms of intimate partner violence, such as psychological coercion and intimidation, and of sexual violence. The cumulative impact of various forms of family violence and how this contributes to women's perceptions of the level of danger they are facing is still not well understood among legal professionals.

There are still misunderstandings of why women remain in abusive relationships. In several cases, legal professionals struggled to understand women's reasons for not having left violent partners. Further, gender-based stereotypes based on traditional understandings of self-defence appear to persist despite legislative efforts to ameliorate them through the codification of self-defence.

The next chapter considers the implications of these findings, and whether, and to what extent, the intentions of the law reforms in Victoria have been realised.

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<sup>47</sup> This comment that he may remain a 'good father' to the other children suggests that a father's sexual abuse of one child in a family will have little impact on the other children. However, research shows that this is not the case. The effects on siblings of a child who has been sexually abused include significant psychological distress, stigma and disruption of family dynamics (Baker et al. 2001; Tavkar & Hansen 2011).



## CHAPTER 4

# Discussion: Legal responses to women who kill

The findings of our analysis of cases of women who killed their intimate partners between 2005 and 2013 are consistent with existing empirical research on women who kill, which shows that women generally kill in response to violence from their intimate partner (see, for example, VLRC 2003; Easta 1993; Mouzos & Rushforth 2003). In the cases we examined:

- Each of the women described repeated prior physical, psychological or sexual violence, or coercive, controlling behaviour by the deceased.
- According to the women's accounts, the killing occurred during an immediate confrontation between them and the deceased (except in the case of Elizabeth Downie where the killing was a response to a perceived harm towards her children).
- A weapon was used in the killing – in each case a knife or a stick.<sup>48</sup>

In this section we discuss the outcomes of these cases, the ways in which the new legislation has impacted on the recognition of family violence, and the perception of the 'reasonableness' of the women's actions. We consider whether the spirit of the legislative reforms, in terms of responding more effectively to women who kill in the context of intimate partner violence, is being realised.

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<sup>48</sup> In the case of *R v Downie* [2012] VSC 27, a weapon was used by one of the two males involved in the killing.

## OUTCOMES AND PLEA BARGAINING

All of the women in this study were charged with murder. Of the seven women whose prosecutions proceeded<sup>49</sup>, all attempted to plead guilty to the lesser offences of manslaughter or defensive homicide. Three manslaughter pleas (Elizabeth Downie, Melissa Kulla Kulla and Veronica Hudson) and two defensive homicide pleas (Karen Black and Jemma Edwards) were accepted by the OPP. Two women (Jade Kells and Eileen Creamer) had their pleas rejected and proceeded to trial, where one (Jade Kells) was found guilty of manslaughter and the other (Eileen Creamer) of defensive homicide. The sentences for those women who pleaded guilty to manslaughter or were found guilty of manslaughter after a trial were comparatively shorter than those received by women who pleaded guilty to defensive homicide or were found guilty of defensive homicide after a trial.<sup>50</sup>

It is unclear why, since the introduction of these reforms, most cases have involved plea outcomes and not proceeded to trial. The determination of guilt in the majority of these cases was settled privately via plea bargaining, which, as several authors have pointed out, is a flawed process due to a perceived lack of transparency (Stubbs & Tolmie 2008; Flynn & Fitz-Gibbon 2011; Tyson 2011) – plea bargaining effectively ‘privatises justice’ (Stubbs & Tolmie 2008, p. 149).

For this reason it is also difficult to know what features of the cases led to the different outcomes of defensive homicide and manslaughter. It may be that in some cases it is harder to obtain a manslaughter verdict when there is indication of an intention to kill or inflict serious injury. For example, in the cases of Jemma Edwards and Eileen Creamer there were multiple wounds inflicted on the deceased, and in Karen Black’s case an intention to kill was expressed to police.

It may be that the women defendants in our study were motivated to plead guilty to lesser offences out of a sense of shame and remorse about their actions. For example, Karen Black appears to have been so ashamed of what she had done that she was prepared to plead guilty to defensive homicide – she told a psychologist, ‘I deserve what I get, I’m so ashamed. I want to face what I’ve done ... The fact that they’ve accepted defensive homicide doesn’t erase the thought. I’ve taken someone’s life’ (Transcript of plea, p. 20). In her interview with the police, Karen Black appears to have blamed herself for reacting to her partner’s abuse, telling them that she should not have let it get to her (para 7). However, it must be recognised that many women victims blame themselves in the context of prevailing community attitudes that excuse men’s violence (Enander 2010). As Enander points out, ‘feeling stupid for allowing oneself to be mistreated and for staying in the abusive relationship’ is a dominant theme in women’s own accounts of abusive relationships, ‘feeling – and labelling oneself – stupid is an expression of gendered shame’ (2010, p. 5). Moreover, as Toole emphasises, this may reflect ‘a distorted sense of self-blame rather than a reasoned assessment of ... criminal liability’ (2012, p. 275).

