

Victoria's New Homicide Laws: Provocative Reforms or More Stories of Women 'asking for it'?

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Abstract

The controversial partial defence of provocation has now been abolished in three Australian jurisdictions, including Victoria. Recent developments in Victorian case law would appear to suggest a continuation of 'excuses' for male anger and violence towards women that position the woman victim as to blame for her own death. This article considers that the 2005 abolition of provocation was only in part designed to redress the problem of victim-blame. The decision was accompanied by other key changes introduced into the *Crimes Act 1958* (Vic) to make it easier for women who kill in the context of family violence to successfully claim self-defence and 'excessive self-defence' (defensive homicide). Drawing on recent developments in Victorian case law since the 2005 amendments, this article argues that the claim that provocation's victim-blaming narratives are being mobilised in the guise of other defences merits closer analysis. It also argues that provocation's critics must continue to expose the gendered (and raced) assumptions underlying the other defences to homicide, such as self-defence including manslaughter and the new offence of defensive homicide. Otherwise there is a risk that provocation's victim-blaming narratives could end up rewritten in such a way that support an argument for a reduction in culpability in cases where there is a history of violence against the woman victim, which is likely to result in claims that little has changed.

Introduction

In 2008, Western Australia became the third Australian state to pass legislation repealing the controversial rule of law that provocation reduces murder to manslaughter (*Criminal Law Amendment (Homicide) Act 2008* (WA)). Tasmania abolished the provocation defence in 2003 (*Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas)), as did Victoria in 2005 (*Crimes (Homicide) Act 2005* (Vic)). The partial defence of provocation still operates in one of the common law and four of the code jurisdictions in Australia. In South Australia, the qualified defence of provocation is governed by the

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common law.¹ In the Australian Capital Territory² and New South Wales,³ there are statutory provisions governing the defence (*Crimes Act 1900* (ACT), s 13; *Crimes Act 1900* (NSW), s23), and in the Northern Territory⁴ and Queensland,⁵ (*Criminal Code Act* (NT), s 34(2); *Criminal Code 1899* (Qld), s 304), both of which carry a mandatory sentence of life imprisonment for murder.

The partial defence of provocation has also been abolished in a small number of overseas jurisdictions. In 2009, the New Zealand Parliament passed legislation repealing the partial defence of provocation (Crimes (Provocation Repeal) Amendment Bill 2009 (NZ)). In 2009 in the UK, the *Coroners and Justice Act 2009* (UK) was introduced.⁶ The Act significantly revised the law of diminished responsibility, and also introduced a revamped partial defence of ‘loss of control’, which replaces the partial defence of provocation and creates a defence

¹ The elements of the partial defence of provocation are set out in *The Queen v R* (1981) 28 SASR 321.

² In 2004, the Australian Capital Territory (ACT) amended s 13 of the *Crimes Act 1900* (ACT) so that a non-violent sexual advance could no longer form the basis of a defendant’s claim to the defence of provocation (*Sexuality Discrimination Legislation Amendment Act 2004* (ACT)).

³ In 1997, the New South Wales Law Reform Commission (NSWLRC) published its report on provocation, in which it recommended that the defence be retained, but that it be reformulated in a way that would leave it up to the jury to decide whether the offender should be partially excused for having lost self-control and killing’ (NSWLRC 1997; Roth 2007). Two key recommendations were rejected by the Commission. The first was ‘the option of specifically excluding the operation of the defence in cases where men killed female partners after a relationship breakdown, or in cases of killing in response to homosexual advances (Roth 2007). The second was ‘the option of removing the “loss of self-control” requirement in the defence to make the defence more available to battered women who kill (Roth 2007). In response to a 1998 Working Party publication on killings in response to homosexual advances, which recommended an amendment to the provocation defence but not to self-defence, in 2001, the NSW Government enacted laws to clarify the law of self-defence and to reintroduce the partial defence of excessive self-defence (Roth 2007).

⁴ In 2006, the Northern Territory (NT) amended the defence of provocation in line with NSW, and in relation to homosexual advances. For a consideration of these reforms in the NT, see Douglas 2006.

⁵ The Criminal Code and Other Legislation Amendment Bill 2010 (Qld) was passed by the Queensland Government on 24 March 2011 and received royal assent and commenced on 4 April 2011. The Act gives effect to key recommendations made by the Queensland Law Reform Commission (QLRC 2008). Constrained by the Government’s intention to make no change to the existing penalty of mandatory life imprisonment for murder, the new laws provide that the onus be on the defendant, rather than the prosecution, to prove on the balance of probabilities that provocation occurred. The changes also restrict the range of circumstances in which the partial defence may be raised and will no longer apply where ‘the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character’. Nor will it apply, ‘other than in circumstances of a most extreme and exceptional character, where ‘(a) a domestic relationship exists between 2 persons; and (b) one person unlawfully kills the other person (the deceased); and (c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done—(i) to end the relationship; or (ii) to change the nature of the relationship; or (iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship’ (Clause 5 Amendment of s 304). In furtherance of the QLRC’s recommendation to have ‘regard to the limitations of existing defences for a person in a seriously abusive and violent relationship who kills his or her abuser’ and ‘that consideration be given to the development of a separate defence of battered persons (recommendations 21–24 of the Review), the *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010* (Qld) was assented to on 16 February 2009. For a full discussion of these legal policy debates and reforms see Carrick (2010).

⁶ In 2004, the Law Commission UK published its report on the defences to homicide (Law Commission UK 2004). It recommended retaining the use of the provocation defence but that it is legislatively redrawn to redefine and narrow the circumstances in which it can be raised. The Law Commission UK also recommended it undertake a more substantial review of the law of murder, and in November 2006 published its report, *Murder, Manslaughter and Infanticide*, in which it revealed that the Home Office would be taking over the review of the law and would be consulting on broader public policy issues such as sentencing (Law Commission, ‘Bringing the law of homicide into the 21st century’, Press Release, 29 November 2006 cited in Roth 2007:35).

akin to the plea of 'excessive self-defence' (Yeo 2010).⁷ Developments in provocation law in the Canadian legal context provide an interesting point of comparison. It has been more than ten years since the Federal Department of Justice Canada (FDJC) published its consultation paper on the defences to homicide, *Reforming Criminal Code Defences: Provocation, Self-Defence of Property, a Consultation Paper* (FDJC 1998), in which it recommended the abolition of provocation, and significant reforms to the law of self-defence for battered women. Since then, no provisions have been enacted to s 232 of the Canadian *Criminal Code* to either remove or reform provocation. Unlike Australia and the United States, Canada has a single nationwide provocation statute and murder carries a mandatory life sentence. Although various and specific criticisms of the Canadian defence of provocation have been widely canvassed in feminist legal debates, as have a number of options for reform, many are in the camp that the defence of provocation should be abolished but only if and when mandatory minimum sentences for murder are also abolished (see, for example, Sheehy 2001; Forell 2006; Holland 2007).⁸

While it remains to be seen what the impact of the various and specific reforms to the laws of homicide in these different international jurisdictions will be in future cases, the 2005 amendments to Victoria's homicide laws have been heralded as among the most 'radical' and 'trendsetting' of feminist homicide law reforms to ever have been implemented (see, for example, Coss 2006; Forell 2006). American homicide law has been slow to respond to feminists concerns about the gender bias of criminal law, yet has led the way in allowing expert testimony on battered woman syndrome. In comparison, as Ramsey (2010:34) has recently observed, the decision taken in the Australian states of Tasmania, Victoria and Western Australia to abolish the provocation defence are among 'the boldest strides towards a feminist transformation of homicide law'. It is too soon to tell if the intent behind the Victorian legislature is being realised. However, recent developments in Victorian case law since the 2005 amendments have raised concerns about the apparent continuation of provocation-type arguments that 'excuse' male violence and construct the woman victim as deserving of her fate.

In May 2010 there were headlines in the Victorian newspapers regarding the case of *R v Middendorp* [2010] VSC 202 (Anderson 2010a; Capper and Crooks 2010; Howe 2010; Murphy 2010). Luke John Middendorp fatally stabbed his former female partner, Jade

⁷ See Ramsey (2010) for a discussion of this policy shift which she argues is away from condoning men's anger. She remains concerned, however that there still needs to be a 'qualifying trigger', namely fear of serious violence or circumstances of an extremely grave character giving rise to a justifiable sense of being seriously wronged. Anger in such a situation may be sudden, such as might occur in the case of a man, or the steadily mounting anger, such as the 'slow burning fuse' or the 'straw that broke the camel's back' such as might occur in the case of a woman subject to continuous beating or abuse by her husband. It is assumed the defence will not succeed where the accused person is simply very angry, or motivated by revenge, or responding to sexual infidelity. Some have argued that this is unfortunate. Ramsey (2010:99) worries that 'the Coroners and Justice Act retains the possibility that mere words—things "done or said (or both)"—might rise to that level'. More recently, Yeo (2010) has proposed that the new English defence of 'loss of control' has 'certain innovative features on the type of provocative conduct that may be legally recognised, and clarifies aspects of the 'ordinary person' tests, both of which provide lessons for the law of New South Wales.

