Family Violence and the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic): Justice in the Accessibility of Self-Defence

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ABSTRACT

In 2014, the Crimes Act 1958 (Vic) was reformed by the enactment of the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) to abolish the offence of defensive homicide. It was in part replaced by a redrafted provision on self-defence to better accommodate responses to family violence and supplemented by family violence jury directions within the Jury Directions Act 2015 (Vic). These reforms were intended to help juries better assess self-defence in a family violence context so that where the actions of a victim of family violence were genuine and reasonable in the circumstances as the victim perceived them, they would be acquitted altogether. Although the reforms sought to respond to long-standing criticisms that the law of self-defence had failed to adequately accommodate victims of family violence, the 2016 Victorian Royal Commission into Family Violence nevertheless found that the State of Victoria was inadequately responding to the social harm caused by family violence.

To ascertain if the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) and amendments to the Jury Directions Act 2015 (Vic) had given victims of family violence who killed their violent partners greater access to self-defence, eight prosecutions heard pursuant to the former law of self-defence under the Crimes (Homicide) Act 2005 (Vic) were analysed using John Rawls' theory of justice. The analysis revealed 14 examples of imperfect procedural justice which resulted in no women successfully accessing self-defence despite cogent evidence being available. Three relevant prosecutions heard pursuant to the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) were also analysed. The analysis revealed an acquittal, a discontinuance and one instance of imperfect procedural justice which suggested that access to self-defence had increased.

12 stakeholders in the criminal justice system were interviewed to probe why these injustices had occurred and whether the current law could be argued to have increased the accessibility of self-defence to victims of family violence. On the former law, the data identified problems including: the provision of dated legal advice; overzealous prosecutions; victims feeling so remorseful that they pleaded guilty despite self-defence being available; defence counsel not raising the family violence self-defence provisions

at trial; the complexity of the law and jury instructions. On the current law, the interviews indicated that the accessibility of self-defence had increased due to the revised test for self-defence, Victoria's new family violence jury directions, increased judicial and professional receptivity and the simplification of the law. However, professional pressures remained in the realm of plea negotiations; pressures continuing to pose foreseeable risks of imperfect procedural justice. Specifically, the abolition of defensive homicide and the charging practices of the Office of Public Prosecutions were identified to have, at times, perpetuated the pressure on victims of family violence to plead guilty to lesser offences despite the existence of cogent evidence of self-defence.

Matters were recommended, including, inter alia: the provision of a brief to the Victorian Law Reform Commission and Department of Justice to review the operation of the legislation to ensure that the legislation consistently achieves its objectives. Further, that the prosecution policy of the Office of Public Prosecutions concerning its discretion to prosecute be amended to contain a comprehensive policy informing the prosecutions of victims of family violence with viable claims to self-defence.

STUDENT DECLARATION

I, Vincent Farrugia, declare that the PhD thesis entitled Family Violence and the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic): Justice in the Accessibility of Self-Defence is no more than 100,000 words in length including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work.

Signature:

Date: 25/05/2020

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LIST OF ABBREVIATIONS

ABS	Australian Bureau of Statistics
ACFTRCOR	Australia Code for the Responsible Conduct of Research
ALRC	Australian Law Reform Commission
CBA	Criminal Bar Association
DPP	Director of Public Prosecutions
DVRCV	Domestic Violence Resource Centre Victoria
HREC	Human Research Ethics Committee
JCV	Judicial College of Victoria
LIV	Law Institute of Victoria
NSECHR	National Statement of Ethical Conduct in Human Research
OPP	Office of Public Prosecutions
VBA	Victorian Bar Association
VDJ	Victorian Department of Justice
VLA	Victoria Legal Aid
VLRC	Victorian Law Reform Commission
VP	Victoria Police
VRCFV	Victorian Royal Commission into Family Violence
VURIP	Victoria University Research Integrity Policy
UN	United Nations
WHO	World Health Organisation

CHAPTER 1
INTRODUCTION

1.1 Background to the research

The international community has become well-acquainted with the pervasiveness of family violence and its destructive consequences. In the most severe circumstances of family violence, perpetrators kill their partners or are killed by their partners in self-defence. Although neither sex may claim to hold a monopoly over the perpetration of family violence, female victims of family violence have, at the domestic level, encountered greater difficulties in availing themselves of the law of self-defence (in comparison to their male counterparts) in response to charges of homicide.

In 2005, the Parliament of Victoria enacted the Crimes (Homicide) Act 2005 (Vic) to codify the common law of self-defence and create the offence of defensive homicide in an attempt to increase the accessibility of self-defence to victims of family violence. In its 9 year operation, no female victims of family violence (who had been charged with a homicide offence) were able to successfully avail themselves of self-defence. As a result, ample commentary suggested that the Crimes (Homicide) Act 2005 (Vic) had failed to achieve its objective.

In 2014, the Crimes Act 1958 (Vic) was further reformed by the enactment of the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) to abolish the offence of defensive homicide. It was in part replaced by a redrafted provision on self-defence to better accommodate responses to family violence and supplemented by family violence jury directions within the Jury Directions Act 2015 (Vic). These reforms were intended to help juries better assess self-defence in a family violence context so that where the actions of a victim of family violence were genuine and reasonable in the circumstances as the victim perceived them, they would be acquitted altogether.

Although the 2014 reforms sought to redress long standing criticisms that the law of self-defence had failed to adequately accommodate victims of family violence who kill their

partners, the 2016 Victorian Royal Commission into Family Violence ('VRCFV') nevertheless found that the State of Victoria was inadequately responding to the social harm caused by family violence. As no doctoral research has considered whether victims of family violence are more likely to receive justice including, where appropriate, acquittals under the reformed law, this research sets out to do so. In the process, it makes recommendations for further research and reform.

1.2 Research questions

In response to the findings of the VRCFV, this research sought to answer the following overarching research question:

> To what extent does the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) provide a more just solution to victims of family violence who kill their partners in self-defence (in comparison to the previous law)?

In order to answer this question, it was necessary to address four subsidiary questions:

1. Did the previous law of self-defence and family violence evidence unjustly fail to accommodate the experiences of family violence victims in criminal prosecutions who were alleged to have killed their violent partners?
2. If so, did the 2014 reforms to the law of self-defence increase justice in the accessibility of self-defence (in that the defence) became more available to victims who killed their violent partners)?
3. Pertinently, do relevant non-legal factors impact the decisions of juries and practitioners in the context of family violence and reduce justice in the accessibility of the present law of self-defence?
4. Are further reforms to the present law of self-defence needed in order to facilitate greater access to the present defence of self-defence for victims of family violence who kill their violent partners?

1.3 Rationale and importance of the research topic

Much has been written about why some victims of family violence kill their partners in self-defence and why female victims in Victoria have often failed to successfully raise self-defence to homicide charges. However, no systematic attempt has been made to examine this phenomenon through the perspectives of those who have input into the criminal justice process.

Additionally, no attempt has been made to assess whether the former defence of self-defence pursuant to the Crimes (Homicide) Act 2005 (Vic) and the more recent changes to that defence contained in the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic), have produced justice for victims of family violence who kill their violent partners according to a theoretical framework such as that proposed by John Rawls in A Theory of Justice.[1] Lastly, no attempt has been made, from a sociological perspective, to assess whether non-legal factors have precluded relevant accused from successfully raising self-defence where an evidential base for it exists under the reformed law.

1.4 Scope of the thesis

This thesis analysed the prosecutions of eight victims of family violence who killed their violent partners and were charged under the Crimes (Homicide) Act 2005 (Vic). These accused held viable claims to self-defence and yet either pleaded guilty or were found guilty of lesser homicide offences. Rawls' theory of justice was applied to these cases to assess whether justice had been accorded to those accused. Numerous examples of imperfect procedural justice were found and explicated.

The thesis then examined the law of self-defence pursuant to the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) and the Jury Directions Act 2015 (Vic). Three cases decided pursuant to this legislation were analysed using Rawls' framework and greater accessibility to self-defence was revealed. However, one instance of imperfect procedural justice was identified.

12 interviews with stakeholders in the criminal justice system provided data from which insights were drawn about the operation of both the 2005 legislation and the 2014

[1] John Rawls, *A Theory of Justice* (Harvard University Press, 1st ed, 1971).

legislation. Deficiencies were isolated. Non-legal factors which have operated to prevent victims of family violence from obtaining justice were also identified using socio-legal frameworks. Suggestions were made for reform where necessary.

1.5 Research approach and method

As the questions posed by this research required the collection, exposition and synthesis of law, expert-opinion and social phenomena, a mixed-methods doctrinal, qualitative and socio-legal research design was used to generate appropriate data for its aims. John Rawls' theory of justice was then used as a theoretical lens in which to interpret the results.

Doctrinal methodology was first used to isolate and comprehensively exposit relevant statutory and common law principles. Rawls' theory of justice was then expounded to provide a framework against which assessments could be made as to whether the law had previously provided victims of family violence with justice and whether justice in the accessibility of self-defence had increased under the reformed law. Qualitative research method was then applied to 12 interviews with stakeholders in the criminal justice process to supplement the doctrinal and Rawlsian analysis of relevant prosecutions. Finally, socio-legal research method was used to consider non-legal factors which possibly produced difficulties in establishing self-defence in the context of the reformed law even where a strong evidential basis for it existed.

1.6 Original contributions to knowledge and research outcomes

Despite the substantial commentary available concerning the Crimes (Homicide) Act 2005 (Vic) and its application to victims of family violence, no doctoral research has produced an academic, theoretical and jurisprudential pronouncement on how Victoria's preceding framework of self-defence and family violence evidence may be said to have unjustly failed to accommodate the experiences of family violence victims in criminal trials who were alleged to have killed their violent partners.[2] By extension, no doctoral

[2] To ascertain if the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) and the *Jury Directions Act 2015 (Vic)* had given victims of family violence greater access to self-defence, eight relevant cases heard pursuant to the *Crimes (Homicide) Act 2005* were analysed using John Rawls' *theory of justice*. The analysis revealed 14 examples of *imperfect procedural justice* which resulted in no women successfully accessing self-defence despite cogent evidence being available. Three relevant prosecutions heard pursuant

research has undertaken an equivalent exercise as a means to compare the operation of the present law with its predecessor.

Although the reforms were designed to provide a wider context for assessing claims of self-defence and ensure that jurors in relevant cases had a better understanding of the dynamics of family violence,[3] commentators expressed doubt as to whether the present statutory language concerning reasonableness would result in change in practice.[5] Such doubt centred on whether the reforms would increase the accessibility of self-defence to those who killed their violent partners in response to family violence. As Fitz-Gibbon has stated, 'if we are truly to rid the Victorian law of homicide of the "ghosts of the past",[6] be it provocation or defensive homicide, it is essential to continue to engage those within the system on what has been learnt from prior attempts at reform and what is sought from the latest package of law reform'.[7]

Accordingly, the research interviewed 12 stakeholders to obtain practical insights pertaining to their experiences with the reformed law. Their insights were then used to produce a qualitative analysis on the extent to which Victoria's reformed law of self-defence had increased justice in the accessibility of self-defence to victims of family violence in practice.

In relation to the previous law, the data identified problems including: the provision of dated legal advice; overzealous prosecutions; victims feeling so remorseful that they pleaded guilty despite self-defence being available; defence counsel not raising the family violence self-defence provisions at trial; the complexity of the law and jury instructions. Although the literature has previously canvassed the complexity of the law and the approach of prosecutors at trial, the provision of dated advice alongside the experiences

to the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) were also analysed. The analysis revealed an acquittal, a discontinuance and one instance of *imperfect procedural justice* which suggested that access to self-defence had increased.

[3] Victoria, *Parliamentary Debates*, Legislative Council, 25 June 2014, 2129 (Edward O'Donohue).

[5] Charlotte King et al, 'Did Defensive Homicide in Victoria Provide a Safety-Net for Battered Women Who Kill? A Case Study Analysis' (2016) 42(1) *Monash University Law Review* 177.

[6] Kate Fitz-Gibbon, 'The Offence of Defensive Homicide: Lessons Learned From Failed Law Reform' in Kate Fitz-Gibbon and Arie Freiberg (ed), *Homicide Law Reform in Victoria: Retrospects and Prospects* (The Federation Press, 2015) 141.

[7] Ibid.

of defence counsel and clients adds depth to the literature with Rawls' theory of justice in mind.

In relation to the current law, the interviews indicated that the accessibility of self-defence had increased due to the revised test for self-defence, Victoria's new family violence jury directions, increased judicial and professional receptivity and the simplification of the law. However, professional pressures remained in the realm of plea negotiations; pressures continuing to pose foreseeable risks of imperfect procedural justice. Essentially, the abolition of defensive homicide and the charging practices of the Office of Public Prosecutions were identified to have, at times, perpetuated the pressure on victims of family violence to plead guilty to lesser offences despite the existence of cogent evidence of self-defence. This was significant in light of the instances of victims of family violence pleading guilty to lesser offences under the previous law in spite of cogent evidence of self-defence.

In addition to the preceding inquiries, socio-legal method was applied to the interviews to yield information on any non-legal factors which affect jury deliberations and practitioner decisions under the present law. A majority of interviewees argued that the current legislative regime would mitigate against gender and other culturally based stereotypes, including race, being used by jurors as part of their decision-making process. However, the majority also believed that there remained a risk of jury members applying their own sense of justice rather than applying judicial directions and that this represented a foreseeable risk of imperfect procedural justice arising in future cases. That being said, they opined that greater weight should be given to the efficacy of the current legislative regime, its simplicity and the capacity of 12 jurors to militate against this phenomenon.

Although these findings revealed that doctrinal law reform was unwarranted, the analysis nevertheless revealed that professional pressures remained in the realm of plea negotiations; a matter which perpetuated the risk of imperfect procedural justice arising in the form of pleas of guilty to lesser offences notwithstanding cogent evidence of self-defence.

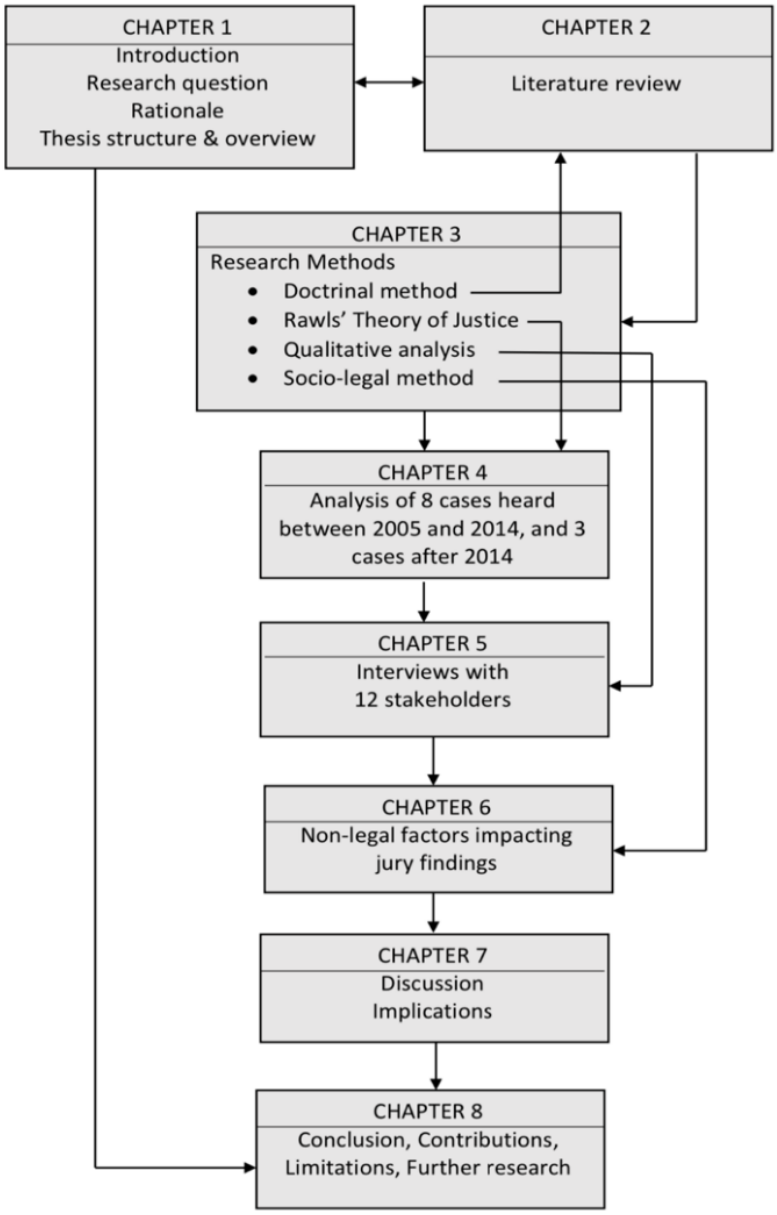
As a result, it was recommended that the prosecution policy of the Office of Public Prosecutions concerning its discretion to prosecute be amended to contain a comprehensive policy informing the prosecutions of victims of family violence with

viable claims to self-defence. Further, that the Victorian Law Reform Commission and Department of Justice review the operation of the legislation to ensure that the legislation consistently achieves its objectives.