Family violence victims also face significant barriers in establishing themselves as credible witnesses. Abuse commonly occurs in private, and many victims do not tell anyone about the abuse because they fear not being believed (VLRC 2004). Without independent witnesses to verify the abuse they have experienced, women’s credibility may be called into question during trials and plea

<sup>49</sup> Beyond the committal hearing. Only one case (Freda Dimitrovski) did not proceed.

<sup>50</sup> The lowest sentences were for manslaughter pleas: Veronica Hudson and Melissa Kulla Kulla both received six years’ imprisonment with three years non-parole; and Elizabeth Downie received six years’ imprisonment with four years non-parole. Jade Kells pleaded guilty to manslaughter at trial and was sentenced to eight years’ imprisonment, with five years non-parole. Those women who pleaded guilty to defensive homicide received longer sentences: Karen Black – nine years’ imprisonment, with six years non-parole; and Jemma Edwards – seven years’ imprisonment, with four years and nine months non-parole. Eileen Creamer, who was found guilty of defensive homicide at trial, received the longest sentence: 11 years’ imprisonment with seven years non-parole.

hearings. These difficulties are compounded for women who have a prior criminal history, are drug or alcohol dependent, or otherwise depart from the norms of femininity (Carlen & Worrall 2004, cited in Stubbs & Tolmie 2008, p. 150). It is worth noting that, since the reforms were introduced, in the only case of a woman who killed an intimate partner in which the charges were dismissed on the grounds of self-defence (Freda Dimitrovski), there appear to have been other family members present who witnessed the deceased violently attacking the defendant immediately prior to his death. In most of the other cases we analysed, no witnesses were present to support the women's accounts of what happened.

Indigenous women face additional pressures to plea bargain. Two of the eight women in this study were identified by the sentencing judge as Indigenous (Melissa Kulla Kulla and Veronica Hudson). As Stubbs and Tolmie point out, Indigenous communities commonly express distrust of the legal system, and may face greater levels of trauma and risk (of conviction) in going to trial (2008, p. 150). Moreover, Indigenous women experience the combined effects of poverty, violence, alcohol and substance abuse, gender and race discrimination, and a historical context that includes colonisation, dispossession and the disruption of family life through the government removal of children (Stubbs & Tolmie 2008, p. 141). Furthermore, Indigenous women may be fearful of the justice system, find it hard to access good legal advice and experience barriers in communication; and there may be cultural traditions that make it inappropriate to speak about a deceased person, or certain matters publicly (Stubbs & Tolmie 2008, p. 150).

As outlined above, in all of the cases we reviewed, the women were charged with murder. However, in most cases the Crown was willing to accept a plea of guilty to a lesser offence of manslaughter or defensive homicide. This situation has been described as one of women who kill intimate partners being 'overcharged' (NSW Select Committee on the Partial Defence of Provocation (NSWSCPDP) 2013, p. 157). Women facing murder charges are under pressure to plead guilty to lesser offences to avoid risking a murder conviction at trial in circumstances where there are defensive elements or where the intent is less than is required for murder (NSWSCPDP 2013, p. 166). This means that in cases where there may be good grounds on which to argue self-defence, the new provisions are not being adequately tested at trial. As a consequence, 'the case law on self-defence is not [being] given the opportunity to develop so that it can accommodate the circumstances of battered defendants in an appropriate way' (Tolmie 2005, p. 40).

Women who plead guilty to lesser offences may be deprived of potentially valid claims to an acquittal on the basis of self-defence (Sheehy, Stubbs & Tolmie 2012). This could be avoided if there were consultation between police and prosecutors about the most appropriate charge to lay (Stubbs & Tolmie, cited in NSWSCPDP 2013, p. 167). As noted by Stubbs and Tolmie, women defendants may be more willing to go to trial and argue self-defence if they are charged with a lesser offence of manslaughter or defensive homicide (NSWSCPDP 2013, p. 167). The committee that recently undertook a review of homicide laws in NSW was in agreement with this proposition, having formed the view that specific guidelines are required to assist prosecutors to determine the appropriate charge to lay against defendants in circumstances where there is a history of violence towards the defendant (NSWSCPDP 2013, p. 167). Such guidelines could also be developed for the Victorian context.

Given the limited recognition of family violence and its impact on victims evident in the cases we examined, individual women defendants who plead guilty to defensive homicide or manslaughter may be making a wise decision in not going to trial. There is certainly little precedent to suggest that they might be acquitted on the basis of self-defence. Furthermore, the sentences they receive

when they plead guilty to a lesser offence are likely to be lower than the sentence they would receive were they to go to trial and be found guilty of that offence (due to plea discounting). There is also the risk that they may be found guilty of murder at trial which attracts a higher sentence than manslaughter or defensive homicide.