⁸ In 2004, a conservative government campaign led by Stephen Harper implemented key changes to federal funding guidelines for women's organisations (such as National Association of Women and the Law (NAWL) and the Status of Women Canada (SWC). These changes resulted in the closure of NAWL in September 2007 and 12 regional offices of SWC. Although Canada's 1982 *Charter of Rights and Freedoms* explicitly provides for sex equality free from government discrimination, the Harper government has not embraced these principles. Indeed, the Harper government also saw fit to remove the issue of equality from the SWC's mandate, which suggests that the problems with provocation are unlikely to be on the political agenda in the near future (Côté 2006).

Bownds, four times in the back after she allegedly ‘came at him with a knife in her right hand’. Moments after he stabbed her, Luke Middendorp was heard by witnesses to have said that she was a ‘filthy slut’ who ‘had it coming’ and ‘got’ what she ‘deserved’ (Murphy 2010). According to the accused, he had stabbed his ex-partner because he was acting in ‘self-defence’ (*R v Middendorp* [2010] VSC 202). In contrast, the prosecution contended that the jury should reject this account that she attacked him with a knife and that the stabbing was in response to a threat to his life or physical safety. According to evidence adduced at the trial, nine months prior to killing his ex-partner, Luke Middendorp had a Family Violence Order recorded against him (Anderson 2010a). There was also evidence of the relationship that showed that both parties had previously been violent towards each other and engaged in frequent fights and arguments (*R v Middendorp* [2010] VSC 147). Finding in favour of the accused, the jury convicted him of defensive homicide (*R v Middendorp* [2010] VSC 202).

The victim’s mother expressed outrage at the verdict and said that she was ‘truly disgusted with the system’ (Anderson 2010b). She said her daughter was ‘scared of him’ and that her daughter’s killer ‘was facing other charges of assaulting her’ (Murphy 2010). She asked ‘[h]ow can a man who is twice her size have to stab her four times in the back because he was in fear of his life?’ (Wilson 2010). According to media reports, there was a huge disparity in their sizes. Luke Middendorp was more than ‘twice her size’ (186cm tall) and weighed a ‘hulking’ 90kg, whereas Jade Bownds was a ‘tiny’, ‘pint sized woman’ who weighed just 50kg (Murphy 2010; Anderson 2010b; Anderson 2010c; Anderson 2010a). Others expressed outrage at the verdict and felt that this was yet another case that ‘excused’ the male defendant’s violence against the deceased and yet it was her character that was put on trial (Capper and Crooks 2010; Howe 2010).⁹ As a result of the publicity this case received, there were calls for the new laws of homicide in Victoria to be overhauled. A specific concern raised by the *Middendorp* case was whether, in the absence of the partial defence of provocation, defensive homicide was becoming its replacement (Capper and Crooks 2010; Wilson 2010).

In response to this criticism, in August 2010 the Victorian Department of Justice (DOJ) published a Discussion Paper, *Review of the Offence of Defensive Homicide*, inviting legal professionals, experts in the field of family violence, and the wider community to comment and give feedback on the operation of the new laws (DOJ 2010). When announcing the release of the Discussion Paper, the Victorian Attorney-General, Rob Hulls, revealed that the Department of Justice had always intended to adopt the recommendation of the Victorian Law Reform Commission (VLRC) to review the new laws within five years, and said that the review of ‘the controversial law of defensive homicide’ was already underway (Munro 2010). He said that ‘family violence remains a complex epidemic and it may be that there is further reform that can occur in time to better respond to its realities’ (Hulls 2010). There is little doubt that the Discussion Paper is an important first step in assisting law reformers to determine whether further changes to Victoria’s homicide laws are necessary. In its opening pages, the Discussion Paper states that the reforms explicitly recognised that change was required to the law and *to the culture* of the criminal justice system (DOJ 2010:3). However, as decades of feminist legal scholarship have shown, often the (masculinist) internal culture(s) of the legal profession can be slow and sometimes resistant

⁹ Jane Ashton, whose brother-in-law was the last man in Victoria to be convicted of provocation manslaughter for the 2003 killing of her sister, Julie Ramage, said that the new law of defensive homicide was ‘being used as an excuse by men to murder women. The woman is dead. She can’t give evidence, yet she has been smeared’ (Murphy 2010).

to change (Thornton 1991; Merry 1992; Hunter 1996, 2006, 2008; Armstrong 2004; Graycar and Morgan 2005). While the re-emergence of concerns about the apparent continuation of 'excuses' for male violence and the problem of victim-blame in post-abolitionist jurisdictions (such as Victoria) are of concern,¹⁰ it is equally important, this article argues, to critically reflect on the emerging developments that have taken place in Victoria case law thus far (since the 2005 amendments) so we can more effectively target future interventions and strategies.

This article begins by briefly revisiting the rationales for the 2005 reforms to Victoria's homicide laws and considers the problem of victim-blame in the context of provocation. It then moves on to discuss some emerging developments in Victorian case law since the reforms. In so doing, it argues for a closer analysis as to whether, and to what extent, provocation-type narratives are being made in the guise of other defences, such as self-defence and particularly, the new offence of defensive homicide. It concludes that more research is needed that focuses both on legal outcomes and the legal narratives that transform and interpret the conduct of the defendant and deceased in cases of intimate killings and that construct the body of the woman victim as inciting male violence.

The problems with provocation

Prior to its abolition in Victoria, the partial defence of provocation was available to an accused person charged with murder. Unlike the full defence of self-defence, which results in an acquittal, a successful defence of provocation reduced the crime of murder to the lesser crime of manslaughter.¹¹ The elements that were to be proven in order for the defence of provocation to succeed were as follows. The deceased must have said something and or acted in a way that was provocative. The accused must have lost self-control as a result of the provocation and killed the deceased while experiencing that loss of self-control. Overriding both of these legal requirements is the further demand that the accused must have acted as an ordinary hypothetical person would have acted (the common law test for provocation was stated in *Masciantonio v The Queen* (1995) 183 CLR 58 at 67). In recent years, various and specific criticisms of the rules and requirements governing provocation have developed. Much of this criticism, not all of it avowedly feminist, has been virtually in agreement that the partial defence has historically operated, and in some jurisdictions continues to operate, as a profoundly sexed excuse for male anger and violence towards women (Horder 1992; Howe 1997, 2002; Morgan 2002).¹² There has been a burgeoning

¹⁰ Similar expressions of public outrage were made in response to the Ramage case in Victoria in 2004 (see Adams 2004; Alexander 2004; Crooks 2004; Kissane 2004a, 2004b; Kissane and Gregory 2004; Stewart 2004). James Ramage was the last man in Victoria to successfully rely on the provocation defence after he killed his estranged wife — she allegedly screwed up her face and said that sex with him repulsed her. He was sentenced to a maximum period of imprisonment of 12 years, with a minimum non-parole period of 8 years (*R v Ramage*). The public outcry in response to the Ramage case has often been cited as ultimately persuading the Victorian Legislature to adopt a key recommendation made by the VLRC in its *Defences to Homicide: Final Report* to abolish the partial defence of provocation (Yule 2007:1). For a full discussion and commentary on the Ramage case, see (Maher et al 2005). The case also became the focus of two popular books: one, written by former footballer and Federal MP Phil Cleary (Cleary 2005) and the other, written by Karen Kissane (Kissane 2006), a journalist who writes for *The Age* newspaper.

¹¹ Alternatively, the Office of Public Prosecutions can accept a plea of guilty to manslaughter on the ground of the alleged provocation offered by the deceased and issues of provocation will be dealt with at sentencing.