1.7 Structure of the thesis

Figure 1–1 presents a diagrammatic representation of the thesis structure. Chapter 1 has outlined the context of the research, its rationale and scope and has given a brief introduction to the multi-disciplinary research methods used to provide answers to the research questions. Chapter 2 provides a review of the extensive literature available to trace the development of the law of self-defence and its intersection with victims of family violence. It also ascertains what non-legal factors have limited victims of family violence from accessing self-defence when they kill their violent partners. Chapter 3 explicates the multi-disciplinary research methods used in this thesis and justifies the use of a mixed methods approach. In Chapter 4, Rawls' theory of justice is applied to eight cases heard pursuant to the Crimes (Homicide) Act 2005 (Vic) to isolate any incidences of imperfect procedural justice. For the same reason, Rawls' theory of justice is then applied to three cases heard pursuant to the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic). A thesis is then exposited. Chapter 5 analyses the responses of 12 stakeholders in the criminal justice system to provide answers to subsidiary questions 1 and 2 of the overarching research question. In Chapter 6, the data from those interviewees is analysed to provide answers to subsidiary questions 3 and 4. In Chapter 7, the original contributions to knowledge made by this research are explored alongside the implications of the research and relevant suggestions for reform. Chapter 8 concludes the thesis by drawing together the threads of the research and addressing the research questions. The limitations of this research are also provided and suggestions for further research canvassed.

Figure 1–1: Thesis Structure



1.8 Conclusion

This chapter has: presented the research problem; defined the research questions; justified the importance of the research; explained the scope of the research topic; briefly outlined the research design adopted to address the research questions; sketched some of the contributions and outcomes of the research and described the structure of the thesis. The next chapter provides a comprehensive review of the literature which informs the overarching research question and subsidiary questions for resolution.

CHAPTER 2
LITERATURE REVIEW

2.1 Introduction

The previous chapter provided an overview of the research problem, the scope of the research, the research questions and the methods used to answer those questions. This chapter reviews the literature concerning family violence to contextualise the incidence of family violence and intimate partner homicide alongside its underlying causes. The development of the law of self-defence and its intersection with victims of family violence is then considered including a critical evaluation of learned helplessness and battered person's syndrome. It subsequently reviews the academic, professional and government responses in Victoria which led to the Crimes (Homicide) Act 2005 (Vic) and the subsequent passage of the Crimes (Abolition of Defensive Homicide) Act 2014 (Vic) and Jury Directions Act 2015 (Vic). Finally, it reviews sociological research on non-legal factors which have limited victims of family violence who kill their violent partners from obtaining justice.

For the purposes of this research, family violence (or intimate partner violence) is defined in section 5 of the *Family Violence Protection Act 2008* (Vic):

… family violence is-

(a) behaviour by a person towards a family member of that person if that behaviour –

(ii) is physically or sexually abusive; or

(iii) is emotionally or psychologically abusive; or

(iv) is economically abusive; or

(v) is threatening; or

(vi) is coercive; or

(vii) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or

(b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).[1]

2.2 Family violence: incidence, causes and Victorian institutional responses

The international and Australian communities are well aware of the pervasiveness of family violence and its destructive consequences.

In 1981, the United Nations (UN) adopted the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in recognition of the need to include women in the universal application of equality, security, liberty, integrity and dignity.[2] In 1993, its Declaration on the Elimination of Violence Against Women further recognised the need to include women in the universal application of equality, security, liberty, integrity and dignity[3] and sought to stimulate international action against family violence.[4] By 2005, the World Health Organisation (WHO) revealed that family violence was a major public health and human rights concern.[5]

2.2.1 International and domestic incidence of family violence

[1] *Family Violence Protection Act 2008* (Vic) s 5.
[2] *Convention on the Elimination of all forms of Discrimination Against Women ,* GA Res 34/180, UN Doc A/RES/48/104 (3 September 1981).
[3] See Chapter 7, *Significance and implications* at 7.6. See also *Declaration on the Elimination of Violence against Women,* GA Res 48/111, UN Doc A/RES/48/104 (23 February 1994).
[4] Giovanni Caracci, 'Violence Against Women' (2003) 32(1) *International Journal of Mental Health* 1. See also Chapter 7, *Significance and implications* at 7.6.
[5] See Claudia Garcia Moreno et al, 'WHO multi-country study on women's health and domestic violence against women: initial results on prevalence, health outcomes and women's responses', *World Health Organisation* (Publication, 2005) <https://www.who.int/gender/violence/who_multicountry_study/summary_report/summary_report_English2.pdf>.

In 2005, the WHO published findings of a multi-country study on family violence against women which collected data on family violence from over 24,000 women in 10 countries[7] revealing widespread family violence against women.[8] Subsequent studies in Australia have been more specific about the level and consequences of such violence for women including homicides.

In 2017, the Australian Bureau of Statistics ('ABS') indicated that 'approximately 1 in 6 (17%, or 1.6 million) women and more than half a million men (6.1%) had experienced violence from a current or previous cohabiting partner since the age of 15'.[9] Further, that 54% of the women who had experienced family violence had experienced more than one violent incident.[10] The rates of family violence had been relatively stable since 2005.[11]

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The Victorian System Review of Family Violence Deaths examined homicides in Victoria between 2000 and 2010.[13] Of the 288 homicides, an intimate relationship was the most common relationship type and accounted for 136 (47%) homicides.[14] Within this sample, '73% of homicides involved male perpetrators, 23% involved female perpetrators and 4% involved both male and female perpetrators'.[15] In 63% of cases, the deceased and the perpetrator were in a relationship.[16] In the remaining 37%, the couples were

[7] Specifically, Bangladesh, Brazil, Ethiopia, Japan, Namibia, Peru, Samoa, Serbia, Montenegro, Thailand and the United Republic of Tanzania. Although such countries do not share identical economic, social and political structures with Australia, the study nevertheless revealed the pervasiveness of family violence at an international level: ibid.

[8] The study revealed that '13-61% of participants reported having experienced physical violence by a partner; 4-49% reported having experienced severe physical violence by a partner; 6-59% reported having experienced sexual violence by a partner at some point during their lives and 20-75% reported having experienced one emotionally abusive act, or more': ibid.

[9] See Australian Bureau of Statistics, *Personal Safety Survey* (Catalogue No 4906.0, 8 November 2017).

[10] Ibid.

[11] See Australian Bureau of Statistics, *Personal Safety Survey* (Catalogue No 4906.0, 21 August 2006).

[13] They related to where a perpetrator had been identified, a criminal or coronial investigation had been finalised and the homicide had occurred within an intimate or family relationship: See C Walsh et al, 'Victorian Systemic Review of Family Violence Deaths – First Report', *Coroners Court of Victoria* (Report, November 2012) < https://www.coronerscourt.vic.gov.au/sites/default/files/2018-11/vsrfvd%2Bfirst%2Breport%2B-%2Bfinal%2Bversion.pdf>.

[14] Ibid.

[15] Ibid.

[16] Ibid.

separated.[17] Further, a known history of family violence was identified in 60% of cases[18] with the deceased being a victim of prior family violence in 75% of cases. The vast majority of victims were women.[19] In 22% of cases, the deceased was the perpetrator of the violence and, of these, the majority were male (15 of the 18 perpetrators).[20]

Similar results were seen from the National Homicide Monitoring Program of the Australian Institute of Criminology. It collected data on all homicides in Australia between 2002 and 2012. One-quarter (25% or 654 incidents) involved current or former intimate partners.[21] Of these, the majority of victims (75% or 488) were women and the majority of perpetrators (77% or 503 perpetrators) were men.[22] In 44% of intimate partner homicides, there was a history of family violence.[23]

A comprehensive New South Wales review of domestic violence related homicides between 2000 and 2010 confirmed that the majority of perpetrators were men and that majority of victims, women.[24] It revealed that 238 cases occurred 'in the context of an identifiable history of domestic violence, which represented 27% of all homicides in New South Wales [within] that period'.[25] Of the women killed by their intimate partners (76%), almost all (97%) had been the victims of domestic violence during the relationship and none had been the perpetrator.[26] Earlier than these studies in 2004, it was estimated that intimate partner violence contributed to 'more death, disability and illness in women aged 15 to 44 than any other preventable

[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Intimate relations were defined as where the victim and the offender shared a current or former intimate relationship - including same sex relationships and extramarital affairs: See Tracey Cussen and Willow Bryant, 'Domestic/family violence in Australia', *Australian Institute of Criminology* (Report, May 2015) < https://aic.gov.au/publications/rip/rip38>.
[22] Ibid.
[23] Ibid.
[24] See New South Wales Domestic Violence Death Review Team, 'Domestic Violence Death Review Team Report 2015-2017', *Parliament of New South Wales* (Report, 2015) <https://www.parliament.nsw.gov.au/lc/papers/DBAssets/tabledpaper/WebAttachments/72106/2015-2017_DVDRT%20REPORT%20PDF.pdf>.
[25] Ibid.
[26] Ibid.

risk factor'[27] and resulted in 'a police call-out on average once every two minutes across' Australia.[28] 2.2.2 Causes of family violence and intimate partner homicides

Australian and international research has demonstrated that 'gender inequality, rigid gender roles and attitudes that condone violence against women' all increase the risk of family violence and intimate partner homicide.[29] There are specific contextual and motivational differences between male and female perpetrators of domestic violence'.[30] For instance, it is widely argued that separation is a key factor in male perpetrated intimate partner homicide[31] with men tending to kill out of jealousy, possessiveness, control and a desire for 'ownership' of their partners.[32]

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[27] Additionally, Australia's National Research Organisation for Women's Safety found that 1 in 4 Australian women had experienced physical or sexual violence by an intimate partner, and that at least one woman was killed by a partner or former partner every week: VicHealth (2004) The health costs of violence: Measuring the burden of disease caused by intimate partner violence, Victorian Health Promotion Foundation, Melbourne <https://www.vichealth.vic.gov.au/media-and-resources/publications/the-health-costs-of-violence> cited in Our Watch, Australia's National Research Organisation for Women's Safety and VicHealth, 'Change the story: A shared framework for the primary prevention of violence against women and their children in Australia', *Our Watch* (Report, 10 November 2015) 12 <https://www.ourwatch.org.au/getmedia/0aa0109b-6b03-43f2-85fe-a9f5ec92ae4e/Change-the-story-framework-prevent-violence-women-children-AA-new.pdf.aspx>.

[28] Ibid.

[29] Kim Webster and Michael Flood, 'Framework foundations 1: A review of the evidence on correlates of violence against women and what works to prevent it. Companion document to Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and VicHealth, Change the Story: A shared framework for the primary prevention of violence against women and their children in Australia, *Our Watch* (Research Paper, 2015) <https://www.ourwatch.org.au/getmedia/d53470da-fe17-4af1-baca-bedfd7f9b235/Change-the-story-framework-foundations-1-updated.pdf.aspx>;
World Health Organization & London School of Hygiene and Tropical Medicine, 'Preventing intimate partner and sexual violence against women', *World Health Organisation* (Research Publication, 2010) <https://apps.who.int/iris/bitstream/handle/10665/44350/9789241564007_eng.pdf?sequence=1>.

[30] Emily Hodell et al, 'Mock Juror Biases and Perceptions of Self-Defence Claims in Intimate Partner Homicide' (2014) 29(1) *Journal of Family Violence* 495; Joanne Belknap and Heather Melton, 'Are Heterosexual Men also Victims of Intimate Partner Violence?' *Research Gate* (Research Paper, 2005) <https://www.researchgate.net/publication/265179433_Are_Heterosexual_Men_Also_Victims_Of_Intimate_Partner_Violence>; Mekha Rajan and Kathy McCloskey, 'Victims of intimate partner violence: Arrest rates across recent studies' (2007) 15(3) *Journal of Aggression, Maltreatment and Trauma* 27; Kevin Hamberger and Clare Guse, 'Men's and Women's Use of Intimate Partner Violence in Clinical Samples' (2002) 8(11) *Violence Against Women* 1301.

[31] New South Wales Domestic Violence Death Review Team (n 24).

[32] See generally Emerson Dobash and Russell Dobash, *When men murder women* (Oxford University Press, 1st ed, 2015); Shanaaz Mathews, Rachel Jewkes and Naeemah Abrahams, 'So Now I'm the Man: Intimate Partner Femicide and Its Interconnections With Expressions of Masculinities in South Africa' (2015) 55(1) *British Journal of Criminology* 107; Marcus Juodis et al, 'A Comparison of Domestic and Non-Domestic Homicides: Further Evidence for Distinct Dynamics and Heterogeneity of Domestic Homicide Perpetrators' (2014) 29(1) *Journal of Family Violence* 299; Ruhama Goussinsky and Dalit Yassour-Borochowitz, 'I killed her, but I never laid a finger on her – A phenomenological difference between wife-killing and wife-battering' (2012) 17(6) *Aggression and Violent Behaviour* 553; Holly Johnson and Tina

A Canadian study conducted by Juodis et al found that separation and possessiveness were common in intimate partner homicides.[33] Of the 37 intimate partner homicides analysed, 70.3% occurred involved separation and 62.2% continuous, violent jealousy.[34] Inversely, a review of studies by Braaf and Barrett found that women's violence against partners tended to be primarily motivated by self-protection and retaliation for previous violence.[35] It was also motivated by anger and frustration.[36] Men's violence tended to be 'instrumental' to obtain control.[37] Contradicting this, Archer and Dutton et al found that women could be just as or even more violent than men toward their intimate partners[38] and that women and men had similar motivations.[39] Hodell et al argued that these findings discounted the context of self-defence as a motivation for violence[40] and the practice of men justifying homicide by denying responsibility or partially blaming the victim.[41]

Unsurprisingly, there is no conclusive profile of a typical perpetrator of intimate partner homicide.[42] However, McKenzie et al maintain that there are personal characteristics that 'increase the risk of the perpetration of intimate partner homicide (in combination with situational and victim factors)'.[43] In an international review of such homicide studies, Kivisto found that half of all perpetrators had not completed high school.[44] Additionally,

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Hotton, 'Losing control: Homicide risk in estranged and intact intimate relationships' (2003) 7(1) *Homicide Studies: An Interdisciplinary & International Journal* 58; Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (Cambridge University Press, 1st ed, 1994); Jill Radford and Diana Russel, *Femicide: The Politics of Woman Killing* (Open University Press, 1st ed, 1992); Martin Daly and Margo Wilson, 'Evolutionary Social Psychology and Family Homicide' (1988) 242(4878) *The American Association for the Advancement of Science* 519; Alison Wallace, *Homicide: the social reality* (Bureau of Crime Statistics and Research, 5th edition, 1986).