## SELF-DEFENCE VS. DEFENSIVE HOMICIDE: WHAT IS 'REASONABLE'?

*Defensive homicide is based on whether it was in self-defence but the basis of it was not on reasonable grounds.*

Transcript of trial, *Creamer*, Justice Coghlan at p. 31

All of the women who have killed their intimate partners since the 2005 reforms have done so in the context of family violence. While it may not always be the case that women who kill in response to family violence acted in self-defence, it is concerning that none of the seven women whose cases we analysed were acquitted on the basis of self-defence. Based on her review of several cases in Victoria and Queensland<sup>51</sup>, Heather Douglas concludes that, despite the introduction of specialised offences and defences for battered women who kill their abusers in these jurisdictions, 'it remains very difficult for battered women to meet the threshold required to succeed in a claim of self-defence' (2012, p. 377). Douglas describes the few women who have been acquitted on the grounds of self-defence as 'benchmark battered women' (2012, p. 377). These women were 'smaller than their partners, white, drug-free, monogamous and without a criminal record', and 'suffered fierce physical abuse over many years ... had attempted to leave the relationship and ... had sought assistance from the police'. In these cases, the killing was the first time they had physically fought back (Douglas 2012, p. 377). Our findings are consistent with Douglas's analysis. In the cases that we analysed, none of the women's circumstances met this benchmark, and none successfully argued self-defence.

The introduction of defensive homicide in Victoria was intended to act as a 'halfway house' for women who kill their violent partners (VLRC 2004, p. 102). The VLRC hoped that having a partial defence as a back-up option would encourage more women defendants to go to trial and argue self-defence, giving juries an option of convicting them of a lesser offence in cases where they did not assess the woman's self-defence claims as reasonable. Our analysis suggests that in some cases defensive homicide may be viewed as the most appropriate outcome for women who kill an abusive partner because it was specifically introduced with family violence cases in mind. However, it was intended to be a 'backstop' alternative offence (akin to the partial defence of 'excessive self-defence') and should not preclude consideration of a full acquittal on the basis of self-defence.

A crucial difference between the full defence of self-defence and the offence of defensive homicide under the new provisions relates to whether the defendant's fear is understood to be 'reasonable' or 'unreasonable'. It has been well established by feminist legal commentators that women who have been subjected to family violence are often perceived to be inherently 'unreasonable' because they remained in an abusive relationship (Anderson & Saunders 2003; Davis 2002; Enander & Holmberg 2008; Kirkwood 2000, 2003). However, as decades of feminist research has also shown, the perception of what is 'reasonable' behaviour on the part of a woman in the context of family

<sup>51</sup> In 2010, Queensland introduced a new defence titled 'killing for preservation in an abusive domestic relationship'. If successful, this defence results in a conviction for manslaughter.

violence is often shaped by stereotypes about family violence (Nicolson 1995; Randall 2004; Stubbs & Tolmie 1999, 2005, 2008; Toole 2012).

In the new legislation, s 9AH states that evidence of family violence may be relevant for determining whether the accused person's actions were 'necessary' to defend themselves or another person, or whether they had 'reasonable' grounds for believing that their conduct was necessary (2 a and b). In the cases we analysed, current interpretations of the legislation appear to lead into a debate about whether the family violence was sufficiently 'serious' to warrant the response of the accused and whether the accused's actions were a reasonable response to the family violence.

For example, at Eileen Creamer's trial there was discussion between the parties and the trial judge about whether Eileen Creamer's actions could be seen as 'reasonable' self-defence or 'unreasonable' self-defence<sup>52</sup> (and thus defensive homicide), and this discussion was linked to whether or not, and to what extent, she was a victim of family violence. The rationale appeared to be that if she was a victim of *serious* family violence her actions would seem more *reasonable*; and if not, her actions were deemed to be unreasonable and therefore to more appropriately fit with defensive homicide.

As the offence of defensive homicide is based on the notion that a defendant's belief in the need for self-defence was 'unreasonable', the way it is currently operating may perpetuate an emphasis on abused women's actions being irrational and 'unreasonable'. This situation might be avoided if defensive homicide were run alongside self-defence and if the emphasis were placed on the woman's defensive actions as 'reasonable' in the context of the family violence she experienced.

In the case of Jemma Edwards, the defence counsel and presiding judge were in agreement that defensive homicide was intended to fit cases such as hers (Transcript of plea, p. 45). Although the family violence experienced by Jemma Edwards was clearly perceived as significant, the defence counsel's view was that the violence had affected her ability to 'think clearly' and make 'calm or rational choices' (Transcript of plea, p. 38). The implication was that, had she been acting in a rational manner, she would have left her abusive husband. However, as a 'battered woman' (Transcript of plea, p. 45) who remained with her husband and 'tolerated' the abuse (Transcript of plea, p. 40), her judgment was described as 'impaired' (Transcript of plea, p. 38). Therefore, the acceptance of a lack of rationality and reasonableness in relation to Jemma Edwards's belief that it was necessary to kill illustrates the perpetuation, rather than cessation, of long-established stereotypes of women and family violence.