¹² There is also a substantial body of literature devoted to the ways in which the provocation defence has operated to excuse male anger and violence towards other men relating to what has come to be termed the 'homosexual panic defence' (HAD). However, it is beyond the scope of this paper to devote a full discussion to this

literature on this topic in the North American context (Sheehy, Stubbs and Tolmie 1992; Baker 1998; Sheehy 2001), the United Kingdom (Radford 1984; Edwards 1984, 1987; Crocker 1985; Wallace 1986; O'Donovan 1991; Wells 2000) and in Australia (Polk and Ranson 1991; Graycar and Morgan 1996; Stubbs and Tolmie 1999; Kirkwood 2000; Bradfield 2002; Stubbs and Tolmie 2005). This work has highlighted the legal system's inequitable treatment of men and women who kill their partners or ex-partners in light of the mounting empirical evidence that men and women kill in very different circumstances. When women kill an intimate partner, they typically do so in circumstances where they are not responding to a specific triggering incident that is legally required before a successful defence of provocation can be made out.¹³ Rather, when women kill they are usually responding to a past history of violence and abuse by the deceased (Bacon and Lansdowne 1982; Wallace 1986; Eastaer 1993, 1994; Polk 1994; Websdale 1999). Although deserving of mitigation, women who kill their violent abusers often failed to satisfy the rules and requirements that structure the partial defence resulting in either the distortion or exclusion of their experiences.

In contrast, men who kill their intimate partners or ex-partners usually kill in response to much slighter provocation — she either 'nagged', 'taunted', 'insulted' or 'goaded' him, 'flirted' with another man, 'flaunted' her infidelity, left the relationship or expressed a desire to leave him (Howe 1999:31). Men who kill in this context, however, have been able to rely on the defence of provocation with relative ease.¹⁴ Feminists have, thus, remained critical of provocation for its 'gender-bias' and pointed to the way these cases operate to inappropriately 'excuse' male violence and constructing the woman victim as provoking her own demise (Edwards 1987; Bandalli 1992; McDonald 1993; Howe 1994; Women's Coalition Against Family Violence 1994; Tarrant 1996; Lees 1997; Morgan 1997; Hocking 1999; Tyson 1999; McSherry 2005; Tyson forthcoming).¹⁵ In so doing, they have exposed

literature here. For a discussion of HAD cases in the Australian legal context, see Tomsen 1994, 1998, 2002; Johnston 1996; Howe 1997, 1998; Golder 2004. For a discussion of race, ethnicity and culture in the context of HAD, see De Pasquale 2002.

¹³ According to Horder (1992:188–9 cited in Edwards 1984:365), the legal predicament faced by battered women when seeking to raise the provocation is as follows: 'Many battered women do not lose their self control prior to the killing of the batterer. Following long term abuse, some battered women appear to have taken a calculated decision to kill that was not triggered by any very recent provocation; still others appear to have acted in the face of recent provocation, but with more or less deliberation at or close to the moment of the fact.'

¹⁴ As Edwards (1987:158, 165) has quite rightly argued, in such cases 'she is held responsible' and 'such men are regarded as justifiably provoked'. Bandalli (1992:398) expressed a similar view almost 15 years ago when she said that: '[w]hatever the formal structure of the law, ultimately the success for failure of a provocation defence depends on ingrained cultural judgment about the hidden agenda of this partial defence, as it operates in practice in spousal homicide, is one of female responsibility, whether as victim or offender'.

¹⁵ Both in its Options Paper and Final Report, the Victorian Law Reform Commission (VLRC) submitted that the gender bias inherent in the provocation defence manifest itself in two key ways. Firstly, it was argued that because the structural requirements of the provocation developed in the context of men killing both men and women, they were said to be based on male aggressive responses to male conduct. For instance, the strict requirement that the defendant suddenly lost self-control as a result of a discrete act or triggering act is seen to be the archetypal male response to provocative conduct. As indicated by the VLRC (2003:56–57, 2004:27), this test remained very difficult for women defendants to use, despite the fact that various and specific changes have been made over time (eg the Court of Criminal Appeal, New South Wales, found in the case of *Chhay*, involving a woman who killed her husband while he was asleep, that the loss of self-control could develop after a long period of violent physical and verbal abuse, and without the necessity for a specific triggering incident. See also the English cases of *Ahluwalia* and *Thornton (No. 2)*, and *Lavallee* [1990] in Canada). Secondly, gender bias was also seen to be related to the 'ordinary person' test. As outlined by the VLRC (2003:57–8), 'because the defence of provocation arose in the context of drunken brawls and breaches to honour between men, the sexless 'ordinary person' is in fact male'. Thus, it was argued that the 'ordinary person' test bore little resemblance to the kinds of reactions that women may have had to provocation.

not only the gendered, but also raced, assumptions that underpin provocation's defence narratives (Volpp 1994; Yeo 1996; Sing 1999; Phillips 2003; Maher et al 2005; Dick 2009).

In agreement with much of this feminist criticism, the VLRC (2003:69, 2004:29) adopted the Law Commission of Canada's approach to law reform using 'reality' or 'women's lives' and not 'legal categories' as a starting point. The VLRC argued that a reconsideration of the defences to homicide informed by the social context in which such homicides arise was 'extremely productive since it helps to ensure that we do not take for granted abstract legal categories that may obfuscate rather than clarify the resolution of a legal problem'. The VLRC (2004:xxv) resolved that '[t]hese two circumstances ... should not be seen as comparable' and that the 'problems with provocation possibly go beyond gender bias'. Furthermore, 'continued existence of provocation can be seen as promoting a culture of blaming the victim and sending a message to the wider community that some victim's lives are less valuable than others' (VLRC 2004:32).¹⁶ Thus, it recommended that the provocation defence be abolished and that considerations of provocation mitigation could more appropriately be dealt with at the sentencing phase (VLRC 2004:32).

The VLRC (2004:33) were of the view that a key benefit of shifting claims of provocation to the realm of sentencing is that it gives greater flexibility to judges about which sentence to impose. However, many have remained worried that shifting claims of provocation to the realm of sentencing will do little to put an end to what is perhaps the most vexing exculpatory narrative of excuse for male violence — the narrative of a woman 'asking for it' — from being mobilised in mitigation at sentencing (Morgan 1997; Côté, Sheehy and Majury 2000; Burton 2003; Howe 2002, 2004; Maher et al 2005; Coss 2005, 2006; Douglas 2008). As Cleary (2006:21) has observed: '[t]here is nothing in the legislation to say a woman's infidelity, alleged or otherwise, won't be dissected in a murder trial. Certainly, it will not be excluded when a judge calculates a sentence'. This is an important point given the tendency for sentencing in cases of domestic homicide to undermine legal developments that potentially benefit women (Horder 1989; Eastal 1993, 1994; Graycar and Morgan 1996; Burton 2003; Stubbs and Tolmie 2008).¹⁷ For instance, a number of feminist scholars have shown that the standard provocation tale of a woman 'asking for it' can be mobilised in the guise of other defences (such as automatism) (see, for example, McSherry 2005 and also Tyson 2007). This concern with the frequently masculinist and heterosexist constructs that circumscribe these victim-blaming narratives has raised the concern posed by Howe (2002:46), among others, whether in a 'post' provocation climate these same 'ill-considered arguments will continue to masquerade as objective, value free assessments' of men's excuses for their anger and violence towards women and other men (see also Howe 1999:128; Morgan 1997).

These concerns regarding the shifting of claims of provocation to the sentencing phase were recently discussed in a Research Report, *Provocation in Sentencing*, published in 2008 by Chair of the Victorian Sentencing Advisory Council (SAC), Professor Arie Freiberg and the SAC's senior Legal Policy Officer, Felicity Stewart (Stewart and Freiberg 2008a:2;

¹⁶ According to the VLRC (2004:32), claims of provocation that successfully result in a conviction for manslaughter can often be upsetting for the families of victims particularly in cases involving a prior history of domestic violence. Furthermore, this can often leave many families of victims with a sense of injustice 'that the accused has "got away" with manslaughter' (VLRC 2003:70, 2004:32).

¹⁷ Morgan (1997: 275–6) has worried that leaving 'provocative' facts to the discretion of a judge in sentencing 'will do nothing to remove the gendered assumptions embodied in the current use of the provocation defence by men in situations of "sexual jealousy"'.

2009:vii).¹⁸ The Report, which is not an official endorsement of the views of the SAC, adopted the VLRC's (2003:95–6) 'equality rights' approach to sentencing, which entails examining the emotions behind the offender's response to the gravity of the provocation, and the reasons behind those emotions. According to the Report, the reasons-based approach to sentencing represents a return to 'the original rationale for provocation insofar as it is focused on the *wrongfulness* of the victim's actions and the justifiability of the offender's grievement, rather than on whether the offender lost self-control as a result of something done by the victim' (Stewart and Freiberg 2009:42).¹⁹ Furthermore, a provocation claim at sentencing would not be justified in cases where conduct by the victim involves the exercise of 'equality rights' (such as leaving an intimate relationship, forming or continuing other intimate or social relationships, or engaging in employment or an education) (Stewart and Freiberg 2008a:4, 52; 2008b:301; 2009:86). While there is obvious merit behind the proposed framework for sentencing (see, for example Ramsey 2010), it is not entirely clear according to what criteria a judge is to distinguish between 'good' and 'bad' reasons for killing the victim. Furthermore, the guidelines are not mandatory (Kissane 2008) — thus, it is up to individual judges to give effect to the spirit of the reforms, an issue that is considered below.