[33] Juodis et al (n 32).

[34] Ibid 310.

[35] See Rochelle Braaf and Barrett Meyering, 'The gender debate in domestic violence: the role of data' (2013) 25(1) *Australian Domestic and Family Violence Clearing House*.

[36] Ibid.

[37] Michael Kimmel, 'Gender Symmetry in domestic violence: A substantive and methodological research review' (2002) 8(11) *Violence Against Women* 1332.

[38] Nicola Graham-Kevin and John Archer, 'Control tactics and partner violence in heterosexual relationships' (2009) 30(6) *Evolution and Human Behaviour* 445.

[39] Ibid.

[40] Hodell et al (n 30).

[41] Ibid.

[42] Aaron Kivisto, 'Male Perpetrators of Intimate Partner Homicide: A Review and Proposed Typology' (2015) 43(3) *Journal of the American Academy of Psychiatry of Law* 310; Louise Dixon, Catherine Hamilton-Giachritsis and Kevin Browne, 'Classifying Partner Homicide' (2008) 23(1) *Journal of Interpersonal Violence* 75.

[43] Mandy McKenzie, Debbie Kirkwood, Danielle Tyson and Bronwyn Naylor, 'Out of character? Legal responses to intimate partner homicide by men in Victoria 2005-2014' *Domestic Violence Resource Centre Victoria* (Discussion Paper, 2016) 9.

[44] Kivisto (n 42).

between one quarter and one-half had been arrested for a violent crime.[45] Such findings were consistent with a US study by Campbell which found that 49% of perpetrators had not completed high school and that 22% had been arrested for a violent crime.[46]

Kivisto also found that a quarter of male perpetrators had been abused as children[47] and that 1 in 10 had had a diagnosis of substance dependence.[48] However, most were not under the influence of drugs or alcohol at the time of the homicide.[49] Similarly, an English study by Dobash and Dobash in England, found that only 20% of perpetrators had been intoxicated.[50] Further, an Australian study by Cussen and Bryant found that only 36% of intimate partner incidents involved the use of alcohol by offenders; a slight reduction compared with all homicides.[51]

With regard to the mental states of offenders, Kivisto found consistent rates of psychotic mental illnesses.[52] Approximately 1 in 10 men were psychotic.[53] However, the rates of mood disorders such as depression were not as consistent and ranged between 17-56%.[54] Similarly, an English and Welsh study by Oram et al, found mental illnesses affected only a 'significant minority of intimate partner homicide perpetrators'.[55]

2.2.3 Victorian institutional responses

In Australia, intimate partner homicides comprise a significant proportion of all homicides. The statistical incidence of family violence over time contextualises Victoria's institutional responses to family violence alongside the development of the law of self-defence and its intersection with lethal responses to family violence.

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[45] Ibid.
[46] Jacquelyn Campbell, 'Risk Factors for Femicide in Abusive Relationships: Results from a Multi-Site Case Control Study' (2003) 93(7) *American Journal of Public Health* 1091.
[47] Kivisto (n 42) 302.
[48] Ibid.
[49] Ibid.
[50] Dobash and Dobash (n 32).
[51] Cussen and Bryant (n 21).
[52] Kivisto (n 42).
[53] Ibid.
[54] Ibid.
[55] Sian Oram et al, 'Domestic Violence and Perinatal Mental Disorders: A Systematic Review and Meta-Analysis' (2013) 10(5) *PLOS Medicine* 4.

Leader-Elliot, an academic criminal lawyer, and others observed that Victoria had moved 'further' and 'faster' in its responses to family violence than most jurisdictions.[60] Tyson et al noted that Victoria's risk management framework led to 'wide-reaching awareness of [the] non-physical forms of family violence' (such as controlling behaviour, obsessive jealousy, threats to kill or threats to commit suicide) and how such behaviours were predictors of a high risk of serious injury or death'.[61] They noted that it had identified a range of actions to address the drivers of violence against women including:

> The challenging of the condoning of violence against women; the promotion of gender equality and women's independence and decision-making in public life and relationships; the challenging of gender stereotypes, gender roles and the normalisation of violence as an expression of masculinity and the acknowledgement of the intersection of social norms relating to alcohol and gender.[62]

With prevention in mind, the national framework for the prevention of violence against women acknowledged that all sectors of the legal system needed to be involved in a comprehensive national approach to addressing these drivers.[63] In terms of the criminal justice system itself, McKenzie et al. acknowledged that it had played 'a key role in responding to violence against women when it [occurred]'[64] and further, it had sought to promote the 'safety of victims and the accountability of perpetrators' alongside 'equality and respect in daily practice'.[65]

When the Magistrates Court was identified as an integral part of Victoria's integrated response, McKenzie et al maintained that the County and Supreme Courts could also 'extend [their] role in [family violence] prevention by ensuring that, where relevant, the narratives and messages … from criminal proceedings and judgments [were] aligned with

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[60] Ian Leader-Elliot, 'Reform and Codification of the Law of Homicide' in Kate Fitz-Gibbon and Arie Freiberg (ed), *Homicide Law Reform in Victoria: Retrospects and Prospects* (The Federation Press, 2015) 158.
[61] Danielle Tyson et al., 'Intimate partner homicides' (2017) 91(5) *Law Institute Journal Victoria* 38.
[62] McKenzie et al (n 43) 127.
[63] Ibid. See also ANROWS, 'Change the Story: National framework for the prevention of violence against women and children', ANROWS (Webpage, 2015) <https://www.anrows.org.au/project/change-the-story-national-framework-for-the-prevention-of-violence-against-women-and-their-children/>.
[64] McKenzie et al (n43) 127.
[65] The question of the system's effectiveness remains the subject of ongoing debate and partly informs the thesis: ibid.

those identified in Australia's shared framework for the primary prevention of violence against women and children'.[66]

Of the legal profession's culture, McKenzie et al observed that this needed to change to more effectively recognise and address family violence and that this must become a firm commitment of all legal professionals and their professional organisations.[67] Pertinently, the Australian Law Reform Commission (ALRC) had identified in 2010 that this would entail an increased understanding of the social context of intimate partner homicide[68] and require social context-centric education.[69]

Previously, in 2004, the VLRC had recommended that those involved in homicide investigations and prosecutions receive extended training about family violence, particularly, training on the relationship between family violence and the use of fatal force.[70] It also identified key stages where additional training would have a significant impact:[71]

> Police investigation stage: investigators should understand the relationship between family violence and homicide to identify the relevance of the prior history of abuse in order to ask suspects relevant questions and obtain supporting statements from witnesses who had observed or been told about the violence.
>
> Pre-trial stage: measures to 'assist both defence counsel and prosecutors in the preparation of matters for trial and to support the making of decisions by the OPP relating to charges and pleas'.
>
> Trial stage: measures to ensure that: evidence of prior abuse and other relevant issues is admitted into evidence; 'appropriate rulings be made by trial judges concerning admissibility and use' of such evidence so that they are properly communicated to juries. Sentencing stage: judges should be permitted to take into

[66] Ibid.
[67] Ibid. See also Our Watch and VicHealth (n 27).
[68] See Australian Law Reform Commission, *Family Violence – A National Legal Response: Final Report* (Report no 114, October 2010) 75.
[69] Ibid.
[70] Victorian Law Reform Commission, *Defences to Homicide – Final Report* (Report No 94, October 2004) 194.
[71] Ibid 195.

> account histories of abuse and the circumstance of a killing in assessing culpability.[72]

To implement these recommendations, the VLRC urged Victoria Legal Aid ('VLA'), the Law Institute of Victoria ('LIV'), the OPP, the Victorian Bar Association ('VBA') and the Judicial College of Victoria ('JCV') to deliver conferences on family violence[73] and emphasised the need for ongoing training.[74] To further strengthen these initiatives, McKenzie et al suggested over a decade later that professional bodies establish a panel of experts for use by defence lawyers.[75] It was to consist of professional and academic experts including social workers, family violence workers, psychiatrists and psychologists with extensive experience in working with victims and offenders.[76] It was also suggested that the OPP utilise a similar panel to 'facilitate the ways in which expert social framework evidence [could] be adduced in trials where family violence [was] alleged to have been perpetrated by the accused prior to the homicide'.[77]

Judicial culture was emphasised by the Supreme Court of Victoria's submission to the Royal Commission in its identification of the continued:

> importance of judges having an understanding of social issues in general and family violence in particular [alongside] … the need for specialist programs to allow all judges to be fully informed about the relevant law and broader issues of family violence.[78]

It specified that ongoing education programs would be 'very valuable'.[79] Consistently with this, McKenzie et al reaffirmed the need for 'more extensive and ongoing professional development on family violence to be provided to defence and prosecution legal practitioners, judges, expert witnesses, police and other legal professionals'.[80]

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[72] Ibid.
[73] Ibid 202.
[74] Ibid 201.
[75] McKenzie et al (n 43) 133.
[76] Ibid.
[77] Ibid.
[78] Supreme Court of Victoria, Submission No 705 to Royal Commission into Family Violence (29 May 2015).
[79] Ibid.
[80] Ibid. See also McKenzie et al (n 43) 128.

McKenzie et al also specified that such training should include 'discussion of forms of violence, common myths, the key drivers of family violence, risk factors, barriers to seeking assistance and the role of family violence evidence'.[81] Further, they suggested that judges could play a significant role in preventing family violence and lethal responses by 'recognising the nature and dynamics of family violence and the role of gender and social attitudes [to] domestic homicides'.[82]

2.2.4 The Victorian Royal Commission into Family Violence

In 2014, the murder of Luke Batty by his father in Victoria brought national attention to family violence. The Premier of Victoria described family violence as 'the most urgent law and order emergency … in [the] state'[83] and 'the most unspeakable crime unfolding across … Australia'.[84] The resulting Royal Commission was 'an acknowledgement of the seriousness in which the Victorian community [had] come to regard family violence and its consequences for individuals and families'.[85] It was 'a recognition that existing policy responses [had] been insufficient [in reducing its] prevalence and severity' in society.[86]

In March 2016, the Royal Commission into Family Violence delivered its report to the Government House of Victoria. The report was the culmination of a 13-month inquiry into how Victoria could effectively: prevent family violence, improve early intervention, support victims, make perpetrators accountable, better coordinate community and government responses and evaluate and measure strategies, frameworks, policies,

[81] McKenzie et al (n 43) 128.
[82] Ibid.
[83] Victorian Government, 'Premier Announces Royal Commission into Family Violence' (Media Release, 23 December 2014) 1.
[84] Ibid.
[85] *Royal Commission into Family Violence* (Summary and Recommendations, March 2016) vol 1. The Commission's findings, alongside the Australian Law Reform Commission's findings give rise to a perception that insufficient consciousness raising efforts have been undertaken over a significant period of time. Pertinently, the Victorian Law Reform Commission's findings alongside the Supreme Court's submission to the Victorian Royal Commission give rise to the perception that consciousness raising has not been prioritised within relevant institutions. See also Chapter 8, *Future research directions* at 8.5.
[86] Ibid.

programs and services.[87] The VRCFV made 227 recommendations in furtherance of these objectives.[88]

Of relevance to the institutional responses discussed at 2.2.3, the VRCFV considered the Domestic Violence Resource Centre of Victoria's ('DVRCV') suggestion that a specialist court list and specialist OPP unit was advisable for family violence homicides.[89] Although the Commission agreed that the nature and dynamics of family violence must be properly understood by judicial officers and legal representatives,[90] the Commission's view was that the entire legal profession should be familiar with them.[91] That is, understandings of family violence were to be regarded as 'core business' of courts and legal practitioners, including those involved in homicide trials[92] otherwise practitioners were less likely to appreciate the conduct of proceedings or decisions made at first instance.[93]

The DVRCV's suggestions mirrored multiple submissions which emphasised the need for training of members of the judiciary and the broader court workforce in relation to the causes and dynamics of family violence and appropriate responses to both applicants and respondents.[94] The Commission noted that responses to family violence in Victoria had been marked by a tendency to dismiss, trivialise and misunderstand family violence.[95] Further, that such responses manifested in a reluctance to charge or prosecute family violence–related offences, and the imposition of inadequate or inconsistent sentences.[96] Aside from putting women and children at risk in particular cases, the Commission maintained that attitudes and practices such as these, particularly when publicised, ran the risk of reinforcing community attitudes which trivialised violence against women. [97]

[87] *Royal Commission into Family Violence* (Summary and Recommendations, March 2016) vol 1, 1.
[88] Ibid 45-106.
[89] *Royal Commission into Family Violence* (Final Report, March 2016) vol 3, 225. See also 2.6.4.2, *Plea decisions* at page 99.
[90] Ibid.
[91] The commission noted that the prevalence of homicides (particularly with women as victims) which involved family violence meant that it was difficult, and possibly not desirable, to restrict those matters to a specialist unit or list: ibid.
[92] Ibid 225.
[93] Ibid 225.
[94] Ibid 117
[95] Ibid 189. See also 2.6.4.1 *Understandings of family violence* at page 97.
[96] Ibid 189.
[97] Ibid 189.

The Commission concluded that changes to sentencing provisions and the creation of new offences often had more of a 'symbolic' than practical effect.[98] That is, laws would only be as effective as 'those who [enforced], [prosecuted] and [applied] them'. [99] Improving practices, through education, training and embedding best practice and family violence specialisation in the courts, was likely to be more effective than simply creating new offences or changing sentencing laws.[100]

As the chapter has canvassed the incidence of family violence in society and Victoria's institutional responses to family violence and family violence homicides, the chapter now considers Victoria's development of the law of self-defence and its intersection with family violence.

2.3 Victoria's codification of self-defence, enactment of defensive homicide and introduction of social-context evidence

Legal responses in Australia to family violence are situated in the pursuit of equality in its political and legal systems. They occur amidst international concerns, international human rights law and Australia's obligations as signatories to international conventions[101] and Victoria's adoption of human rights legislation.[102]

In liberal societies, equality is sourced to a social contract, an agreement, for governing relations between people in a human made social order.[103] Following the trans-Atlantic revolutions which established liberalism and its principle of formal equality as the basis for government, little attention was paid to what substantive equality may have meant. It was assumed that society was classless and homogeneous alongside assertions that

[98] Ibid 189.
[99] Ibid 189.
[100] Ibid 189.
[101] See *Family violence: incidence, causes and Victorian institutional responses* at 2.2.
[102] See *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 9-10 (on the right to life and protection from cruel, inhuman or degrading treatment).
[103] See Stanford Encyclopedia of Philosophy, 'Contemporary Approaches to the Social Contract', *Stanford Encyclopaedia of Philosophy* (Article, 31 May 2017) <https://plato.stanford.edu/entries/contractarianism-contemporary>.

women, by nature, lacked the characteristics and capacities of free and equal individuals which precluded their capacity to be self-governing.[104] There were exceptions.[105] In the British revolutions, Locke was a hesitant supporter of the equality of men and women.[106] Similarly, Wollstonecraft, after the French revolution, argued that women should be seen as human beings with the same rights as men and not social ornaments or property traded in marriage.[107]

In the 1860s, a first wave sought political equality. A second wave merged into a third between the 1960s and 1990s. In summary, an initial focus on socio-economic discrimination and sexual freedom came to include racial or ethnic discrimination and claims for equality of women's experiences of life.[113]

Representing the turn to the third wave of feminism, Pateman argued that there was a sexual rather than social contract which reflected men's power over women. The patriarchal structure of institutions did not reflect an original contract which rested on the premise that individuals were born free and equal to each other.[119]

[104] In 1700, Mary Astell asked 'why if all men were born free, all women were born slaves?': See Mary Astell, 'Reflections upon Marriage' in Patricia Springborg (ed), *Astell: Political Writings* (Cambridge University Press, 1996) 7-80.
[105] Locke broke with an older belief based on ecclesiastical authority that women were inferior to men: See, eg, Jeremy Waldron, *God, Locke and equality: Christian foundations in Locke's political thought* (Cambridge University Press, 2002).
[106] In the view of Waldron, Locke challenged the persistent view based on the model of Adam and Eve that women, as wives, were subject to control by their husbands. Although Locke accepted that women were created in the image of God, endowed with reason and therefore entitled to equality in societies established by the social contract, Waldron noted that Locke was not entirely comfortable with his conclusions: ibid 22.
[107] See Marry Wollstonecraft, *A Vindication of the Rights of Woman: With Strictures on Political and Moral Subjects* (United Kingdom, 1792).
[113] The first wave encompassed the right to vote, the second explored sexuality, family, the workplace, reproductive rights and both legal and de facto inequalities and the third wave examined womanhood, gender, beauty, sexuality, femininity and masculinity: Sarah Maddison and Marian Sawer, *The Women's movement in protest, institutions and the internet: Australia in transnational perspective* (Routledge, 2013).
[119] See Carole Pateman, *The sexual contract* (Stanford University Press, 1988).