The women in the cases we examined were variously described by counsel and the presiding judges as helpless, dependent and irrational, or as unstable and angry. For example, Karen Black was described as 'unassertive and timid' (Transcript of plea, p. 56); Jemma Edwards as 'sick', dependent, having 'impaired' judgment and lacking 'strength of character' (Transcript of plea, pp. 38–40); Eileen Creamer as 'a rather gullible woman, a rather foolish woman, a rather dependent sort of person' (Transcript of plea, p. 1552); and Veronica Hudson as a 'very dependent person' (Transcript of plea, p. 14). Several of the women were described as being caught in a 'cycle' of making 'poor choices' in partners (see, for example, *Hudson*, Transcript of plea, p. 41; *R v Downie* [2012] VSC 27, para 31). Kells was characterised as angry, aggressive and vengeful, and Downie was presented as 'unstable' and angry<sup>53</sup> (*R v Downie* [2012] VSC 27, para 32). Consequently, none of the women

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<sup>52</sup> Creamer, Transcript of trial, pp. 1540–65.

<sup>53</sup> Women's rage and anger at their abusive partners is seen to be incompatible with traditional conceptions of femininity that characterise women as passive, helpless and fearful (Nicolson 1995). Radford has argued that anger on the part of women experiencing family violence is 'deemed illegitimate, supposedly "proving" that their attacks on their abusers were solely revenge-motivated' (Radford 1993, pp. 195–6, cited in Morrissey 2003, p. 98). This denies conceptions of women as 'active, human subjects' (Morrissey 2003, p. 17).

were perceived as rational actors who killed their violent partners based on a reasonable belief that it was necessary to defend themselves against the risk of death or really serious injury.

Given that it has been almost eight years since the reforms were introduced, it is disappointing that none of the women who killed their intimate partners in the context of family violence successfully utilised the full defence of self-defence.<sup>54</sup> We note that not all cases of women who kill abusive intimate partners should result in an acquittal on the basis of self-defence (Tolmie 2005; Burke 2002). However, our reading of the available material suggests that at least some of the women whose cases we have examined appear to have strong cases for arguing a complete acquittal based on self-defence, given the context of the history of threats and abuse to which they had been subjected, as well as the imminent danger they faced from the deceased. We do agree with Douglas that it is a concern that stereotypes about women and family violence continue to inform the choices made by legal professionals and juries in homicide cases (2012, p. 377; see also Toole 2012, p. 278). In most cases, such stereotypes appear to be undermining women's potential claims that they acted in self-defence.

## PROPORTIONALITY

The 2005 reforms included changes that were designed to shift the traditional notion that legitimate self-defence requires a proportional response to an immediate threat, and to recognise that the size and strength disparities between men and women mean that women may resort to the use of weapons to protect themselves from a violent partner. Thus, arguments put to a judge and/or jury under s 9AH (d) do not require proportionality. The provisions under s 9AH provide that a person subjected to family violence may have reasonable grounds for believing that conduct in self-defence is necessary, even if 'his or her response involves the use of force in excess of the force involved in the harm or threatened harm'.

However, our analysis shows that legal professionals are not utilising s 9AH to its full potential to assist judges and juries to better understand the dynamics of family violence. For instance, in the cases of Jemma Edwards, Karen Black, Jade Kells and Eileen Creamer, kitchen knives were used, and the stabbings were described by sentencing or appeal judges as 'disproportionate' to the threat posed by the deceased (*R v Edwards* [2012] VSC 138, para 49; *R v Black* [2011] VSC 152, para 22; *R v Kells* [2012] VSC 53, para 14; *Creamer v The Queen* [2012] VSCA 182, para 51).

## EXPERT WITNESS EVIDENCE

As outlined above, the 2005 provisions specify that expert evidence regarding the 'general nature and dynamics' of family violence and the 'cumulative effect' of such violence can be admitted to demonstrate that the defendant had reasonable grounds for a belief that they were in danger of being killed or suffering really serious injury (s 9AH). The VLRC intended that such evidence may include both 'general expert evidence about the nature and effects of family violence' and 'case-

<sup>54</sup> The exception was the case of Freda Dimitrovski. As noted earlier, this case was heard immediately after the reforms were implemented. In addition, there were other family members (Freda Dimitrovski's adult daughter and four-year-old grandson) present who witnessed the violent attack by the deceased, and who were themselves attacked. It appears that the killing was a response to the deceased's attempt to attack Ms Dimitrovski's daughter. Freda Dimitrovski had been subjected to 30 years of physical and psychological abuse (DOJ 2010, p. 31).

specific' expert evidence, which would place the situation of the accused within the framework of current knowledge on family violence (2004, p. 141). Expert evidence about family violence has the potential to shift the focus away from a narrow one on the psychopathology of female defendants towards an approach that challenges gender-based stereotypes around self-defence, immediacy and proportionality.