The 2005 Victorian amendments and emerging developments

After a lengthy process of consultation undertaken by the VLRC, the Victorian legislature repealed the controversial partial defence of provocation and implemented a comprehensive package of reforms through the *Crimes (Homicide) Act 2005* (Vic) aimed at tackling entrenched gender bias in the criminal law (Office of the Attorney-General Victoria 2005).²⁰ The amendments included clarification of the law of self-defence in relation to murder and manslaughter.²¹ The reforms confirmed that in order for self-defence to succeed, the accused person must have held a subjective belief that the actions taken in self-defence were necessary (*Crimes Act 1958* (Vic) s 9AC), and that belief must have been based on reasonable grounds (*Crimes Act 1958* (Vic) s 9AE). The 2005 amendments also make it clear that 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 of threatened harm, that self-defence may be raised (see *Crimes Act 1958* (Vic) s 9AH(1)). The most specific reform made to the law of self-defence concerns a new section added to the

¹⁸ In its opening pages, the Report states that:

[i]n the transformation of the law of provocation, the past should not continue to influence the present in undesirable ways and the partial defence should not re-emerge in a new guise as a particular variety of murder. Many of the old assumptions will need to be discarded and a new normative framework must be developed (Stewart and Freiberg 2008:2; 2009:vii).

¹⁹ According to the Report, 'the crucial questions for a court will not relate to the defendant's loss of self-control' because, following the insights made by Coss (2006:52 cited in Stewart and Freiberg 2009), among others, 'the real "loss of control" is that men have lost control of their women'.

²⁰ Tasmania was the first Australian state to pass legislation repealing the partial provocation defence in 2003 (*Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas)). Interestingly, Tasmania is the only Australian state to abolish the partial defence of provocation as a stand-alone decision. As Ramsey (2010:69) has emphasised, '[n]o evidentiary changes were introduced to make it easier for battered women charged with murder to convince the jury that they had acted in self-defence, and no substitute for provocation was enacted'. This had lead her to reiterate concerns made by Bradfield (2003:324 cited in Ramsey 2010:69) who has noted that '[f]or some Australian feminists, Tasmania's surgical strike raised a grave concern that eliminating the provocation doctrine would actually "worsen the legal position of battered women who kill"'.²¹

²¹ Judicial practice in terms of directing on the common law of self-defence and statutory self-defence has recently been clarified by the Victorian Court of Appeal in *Babic v The Queen*.

Crimes Act regarding the laws of evidence so that evidence highlighting the relationship and social context about family violence can be admitted in cases of homicide (*Crimes Act* 1958 (Vic) s 9AH(3) (a)–(f)).²² In addition to allowing such evidence, statutory recognition was also given to the VLRC's recommendation to reintroduce 'excessive self-defence' through the introduction of the new offence of 'defensive homicide' (s 9AC and 9AD *Crimes Act* 1958 (Vic)). According to Victorian Attorney-General, Rob Hulls, the new offence will apply to situations where 'a killing occurs in the context of family violence' and where the accused person genuinely held the subjective belief that the actions taken in self-defence were necessary, but that belief was ultimately unreasonable (Office of the Attorney-General Victoria 2005). The offence of defensive homicide operates as an alternative charge to the charge of murder and, if successfully argued, carries a maximum term of imprisonment of 20 years.

During the consultation process conducted by the VLRC, some critics worried whether the reforms would be of direct benefit to women who kill their violent abusers (VLRC 2004:xxx, 94, 99). For example, concerns were raised in relation to the VLRC's recommendation to reintroduce 'excessive self-defence' (defensive homicide) as a 'safety-net' for women who kill violent partners. According to one submission cited in the VLRC's Final Report, it was alleged that should the defence of excessive self-defence be reintroduced, juries would automatically decide women's actions were 'excessive', without properly considering the reasonableness of their actions. As a result, women might be convicted of manslaughter, while men could continue to successfully argue self-defence and be acquitted (VLRC 2004:xxx, 94, 99). A second and related concern was that there may be a risk that women offenders will be encouraged away from proceeding to trial and seeking to rely on the full defence of self-defence, and have a real chance of acquittal.

Since the *Crimes (Homicide) Act 2005* (Vic) was implemented, the decisions not to proceed to trial in two cases involving women defendants who killed a male victim after a prolonged history of family violence have been cautiously interpreted as a sign that the reforms are working (Tyson, Capper and Kirkwood 2010; Domestic Violence Resource Centre Victoria (DVRCV) 2010). On 27 March 2009 the then Director of the Victorian Office of Public Prosecutions, Jeremy Rapke QC, dropped a murder charge against a young woman from Shepparton accused of murdering her stepfather who sexually abused her. He said there was no reasonable prospect that a jury would convict her and outside the court her lawyer, Brian Birrell, said '[t]he legal defence in this case have always taken the view that a jury would find this to be a legally justifiable homicide' (Johnston 2009a).²³

On 6 May 2009 a Magistrate dismissed the murder charges against Freda Dimitrovski accused of killing her husband, Sava Dimitrovski, after a three day committal hearing. Freda Dimitrovski's lawyer, Ian Hill QC, said: 'recent changes to the Crimes Act made

²² Under s 9AH (3) of the *Crimes Act 1958* (Vic) 'evidence of (a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member; (b) the cumulative effect, including the psychological effect, on the person or a family member of that violence; (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence; (d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser; (e) the psychological effect of violence on people who are or have been in a relationship affected by family violence; (f) social or economic factors that impact on people who are or have been in a relationship affected by family violence'. For a recent overview of the reforms to the law of self-defence in Victoria see (Hopkins and Eastal 2010).

²³ Robert Richter, a prominent QC, had also agreed to represent her without fee, 'partly because of the case's strong relevance to Victoria's new defences to homicide legislation' (Johnston 2009b).

self-defence in family violence cases acceptable under law' (Anonymous 2009a; Stevens 2009).²⁴ Arguably, the reason these two cases did not proceed to trial is because they fit into traditional notions of self-defence (with respect to imminence and proportionality) (Tyson, Capper and Kirkwood 2010; DVRCV 2010). Furthermore, it has not necessarily followed that other women defendants who have killed their violent abuser have received a similar (positive) outcome.²⁵

It is interesting that a plea of defensive homicide has been accepted by the Victorian Office of Public Prosecutions in a large number of cases involving a male defendant who has killed a male victim in what appears to be situations that would have previously supported a plea of provocation (eg in what are largely one-on-one, 'spontaneous' violent encounters). Since the *Crimes (Homicide) Act 2005* (Vic) came into effect, 14 male defendants have been sentenced on the basis of defensive homicide; 10 of these have been the result of a decision by the Office of Public Prosecutions to accept a plea of guilty (Tyson 2010; DOJ 2010; Tyson, Capper and Kirkwood 2010). This development is not all that surprising if we consider that during its consultation phase, the VLRC anticipated that the reintroduction of excessive self-defence (defensive homicide) may provide an additional basis for a plea of manslaughter to be negotiated, without resulting in any substantial change in how these cases are managed.²⁶ Furthermore, the VLRC (2004:98) acknowledged that, in some cases, it may also provide an additional basis on which an accused person might be charged with manslaughter. There has been some public criticism of the decisions of the Director of the Office of Public Prosecutions in Victoria to accept a plea of guilty to defensive homicide in many of these cases, particularly those involving a male defendant who killed a male victim (see, for example, Evans 2010; Fyfe 2010; MacDonald 2010), although the arguments have not been put as strongly as those made about the legal outcome in *Middendorp*. However, it does beg the question whether the Victorian legislature should adopt the VLRC (2004:106) recommendation that all plea negotiations (written and verbal) be made transparent and officially recorded (as is the case in some other Australian states). Such a move stands to increase public understanding about and awareness of the plea bargaining process (see, for example, Flynn 2007, 2009).

Another more positive development (on the face of it at least) is that in the majority of cases where women have been killed by their intimate partner or ex-partner after the *Crimes (Homicide) Act 2005* (Vic) came into effect, most of these male defendants have not

²⁴ The more recent acquittal of Susan Falls who shot and killed her violent husband in Queensland in May 2006 has been described as sending 'a message to all battered women and victims of serious violence that there is justice in the legal system' (Swanwick 2010).