By the 1980s, the Australian legal system, the courts and the legal profession were increasingly challenged on gender bias.[120] For instance, in R v L,[121] the High Court ended an understanding of the common law rule that husbands could not rape wives.[122] Pertinently, a number of judges had also made comments about rape and consent[123] which drew public attention.[124] The federal government responded by funding courses for judicial officers that would 'help them identify prejudices that might impact on their judicial conduct towards women'.[125]

A reference was subsequently given to the ALRC in 1993 to investigate gender bias in the law in the interest of the equality of women's experience of the world. In 1994, the Equality before the Law: Justice for Women report concluded that the Australian legal system itself was a factor in the subordination of women. It sanctioned and perpetuated the means by which men kept women in an unequal position including failing to deal effectively with violence by men against women.[126]

Of the report's numerous recommendations, 12.1 saliently provided that 'in the development of [a] uniform criminal code, women's perspectives should be actively sought. This should include consultation with appropriate experts on [such] issues. It

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[120] See Margaret Thornton, *The liberal promise: Anti-discrimination legislation in Australia* (Oxford University Press, 1990). See also Margaret Thornton 'Women and Legal Hierarchy' (1989) 1(1) *Legal Education Review* 97 where Thornton draws upon the work of Catherine MacKinnon to discuss the situation of women in Australian legal education; Regina Greycar and Jenny Morgan, *The hidden gender of the law* (Federation Press, 1990) and Jocelynne Scutt, *Women and the Law* (The Law Book Company, 1990).

[121] [1991] HCA 48.

[122] 'If it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law': ibid [19] (Mason CJ, Deane and Toohey JJ).

[123] Public outrage ensued following the 1993 conviction of Paul Stanbrook in the Supreme Court of Victoria for the rape and attempted murder of a 17 year old girl. In sentencing Stanbrook, Judge Norman O'Bryan significantly reduced Stanbrook's sentence, arguing the girl was unconscious and therefore not traumatised when she was actually raped. Previously, in a trial of a male youth who raped a 15 year old girl, Victorian County Court Judge John Bland said: 'it does happen, in the common experience of those who have been in the law as long as I have anyway, that no often subsequently means yes'. Previously, in a trial of a male youth who raped a 15 year old girl, Victorian County Court Judge John Bland said: 'it does happen, in the common experience of those who have been in the law as long as I have anyway, that no often subsequently means yes. Lastly, in the trial of a man charged with the rape of his wife, South Australian Supreme Court Judge Derek Bollen instructed the jury that it was acceptable for men to use 'rougher than usual handling' to persuade their wives to have sexual intercourse': Robert Milliken, 'Judges accused of anti-female bias: Anger in Australia as victims blamed for rapes', *The Independent* (Sydney, 20 May 1993).

[124] Though it was argued that Bollen's words were taken out of context by the media, the fact that the man was acquitted failed to ease public resentment: ibid.

[125] Ibid.

[126] See Australian Law Reform Commission, *Equality before the Law: Justice for Women* (Report No 69, July 1994).

should also include a re-examination of the proposals relating to self-defence and provocation'.[127] The report anticipated further developments in Victoria.

In 2001, responding to ongoing concerns about how the criminal law dealt with women who killed in response to threats of violence with lethal force,[128] the Attorney General, Rob Hulls MP, referred the issue to the VLRC. It was to examine the law of homicide and consider whether to 'reform, narrow or extend defences or partial excuses to homicide, including self-defence, provocation and diminished responsibility'.[129] As a result, Victorian policy and law makers considered the difficulties which victims of family violence had experienced in accessing the law of self-defence. They would also consider the limitations of the battered person's syndrome in that context. The enactment of the Crimes (Homicide) Act 2005 (Vic) would be the result.

2.3.1 The work of the Victorian Law Reform Commission

In 2003, the VLRC released an Options Paper including empirical studies conducted by academic and external bodies and its own study of Victorian homicide prosecutions and their outcomes.[130] Based on all trials for murder, manslaughter or infanticide between 1 July 1997 and 30 June 2001, the Commission found that:

> (A) homicides were overwhelmingly committed by men (84.1%);
> (B) men had been the majority of victims (58.6%);
> (C) the largest category of homicides had occurred in the context of sexual intimacy – killing a partner or former partner including a violent partner or a rival (31.5%);[131]

[127] Ibid 20.
[128] Marcia Neave, 'The More Things Change - The More They Stay The Same' in Kate Fitz-Gibbon and Arie Freiberg (ed), *Homicide Law Reform in Victoria: Retrospects and Prospects* (The Federation Press, 2015) 15.
[129] *Defences to Homicide – Final Report* (n 70) xv.
[130] Victorian Law Reform Commission, *Defences to Homicide – Options Paper* (Options Paper No 1, September 2003) 23. See also Chapter 3, *John Rawls' Theory of Justice – Rawls' Justice as Fairness – situating Victoria's previous framework within a theoretical setting through the conceptualisation of a 'standard of justice'* at 3.2.4.1 where the VLRC's report is used to ground the philosophical inquiry undertaken by this research.
[131] Other significant categories of homicide included 'conflict resolution homicides' where violence was used to resolve disputes (16.8%) and 'spontaneous encounter homicides' where strangers or acquaintances were killed in spontaneous encounters (9.3%). All of these homicides involved male offenders: *Defences to Homicide – Options Paper* (n 130).

(D) in sexual intimacy homicides men and women killed for different reasons with men being motivated by jealousy or a desire to control their partner, for example, by preventing a woman from leaving a relationship;
(E) in about half of sexual intimacy homicides, there were allegations of violence against the accused. In 95.5% of these (21 out of 22), the deceased was a woman.[132]

The sample size was too small to permit firm comparisons to be made between the use of provocation by men and women who killed their sexual partners or rivals.[133] Neave, who chaired the review, subsequently noted that four of the 12 men who had killed in the context of sexual intimacy were convicted of manslaughter[134] whereas the three women who had relied on provocation to reduce murder to manslaughter and the two women who had raised self-defence were all convicted of murder.[135]

2.3.1.1 Approach to law reform by the VLRC

In 2002, Jenny Morgan released an Occasional Paper (which was commissioned by the VLRC) that brought together statistical and other material on the victims of homicide, the characteristics of people who kill others and the contexts in which homicides occurred.[136] Although the paper did not necessarily represent the views of the Commission, it was published by the Commission in order to encourage consideration of the law of defences to homicide within the social context in which they arose.[137]

The paper advanced the premise that social problems rather than legal categories best inform law reform.[138] It also drew attention to Nathalie Des Rosiers who argued that an approach to law reform that was oriented toward the social (and economic) context of people's lives and used 'reality as a starting point' was 'extremely productive since it

[132] Ibid 17.
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] Jenny Morgan, *Who Kills Whom and Why* (Victorian Law Reform Commission, 1st ed, 2004) 194.
[137] Ibid 1.
[138] Ibid 2.

[helped] to ensure that [society] [would] [not] take for granted abstract legal categories that … [obfuscated] rather than [clarified] the resolution of … [legal problems]'.[139]

The VLRC subsequently reasoned that defences and partial defences should not be based on abstract philosophical principles but the context in which homicides typically occurred;[140] that the law should deal fairly with both men and women and that any defences should be constructed to recognise that they often killed in different circumstances.[141]The VLRC proposed three further principles, namely, that the law be gender neutral, be based on principles of culpability and that any reform should simplify and not complicate the law.[142] Lastly, the Commission's approach took account of four primary barriers which female defendants had faced within the realm of self-defence and family violence. Specifically:

> Demonstrating that the level of force used was reasonable and proportionate in the circumstances, particularly where a weapon had been used against their unarmed or sleeping partners;
>
> Explaining the reasonableness of their actions given the apparent existence of alternative options, such as leaving or calling for assistance;
>
> Establishing the nature of threat and harm, for example where they may have been responding to the cumulative effects of harm or an ongoing threat of violence; or
>
> Explaining why they may have reasonably believed they had to plan the killing or to use another person to kill their abusive partners.[143]

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[139] Nathalie Des Rosiers, 'Reforming or Rethinking the Law? Canada's Experience of Law Reform', Notes for a speech to be delivered at the Rencontre internationale de juristes d'expression francaise (Montpellier, 25 June 2000).

[140] *Defences to Homicide – Final Report* (n 70) 15. See Chapter 3, *Roscoe Pound's sociology of law reform* at 3.4.3.2 where a link between Pound's concept of law reform and desire for standing law reform commissions and the work of the VLRC can be made. See also Chapter 3, *social interests and reconciliation* at 3.4.3.2(a) for a justification of the socio-legal methodology employed by this research and that of the VLRC and VDJ. Lastly, see Chapter 7, *Academic and practical significance* at 7.6.1 as pragmatism bridges academic and practical matters in legal research: see generally, Chapter 3, *Roscoe Pound's sociology of law reform* at 3.4.3.2.

[141] *Defences to Homicide – Final Report* (n 70) 15.

[142] Kate Fitz-Gibbon, 'The Offence of Defensive Homicide: Lessons Learned From Failed Law Reform' in Kate Fitz-Gibbon and Arie Freiberg (ed), *Homicide Law Reform in Victoria: Retrospects and Prospects* (The Federation Press, 2015) 139.

[143] *Defences to Homicide – Final Report* (n 70) 70.

2.3.2 The common law of provocation and self-defence and its application to victims of family violence

The VLRC's review occurred, as indicated, amidst a perception of the law's inability to recognise the nature of family violence and its role in intimate partner homicides.[144] By the time of the review, two primary concerns had emerged: men utilising the partial-defence of provocation to excuse their actions;[145] and women who killed to protect themselves from serious harm or death not being able to successfully raise-self-defence.[146]

2.3.2.1 The doctrine of provocation

In Victoria, the doctrine of provocation existed as a common law partial defence to murder.[147] It was raised where the deceased had engaged in provocative conduct that was insufficient to provide lawful justification for the use of lethal force.[148] If successfully raised, it reduced a conviction for murder to voluntary manslaughter.[149] The defence reflected leniency for those who killed in anger in response to provocative conduct.[150]

The genesis of provocation is in a historic right of men to defend their honour in response to perceived challenges to their masculinity by other men.[151] In the 16th and 17th centuries,

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[144] Debbie Kirkwood, Mandy McKenzie and Danielle Tyson, 'Justice or Judgement? The impact of Victorian homicide law reforms on responses to women who kill intimate partners' *Domestic Violence Resource Centre Victoria* (Discussion Paper, November 2013) 5 <http://www.dvrcv.org.au/sites/thelookout.sites.go1.com.au/files/DVRCV-DiscussionPaper-9-2013-web_0.pdf>.

[145] See, eg, Thomas Crofts and Danielle Tyson, 'Homicide Law Reform in Australia: Improving Access of Women Who Kill Their Abusers to Defences' (2013) 39(3) *Monash University Law Review* 881; Phil Cleary, *Getting away with murder: the true story of Julie Ramage's death* (Allen & Unwin, 2005); Phil Cleary, *Just Another Little Murder* (Allen & Unwin, 2003); Victorian Law Reform Commission, *Defences to Homicide* (Issues Paper, March 2002); Adrian Howe, 'Provoking Polemic – Provoked Killings and the Ethical Paradoxes of the Postmodern Feminist Condition' (2002) 10(1) *Feminist Legal Studies*; Jenny Morgan, 'Provocation Law and Facts: Dead Women Tell No Tales, Tales are Told about Them' (1997) 21(1) *Melbourne University Law Review*; Danielle Tyson, 'Asking For It: An Anatomy of Provocation' (1999) 13(2) *Australian Feminist Law Review.*

[146] See, eg, Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Battered women charged with homicide in Australia, Canada and New Zealand: How do they fare?' (2012) 45(3) *Australian & New Zealand Journal of Criminology;* Julia Tolmie, 'Provocation or Self-Defence for Battered Women who Kill' in Stanley Yeo (ed), *Partial Excuses to Murder* (The Federation Press, 1991).

[147] *R v Falla* [1964] VR 78, [80] (Pape J).

[148] Kenneth Arenson, Mirko Bagaric and Peter Gillies, *Australian Criminal Law in the Common Law Jurisdictions: Cases and Materials* (Oxford University Press, 4th rev ed, 2016) 132.

[149] McKenzie et al (n43) 17.

[150] Ibid 10.

[151] Jeremy Horder, *Provocation and Responsibility* (Clarendon Press, 1992) 26–7.

fights arising from 'breaches of honour' were commonplace.[152] Honour had great social significance.[153] A major slight on honour for example, was a man's wife committing adultery.[154] Adultery was regarded as 'the highest invasion of property'.[155] It was necessary for a man to respond to it and other affronts by retaliating.[156] An angered response was expected as natural. If he failed to respond in such a way, he would be regarded as a disgraced coward.[157] The anger had to be a 'reasonable and rational response in the circumstances'.[158] An emphasis was placed on the magnitude of the affront rather than the mental state of the man affronted.[159]

The defence developed in a criminal justice system in which the mandatory penalty for murder was death.[160] Provocation, as a partial justification, was 'inextricably linked [to] the desire to mitigate against the harshness of a mandatory sentence'.[161]

By the 19th century, the defence of provocation began to conceptualise anger as '[a] loss of self-control'.[162] It was justified on the basis that 'the accused could not properly control his or her behaviour in the circumstances and [that] an ordinary person [may have reacted] similarly'.[163] Anger was seen to 'uproot reason'.[164] It required evidence that 'a wave of anger [overcame a] capacity to behave in a normal law-abiding fashion'.[165] Provocation came to be regarded as a 'concession to human frailty'[166] which distinguished premeditated murder from impulsive homicides.[167]

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[152] *Defences to Homicide – Final Report* (n 70) 22.
[153] Ibid. See Chapter 3, *The fluctuating nature of norms – subjectivity, morality and representation in norms* at 3.4.4.1 and 3.4.4.2. See also Chapter 3, *Roscoe Pound's sociology of law reform – social interests – reconciliation* at 3.4.3.2(a);(b).
[154] *Defences to Homicide – Final Report* (n 70) 22.
[155] Ibid.
[156] Ibid.
[157] Ibid.
[158] Ibid.
[159] Ibid.
[160] Ibid.
[161] Ibid 23.
[162] Ibid.
[163] Ibid.
[164] Ibid.
[165] Ibid.
[166] Ibid. See also *R v Kirkham* (1837) 173 ER 422, [424] (Coleridge J).
[167] Bernard J Brown, 'The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law' (1963) 7(4) *The American Journal of Legal History* 310–18.