Typically in Australian courts, the experts being admitted in cases where women have killed their violent partners have been confined to psychologists and psychiatrists giving evidence on battered woman syndrome (VLRC 2004, para 4.115). The VLRC sought to encourage the courts to accept a 'broad range' of experts, including family violence workers, stating that 'people best qualified to give expert evidence on family violence are likely to include those with direct experience of working with people who have experienced family violence and with knowledge of current research in the field' (VLRC 2004, para 4.131).<sup>55</sup> The VLRC further recommended that if the accused is Indigenous or of a particular cultural background, experts should include professionals who have direct experience in working with those communities.

Our analysis shows that the potential envisioned by the VLRC in relation to the use of expert evidence has not been realised. There was little, if any, indication in our study that a broad range of experts with specific family violence training is being called upon by legal counsel. Rather, we found that in these cases expert evidence was confined to that provided by forensic psychiatrists and psychologists who undertook psychological assessments of the women and did not appear to provide evidence relating to the broader social context of family violence.

If we consider hypothetically that in the case of Jemma Edwards, her murder charge was contested at a trial rather than by her pleading guilty to defensive homicide, an expert who had extensive practice or research experience in family violence could have identified the evidence-based risk factors present in her case in support of an argument that her assessment of the danger she faced was reasonable under the circumstances. For example, factors that indicate a high risk of lethal violence, according to widely used family violence risk assessment frameworks (such as the *Victorian family violence risk assessment and risk management framework* launched by the Victorian Government in 2007), include the perpetrator escalating his violence, making threats to kill, misusing drugs or alcohol, breaching a protection order or harming other family members (Department of Human Services 2012). Each of these risk factors was present in Jemma Edwards's case.

An expert witness could have also linked Jemma Edwards's case to social context evidence regarding the cumulative impact of family violence on mental health, and the social and economic factors relevant to understanding why women stay in abusive relationships. During the relationship, Jemma Edwards had left her job, become 'disassociated from her family and friends' (Transcript of plea, p. 2), and developed anxiety and depression. Her husband had apparently used her poor mental health as a further reason to abuse her – according to her mother, James Edwards had threatened to 'have her locked away' (Transcript of plea, p. 8). Broader social framework evidence could have emphasised that these impacts are common in cases of family violence (see, for example, Rees et al. 2011) and are often directly related to the abusive tactics adopted by the perpetrator. This could have shifted the focus away from Jemma Edwards's personal characteristics and psychopathology.

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<sup>55</sup> We note that the *Family Violence Protection Act* (2008) (Vic) (s 73) which applies to family violence matters such as intervention orders in Victoria allows for expert evidence to be given about family violence. The Act states that an expert witness refers to a witness with relevant qualifications, training or expertise in family violence. However, the 2005 changes to the laws of homicide in Victoria do not provide explicit guidance about the need for expert witnesses who give evidence in cases of intimate partner homicide to have family violence training.

Although we acknowledge there are concerns about the reliance on ‘experts’ to validate women’s stories and experiences (see, for example, Douglas 2008), women who kill are still in need of a ‘new legal narrative’ that can ‘uphold their claims of self-defence’, and which ‘would base representation upon a concept of determined agency’ (Morrissey 2003, p. 102). As Morrissey has asserted, it is in this way that women’s act of killing their abusers can more appropriately be understood as ‘a rational choice’ and the result of being ‘coerced into that decision through lack of societal support and recognition of their situation’ (2003, p. 102).

## **SHIFTING LEGAL CULTURES: FAMILY VIOLENCE AWARENESS AND EDUCATION**

Research on attitudes towards victims of family violence in Victoria continues to highlight misconceptions among members of the general community (Victorian Health Promotion Foundation 2009). Juries and legal professionals require greater understanding of family violence to ensure improved responses to women who kill abusive partners. As Douglas points out, we need ‘more than statute reform’ to change women’s experiences of justice (2012, p. 378). The effectiveness of reforms depends on ‘how the legal profession interprets and applies’ them (Stubbs in NSWSCPDP 2013, p. 188) and how it does this will depend on legal professionals’ level of understanding of the dynamics of family violence.

The VLRC recommended family violence training for police, legal practitioners and judges (2004, p. 194). Such training should include discussion of common myths, barriers to disclosing family violence, and how the use of expert evidence may assist in supporting a plea of self-defence. There have been some important steps in this direction. For example, in 2011, the Victorian DPP introduced a policy for the OPP to identify and respond to family violence (DPP 2010). The policy provides direction on best practice for OPP solicitors and counsel in preparing and prosecuting family violence matters. OPP solicitors also undertook training in family violence (OPP 2011).