²⁵ Since writing this article, there have been a number of other Victorian cases involving women who have killed a male victim. Although it is beyond the scope of this article to discuss these cases in any depth here, it should be noted that a young Indigenous woman, Melissa Anne Kulla Kulla, pleaded guilty to one count of manslaughter after she was charged with the stabbing murder of Hussein Mumin on 10 September 2008 (*R v Kulla Kulla*). On 3 March 2011 Eileen Creamer was found guilty of the offence of defensive homicide after she killed her husband, David, with a South African weapon known as a knobkerrie (*R v Creamer*). The jury accepted the evidence led in Ms Creamer's defence, which was that she was repeatedly forced to take part in group sex with men other than her husband. On 12 April 2011, the Office of Public Prosecutions, Victoria, accepted a plea of guilty to defensive homicide in the case of Karen Black, who killed her de facto husband, Wayne Clark. The judge accepted that the killing took place in the context of a long history of drunken verbal abuse by the deceased towards the defendant and which also involved threats, intimidation, harassment, jabbing and prodding, as it did on the night in question (*R v Black*).

²⁶ Other Australian states such as Western Australia have implemented changes to the laws of homicide with the explicit aim that these will 'result in more guilty pleas, fewer trials, and more convictions - saving court resources and reducing stress for victims' families' (Office of the Attorney-General Western Australia 2008).

successfully relied on a 'sexed excuse' for their crime. Since 2005, there have been 23 male defendants who have been charged with murder for killing an intimate female partner or ex-partner: 16 of these men have been sentenced on the basis of murder; 10 were the result of a plea of guilty to murder,²⁷ and another 7 were convicted of murder after a trial.²⁸ There have only been five cases involving men who killed their intimate partner or ex-partner who have had their culpability reduced to manslaughter after a trial.²⁹ The case of *Middendorp* is the only case involving a man who killed his ex-partner and who has been convicted of the offence of defensive homicide after a trial.³⁰ However, it would certainly appear that in some of these cases, provocation-type arguments are being mobilised in the guise of defensive homicide. In at least 5 cases, the presiding judge sentenced the male defendant on the basis that he was satisfied that some argument or altercation had developed between the parties that escalated to a point that this was what induced an intention in the offender to cause death or really serious injury.³¹ And in some of these cases, the presiding judge said that he accepted the male defendant's response to the alleged argument or altercation between him and the deceased was not planned or premeditated; rather his response was 'sudden', 'unplanned', 'a spontaneous outburst of anger-related violence, one in which he 'lost it' or 'severely overreacted.'³² There have only been a few cases where the presiding judge was clearly unsympathetic to the male defendant's claim that he 'snapped' or momentarily lost self-control in response to something said or done by the deceased, and saw fit to issue a strong condemnation that the use of violence as a response to the termination of a relationship was inappropriate (*R v Piper*; see also *R v Azizi*, which is discussed in more detail below). However, most of these instances involved clear evidence of a prior history of domestic violence perpetrated by the defendant towards the deceased.³³

According to Stewart and Freiberg (2009:vii) in the *Provocation in Sentencing Research Report*, while 'the full impact on sentencing outcomes of the reforms initiated by the Victorian Law Reform Commission ... will only become apparent in years to come', it was anticipated that 'offenders who otherwise might have been convicted of provocation manslaughter' may 'now face sentencing for murder'. If we accept that a murder conviction sends a more appropriate condemnatory message to the wider community that stigmatises this type of killing (intimate partner homicide), then this cursory analysis of the cases mentioned above appears to suggest that the Victorian reforms have yielded some positive results in terms of case outcomes. While it was predicted that those offenders who otherwise might have claimed provocation prior to the legislative reforms in Victoria, may be convicted of defensive homicide (Stewart and Freiberg 2009:vii), this positive assessment of legal outcomes needs to be considered alongside recent claims about provocation type

²⁷ *DPP v Lam*; *R v Diver*; *R v Piper*; *R v Foster*; *R v Dutton*; *R v Felicite*; *R v Singh*; *R v Bayram*; *R v Mamour*; *R v McDonald*.

²⁸ *R v Brooks*; *R v Ellis*; *R v Baxter*; *R v Chalmers*; *R v Robinson*; *R v Azizi*; *R v Caruso*.

²⁹ *DPP v Pennisi*; *R v Smart*; *R v Sherna* [2009] VSC 526; *R v Reid*; *R v Lubik*.

³⁰ *R v Borthwick* involved a man who was convicted of manslaughter by criminal negligence after he killed his 'love rival', Mark Zimmer, who had formed a relationship with his ex-girlfriend, Nicola Martin, in the previous three months by driving into him with his van. Although the sentencing judge described Borthwick's actions in killing the deceased as 'a serious example of the crime of manslaughter by criminal negligence', she said that the killing was committed in the context of a 'breakdown' of his 'two year relationship with his girlfriend' and commented how he had become 'jealous of Mark Zimmer and persistently sought details of their contact and had threatened to harm and kill him with guns and knives.' She also noted that Mark Zimmer had tried to calm him down and had reported Borthwick's behaviour to the police ([2010] VSC 613 per Williams J at 2).

³¹ *R v Brooks*; *R v Ellis*; *R v Diver*; *R v Foster*; *R v Felicite*; *R v Bayram*.

³² *R v Diver*; *R v Foster*; *R v Felicite*; *R v Bayram*.

³³ *R v Baxter*; *R v Azizi*; *R v Singh*.

arguments being made in the guise of other defences, in this instance, the offence of defensive homicide.

Is this the end of cultures of 'excuse' for men's violence towards women?

It can be noted that throughout the trial of Luke Middendorp there was little or no media present until the victim's mother, Shae Beck, consulted with Jane Ashton, Communications Coordinator for the Women's Domestic Violence Crisis Service, Melbourne, Victoria after she was contacted by Channel Nine's *A Current Affair* program.³⁴ Phil Cleary also saw fit to comment on this initial lack of media attention given to the case. He said: 'When Luke Middendorp, who stabbed his ex-girlfriend four times in the back, was found guilty only of defensive homicide, not murder, there wasn't a word of indignation on talkback radio or a word of sympathy for his victim's grieving mother from one of our high profile human rights lawyers' (Cleary 2010). In a newspaper article published immediately following the jury's decision in the *Middendorp* case (to find the male accused not guilty of murder, but guilty of the offence of defensive homicide), Sarah Capper, a policy officer with the Victorian Women's Trust, and Mary Crooks, the Trust's Executive Director, raised questions about the capacity of the reforms to homicide law in Victoria to contend 'with the grim, gendered realities of family violence' (Capper and Crooks 2010:21; see also Howe 2010).³⁵ The article by Capper and Crooks issues a stark reminder about the intent of the reforms: the 'removal of provocation' was so that violent men who used the partial defence 'as an excuse for jealous rage and anger' could no longer do so 'and have what should have been murder convictions downgraded to manslaughter, with a lesser sentence'. According to Attorney-General, Rob Hulls, when announcing the reforms, '[t]he Common law has slowly changed to take into account other circumstances where a person may kill to protect themselves – for example, where a person kills in response to long-term family violence'. As Capper and Crooks (2010) remind us: '[t]he key point here is that much of this reform was designed to take account of family violence ... Shae Beck's call for a review is understandable. Family members will want intentional killing to be labelled for what it is – murder'. Thus, they asked: '[w]hat is required of the legal system to uphold the original intent of these law reforms, particularly where there is a history of violence towards the woman and where the woman killed is a victim blamed?'

In response to these criticisms, in August 2010 the Victorian Department of Justice published a Discussion Paper, *Review of the Offence of Defensive Homicide*, inviting legal professionals, experts in the field of family violence and the wider community to comment and give feedback on how the new offence is being used (Hulls 2010). According to a joint

³⁴ Private communication between the author and Jane Ashton.

³⁵ There was also a public outcry following an earlier decision by a Victorian jury to find Sherna, not guilty of murder but guilty of manslaughter by an unlawful and dangerous act after he strangled his de facto wife, Susanne Wild, with the cord of his dressing gown. Former federal MP and law reform campaigner, Phil Cleary, whose sister, Vicky, was killed by her ex-boyfriend, Peter Keogh, in 1987 outside the kindergarten where she worked, and who was convicted of manslaughter after he claimed that Vicky provoked him declared the jury's decision to acquit Sherna 'of murder after he admitted to strangling his de-facto wife ... a scandal and a disgrace'. He urged Attorney-General, Rob Hulls, to 'revisit his homicide law changes that four years ago abolished the defence of provocation'. He reasoned that the manslaughter verdict not only 'indicates that men are entitled to kill women in such circumstances' stating that 'the Sherna case fitted provocation's "blame the victim" template' (Munro 2009a). On his website, Cleary (2009) asks: 'Why was the old-fashioned and dangerous idea about Sherna being "hen-pecked" allowed to run almost unchallenged?'

submission (Tyson, Capper and Kirkwood 2010) to the Department of Justice in September 2010 on behalf of the Victorian Women's Trust (VWT), the DVRCV, Domestic Violence Victoria (DV Vic) Inc, the Federation of Community Legal Centres (FCLC), Koorie Women Mean Business (KWMB), and Women's Health Victoria (WHV), a key problem with the jury's decision to convict Luke Middendorp of defensive homicide lies in its failure to have regard for the empirical literature on the gendered dynamics of family violence. Specifically, Tyson, Capper and Kirkwood (2010:11) took issue with the way in which the killing was represented in court as the inevitable culmination of that relationship:

while both parties were involved in frequent fights and arguments, on the day in question, Jade Bownds had arrived at the house with a male companion (possibly for protection, the companion was 'chased away' by Middendorp), and that witnesses heard Middendorp threaten to stab her.