These features are seen in 20th century Australian common law.[168] The High Court of Australia defined the doctrine in Masciantonio v The Queen[169] to require evidence of provocative conduct by the victim; evidence that the defendant lost self-control as a result of that provocation; evidence that the provocation was such that it was capable of causing an ordinary person to lose self-control and form an intention to cause serious bodily harm or death; evidence that the provocation must have actually caused the defendant to lose self-control; and evidence that the defendant must have acted while deprived of self-control and before he or she had the opportunity to regain his or her composure.[170] The comments of Lord Morris in Parker v The Queen indicated that the response to a provocation did not need to occur instantaneously, albeit, in the context of infidelity.[171]

2.3.2.2 The application of provocation to female victims of family violence

By the 1990s, the defence of provocation was increasingly criticised. The principal criticism was that it was only available to male defendants[172] as its formulation was based on 'archetypal male responses to provocative conduct (such as insults to male honour)'.[173] The VLRC found it did not reflect the social context in which women tended to kill (in response to fear and male violence as opposed to affronts to honour).[174]

It had become apparent that 'intimate partner homicides (whether perpetrated by a man or a woman) generally [occurred] in the context of [a man's] violence against [a woman]

[168] The Court was restating a definition given by King CJ in *R v The Queen*. To amount to provocation … acts or words must …(1) be done or said by the deceased, to or in the presence of the killer; (2) they must have caused in the killer, a sudden and temporary loss of self-control rendering the killer so subject to passion as to make him, for the moment, not the master of his mind [and]; (3) they must [have been] of such character as [to] cause an ordinary person to lose his self-control to such extent as to act as the killer … acted: (1981) 28 SASR [321]-[322] (King CJ)
[169] (1995) 183 CLR 55, 66.
[170] Ibid.
[171] Lord Morris observed that: The jury might well have taken the view that the appellant was tormented beyond endurance. His wife whom he loved was being lured away from him and their children despite protests, appeals and remonstrances. In open defiance of his grief and his anguish, his wife was being taken by one who had jeered at his (the appellant's) lesser strength and had spoken with unashamed relish of his lascivious intents [and though] there was an interval of time between the moment when the appellant's wife and the deceased went away and the moment when the appellant overtook them and then caused the death of the deceased, a jury might well consider and would be entitled to consider that the deceased's whole conduct was such as to heat the blood to a proportionable degree of resentment and to keep it boiling to the moment of the fact: *Parker v The Queen* (1964) 111 CLR 665 [673] (Lord Morris).
[172] *Defences to Homicide – Final Report* (n 70) 53.
[173] Ibid 28.
[174] Ibid.

in [a] relationship'.[175] When women sought to rely on provocation having killed their partners out of fear they were often unsuccessful. Juries perceived them as having killed 'in circumstances that [were] cold and calculated; for example, while their partner was asleep or otherwise less able than usual to defend themselves' due to disparities in strength and size.[176]

Defence lawyers had attempted to extend provocation to women's lethal responses to intimate partner violence by arguing that it was a 'psychological reaction to being in a violent relationship [which] was equivalent to that of a man arguing self-defence or provocation in traditional contexts'.[177] They relied on case law which had extended the period of male anger.[178]

In Moffa v The Queen,[179] Murphy J clearly stated this development:

> There is no requirement that there must not have been time to cool off or regain self-control. The interval between provocation and [a] killing may, but need not, be short and I see no reason why intermediate temporary regaining of control should exclude the defence. These considerations are no doubt relevant to the real question of whether [a] killing [is performed] in the passion of the fury brought about by provocation.[180]

It was argued that the law had come to recognise the cumulative effect of circumstances leading to an accused's loss of control and acknowledged that it need not be instantaneous.[181]

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[175] McKenzie et al (n43) 17.
[176] Penny Crofts et al, *Waller & Williams – Criminal Law: Text and Cases* (LexisNexis Butterworths, 13th ed, 2016) 332.
[177] Bronwyn Naylor and Daniel Tyson, 'Reforming defences to homicide in Victoria: another attempt to address the gender question' (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 75. See, eg, *Osland v The Queen* [1998] HCA 75 ('*Osland*').
[178] Again, in *Parker v The Queen* (1964) 111 CLR 665, Lord Morris observed that: The jury might well have taken the view that the appellant was tormented beyond endurance. His wife whom he loved was being lured away from him and their children despite protests, appeals and remonstrances. In open defiance of his grief and his anguish, his wife was being taken by one who had jeered at his (the appellant's) lesser strength and had spoken with unashamed relish of his lascivious intents [and though] there was an interval of time between the moment when the appellant's wife and the deceased went away and the moment when the appellant overtook them and then caused the death of the deceased, a jury might well consider and would be entitled to consider that the deceased's whole conduct was such as to heat the blood to a proportionable degree of resentment and to keep it boiling to the moment of the fact: *Parker v The Queen* (1964) 111 CLR 665, [673] (Lord Morris).
[179] (1977) 13 ALR 225.
[180] Ibid [18] (Murphy J).
[181] (1994) 72 A Crim R 1 ('*Chhay*').

In 1994, Chhay v R[182] affirmed that such circumstances could include the background and history of the relationship between the accused and the victim.[183] Further, it demonstrated that a loss of self-control could develop after a period of protracted abuse without a need for a specific triggering incident[184] and that a jury could find, in that context, that a seemingly inoffensive isolated incident was provocative.[185]

While the doctrine of provocation originally required anger to lead to a loss of control, the experiences of women came to be accommodated by the doctrine's standard expanding to include a loss of self-control from fear or panic.[186] In this context, provocation became a question of whether a killing occurred while the accused was in an emotional state that a jury accepted as a loss of self-control.[187] It had developed to enable women to argue provocation in some circumstances of intimate partner violence thus reflecting the context in which women typically killed.[188]

Nevertheless, women's provocation defences based on intimate partner violence were rarely successful.[189] Practitioners encountered difficulties in persuading juries that intimate partner violence warranted lethal force especially a woman had continued to live with her violent partner.[190] Further, as women commonly needed weapons or for the male to be incapacitated or asleep to account for disparities in strength and size, women were commonly perceived to have killed in 'cold blood'.[191] Provocation continued to be the subject of considerable criticism.

2.3.2.3 The abolition of provocation

In 1991, the VLRC recommended that provocation be retained, citing evidence that juries did not routinely accept men's provocation arguments.[192] It also reasoned that it would be

[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] Ibid.
[186] *Van den Hoek v R* (1986) 161 CLR 158, [18] (Gibbs CJ).
[187] *Chhay* (n 181) [14] (Gleeson CJ).
[188] *Defences to Homicide – Final Report* (n 70) 28.
[189] Ibid 29.
[190] Ibid.
[191] Crofts et al (n 176).
[192] In the Commission's homicide prosecutions study, 10 women and 65 men raised provocation as a defence. Of the 10 women who raised provocation, six (60%) were convicted of manslaughter, and three (30%) were acquitted. None were convicted of murder. In comparison, 13 (20%) of the 65 male accused

'ironic' to abolish the defence as it had become more accessible to women.[193] Although its conclusions addressed the issue of equality before the law, the continued 'gendered' application of provocation would be its undoing with the prosecution of James Ramage as the catalyst.

In 2003, James Ramage strangled his wife, Julie Ramage, at their former home in Melbourne.[194] Mrs Ramage had left him several weeks before. This was described by Osborn J as 'sudden, unexpected, and emotionally destabilising'.[195] On the day that she was killed, she had told Ramage that 'their relationship was over'.[196] Ramage alleged that when she then ridiculed him by comparing him to her new partner,[197] he lost control and killed her.[198]

At trial, Ramage argued that he had not intended to kill Mrs Ramage and that it was the result of provocation.[199] Although the jury were told about Ramage's 'controlling personality', McKenzie et al observed that the jury received little evidence of this.[200] It also did not learn that Ramage 'had broken Julie's nose by head-butting her early in their marriage, or that she feared that he would kill her'.[201] It was inadmissible as hearsay, unduly prejudicial and had occurred long before the homicide.[202] The jury found Ramage not guilty of murder, but guilty of manslaughter because of provocation.[203] He was sentenced to 11 years imprisonment with an 8-year minimum non-parole period.[204]

The conviction for manslaughter sparked outrage.[205] As Tyson argued, provocation largely operated as a 'profoundly sexed excuse for men who [had] killed their nagging, unfaithful or departing wives to avoid a conviction for murder'.[206] Similarly, Tolmie maintained[207] that

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who argued provocation were convicted of murder, 42 (65%) of manslaughter), and six (9%) were acquitted: Law Reform Commission of Victoria, *Homicide Prosecutions Study* (Report No 40, 1991), 76.

[193] Ibid.

[194] *R v Ramage* [2004] VSC 508 ('*Ramage'*).

[195] Ibid [5] (Osborn J).

[196] Ibid [32] (Osborn J).

[197] Ibid [22] (Osborn J).

[198] Ibid [23] (Osborn J).

[199] McKenzie et al (n 43) 17.

[200] See Cleary (n 145).

[201] Ibid.

[202] McKenzie et al (n 43) 17.

[203] Ibid.

[204] *Ramage* (no 194) [56] (Osborn J).

[205] McKenzie et al (n 43) 17.

[206] Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (Routledge, 2013) 17–34.

[207] Tolmie (n 146).

provocation normalised male violence as a natural characteristic of masculinity[208] and inadequately acknowledged the context in which women typically killed men.[209]

By then and before the 'media storm', the VLRC had published its report on the defences to homicide.[210] In its report, it maintained that although the law of provocation had 'incrementally changed over time in an attempt to ensure that it was applied fairly', it had promoted values 'inconsistent with … notions of a civilised society'[211] and reinforced gender inequality.[212] The Commission observed:

> The continued existence of provocation as a separate partial defence to murder [had] partly [legitimised] killings committed in anger [and reflected that] there [were] circumstances in which [the] community [did] not expect a person to control their impulses to kill or to seriously injure a person. This [was] of particular concern [where] [such] behaviour [was] in response to a person who [was] exercising his or her personal rights, for instance to leave a relationship or to start a new relationship with another person … anger and a loss of self-control, regardless of whether such anger [was] understandable, [was] no longer a legitimate excuse for the use of lethal violence.[213]

The VLRC acknowledged arguments in favour of retaining provocation. It acknowledged that killers who had been provoked were less morally culpable than those acting with premeditation. It believed this could be taken into consideration in sentencing.[214] Secondly, it acknowledged that provocation was a half-way defence and that sympathetic verdicts of acquittal for murder would be more likely if it were abolished and juries were left with no alternative verdict of manslaughter.[215] It maintained that a revised and broader approach to self-defence would address this.[216]

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[208] Ibid 19-20. See also Stephen Tomsen and Thomas Crofts, 'Social and Cultural Meanings of Legal Responses to Homicide among Men: Masculine Honour, Sexual Advances and Accidents' (2012) 45 *Australian & New Zealand Journal of Criminology* 423; Julia Tolmie, 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation' [2005] *New Zealand Law Review* 25, 45.
[209] See Chapter 3, *John Rawls' Theory of Justice* at 3.2.4.1.
[210] McKenzie et al (n 43) 17. See also Kate Fitz-Gibbon and Arie Freiberg, 'Introduction: Homicide Law Reform in Victoria: Retrospects and Prospects' in Kate Fitz-Gibbon and Arie Freiberg (eds) *Homicide Law Reform in Victoria: Retrospects and Prospects* (The Federation Press, 2015) 4.
[211] Arenson, Bagaric and Gillies (n 148) 191.
[212] *Defences to Homicide – Final Report* (n 70) xxviii.
[213] Ibid 56.
[214] Ibid 36.
[215] Ibid 39.
[216] Ibid.

Lastly, the VLRC addressed submissions that reforms were not required as the common law had moved to reflect community values in rejecting, sexist, homophobic and racist provocations.[217] While not persuaded that this had occurred, it conceded that provocation could be reformed to allow judges to exclude it if it concerned 'the termination of a relationship … suspected, discovered or confessed infidelity or non-violent homosexual advances'.[218] However, it concluded that provocation privileged a loss of self-control and promoted a culture of victim blaming. [219] As a result of its recommendations, the defence of provocation was abolished in Victoria in 2005.

In posthumous support of abolition, Arenson, Bagaric and Gillies agreed that the continued existence of the defence would have placed 'anger in a special position … unjustifiable at … psychological [or] normative levels'.[220] The abolition of the defence reflected that there was no positive role for anger[221] in contemporary society and that individuals could no longer rely on provocative conduct to excuse the intentional killing of an intimate partner. Anger was to be accommodated, if at all, by the doctrine of self-defence.[222]

2.3.3 Analysis of the law of self-defence

Before 2005, the doctrine of self-defence was defined at common law in Zecevic v DPP (Vic).[223] The High Court stated that the test of self-defence was:

> [W]hether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he [or she] did. If he [or she] had that belief and there were reasonable grounds for it, or if the jury [was] left in reasonable doubt about the matter, then he [or she was] entitled to an acquittal.[224]

[217] Ibid 41.
[218] Ibid.
[219] Ibid 32.
[220] Arenson, Bagaric and Gillies (n 148) 194.
[221] Ibid.
[222] Ibid.
[223] *Zecevic v DPP (Vic)* (1987) 162 CLR 645 ('*Zecevic*').
[224] Ibid [661].