Our analysis highlights the need for training to be ongoing, comprehensive and consistent; to be provided to prosecuting and defence counsel, judges, expert witnesses and other legal professionals; and to include cultural awareness training.<sup>56</sup> The ALRC and NSWLRC made an explicit recommendation for ‘training for judicial officers, lawyers, prosecutors, police and victim support services specifically in relation to the nature and dynamics of sexual assault as a form of family violence’ (Recommendation 26-3 ALRC and NSWLRC 2010, p. 39). They also recommended a national audit on family violence training provided by government and non-government agencies, and that such an audit should include criminal law training, including in relation to homicide defences and criminal defences more generally (ALRC and NSWLRC 2010, p. 651).

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<sup>56</sup> The need for police to have cultural awareness training was a key recommendation made by the Aboriginal Family Violence Prevention and Legal Service Victoria in its submission to the ALRC and the NSWLRC (2010, p. 382 fn 98; see also p. 537).

## CONCERNS ABOUT DEFENSIVE HOMICIDE

Since the reforms were implemented, concerns have been expressed about whether defensive homicide has given any effect to the underlying rationale for the reforms (see, for example, Weinberg 2011, p. 14; see also Douglas 2012, p. 372; Capper & Crooks 2010). Others have commented specifically on the complexity of and confusion surrounding the new laws (Fitz-Gibbon & Pickering 2012). These concerns have led to calls for the abolition of defensive homicide.

Further impetus for reforming or abolishing defensive homicide was inspired by the controversial case of Middendorp (discussed on page 12), who was sentenced for defensive homicide in May 2010.<sup>57</sup> It is important to note that since the Middendorp case, there have been no other cases in which men who killed an intimate partner have been convicted of defensive homicide.

The consultation paper recently released by DOJ proposes that defensive homicide be abolished and no other partial defence introduced to replace it (DOJ 2013). The paper points to the high proportion of men using defensive homicide to defend themselves on murder charges in which they have killed other men (most of these cases do not involve family members or family violence).

The findings of our research, however, give some cause to be concerned about the proposal to abolish defensive homicide. There is little evidence, if any, to suggest that the 2005 changes to the new statutory defence of self-defence can be utilised successfully by women defendants at trial. We are of the view that until we can ascertain the impacts of both the provisions that codify self-defence (s 9AC) and those that permit greater understanding of the dynamics of family violence in trials and plea hearings for domestic homicides (s 9AH), removing defensive homicide may result in negative outcomes for women defendants. If there is, for example, no alternative such as defensive homicide, and women who kill their partners are not able to plead guilty to manslaughter, then they may be more likely to receive a murder conviction and consequently a longer prison sentence.

For example, in the absence of a partial defence, Karen Black would have likely faced a decision to go to trial and attempt to defend herself on the grounds of self-defence or to offer to plead guilty to murder and receive a discounted sentence. Considering the court's perception that the violence she had previously been subjected to and faced on the night was 'limited', it is difficult to feel confident that a claim of self-defence would have been successful in this case.<sup>58</sup> Consequently, a murder conviction may have resulted.

It could be argued that if women are found guilty of murder for killing in response to family violence, judges can take the family violence into consideration in sentencing such women. The ALRC and NSWLRC recommend that the dynamics of family violence be taken into account in the sentencing of defendants who are found guilty or who plead guilty to crimes that have occurred in circumstances of family violence (2010, p. 594). While we support this contention, our analysis indicates that judges may still have misconceptions about the dynamics of family violence and therefore may not adequately take the issues related to family violence into account when sentencing women who kill in this context. There is also pressure on judges to fit sentences within a particular range. Currently the average sentence for murder is approximately 20 years in Victoria (Sentencing Advisory Council 2013).<sup>59</sup> If sentences for murder are perceived to be low there may

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<sup>57</sup> *R v Middendorp* [2010] VSC 202.

<sup>58</sup> This view is shared by Heather Douglas, who stated that, arguably, defensive homicide delivered a merciful outcome for Karen Black, considering how difficult it is for women to meet the threshold to succeed in a claim of self-defence (2012, p. 377).

<sup>59</sup> In 2011-12, the average length of imprisonment term imposed on people sentenced for murder was 20 years and 1 month (Sentencing Advisory Council 2013, p.4).

be public outrage and pressure for higher sentences. In addition, there is a stigma attached to the label of ‘murder’ (NSWSCPDP 2013, p. 87). Regardless of whether or not women who are convicted of murder receive a reduced sentence after family violence is taken into account, they will have to live with the public shame of being labelled a ‘murderer’, and the family violence they experienced may be obscured.