Tyson, Capper and Kirkwood (2010:11–12) also note that in contrast to the empirical literature documenting the prevalence of separation assaults on women, men, by contrast:

do not live in such fear of their own lives, especially in the process of leaving a relationship (and homicide statistics support this). "In a significant number of cases when women have killed in the context of an intimate relationship, there is a history of violence used against the women" (VLRC, quoted in the Discussion Paper, 16).

Thus, Tyson, Capper and Kirkwood (2010:6–7) remain concerned that there is a real possibility that the outcome reached in this particular case may open the door for other male defendants who have killed women in the context of family violence to claim that their culpability should be reduced from murder to defensive homicide or manslaughter. The submission concludes by outlining a number of proposals for ongoing and further reform for the Victorian Government to consider including the recommendation that a specialist domestic homicide unit to be housed within the Office of Public Prosecutions along the lines of the specialist sexual offences unit that is already in operation in Victoria (Tyson, Capper and Kirkwood 2010:17).

Clearly, the jury's determination that it could not rule out Luke Middendorp's subjectively held but ultimately unreasonable belief that what he did was necessary to protect himself from his ex-partner has raised some grave concerns. In particular, it raises concerns about the continuation of 'cultures of excuse' for male violence in post-provocation jurisdictions.³⁶ However, the specific claim that in the absence of provocation, defensive is becoming its replacement, merits closer analysis. While a specific rationale for the abolition of the partial defence of provocation concerned the problem of how these cases construct the woman victim as to blame for her own death, the abolition of provocation was brought about at the same time as new legislative provisions to facilitate evidence being admitted in support of an argument of self-defence or 'excessive self-defence' (defensive homicide) in the context of a family violence situation. To this end, s 9AH of the *Crimes Act 1958* (Vic) facilitates blame being ascribed to the victim where the victim has perpetrated family violence and the killing is in response to this. Although the *Middendorp* case is one that clearly involves victim-blame, it is victim-blame in the context of self-defence (and not provocation). Thus, there is an urgent need for research that focuses explicitly on legal outcomes as well as legal narratives that claim to represent the circumstances of such killing

³⁶ Commenting on the *Coroner's and Justice Act 2009* (UK) that introduces a new partial defence of 'loss of self-control' that replaces the common law defence of provocation, one journalist remarked that: '[e]nding the provocation defence in cases of "infidelity" is an important law change and will put an end to the culture of excuses' (Slack and Doughy 2009).

and that all too often permit ‘trial by character’ (Nicolson 1995:201), so we can better ascertain whether, and to what extent, provocation’s exculpatory narratives of ‘excuse’ are being made in the guise of other defences.

At this point it is necessary to briefly consider the earlier case of *Sherna*, which also attracted significant public criticism following the decision by a Victorian jury to find the male defendant not guilty of murder or of the offence of defensive homicide, but guilty of manslaughter by an unlawful and dangerous act for strangling his de facto partner, Susanne Wild, with the cord of his dressing gown, thereby causing her death (*DPP v Sherna* [2009] VSC 494).³⁷ According to the defendant, on the night in question Wild had come ‘storming’ into the laundry ‘yelling and screaming’ about a mobile phone bill upsetting both him and his dog, Hubble, whom Sherna had been ‘rocking to sleep’. Wild then left the laundry and walked towards the kitchen. Sherna put the dog to bed and followed Wild into the kitchen. On the way, he said he grabbed the cord from his dressing gown which was hanging on the back of the door of the laundry. When asked by police what was going through his mind at the time he grabbed the cord, he said: ‘I was just so angry. I just - because I was drunk I grabbed the cord to kill her. I was so angry’. He maintained that Wild was on one side of the kitchen bench and he was on the other. He recalled that the dressing gown cord was out of sight because he was holding it in his hands which were hanging down by his side. He said he then tried to regain his composure and calm himself down, but then she said something about the mobile phone bill which got him fired up again. It was at this point he lost his temper and strangled her with the dressing gown cord until she could no longer breathe. When asked whether she said anything when he approached her with the dressing gown cord, his response was, she said: ‘Tony, no, don’t do it,’ but he just ignored her (*Sherna Trial Transcript 19/10/09 Address - Mr Tinney:26–8*).³⁸

According to counsel for the defendant, Jane Dixon, the killing of Susanne Wild was not ‘pre-planned’. ‘Quite to the contrary’, she submitted to the jury in her opening address, ‘it was entirely spontaneous. It was a sudden eruption as a result of the cumulative effect of many, many years of abuse’ (*Sherna Trial Transcript 19/10/09 Address – Ms Dixon:42*). Throughout the trial, the defence narrative inscribed the woman victim as a thoroughly unlikeable woman who sought to dominate and control the male defendant through her verbally abusive behaviour. This construction of the woman victim’s character is partly due to evidence adduced at the trial by Sherna that told of how ‘Susie was a mouth – really mouthy, none of the neighbours liked us at all. None of the neighbours would talk to us because she was always mouthing off at them ... So for me, it was – just every day was a pressure cooker day’ (*DPP v Sherna* [2009] VSC 494:2). Citing some of this evidence, the defence narrative’s construction of the deceased as a scolding wife who was killed by her ‘cuckolded’ de facto partner was echoed in media reports that featured the following headline: ‘henpecked hubby “snapped” over upset dog’ (Hunt 2008; Anderson 2009; Anonymous 2009b).³⁹ In her closing address, Ms Dixon told the jury that Sherna had been

³⁷ This was the second trial involving this accused person following the failure of the jury to reach a verdict at his first trial (Munro 2009b).

³⁸ After Sherna strangled Wild, he dragged her body to her bedroom and left her lying face down on her bed for three days while he went out to play the pokies and visited a brothel. But after the smell of decomposition became so bad that he overheard a neighbour complaining about it, he proceeded to dig a grave in which to bury her body in their back yard (Hagan and Russell 2009).

³⁹ Witnesses who gave evidence at the trial were asked to give an opinion as to what sort of person Sherna was. One witness, a colleague of Sherna’s, said: ‘I thought he was a pretty nice guy. He was just a little bit, seemed to be nervous a lot and a little bit timid ... when it came to speaking in a group’ (*Sherna Trial Transcript*

trapped within what she described as ‘a grossly dysfunctional relationship with Wild who dominated and controlled him to a pathological extent’. She said: he was a man who ‘had reached the threshold of his horrible life with Susie Wild. He was always defending himself from daily abuse and put-downs’ (*Sherna Trial Transcript 29/10/09 Address – Ms Dixon:830*).⁴⁰ Clearly, the jury’s sympathy lay with the defendant as indicated by their decision to find him not guilty of murder or defensive homicide, but guilty of manslaughter by an unlawful and dangerous act. However, if we accept the evidence that was also adduced at the trial in this case and that obviously lent support to the plausibility of the defence narrative, this case needs to be understood as an unusual case of intimate partner homicide committed in the context of family violence with the victim being the de facto male partner (for a discussion of the rare instance of a case involving a claim of ‘battered husband syndrome’, see Schwartz and DeKeseredy 1993; Straton 1994; Simone 1997).

When making her plea, it is interesting that Ms Dixon sought to distinguish the current situation from those more ‘typical’ provocation manslaughter cases involving sexual jealousy and infidelity:

Your Honour, we are really entering into new and uncharted territory here as a result of the new changes to the Crimes Act ... it must be borne in mind that whatever Your Honour does in this case is going to have to sit well against cases where the accused is a female and has been subjected to psychological domination or abuse and may have been convicted of manslaughter, for example, where there is no present threat. So it is not a simple sentencing exercise in this case ... It is very different from those provocation manslaughter cases where the issue is about some sense, and I suppose Ramage might be one of these, where there is a sense of the wife was having it off with the boyfriend and there is a kind of sexual jealousy kind of an overtone (*Sherna Trial Transcript 2009:1007–8*).