The test contained both a subjective and objective assessment, requiring an honest belief and reasonable grounds for the belief that it was necessary to do what the accused did.[225] It also required consideration of the accused's perception of a threat and the accused's response to that threat.[226]As the assessment of whether there were reasonable grounds for a belief to act was not purely objective,[227] a full appreciation of an accused's situational and psychological predicament was required.[228]

Accordingly, the test of self-defence was not a question of whether an accused's actions accorded with those of a 'hypothetical reasonable person'.[229] Rather, the personal characteristics of the accused affecting their appreciation of the gravity of the threat which they faced and the reasonableness of their response to that danger were to be considered.[230]

2.3.3.1 The application of self-defence to female victims of family violence

Like provocation, the extent to which victims of family violence could demonstrate objectively reasonable grounds for a subjective belief to act in self-defence became the subject of considerable debate.[231] This was due to the perception that it was difficult for female victims of family violence to satisfy the test for self-defence when they had killed a partner in the absence of an immediate threat or had used significant force on an unarmed or otherwise defenceless partner.[232]

Bradfield describes how the law of self-defence had been formulated around the psychological profile of men and the context in which they killed other men;[233] a fight was in progress and a defensive killing was required to preserve life or limb. Crofts and Tyson argued that conceptualisations of self-defence were based on 'ongoing' or 'imminent acts of violence' and had made self-defence inaccessible to women whose

[225] Anthony Hopkins and Patricia Easteal, 'Walking in her shoes: Battered women who kill in Victoria, Western Australia and Queensland' (2012) 35(3) *Alternative Law Journal* 132.
[226] Ibid.
[227] Ibid 133.
[228] Ibid.
[229] *R v Conlon* (1993) 69 A Crim R 92 ('*Conlon*'), [98] (Hunt CJ).
[230] Ibid [99] (Hunt CJ).
[231] Hopkins and Easteal (no 225) 133.
[232] *Defences to Homicide – Final Report* (no 70) 61.
[233] Rebecca Bradfield, 'Domestic Homicide and the Defence of Provocation: A Tasmanian Perspective on the Jealous Husband and the Battered Wife' (2000) 19(1) *University of Tasmania Law Review* 5.

experiences did not fit with such conceptualisations.[234] For these reasons, Sheedy et al.[235] maintained that, in practice, the law excluded the experience of victims of family violence by undermining their 'less conventional' claims to reasonableness.[236]

Although the doctrine of self-defence had never required 'a threat to be imminent or that [a] response be necessarily "proportionate to [a] threat", questions of imminence and proportionality [were] considerations which [significantly bore] upon a judge's and juror's assessment of reasonableness'.[237] Accordingly, it was common for juries not to consider non-imminent threats of injury as a basis for self-defence as they were inconsistent with what self-defence 'really [was]'.[238] As previously discussed,[239] research demonstrated that women usually killed in response to a history of family violence where their emotions were grounded in fear and the need for self-preservation.[240]

Due to differences in size between men and women, it was not uncommon for women to kill unarmed partners with weapons[241] or to kill partners while they slept.[242] Consequently, as Hopkins and Easteal observed, such killings pointed 'to the conclusion that [a] woman's actions were not reasonable or necessary'.[243] Further, that judges and jurors, uninformed about the dynamics and effects of family violence, saw such killings as 'unreasonable, irrational, retaliatory or premeditated'.[244] They claimed that such killings led juries to ask: 'Why didn't she just leave? Why didn't she seek help? Why didn't she call the police? Were there not options available to her other than the use of lethal force?'[245]

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[234] Thomas Crofts and Danielle Tyson, 'Homicide Law Reform in Australia: Improving Access of Women Who Kill Their Abusers to Defences' (2013) 39(3) *Monash University Law Review* 873.
[235] Elizabeth Sheedy, Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations' (1992) 16(1) *Criminal Law Journal* 369.
[236] See Chapter 3, *John Rawls' Theory of Justice* at 3.2.4.1.
[237] *Zecevic* (n 223) [661]-[665].
[238] *Defences to Homicide – Final Report* (n 70) 77.
[239] See *Causes of family violence and intimate partner homicides at* 2.2.2.
[240] Margo Wilson and Martin Daly, 'Who Kills Whom in Spouse Killings? On the Exceptional Sex Ratio of Spousal Homicides in the United States' (1992) 30(2) *Criminology* 189, 206.
[241] *Defences to Homicide – Final Report* (n 70) 67.
[242] *Osland* (n 177). See also *Defences to Homicide – Final Report* (n 70).
[243] Hopkins and Easteal (n 225). See also Chapter 7, *Original insights concerning trials of victims of family violence – pathologising victims of family violence* at 7.3.1.1(a).
[244] Ibid.
[245] Ibid.

While these questions were understandable, Stark contended that traditional conceptualisations of self-defence which invoked them 'minimised the extent of women's entrapment by male partners in their personal lives and [the] consequences' which flowed from such entrapment.[246] Concurring, Tarrant maintained that the law's traditional formulation of self-defence represented 'the most profound instance of the exclusion of women's experiences as [it focussed] on an isolated altercation representing an extraordinary eruption in a normal existence' whereas 'women who [had killed] in retaliation to systematic abuse [had killed] in response to an aspect of their ordinary existence'. [247]

The Commission concluded that the Zecevic formulation of self-defence was 'clear, simple and easily understood' yet retained a risk of being unfairly interpreted and applied to victims of family violence.[248] It recommended that the law of self-defence be codified to 'promote a better understanding by jurors and other members of the community about [its] scope'.[249]

On the basis that the common law was easily understood, the Commission concluded that it could statutorily accommodate self-protective actions against future violence which were likely to cause serious injury or death.[250] However, it believed that jury directions had inadequately addressed issues of imminence and proportionality.[251] Consequently, it recommended that legislation specify that actions may still be in self-defence despite a threat not being imminent to enable wider consideration by jurors of the circumstances in which people may reasonably believe that their lives are in danger.[252] It proposed a provision to operate with the test for self-defence stating that:

> A person may believe that the conduct is necessary [in self-defence]; and . . . a person's response may be reasonable [in self-defence] when the person believes

[246] Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 1st ed, 2007) 10.
[247] Stella Tarrant, 'Something Is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws' (1990) 20(1) *University of Western Australia Law Review* 597. See also Chapter 3, *John Rawls' Theory of Justice* at 3.2.4.1..
[248] *Defences to Homicide – Final Report* (n 70) 68.
[249] Ibid 69.
[250] Ibid 75.
[251] Ibid.
[252] Ibid 80.

> that the harm to which he or she is responding is inevitable, whether or not it is immediate.[253]

The Criminal Bar Association (CBA) opposed the concept of inevitability. It argued that:

> [S]uch a reform would involve a major and unprecedented change to self-defence. It would legitimate violent self-help at a new level. It would require a major reconsideration of the objective element of self-defence.[254]

It further argued that a degree of certainty in criminal trial directions was required. For example, "what was necessary to establish 'inevitable'? Was the concept to be objective inevitability? What evidence was admissible to prove 'inevitability'? Was inevitability to be regarded as a proper field for expert evidence?"[255] Arguing that the reform would add complexity to judicial directions,[256] the CBA described the proposal as 'adventurous, controversial and frankly unsubstantiated'.[257]

In response, the VLRC maintained that the formulation represented a subjective belief ensuring that the actions of an accused were not unquestioningly dismissed from the scope of self-defence because of immediacy. Whether the accused acted reasonably in self-defence then remained a matter which juries could ultimately decide for themselves.[258]

In respect of proportionality, the VLRC acknowledged that there was no strict requirement for a threat of death or serious injury, or that the force used be strictly proportionate to the threat of harm or force responded to.[259] However, like imminence, proportionality was relevant to whether an accused necessarily believed that they were required to act and that they held reasonable grounds for that belief.[260]

The VLRC acknowledged that proportionality had been problematic for victims of family violence as the force used was often construed in isolation as disproportionate as the

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[253] Ibid 81.
[254] Criminal Bar Association, Submission No 27 to Victorian Law Reform Commission, *Defences to Homicide – Final Report* (n 70) 80.
[255] Ibid.
[256] Ibid.
[257] Ibid.
[258] Ibid 81.
[259] Ibid.
[260] *Zecevic* (n 223) [662]-[663] (Wilson, Dawson and Toohey JJ).

partner was asleep or caught by surprise.[261] Referring to its homicide study which found that all women who had killed had used a weapon,[262] the VLRC took notice of disparities in strength and size which commonly led victims to believe that there were no options available other than to arm themselves or to use fatal force where a partner was defenceless.[263]

The Commission recommended that the legislation specify that a person's actions may be reasonable in circumstances where the force used exceeded the force previously used against the accused.[264] It concluded that the objective element of reasonableness be retained in the test of self-defence.[265]

Lastly, the Commission reported that the culpability of people who kill believing it was necessary for self-protection was reduced even if they were unable to establish the reasonableness of their conduct.[266] It recommended that excessive self-defence be a separate crime to mitigate against undue emphasis being placed on proportionality[267] and to provide greater protection to victims of family violence.[268] The resulting offence of defensive homicide is discussed at 2.3.6.2 below.

The VLRC found that the law had inadequately represented the needs, experiences and views of women. Its emphasis on imminence and proportionality discounted the effects of Lenore Walker's research on the battered person' syndrome resulting from protracted emotional, physical, psychological or sexual abuse.[270]

2.3.4 The psychology and neuroscience of battered person's syndrome and learned helplessness

[261] *Defences to Homicide – Final Report* (n 70) 83.
[262] *Defences to Homicide – Options Paper* (n 130) 23.
[263] *Defences to Homicide – Final Report* (n 70) 84.
[264] Ibid 83.
[265] Ibid.
[266] Ibid 87.
[267] Ibid 83.
[268] Ibid.
[270] See Lenore Walker, *The Battered Woman Syndrome* (Harper and Row, 1st ed, 1979).

In 1977, Lenore Walker's research entitled Battered Woman Syndrome[271] observed a pattern of perceptions and responses reflecting severe and continuous family violence which led to depressed states and diminished capacities for independent actions which enabled victims to escape violence.[272]

As canvassed earlier,[273] the literature on when women killed indicated that it was usually in response to a history of family violence and was based on fear and self-preservation.[274] The conduct reflected Martin Seligman's learned helplessness on which Walker drew a decade later.[275] Seligman's idea provides the foundations to understanding Walker's battered person's syndrome and its relevance to the law of self-defence and imminence and proportionality.

2.3.4.1 Learned helplessness

Seligman's concept of learned helplessness was based on experiments with electric shocks inflicted on dogs.[276] He observed that dogs subjected to inescapable shocks made

[271] It was the title for Walker's US National Institute of Mental Health research grant which collected data on over 400 self-referred women who met the definition of a 'battered woman': Lenore Walker, *The Battered Woman Syndrome* (Springer Publishing Company, 4th ed, 2017) 49.
[272] Ibid. See also Annik Mossiere, Evelyn Maeder and Emily Pica, 'Racial Composition of Couples in Battered Spouse Syndrome Cases: A Look at Juror Perceptions and Decisions (2016) 33(18) *Journal of Interpersonal Violence* 2; Regina Schuller and Neil Vidmar, 'Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature' (1992) 16(3) *Law and Human Behavior* 273-291.
[273] See *Causes of family violence and intimate partner homicides at* 2.2.2..
[274] See Suzanne Beri, 'Justice for Women Who Kill: A New Way?' (1997) 8(1) *Australian Feminist Law Journal* 113; Martha Shaffer, 'The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After R v Lavallee' (1997) 47(1) *University of Toronto Law Journal* 1; Melanie Griffith, 'Battered Woman Syndrome: A Tool for Batterers?' (1995) 64(1) *Fordham Law Review* 141; Julie Stubbs and Julia Tolmie, 'Race, Gender and the Battered Woman Syndrome: An Australian Case Study' (1995) 8(1) *Canadian Journal of Women and the Law* 122; Wendy Chan, 'A Feminist Critique of Self-Defence and Provocation in Battered Women's Cases in England and Wales' (1994) 6(1) *Women & Criminal Justice* 39; Celia Wells, 'Battered woman syndrome and defences to homicide: where now?' (1994) 14(2) *Legal Studies* 266; Katherine O'Donovan, 'Law's Knowledge: The Judge, The Expert, The Battered Woman, and Her Syndrome' (1993) 20(4) *Journal of Law and Society* 427.
[275] See Martin Seligman, 'Learned Helplessness' (1972) 23(1) *Annual Review of Medicine* 407.
[276] Between 1965 and 1969, Seligman placed a portion of 150 dogs within a harness apparatus from which they could not escape. An electric shock was then administered to the paws of the dogs; a painful stimulus which the dogs were unable to stop. After this had been performed several times, Seligman placed the dogs in a 'shuttle avoidance box'. When a buzzing sound was activated or when the lights within the room were dimmed, the dogs had 10 seconds to leap over a barrier to avoid the next electric shock. Martin Seligman and Steven Maier, 'Failure to Escape Traumatic Shock' (1967) 74(1) *Journal of Experimental Psychology*

no efforts to avoid them and 'remained passive and appeared helpless and dysphoric.'[277] He hypothesised that 'frequent experience with a lack of contingency between outcome and response (between a cessation of shock or an escape from pain and the animal's efforts to escape an inescapable harness) led the [dogs] to assume that escape attempts (and other actions) were futile'.[278] He described this phenomenon as learned helplessness.[279]

Subsequent human research demonstrated that humans developed similar patterns of helplessness[280] with loss of control, social isolation, passivity and dysphoric affects.[281] It was a 'condition in which the individual ceased to appreciate the potential efficacy of his or her own actions to influence daily life in adaptive ways'.[282] However, as not all traumatised persons became helpless,[283] Seligman's research was extensively challenged by other psychologists leading to alternative behavioural explanations alongside criticisms of Seligman's methodology. The literature also remains significant in understanding battered person syndrome as it indicates that abuse has a physiological as well as psychological effect.

2.3.4.2 Scrutiny of the learned helplessness hypothesis

Costello critically reviewed Seligman's work.[284] He concluded two major symptoms of learned helplessness were motivational: lowered response initiation and cognitive reduced ability to learn producing reinforcement.[285] He argued that Seligman had not

1-9; J. Bruce Overmier and Martin Seligman, 'Effects of inescapable shock upon subsequent escape and avoidance responding' (1967) 63(1) *Journal of Comparative and Physiological Psychology* 63(1) 28-33.

[277] In contrast, those dogs which had not been subjected to inescapable shocks had readily learned to avoid pain by jumping from one portion of the cage to the other: ibid.

[278] Ibid.

[279] Ibid.

[280] See Judy Garber and Martin Seligman, *Human helplessness: theory and applications* (Academic Press, 1980).

[281] Motivated by Seligman's original theory, the *learned helplessness* experiments were replicated by Hiroto in seemingly analogous human settings. See Donald Hiroto and Martin Seligman, 'Generality of learned helplessness in man' (1975) 31(2) *Journal of Personality and Social Psychology* 311-327 cited in Steven Maier and Martin Seligman, 'Learned Helplessness at Fifty: Insights from Neuroscience' (2016) 123(4) *Psychological Review* 351.

[282] Raymond Flannery and Mary Harvey, 'Psychological trauma and learned helplessness: Seligman's paradigm reconsidered' (1991) 28(2) *American Psychological Association - Psychotherapy* 376.

[283] Hiroto and Seligman (n 281).

[284] He concluded that Seligman's experiments '[provided] little or no support for the learned helplessness theory of depression' and that 'heuristic theories … should be closely examined before psychologists embark on an extensive series of experimental tests': Charles Costello, 'A Critical Review of Seligman's Laboratory Experiments on Learned Helplessness and Depression in Humans' (1978) 87(1) *Journal of Abnormal Psychology* 21.

[285] Ibid 26.

separated and investigated these.[286] It left open the possibility that 'performance deficits [could have been] a result of the poor motivation of [a] depressed person'[287] compared with a non-depressed person. Flannery and Harvey noted that 'a lack of options, a lack of skills, opposition from others, internalisation of blame, adaptive survival and altruism'[288] were all examples of alternative sources of behaviour of victims of psychological trauma.[289]

An ecological model for understanding individual differences in responses was promulgated to demarcate the alternate explanations for behaviours described as learned helplessness.[290] Seligman conceded that his original hypothesis had not distinguished 'between cases in which outcomes were uncontrollable for all people and cases in which they were uncontrollable for only some people'.[291]

In order to account for these deficiencies, Abramson, Seligman and Teasdale re-evaluated earlier studies in 1974.[292] They concluded that the original formulation of learned

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[286] Ibid.

[287] In essence, Costello believed that Seligman's findings suggested that a cognitive impairment was involved when a person was depressed (or when a person had been given a laboratory experience of uncontrollable events) despite it having not been made clear whether the cognitive impairment was the specific one postulated by Seligman's theory. For Costello, the poorer motivation of depressed subjects (as opposed to non-depressed subjects) was an 'overlooked antecedent'. In other words, it was conceivable that other factors could explain the manifestations of the cognitive deficit of helplessness and that this had not been sufficiently articulated, acknowledged or accounted for by Seligman: ibid.

[288] These factors were also suggested to be influenced by the victim's age and stage of development (including the victim's pre-traumatic repertoire of coping capabilities and cognitive functioning). Lastly, the relationship of the victim to the offender and the 'attitudes, values and support capabilities of the victim's support system' were also deemed relevant. In summary, it was Flannery and Harvey's position that the decisions victims made were influenced by the 'ecosystem of resources' available to them: ibid 377.

[289] This position was shared by Raymond Flannery and Mary Harvey who, in 1991, maintained that Seligman's model of *learned helplessness* should not be considered a 'unitary construct'. Further, that the 'applicability of the learned helplessness paradigm to chronically traumatised victims of violence may [have been] more limited than [had been] generally assumed': Flannery and Harvey (n 282) 375.