Our view is that, should defensive homicide be abolished and no other partial defence be established to replace it, it is conceivable that some women who kill in the context of family violence will receive harsher outcomes than is currently the case. The outcomes in the cases we have examined highlight what Douglas has noted as ‘the importance of the “halfway house” provided by defensive homicide’ (2012, p. 371). Other jurisdictions have recognised the need to maintain partial defences, particularly for female defendants (see, for example, NSWSCPDP 2013). Sheehy, Stubbs and Tolmie also remain concerned about the impact of abolishing partial defences on female defendants (2012, pp. 11–12).<sup>60</sup>

It has been argued that abolishing defensive homicide would encourage more women to pursue self-defence at trial (DOJ 2013). While this is an appealing prospect there is no evidence to support it. It may be that more women will offer to plead guilty (to manslaughter or murder) rather than risk going to trial and being found guilty of murder. The proposal to abolish defensive homicide is likely to result in an experiment that in all likelihood would place women defendants in a precarious situation, at least in the interim, until we have evidence that the new self-defence provisions are accommodating responses to family violence. The ongoing limited recognition of family violence and its practical realities for women, evident in the cases we examined, gives us little confidence that women will, in the current climate, have an equitable chance of a successful claim of self-defence and being acquitted at trial. In the current legal context, we consider that the most appropriate option is for defence counsel to link arguments about the reasonableness of the woman’s belief in the need for lethal violence more explicitly to the self-defence provisions and the evidence in relation to family violence and social context. If self-defence is unsuccessful then women can rely on the ‘halfway house’ of defensive homicide.

As discussed above, we would also be likely to see more women proceeding to trial on the basis of self-defence if they were charged with manslaughter or defensive homicide from the outset rather than murder.<sup>61</sup> The issue of how prosecutors determine the appropriate charge in cases where there is a history of family violence towards the defendant is one which requires further examination.

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**60** New Zealand abolished the partial defence of provocation in 2008 and did not implement an alternative partial defence to murder. In a recent study of cases involving battered women defendants from 2000 to 2010 in Australia, Canada and New Zealand, Sheehy, Stubbs and Tolmie found that although New Zealand’s small number of cases made it difficult to generalise, overall trends appear to be different from those observed in Australia and Canada in both the high proportion of cases proceeding to trial and those resulting in a conviction for murder. Consequently, they conclude that there is a need to further examine prosecutorial practices of proceeding to trial on murder rather than manslaughter charges, even when manslaughter would be ultimately satisfactory to the prosecution, and of accepting guilty pleas to manslaughter verdicts in circumstances where the battered woman appears to have a strong self-defence case.

**61** See s 9AE of the Crimes Act regarding self-defence to manslaughter.

## CONCLUSION

Our analysis of legal responses to women who have killed their intimate partners in the eight years since the homicide law reforms were implemented in Victoria suggests that the potential for the reforms to improve outcomes for women defendants has not been realised. The key rationales for the reforms were to shift the focus away from the individual psychology of the female defendant, to challenge the gendered stereotypes that have traditionally informed the law of self-defence, and to expand and deepen understandings of family violence.

Our findings show that there is limited recognition of the nature, dynamics and impact of family violence on victims. In particular there remains:

- a failure to understand how prior family violence may affect women's responses to abusive, intimidating or threatening behaviour
- a lack of understanding of why victims may remain in abusive relationships
- a greater likelihood of recognising physical violence than other forms of family violence such as sexual assault, threats, and coercive and controlling behaviour
- little recognition of the cumulative impact of various forms of family violence
- gender-based stereotypes which influence perceptions of what is a reasonable and proportional response
- an inadequate use of the family violence social context evidence provisions.

On a more positive note, it may be that, without the new provisions, family violence would not have been recognised at all in some of these cases. The new provisions make it more likely that family violence will be considered and linked, albeit in a limited way, to arguments about the accused person's actions.

We face a double bind in that, until women victims of family violence can be seen to be successfully raising self-defence, we are not able to support the abolition of defensive homicide. However, if defensive homicide continues to serve as a default option for women who kill their violent partners in response to a history of violence, it may be unlikely that self-defence will be tested in the near future. For this to happen, we would need to see further shifts in the legal profession and culture around the recognition of family violence and women's responses to it. At present, there is no evidence that women's prospects of raising self-defence successfully have improved.

Several authors have noted the limits of formal legal change in achieving justice for women who kill (see, for example, Graycar & Morgan 2005; Douglas 2012, p. 378). Specialised training for legal professionals and increased use of expert witnesses who can provide family violence evidence and clearly link it to the elements of the relevant defences are important steps that would help to ensure that women's claims that they acted in self-defence are more comprehensively assessed by legal counsel, judges and juries.

The need for law reform to ensure justice for women who kill violent partners has been well established for some decades. Victoria has led the way for other Australian jurisdictions in its commitment to bringing about more positive changes for women defendants. We need to continue our efforts to develop the law in a way that adequately recognises the impact of family violence on women's lives, but also to work with the legal profession to improve the applications of the law so that the spirit and potential of legislative reform can be effectively realised.