While it would appear that in a post-provocation context, feminist arguments about the propensity for defence narratives to mobilise gendered stereotypes about unruly woman victims who provoke the rage of tragic cuckolded partners in an effort to elicit sympathy from juries and judges are being realised (see, for example, Howe 2002:42), the claim that provocation’s narratives are being used in the guise of other defences — in this instance, manslaughter — merits closer analysis.

If we consider that in his closing address to the jury in the *Sherna* case, the prosecuting counsel, Mr Tinney, saw fit to comment on how the accused had either ‘personally or through his counsel ... complained mercilessly about Susanne Wild’. He said that the Court had ‘been absolutely awash with criticisms of her’. He intimated that this was a tactic on the part of the accused and or his lawyer who deliberately sought to say ‘something, anything,

19/10/09 Cross-examination – Mr Tinney:62). Media reports also commented on how *Sherna* considered his dog a ‘child substitute’ because he rocked it to sleep every night (Iaria 2009; Anonymous 2009b).

⁴⁰ *Sherna* claimed he was in a very controlling and verbally abusive relationship with the deceased. There was evidence adduced at the trial to show that the relationship was one in which they had no children, were isolated from family and friends, didn’t go out to restaurants, slept in separate bedrooms, and how the defendant’s toilet access was restricted by his de facto partner and that he was made to sleep in the laundry with his dog, Hubble. Counsel for the defendant (Ms Jane Dixon) also relied on the evidence from a consulting clinical and forensic psychologist, Jeffery Cummins, who was of the opinion that the defendant was suffering from ‘battered woman syndrome’ (*Sherna Trial Transcript 27/10/09:638*). Mr Cummins testified that *Sherna* exhibited key symptoms including social isolation arising from ‘an extremely symbiotic relationship’ in which they were ‘inappropriately dependent on each other’. He said that this led to *Sherna* ‘feeling powerless’, ‘helpless and worthless’. His self-esteem deteriorated to such an extent that ‘he became significantly depressed’. He further diagnosed that *Sherna* was suffering from ‘a chronic depressive condition’ known as ‘a dysthymic disorder’. He also assessed him ‘as having an adjustment disorder’ (*Sherna Trial Transcript 27/10/09:639*).

however small, [but] negative about Susanne Wild'. Thus, the prosecuting counsel was critical that this had been 'quite a one-sided process'. While he conceded that the practice of resorting to defence tactics that blame the victim was linked to the nature of the adversarial process, he said it was not one in which the victim was the one on 'trial as to her character'. This led him to conclude that the process 'may have had a tendency to obscure the reality of what it actually was that this man did to his wife' (*Sherna Trial Transcript* 28/10/09 Address – Mr Tinney:767). Although the jury determined that it did not accept the male defendant's subjective but unreasonable belief that he did what was necessary to defend himself (thus, they found him not guilty of defensive homicide), their decision to return a conviction of manslaughter by an unlawful and dangerous shows how provocation-type arguments are being mobilised in the guise of other offences (eg the problem of victim-blame in the context of provocation ends up being a problem in another context which is manslaughter), an area that to date has not received much critical attention from provocation's critics (on this point see Stewart and Freiberg 2009:vii).

Challenging legal cultures

As indicated above, in its opening pages, the Discussion Paper, *Review of the Offence of Defensive Homicide*, states that the 2005 reforms to the law of homicide in Victoria explicitly recognised that change was required both to the law *and to the culture* of the criminal justice system (DOJ 2010:3). However, as decades of feminist legal scholarship reminds us, often the (masculinist) internal culture(s) of the legal profession can be slow, and sometimes resistant, to change (Kaspiew 1995; Hunter 1996, 2006, 2008). To provide a brief illustration, consider the comments made by the (now retired) Deputy Chief Justice David Byrne QC, who presided over the *Middendorp* case. When sentencing the defendant, His Honour described the defendant's act in killing his ex-partner a 'foolish act' committed against a 'troubled young woman' (*R v Middendorp* [2010] VSC 202 per Byrne J:[17]). Comments such as these only serve to minimise the significance of the death threats and a prior history of domestic violence perpetrated against the woman victim. As Busch (1994:110) has observed, there is little or no sense that threats of this kind may represent criminal behaviour and the implicit assumption is that she is an unworthy victim. One could conclude from this that His Honour's comments represent an 'isolated instance' of gender bias on the part of the legal profession (or even a foolish lapse?). However, there is also much evidence to the contrary that suggests that masculinist bias is a "real, significant but largely unconscious" systemic problem' (Kaspiew 1995:351). If we compare the above comments to those made in the case of *Azizi* discussed below, it would appear that some members of the judiciary are seeking to implement normative change by adopting an 'equality approach' to sentencing as recommended in the *Provocation in Sentencing* report.

Soltan Azizi was charged with murder after he strangled his wife to death with her scarf (*R v Azizi*). He claimed that he did not intend to kill, or do really serious injury to his wife when he pulled on the scarf. Rather, he maintained that her death was an accident and that he pulled on the scarf to stop her from biting him on the leg after he bent down to pick up their 18 month old child, Hamsa, whom she had allegedly thrown onto the floor. According to the defendant, when he asked his wife why she was doing this to the baby, he alleged that she said: 'in Australia that is her right, that the mum has the right to do those things' to which he responded 'it may be your right but the baby might die' (*R v Azizi* [2010] VSC 112 per King J at 5). When sentencing Soltan Azizi, King J determined that she was in agreement with the decision of the jury to return a verdict of murder. Her Honour said she

did not find Azizi to be 'a witness of truth' and that she was 'not prepared to act upon the material [he] gave under oath'. Rather, Her Honour was of the view that:

over the 14 years of your marriage, [you] subjected your wife to ill-treatment both of an emotional and physical nature. I find that you have treated her as a person lacking in individual rights, and a person that must do what she was told to do by you (*R v Azizi* per King J at 6).

Whereas Middendorp's act of killing his ex-partner is not understood by the judge who presided over that case as specific to Anglo-Australian culture, Soltan Azizi's act is characterised as conflicting with current Australian values. This point can be illustrated by Her Honour's remark that Soltan Azizi's treatment of his wife 'was not what would be normally acceptable in this country':

It is clear that you were unable to accept that your wife had rights, which rights included the ability to leave you if that was what she desired, to seek an intervention order against you, if that was what she required and to be supported to live separately and apart, if that was what was required (*R v Azizi* per King J at 7–8).

Justice King's comments in the case of *Azizi* above issue a strong condemnation of the violence and control that took place within the relationship leading up to the murder (for a full discussion of this judgment see Tyson, Capper and Kirkwood 2010). Whereas Judge Byrne's description of the relationship in *Middendorp* as 'tempestuous, even violent' reveal a tendency on the part of the legal system to misrepresent 'partner violence' as 'equally harmful to both parties' (Howe 2010).

Moreover, the above comments need to be interpreted in light of feminists' criticism of how the provocation defence produces racist stereotypes, especially when it relates to male anger and violence against women (Volpp 1994; Yeo 1996; Sing 1999; Phillips 2003; Maher et al 2005; Dick 2009). According to Maher et al (2005:148,151–2), the Australian legal system's tendency to narrate men's 'excuses' for their anger and violence towards women differently when violent masculinity is practiced by white middle-class men compared to those identified as culturally "other" may well mean that:

While the door to provocation may shortly be closed, the underlying assumptions and ideologies about masculinity ... are likely to continue to effect the arguments and judgements made in sentencing men who have perpetrated intimate homicides.

A specific example of a non-critical (non-feminist) assessment of men's excuses for anger and violence against women can be found in an inaugural address given by The Honourable JJ Spigelman AC, Chief Justice of New South Wales to the *Law, Governance and Social Justice Forum* convened by the University of New South Wales' Law Faculty. His Honour's speech was entitled 'Violence Against Women: The Dimension of Fear' and warned that Australia's changing demographic means courts increasingly have to deal with cultural traditions that involve violence against women. He said that throughout Europe significant issues have arisen with respect to Islamic and South Asian communities extending to honour crimes and forced marriages. In a colonising gesture, he offered that 'we' in Australia are 'not able to compromise on key issues like violence against women', and cited the 'winding back' of the partial defence of provocation as evidence that Australian courts had made 'great progress ... in bringing about gender equity before the law' (Hall 2010).