[290] This was due to the perception that Seligman's model had failed to consider the ecological context and variables of certain victims of chronic or repeated trauma. In essence, the ecological model recognised that individual reactions to traumatic events widely varied, that different events were not equally traumatic for all individuals and that individual differences in post-traumatic responses and recoveries were the result of a 'complex interaction [between] person x and event x environment factors': ibid 375.

[291] That is, the hypothesis had not distinguished between *universal helplessness* and *personal helplessness*. Additionally, the original hypothesis had not explained whether *helplessness* was general, specific, chronic or acute: ibid.

[292] In this experiment, the experimenter informed the subjects that there was something that could be done to turn off a noise. However, the noise was actually uncontrollable and the subjects were unable to find a way to turn it off. After numerous failed attempts to control the noise, the subjects came to believe one of two things. The first was that the problem was unsolvable and that neither they nor anyone else could terminate the noise. In the absence of this belief, they believed that the problem was solvable but that they did not have the skills to do so. As a result, Abramson, Seligman and Teasdale conceded that the original

helplessness was inadequate on four grounds. Firstly, it was only those uncontrollable outcomes in which the estimated probability of the occurrence of a desired outcome was low or the estimated probability of the occurrence of an aversive outcome was high which were sufficient to generate the depressed affect. Secondly, the lowering of self-esteem, as a symptom of depression, was not explained. Thirdly, the tendency of depressed people to make internal attributions for failure was not explained and, finally, variations in the chronic nature of the depression were not explained.[293]

Subsequently, a reformulation based on attribution theory was proposed to resolve these limitations.[294] Under this reformulation, once people perceived non-contingency, they looked to attribute helplessness to a cause.[295] These causes could be stable, unstable, global, specific, internal or external.[296] The attribution chosen would then influence whether expectations of future helplessness would be chronic, acute, broad, narrow and whether helplessness would lower self-esteem.[297]

Despite the criticisms of Seligman's original learned helplessness hypothesis, his concept has remained the dominant one for understanding helplessness[298] and contributed to the neuroscience relating to depression.

2.3.4.3 The neuroscience of learned helplessness

Developments in neuroscience have provided further insights into the biological and neurological factors accounting for the inaction of those with helplessness. In a 1970s study using Seligman's model of helplessness, Li et al. examined the hippocampus of mice in order to understand the molecular mechanisms underlying the pathologies of stress and depression to develop more effective responses to depression.[299] They

formulation failed to distinguish between these two states ('either of which could be engendered by the procedure of presenting uncontrollable outcomes'): ibid.
[293] Ibid 49.
[294] Ibid.
[295] Ibid.
[296] Ibid.
[297] Ibid.
[298] Seligman also revised the theory to include three cognitive factors which were likely to strengthen or weaken the probability of developing helplessness. Specifically, if the individual assumed excessive personal control, he concluded that the event would be of long-lasting duration and would negatively influence other subsequent actions by the individual, then helplessness would be the probable outcome: Flannery and Harvey (n 282).
[299] In their study they. found that gene ontology and pathway enrichment analyses suggested that 'the induction of helplessness altered the expression of mRNAs enriched in fundamental biological functions

confirmed that helplessness altered the qualities and functioning of the mice brain in a manner akin to depression. [300]

Notwithstanding their findings, Landgraf et al. warned that most mice studies mice had adopted learned helplessness protocols which ensured that training and testing occurred in the same environment with the same stressor.[301] Accordingly, Landgraf et al. maintained that failures to escape may have reflected a 'conditioned fear to a particular environment as opposed to a general change of a helpless state' and that there was no established learned helplessness protocol that incorporated this transsituationality.[302]

Cheng et al. examined the neurological factors which regulated recovery from helplessness and maintained that recovery was especially difficult in cases of subjects which were refractory to anti-depressant treatment.[303] In support of positive neurological

implicated in stress/depression neurobiology (such as synaptic, metabolic, cell survival and proliferation, developmental and chromatin modification functions)': Chaoqun Li et al, 'Profiling and Co-expression Network Analysis of Learned Helplessness Regulated mRNAs and IncRNAs in the Mouse Hippocampus' (2018) 10(454) *Frontiers in Molecular Neuroscience* 2.

[300] It identified, for the first time, distinct groups of brain activity regulated by the induction of learned helplessness in the mouse brain. Further, that the induction of helplessness (through inescapable stress) misregulated both mRNA and IncRNA expressions within mice. This created implications for the extent to which such IncRNAs played regulatory roles in cell metabolism dysfunction, proliferation, differentiation, survival, neurodevelopment, synapse machinery or epigenetic modification; factors which were previously hypothesised to have underpinned stress and depression pathologies (due to inescapable stress having impaired synaptic transmission and plasticity). The study was criticised by Landgraf et al. on the basis that studies in mice had adopted *learned helplessness* protocols which ensured that training and testing occurred within the same environment with the same form of stressor. Accordingly, they maintained that failures to escape may have reflected a 'conditioned fear to a particular environment as opposed to a general change of a helpless state' and that there was no established *learned helplessness* protocol that incorporated this transsituationality: ibid.

[301] Dominic Landgraf, Jaime Long, Andre Der-Avakian, Margo Streets and David Welsh, 'Dissociation of Learned Helplessness and Fear Conditioning in Mice: A Mouse Model of Depression' (2015) 10(4) *Public Library of Science* 1.

[302] Ibid.

[303] Positively, in developing a prolonged *learned helplessness* depression model in mice, Cheng et al. went on to demonstrate that prolonged learned helplessness was maintained by abnormally active glycogen synthase kinase-3 ("GSK3") but was nevertheless reversible. Following the induction of *learned helplessness*, mice were separated into groups that recovered or did not recover within four weeks. At the conclusion of a comparative analysis into the hippocampal proteins, inflammatory cytokines and hippocampal proteins of the mice, the mice which had not recovered displayed a form of prolonged *learned helplessness*. Specifically, they had 'greater hippocampal activation of GSK3, higher levels of tumour necrosis factor-α ("TNFα"), interleukin-17A, interleukin-23, increased permeability of the blood brain barrier (BBB), lower levels of BBB tight junction proteins occludin, ZO1, and claudin-5'.While this highlighted the neurological impediments to recovery (where helplessness was concerned), Cheng et al. ultimately discovered that TDZD-8 (a GSK3 inhibitor) effectively reduced inflammatory cytokine levels, increased tight junction protein levels, and reversed impaired recovery from *learned helplessness* thus indicating a *positive neurological prognosis* for *learned helplessness*: Yuyan Cheng et al, 'TNFa disrupts blood brain barrier integrity to maintain prolonged depressive-like behaviour in mice' (2018) 68(1) *Brain, Behaviour and Immunity* 1.

treatment, Oliveira and Hunziker considered the extent to which exposure to positive reinforcement eliminated learned helplessness under escape contingencies.[304] As a result, they concluded that 'the learned helplessness effect did not extend to discriminative behaviour that [was] positively reinforced and that the learned helplessness effect did not revert for most subjects after exposure to positive reinforcement'.[305]

With regard to these developments, Steven Maier and Martin Seligman reflected that the mechanism of learned helplessness was physiologically well documented though the original theory 'got it backward'.[306] It was first theorised that 'helplessness was characteristically cognitive and that it was learned; that a subject must detect a lack of contingency and expect that a future shock would be independent of his or her responses'.[307] Seligman revised that 'passivity in response to shock [was] not learned, it [was] the default, unlearned response to prolonged aversive events … mediated by the serotonergic activity of the dorsal raphe nucleus, which in turn, [inhibited] escape'.[308] Studies also showed that in specific circumstances control over adverse events could be relearnt.[309]

This discussion of the sense of lost personal control reported by victims of repeated or chronic trauma[310] contextualises Lenore Walker's research in considering the specific helplessness that victims of family violence may experience.

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[304] Emileane Oliveira and Maria Hunziker, 'Longitudinal investigation on learned helplessness tested under negative and positive reinforcement involving stimulus control' (2014) 106(1) *Behavioural Processes* 106(1) 160-167.

[305] Within their study, rats were exposed to controllable (Group C) and uncontrollable (Group U) scenarios (including scenarios without shocks being used at all - group N). After twenty-four hours, rats were exposed to 60 escapable shocks delivered within a shuttle box. Oliveira and Hunziker then selected the four subjects from each group that demonstrated the most typical group pattern – no escape learning (*learned helplessness*) in Group U and escape learning in Groups C and N. All subjects were then exposed to two phases, the positive reinforcement for lever pressing and a re-test under negative reinforcement (escape). A fourth group were then exposed to positive reinforcement sessions only. At the conclusion of the study, all subjects showed discrimination learning under multiple schedules. In the escape re-test, the learned helplessness effect was maintained for three of the animals in Group U: ibid.

[306] Maier and Seligman (n 281) 349.

[307] Ibid.

[308] Ibid.

[309] Ultimately, passivity could be overcome by learning control, with the activity of the medial prefrontal cortex, which promoted the detection of control leading to the automatic inhibition of the dorsal raphe nucleus. In essence, subjects could learn to control averse events and realise that their passive failure to learn to escape was simply 'an unlearned reaction to prolonged aversive stimulation: ibid.

[310] Flannery and Harvey (n 282).

2.3.4.4 Battered person's syndrome

From over 1,000 interviews of women subjected to family violence, Lenore Walker developed a model of abusive relationships using the concept of learned helplessness. The model was a cycle of abuse of 'tension-building … acute battering and loving contrition'.[311] During the tension-building phase, a gradual escalation of tension occurred through intentional acts, such as name-calling), and physical abuse.[312] Victims would attempt to placate batterers to avoid aggravating them further.[313] Victims tended to succeed for a short time so an 'unrealistic belief' that the victim could 'control' her partner would begin to grow to become part of an 'unpredictable non-contingency response/outcome pattern that [resulted in] … learned helplessness'.[314]

As tension continued to escalate, women would become more fearful of impending danger and eventually be unable to control their partner's aggressive responses.[315] Exhausted from constant stress, women tended to withdraw from their partners while the partners began to oppressively pursue which led to 'unbearable tension'.[316] Without intervention, the acute battering phase became inevitable.

In the acute battering phase, women precipitated explosions in the batterer having taken precautions to minimise injuries and pain.[317] The verbal and physical aggression still left women 'severely shaken and injured'.[318] Women would then learn to expect the violence - a point of no escape unless the batterer permitted it.[319] The phase concluded when the battering stopped, a naturally reinforcing process that often succeeded because it had achieved its objective.[320]

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[311] Walker (n 271) 94.
[312] Ibid.
[313] Ibid 97.
[314] It should be noted that learned helplessness is usually directly measured in a laboratory setting under experimentally controlled conditions. Walker's research attempted to identify its presence from variables that caused it to develop as predicted by the literature. Although results were positive, Walker strongly recommended that a controlled laboratory setting be constructed to test if learned helplessness could easily be induced in a sample of battered women comparable to her research (in order to affirm its theoretical application to battered women): Walker (n 271) 97.
[315] Ibid.
[316] Ibid.
[317] Ibid.
[318] Ibid.
[319] Ibid.
[320] Ibid.

In the next phase, the contrition phase, batterers often apologised profusely, showed kindness and showered their partners with gifts or promises of change.[321] Many of the behaviours reminded the women of why they had fallen in love with their partners.[322] They would often believe their batterers and renew their hope in their partners' abilities to change.[323] However, the cycle would continue. The tension and danger remained high and eventually eliminated the contrition phase altogether.[324] It was not uncommon for the violence to increase to potentially lethal severity.[325]

As a result, women tended to feel confused, worn out and would passively resolve to stay in the relationships to protect themselves.[326] Other socioeconomic and external constraints limited their capacity to leave safely.[327] These included: finding safe and affordable housing and finance; the fear of losing custody of children; the safety of children, family, and friends; and, the anxiety of defying cultural and religious values.[328] Walker subsequently concluded that there were very few effective responses available to women that would protect them or their children from batterer's non-negotiable demands. She found that women were often better able to protect themselves and their children by staying in relationships rather than looking to the police or courts for protection.[329]

Walker also argued that those who had developed learned helplessness had a diminished capacity to predict that their actions would produce a result protecting them from further violence[330] and that the more pessimistic victims were, the less likely they would choose an effective response (even if one existed).[331]

As noted by Flannery and Harvey, women victims of family violence could often only choose to stay with their children in a sporadically violent home, call the police who were unable to stop the violence and risk provoking a violent confrontation, or to seek

[321] Ibid.
[322] Ibid.
[323] Ibid 98.
[324] Ibid.
[325] Ibid.
[326] Ibid.
[327] Shaffer (n 274) 1-33.
[328] Ibid.
[329] Walker (n 271) 17.
[330] Ibid.
[331] Ibid.

protection in a shelter with the possibility that random violence could occur.[332] They found that it was not surprising that victims of family violence experienced despondency and despair and lacked expectations that life could improve.[333] Accordingly, helplessness, in the context of family violence, originated from a victim's despair and an environment with no alternatives to further victimisation.[334]

In the 1990s, Flannery and Harvey noted that the cycle was exacerbated by victims lacking the life-skills to escape their situations.[335] Specifically, victims were unsure of when to 'attempt to leave, who to trust, who to tell and what to say'.[336] Further, options and coping skills were, at times, nullified by third-party opposition.[337] For instance, a victim may have obtained an intervention order only to find that the police were unresponsive to breaches.[338]

In addition to the preceding factors underpinning helplessness, it was not uncommon for victims to internalise blame, to believe that they deserved to be abused because of their presumed inadequacy; a process described by Janoff Bulman as a form of 'characterological self-blame'.[339]

Whatever the causes of learned helplessness in the context of family violence, they were linked by one common thread: victims perceived that there was no reasonable escape.[340] As separation and divorce often failed to end a batterer's control and influence, feelings of helplessness commonly solidified.[341] This was confirmed by Walker's finding that the most dangerous point of domestic violence was at the point of separation.[342] It became clearer why victims often thought they could not leave their relationships.

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[332] Flannery and Harvey (n 282) 377.
[333] Ibid.
[334] Ibid.
[335] Ibid.
[336] Ibid.
[337] Ibid.
[338] Ibid.
[339] Ibid.
[340] Ibid.
[341] Walker (n 271) 18.
[342] Ibid. Pertinently, research indicates that many abused women who are eventually killed by their abuser are no longer living with them at the time of their death: see also Cheryl A. Terrance, Karyn M. Plumm and Katlin J. Rhyner 'Expert Testimony in Cases Involving Battered Women Who Kill: Going Beyond the Battered Woman Syndrome' (2012) 88(1) *North Dakota Law Review* 922-954.

From the victim's perspective, 'having lived with serious abuse under the constant threat of violence, having developed a heightened capacity to perceive danger from [their] batterer, for whom escape has failed or [was] not a realistic option' — it was also clearer why victims found no reasonable alternative[343] other than lethal force. In such instances, Walker observed that individuals often used a weapon because they could not be certain that any lesser action would protect themselves from being killed.[344]

However, as discussed earlier, juries commonly saw attacks in response to non-imminent threats or with the use of weapons on sleeping or defenceless partners as unreasonable or disproportionate; as not amounting to self-defence. These issues were explored in relation to provocation and self-defence by the High Court of Australia in Osland v The Queen.[345] Although Osland represented the first time that the High Court considered these defences in the context of battered person's syndrome,[346] other Australian courts had addressed its significance in criminal trials.[347]

It was decided in 1998 prior to the VLRC's review of the defences to homicide and the Victorian parliament's subsequent enactment of the Crimes (Homicide) Act 2005 (Vic). For a statement of the material facts, see Annexure A.