## APPENDIX

# Cases since 2005

The following lists the relevant cases we identified in relation to:

- Women who killed their intimate partners or ex-partners (8)
- Men who killed their intimate partners or ex-partners (31)
- Men who killed other men sentenced on the basis of defensive homicide (22)

(Total cases = 61)

### **WOMEN WHO KILLED THEIR INTIMATE PARTNERS OR EX-PARTNERS (8)**

#### ***Did not proceed to trial***

- *DPP v Dimitrovski* [2009] – Magistrate dismissed charges. Killing occurred in response to an immediate violent attack, but in the context of long-term family violence. Argued self-defence.

#### ***Manslaughter***

##### **Plea – manslaughter (3)**

- *R v Kulla Kulla* [2010] VSC 60– pleaded guilty to manslaughter.
- *R v Hudson* [2013] VSC 184 – pleaded guilty to manslaughter.
- *R v Downie* [2012] VSC 27 – pleaded guilty to manslaughter. Co-accused with two other men.

##### **Trial – verdict – manslaughter (1)**

- *R v Kells* [2011] VSC 53 – pleaded not guilty to murder, raised self-defence. Found guilty of manslaughter.

**Defensive homicide**

**Plea – defensive homicide (2)**

- *R v Black* [2011] VSC 152 – pleaded guilty to defensive homicide.
- *R v Edwards* [2012] VSC 138 – pleaded guilty to defensive homicide.

**Trial – verdict – defensive homicide (1)**

- *R v Creamer* [2011] VSC 196 – pleaded not guilty to murder, found guilty of defensive homicide.

**MEN WHO KILLED THEIR FEMALE INTIMATE PARTNERS OR EX-PARTNERS (31)**

**Murder**

**Plea – murder (14)**

- *DPP v Lam* [2007] VSC 307
- *R v Diver* [2008] VSC 399
- *R v Piper* [2008] VSC 569
- *R v Foster* [2009] VSC 124
- *R v Dutton* [2010] VSC 107
- *R v Felicite* [2010] VSC 245
- *R v Singh* [2010] VSC 299
- *R v Bayram* [2011] VSC 10
- *R v Mamour* [2011] VSC 113
- *R v Penglase* [2011] VSC 356
- *R v Hopkins* [2011] VSC 517
- *R v Caroulus* [2011] VSC 583
- *R v Mulhall* [2012] VSC 471
- *R v Delich* [2013] VSC 309

**Trial – verdict – murder (10)**

- *R v Brooks* [2008] VSC 70
- *R v Ellis* [2008] VSC 372
- *R v Baxter* [2009] VSC 180
- *R v Chalmers* [2009] VSC 251
- *R v Robinson* [2010] VSC 10
- *R v Azizi* [2010] VSC 112
- *R v Caruso* [2010] VSC 254
- *R v Wilson* [2011] VSC 123
- *R v McDonald* [2011] VSC 235
- *R v Weaven* [2011] VSC 508

### **Manslaughter**

#### **Trial – verdict – manslaughter (4)**

- *DPP v Pennisi* [2008] VSC 498 – pleaded not guilty to murder; found guilty of manslaughter UDA
- *DPP v Sherna* [2009] VSC 526 – pleaded not guilty to murder; found not guilty of defensive homicide but guilty of manslaughter UDA
- *R v Reid* [2009] VSC 326 – pleaded not guilty to manslaughter and recklessly causing injury, found guilty of manslaughter by criminal negligence and recklessly causing injury
- *R v Lubik* [2010] VSC 465 – pleaded not guilty to murder; found guilty of manslaughter UDA

#### **Plea – manslaughter (2)**

- *R v Drummond* [2012] VSC 505
- *R v Ahmadi* [2013] VSC 293

### **Defensive homicide**

#### **Trial – verdict – defensive homicide (1)**

- *R v Middendorp* [2010] VSC 202 – acquitted of murder; found guilty of defensive homicide.

### **MEN WHO KILLED OTHER MEN (22)**

#### **Trial – verdict – defensive homicide (6)**

- *R v Croxford/Doubleday* [2009] VSC 516
- *R v Parr* [2009] VSC 468
- *R v Svetina* [2011] VSC 392
- *DPP v (McEwan, Robb and) Dambitis* [2012] VSC 417
- *DPP v Chen* [2013] VSC 296
- *The Queen v Kassab & Anor* [2013] VSC 379

#### **Plea – defensive homicide (16)**

- *R v Smith (Michael Paul)* [2008] VSC 87
- *R v Edwards* [2008] VSC 297
- *R v Giammona* [2008] VSC 376
- *R v Smith (Callum-Zane)* [2008] VSC 617
- *R v Taiba* [2008] VSC 589
- *R v Baxter* [2009] VSC 178
- *R v Trezise* [2009] VSC 520
- *R v Spark* [2009] VSC 374
- *R v Wilson* [2009] VSC 431
- *R v Evans* [2009] VSC 593
- *R v Ghazlan* [2011] VSC 178
- *R v Martin* [2011] VSC 217
- *R v Jewell* [2011] VSC 483
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