Spigelman's insistence that it is mainly those men from 'other' (Islamic and South Asian) communities who hold sexist, cultural traditions that involve violence against women who

threaten to clog up ‘our’ Australian courts (Hall 2010) is worrying indeed.⁴¹ As Howe (2002:46) has remarked, it is comments such as these that illustrate how racialised excuses for male anger and violence towards women are able to persist in ‘the new “post”-provocation’ judgements of abolitionist judges’. This is because it is not only the body of the woman victim that is put on trial, but also those men who have failed to approximate the norms of appropriate masculinity (see, for example, Kersten 1996; Maher et al 2005). As discussed above, it is apparent that some judges have issued condemnations of behaviour they deem to be ‘unmanly’ or inappropriate since the 2005 amendments to the laws of homicide in Victoria. However, it would appear that we still have a way to go in the process of educating not only society, but equally if not more importantly, lawyers and judges, about their complicity in ‘trial by character’ and the resulting sympathy afforded defence narratives that construct some men’s stories about why they killed their intimate partner or ex-partner as ‘foolish acts’ or ‘tragedies’ and which stem from the dead women’s flawed character (Nicolson 1995:203) and not others.

This point has been made by Hunter (2006) who has recently observed that laws relating to domestic violence are always going to be dogged by ‘the implementation problem’; that is, by lawyers and judges who do not necessarily share, or are often resistant to assuming, those feminist understandings. Thus, it is important not to take ‘implementation for granted’ nor should we ‘ignore the importance of existing legal cultures’ (Hunter 2006:734, 773). Indeed, feminist legal scholars are very much aware and have even come to expect that any attempt to engage with the criminal justice system runs the risk of producing a range of negative, indeed dismal, results for women (Smart 1989; Thornton 1991; Armstrong 2004; Graycar and Morgan 2005; Hunter 2006; Douglas 2008; Hunter 2008). Hunter (2008:8) explains that this is because ‘[l]aw transforms elements of experience (such as being subjected to domestic violence) into fixed, objectified, and disempowering categories (such as those of ‘victim’, or ‘battered woman’), and decisions as to whether individual women fit into these categories and therefore qualify for protection are made by unsympathetic law enforcers’.⁴²

Conclusion

The 2005 amendments to the laws of homicide in Victoria have been described by some as representing the success of feminist concepts of substantive — rather than formal —

⁴¹ In a recent and thought provoking critique of His Honour’s speech, Golder (2010:194) argues that ‘Spigelman CJ’s racialised assumptions about culture and its effect on women prevent a more nuanced acknowledgment of, and hence constructive engagement with, the dynamics of gendered violence’. Golder (2010:196) considers ‘[t]he seductive plausibility of Spigelman CJ’s “we”’, which he argues:

gathers together a range of very different and conflicting interests under the unitary signs of the West or of Europe—and opposes this to the proverbial “rest”. This uncritical resort to “we”, along with the other binary distinctions of “majority” and “minority” culture, is adduced by the Chief Justice in order to bolster the West’s claim to universality, tolerance and respect for women. This gesture obviously belies a long history (and present) of Western violence against women (and in so doing erases a whole range of more interesting and productive critical questions which could well be asked of contemporary gendered violence).

⁴² According to Hunter (2008:8):

the real problem for women may turn out to be not lack of legal recognition, but hostile social discourses of which law is only a part. Thus, rather than accepting law’s claims to be a powerful instrument for justice, feminists should focus their attack on those wider discourses as they are manifested in law and elsewhere.

equality⁴³ as a means of ensuring legal categories are more responsive to the complexities of women's lives (Forell 2006:30; Ramsey 2010:69). According to Douglas (2008:55), the decision to allow social context evidence or what is otherwise referred to as evidence of 'social framework' in cases of homicide involving family violence is a promising legal development that represents an attempt to 'ensure that women's experiences of violence inform the analysis of the question of the necessity of the self-defence response ... [and] ... also specifically recognise the potentially cumulative effect of family violence on an individual and the particular dynamics of relationships'. Many are sceptical, however, about the capacity of equality inspired approaches to bring about legal and social change. Some critics particularly in the North American legal context are of the view that feminist claims of equality have been a 'spectacular failure' for women (Boyd 2008:59–80)⁴⁴ and that it is time to move on (Hunter 2008:81–104). Others are not yet ready to abandon it (eg Graycar and Morgan 2008:105–24). As Douglas (2008:42), has observed, past reforms aimed at achieving gender equality have often had limited results. She cites the various and specific modifications that had been made to the specific requirements of the provocation defence that expanded the range of circumstances where women could claim the defence, but tended to also expand the availability of provocation to men (Douglas 2008:44). The practical results of extending the timeframe for the defendant's response to the provocation also extended it for men who killed in situations of jealousy or perceived infidelity (Douglas 2008:49; see also Morgan 1997). For this reason, many have worried whether, and to what extent, the move to repeal the partial defence of provocation 'will transcend the equality versus difference conundrum evident in previous law reform efforts' (Douglas 2008:44).

As discussed above, it would appear that the beneficiaries of the new offence of defensive homicide are overwhelmingly men who have killed other men, but there is also some emerging evidence to suggest that it is operating to advance the interests of some women who kill their violent abusers. What the discussion of the *Middendorp* and *Sherna* decisions above has also shown is that it would appear that the characters of dead women who have been killed by their intimate partners or ex-partners are still being put on trial. While many feminist scholars, including some of those within the Victorian legislature, remain optimistic that the decision to abolish the partial defence of provocation will put an end to the (legal) culture of blaming the woman victim for male anger and violence, the question is when and what will it take. It is the particular inscription of male rage as a normal characteristic of masculinity that shores up the cultural commonplace narrative that the woman victim 'asked for it' and, hence, is deserving of what she gets (Tyson 1999). It is constructions such as these that have quite literally come to set the limits of law's understanding. Feminist postmodernist critiques of law have long sought to expose the ways in which contemporary legal discourse's reliance on sexist (and racist) stereotypes means that men's violence is normalised and often 'excused' while women's violence is rarely, if ever, explained as a rational reaction to life's stresses or response to social, political or physical inequalities (Morrissey 2003:33; see also Nicolson 2000; Rollinson 2000). In the

⁴³ Graycar and Morgan (2006:405–6) have examined the persistence in law 'in viewing equality as meaning only formal equality, that is, the Aristotelian belief that all people should be treated the same, regardless of circumstances' is one that has for too long meant that a more fruitful concept of equality has remained hidden. According to Graycar and Morgan, the concept, substantive equality, is one that recognises the disparate circumstances in which men and women kill. Hence, the failure to recognise social context — that 'women who are killed and the women who kill are, in effect, the same women, and the contexts in which women and men kill are not commensurate' — has often led to a further failure on the part of reform bodies to accept, rather than persistently ignore, that the provocation defence is gender biased.

⁴⁴ For a more detailed discussion of the reasons why the abolition of provocation 'is currently unthinkable in Canada', see Forell (2006:27–71).

now classic work of Carol Smart (1989), law is described as not simply reflecting social norms about behaviour and relationships; it is a powerful discourse that produces particular kinds of knowledge in the form of normative and often socially harmful narratives about particular gendered and raced subjects.⁴⁵ If we consider that provocation's narratives have become normative and regulatory, in Threadgold's (2002:26) terms, 'part of law's habitus',⁴⁶ that for too long these narratives have permitted sympathy to be afforded the murderous rage of the cuckold who kills his 'nagging', 'taunting', 'unfaithful' or 'departing' wife (Howe 2002:58, 61; see also Howe 2004; Tyson 2007:298–99), then these are going to be very hard to dislodge indeed. Provocation's critics must continue to expose the gendered and raced assumptions underlying the (legal) narratives used to claim other defences to homicide (eg self-defence, manslaughter by an unlawful and dangerous act) and particularly the offence of defensive homicide. Otherwise, there is a risk that the standard provocation story of male violence as an uncontrolled response to people with whom they are 'angry' will end up rewritten as a story about male violence as a subjective but unreasonable response to people (eg women) of whom they are 'fearful' in situations where they are also the perpetrator of domestic violence.

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⁴⁵ The idea that the provocation narratives told by defence counsel in cases of men who kill their intimate partner or ex-partners have damaging ideological consequences that can 'post-humously' harm women victims has been explored by Adrian Howe (2004:75; for a fuller discussion of the concept of social harm as it relates to violence against women, see Cain and Howe 2008).

⁴⁶ Dispelling the myth that law is distinct from cultural forms such as the literature and film, Threadgold highlights that like literature, law offers 'modes of reading/writing, which are formative of particular kinds of habitus and are inevitably partially constituted intertextually by and through mediations of popular culture'. She cites the work of James Boyd White who has shown that it is possible 'to read the law as if it were literature, as a technology for making worlds and selves' (Threadgold 2002:26). The fundamental point Threadgold (2002:26) is making here is that law is a discursive community embedded if not deeply implicated in the field of everyday life, and one that is 'habitually authorised to magically institute what it says as performative speech acts'.

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