2.3.5 The relevance of battered person's syndrome to the law of provocation and self-defence

In Osland v The Queen,[348] expert evidence was led on battered person's syndrome. Clinical and forensic psychologist Kenneth Byrne, drawing on Walker's work, testified that certain behaviours were characteristic of battered women but not in all cases.[349] Namely, they were ashamed, feared telling others and thus kept it secret. They tended to

[343] Patricia Easteal, *Less than Equal: Women and the Australian Legal System* (Butterworths, 2001), 37.
[344] Walker (no 233) 18. Pertinently, of the 76 women who killed their spouses within Australia between 1980 and 2000, all had used a weapon: Rebecca Bradfield, 'The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System' (Unpublished PhD Thesis, University of Tasmania). In 56 cases, 38 had used a knife, 12 had used a firearm and 6 had used a blunt instrument: Jenny Mouzos, 'When Women Kill: Scenarios of Lethal Self-Help in Australia' (Unpublished PhD Thesis, University of Melbourne, 2003) 112. Lastly, in a study conducted by the VLRC between 1996 and 2001, all female accused (acting alone) had used a weapon other than their hands and feet: Victorian Law Reform Commission, *Defences to Homicide – Options Paper* (n 130) 23.
[345] *Osland* (n 177).
[346] Ibid [159] (Kirby J).
[347] See, eg, *R v Runjanjic and R v Kontinnen* (1991) 56 SASR 114; *R v Secretary* (1996) 86 A Crim R 119.
[348] *Osland* (n 177).
[349] Ibid [54] (Gaudron and Gummow JJ).

relive their experiences and, if frightened or intimidated, their thinking became confused and unfocussed. As a result, they had increased arousal and often became acutely aware of any sign of danger from their partner. When that danger was ever present they often stayed in abusive relationships because they believed that if they left, their violent partner would find them and take revenge upon them, including in severe cases, kill them.[350]

Osland was convicted and appealed on a number of grounds including that the trial judge should have related Byrne's evidence to the law of provocation.[351] Specifically, that:

> [With] self-defence having been raised, the jury should have been instructed that the evidence [could have been] of use in understanding ... why an abused woman [remained] in an abusive relationship ... the nature and extent of the violence that may [have existed] in [the] battering relationship ... the accused's ability to perceive danger from her abuser, and ... whether the accused believed on reasonable grounds that she could not [have] otherwise [protected] herself from death or grievous bodily harm.[352]

2.3.5.1 Relevance of battered person's syndrome

The majority of the High Court rejected the appeal. In response to the specific ground of the expert evidence and directions based on it about remaining with a violent partner the court acknowledged that conduct was 'contrary to what an ordinary person might [have expected]'.[353] Further, that if someone had not reported violence and had stayed in a relationship, an ordinary person would have likely reasoned that the relationship had not involved abuse or abuse of the severity claimed.[354]

It was acknowledged that the benefit of expert evidence on battered person's syndrome was of relevance to the law of provocation and self-defence as 'the ordinary person [was unlikely] to be aware of the heightened arousal or awareness of danger … experienced by battered women'.[355] Further, it was stated that such matters were relevant to questions of whether a battered woman believed that she was at risk of death or serious bodily harm

[350] Ibid.
[351] Ibid [52] (Gaudron and Gummow JJ).
[352] Ibid.
[353] Ibid [54] (Gaudron and Gummow JJ).
[354] Ibid.
[355] Ibid [55] (Gaudron and Gummow JJ).

and whether her actions were necessary to avoid that risk,[356] and lastly, that the history of a particular relationship could bear on the reasonableness of that belief.[357] However, Kirby J maintained that there was 'a need for caution in the reception of testimony concerning battered [person's] syndrome'.[358] As Kirby J stated:

> [L]east of all does the mere raising of it, in evidence or argument, cast a protective cloak over an accused, charged with homicide, who alleges subjection to a long-term battering or other abusive relationship. No civilised society removes its protection to human life simply because of the existence of a history of long-term physical or psychological abuse. If it were so, it would expose to unsanctioned homicide, a large number of persons who, in the nature of things, would not be able to give their version of the facts.[359]

He emphasised that the battered person's syndrome did not provide victims of family violence with a license to engage in premeditated homicide.[360] As put by Wilson J in R v Lavallee,[361] 'the fact that [an] appellant was a battered woman [did not] entitle her to an acquittal. Battered women may … well kill their partners other than in self-defence'.[362]

Provocation and self-defence required self-control where life was at stake[363] and were reserved for cases of exceptional circumstances.[364] Evidence of battered person's syndrome could not be used to establish that those accused were battered persons as if that rendered them not guilty.[365] It could be used to establish that a battered person was suffering from symptoms or characteristics relevant to the elements of provocation and self-defence.[366]

2.3.5.2 Scrutiny of the battered person's syndrome

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[356] *Zecevic* (n 223) [661]-[662] (Wilson, Dawson and Toohey JJ, Mason CJ concurring at [654] and Gaudron J concurring at [683]).
[357] Ibid.
[358] *Osland* (n 177) [165] (Kirby J).
[359] Ibid.
[360] *Green v The Queen* (1997) 191 CLR 334, [407].
[361] *R v Lavallee* [1990] 1 SCR 852, [890] (Wilson J).
[362] Ibid.
[363] *Osland* (n 177) [167] (Kirby J).
[364] Ibid.
[365] Phyllis Crocker, 'The Meaning of Equality for Battered Women Who Kill Men In Self-Defence' (1985) 8(1) *Harvard Women's Law Journal* 149.
[366] *Ruka v Department of Social Welfare* [1997] I NZLR 154, [173]-[174] (Thomas J).

Despite judicial acknowledgement of the relevance of battered person's syndrome to the law of provocation and self-defence, the Osland matter highlighted several problems with the concept, including the improper medicalisation of victims, the obfuscation of legal issues and the scientific reliability of the syndrome.

On the medicalisation of victims, Kirby J noted that use of the term 'syndrome' distracted attention from conduct which may have constituted a reasonable response to extreme circumstances.[367] Its use could deny the rationality of victim's response to prolonged abuse by depicting it as irrational and emotional[368] in a framework of dysfunction.[369] It risked undermining the purpose of its use to demonstrate how victim's actions in taking lethal self-help against abusers were reasonable in the extraordinary circumstances which victims faced.[370]

Stark had previously contended that battered person's syndrome was a 'traumatisation model' providing an 'inaccurate, reductionist, and potentially demeaning representation of battering'.[371] In focussing on discrete episodes of violence, the model perpetuated the 'same persistent structural inequities and biases which [underpinned the] battering itself'.[372] Stark suggested an alternative framework, 'coercive control', for understanding family violence. It emphasised patterns of coercion and control rather than acts of violence committed by abusers and their psychological effects.[373] In Stark's view, this avoided stigmatising psychological assessments of traumatisation and directed attention

[367] *Osland* (n 177) [164] (Kirby J).
[368] See, eg, Stanley Yeo, 'Resolving Gender Bias in Criminal Defences' (1993) 19(1) *Monash University Law Review* 111; Isabel Grant, 'The Syndromization of Women's Experience' (1991) 25(1) *UBC Law Review* 51 cited in Donna Martinson et al, 'A Forum on Lavallee v R: Women and Self Defence' (1991) 23(1) *University of British Columbia Law Review* 53-54; Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90(1) *Michigan Law Review* 42; Martha Shaffer, 'R v Lavallee: A Review Essay' (1990) 22(3) *Ottawa Law Review* 607.
[369] See, eg, Regina Schuller and Sara Rzepa, 'Expert Testimony Pertaining to Battered Woman Syndrome: Its Impact on Jurors' Decisions' (2002) 26(6) *Law and Human Behaviour* 657; Fiona Raitt and Suzanne Zeedyk, *The Implicit Relation of Psychology and Law: Women and Syndrome Evidence* (Routledge, 2000).
[370] See, eg, Shelby A.D. Moore, 'Battered Woman Syndrome: Selling the Shadow to Support the Substance' (1995) 38(1) *Howard Law Journal* 301-302; Elizabeth Schneider, 'Describing and Changing: Women's Self-Defence Work and the Problem of Expert Testimony on Battering' (1986) 9(1) *Women's Rights Law Reporter* 199.
[371] Evan Stark, 'Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control' (1995) 58(4) *Albany Law Review* 974-5.
[372] Ibid 976.
[373] Ibid.

to the links between structural inequalities, the systemic nature of women's oppression in particular relationships and the harms associated with domination.[374]

Concerning the obfuscation of legal issues, Kirby J drew attention to Wilson J's remarks in R v Lavallee[375] where Wilson J stated that 'the fact that the appellant was a battered woman [did] not entitle her to an acquittal. Battered women may well kill their partners other than in self-defence. The focus is not on who the woman is, but on what she did'.[376] Schopp, Sturgis and Sullivan had observed in the context of US law that battered person's syndrome could lead to disputes centred on whether accused suffered from a syndrome as opposed to whether the lethal force was justifiable.[377]

On the question of the syndrome's scientific reliability, the foundation of the battered person's syndrome had been claimed to have 'no medical legitimacy'[378] in that it failed to meet established criteria for 'scientific reliability'.[379] Specifically, the syndrome had failed to satisfy the Daubert test for scientific reliability in US law because of scientific testability issues, error criteria, support in peer reviewed journals publications and general scientific acceptance.[380]

2.3.5.3 The current status of the battered person's syndrome

[374] Ibid.
[375] [1990] 1 SCR 852.
[376] Ibid [890] (Wilson J).
[377] Robert Schopp, Barbara Sturgis and Megan Sullivan, 'Battered Woman Syndrome, Expert Testimony and the Distinction Between Justification and Excuse' (1994) 45(1) *University of Illinois Law Review* 46-7.
[378] Goodyear Smith, 'Re Battered Woman's Syndrome [1997] NZLJ 436-438' (1998) 39(1) *New Zealand Law Journal* 39.
[379] Goodyear Smith concluded that the BPS failed to meet the Daubert test for scientific reliability in the United States law courts. Specifically, on the grounds of scientific testability, error criteria, support in peer review journal publications and general scientific acceptance. She concluded that there would have been 'few experimental psychologists who would consider it a valid entity': ibid. See also David Faigman and Amy Wright, 'The Battered Woman Syndrome in the Age of Science' (1997) 67(1) *Arizona Law Review* 107-111.
[380] Goodyear (n 378). Further, in a report prepared by Mary Ann Dutton for the US Department of Justice and Department of Health and Human Services in 1996, the *battered person's syndrome* was maintained to have inadequately reflected the breadth of knowledge around battering and its effects on victims with the effect of being 'imprecise … and misleading': Mary Ann Dutton, Submission No 160972 to US Department of Justice, *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials* (May 1996) 17.

Osland indicated that battered person's syndrome remained accepted as a proper matter for expert evidence in Australia[381] as it transcended common knowledge.[382] Its development was instrumental in changing the law of self-defence and practices surrounding it.[383] For judges and jurors, battered person's syndrome evidence provided a useful framework to rectify misconceptions about women in abusive relationships and to understand their complex circumstances.[384] Schuller and Hastings noted its educative functions in helping judges and jurors to understand 'the prevalence of violence against women, the dynamics and effects of abusive relationships … and [the] reasons why women [did] not [or could not] leave their abusive partners'.[385] Importantly, it explained how abused individuals may perceive threats of violence,[386] why they may have felt in danger before killing an abusive partner and why abused individuals may have believed that they had no other options.[387] Such evidence enabled actions to be perceived as reasonable in the context of self-defence.[388]

While Osland acknowledged the relevance and utility of battered person's syndrome to the law of provocation and self-defence, women committing fatal violence against violent intimate partners[389] often remained unsuccessful because of doctrinal considerations of imminence and proportionality alongside social perceptions of what 'real' self-defence 'was'.

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[381] *Osland* (n 177) 54.
[382] Heather Douglas, 'Social Framework Evidence: Its Interpretation and Application in Victoria and Beyond' in Kate Fitz-Gibbon and Arie Freiberg (ed), *Homicide Law Reform in Victoria: Retrospects and Prospects* (The Federation Press, 2015) 158.
[383] Crofts and Tyson (n 234) 881.
[384] Regina Schuller and Patricia Hastings, 'Trials of battered women who kill: the impact of alternative forms of expert evidence' (1996) 20(2) *Law and Human Behavior* 167–188. See Chapter 7, *Original insights concerning trials of victims of family violence – pathologising victims of family violence* at 7.3.1.1(a).
[385] See, eg, Kimberley White-Mair, 'Experts and ordinary men: Locating R. v. Lavallee, Battered Woman Syndrome, and the 'new' psychiatric expertise on women within Canadian legal history' (2000) 12(1) *Canadian Journal of Women and the Law* 406–438; Mary Ann Dutton, 'Understanding women's responses to domestic violence: A redefinition of Battered Woman Syndrome' (1993) 21(1) *Hofstra Law Review* 1191–1242.
[386] Tarrant (n 247) 600.
[387] R A Schuller, Wells E, Rzepa S & Klippenstine M A, 'Rethinking battered woman syndrome evidence: The impact of alternative forms of expert evidence on mock jurors' decisions', (2004) 36(2) *Canadian Journal of Behavioural Science* 127-136.
[388] Crofts and Tyson (n 234).
[389] See, eg, *Osland* (n 177); *R v Ahluwalia* [1992] 4 All ER 889 and Bronwyn Naylor and Daniel Tyson, 'Reforming defences to homicide in Victoria: another attempt to address the gender question' (2017) 6(3) International Journal for Crime, Justice and Social Democracy 75.

2.3.5.4 The VLRC's analysis of battered person's syndrome and social context evidence

To further address doctrinal problems with imminence and proportionality, the VLRC, in its 2004 report, recommended that a separate evidence provision be introduced for factors relevant to self-defence in the context of family violence.[390] In its view, this avoided 'elevating matters of evidence' to 'rules of law'[391] by requiring an appropriate provision for the introduction of such evidence.

The VLRC had considered the limitations mentioned above on battered person's syndrome evidence. It proposed two models of self-defence beyond battered person's syndrome. A 'self-preservation' model which 'would apply in circumstances where a woman honestly [believed that] there [was] no protection or safety from the abuse and [was] convinced [that] the killing [was] necessary for … self-preservation'.[392] Additionally, a 'coercive-control' model which 'focussed on a person's need to free himself or herself from circumstances of coercive control'.[393]

These were proposed in spite of submissions that a new defence, tailored to the 'unique circumstances of violence against women in the home, [necessitated] a separate defence for such defendants'.[394] The VLRC believed that a specific defence to family violence would have some benefits including recognition and certainty in the law. It ultimately concluded that reform should focus on ensuring that self-defence sufficiently accommodated women's experiences of abuse as opposed to a special defence for women who killed in response to family violence.[395]

As a result, the VLRC considered a social framework or context model to provide for evidence.[396] Historically criminal justice responses to family violence involved 'violent incident' models which framed violence as discrete assaults and physical injuries.[397] However, the experiences of subjects of family violence often demonstrated that violence

[390] *Defences to Homicide – Final Report* (n70) 75.
[391] Ibid.
[392] Suzanne Beri (n 274) 113.
[393] *Defences to Homicide – Final Report* (n 70) 64.
[394] Ibid 66.
[395] Ibid 68.
[396] *Defences to Homicide – Options Paper* (n 130).
[397] McKenzie et al (n 43) 28.

may not be physical or result in injury.[398] Instead, perpetrators commonly used a number of 'tactics to degrade, control and isolate their partner, and the majority of these tactics [did] not involve physical violence'.[399] Wider social, cultural and economic factors were ignored.

The VLRC decided that this supporting provision would not refer to duties to retreat, issues of planning or third-party agents.[400] Rather, emphasis would be placed on the cumulative effects of violence and the social, cultural and economic factors which may have affected accused and led them to believe that there were no other options available to them other than to use deadly force.[401] This, in the Commission's view, would allow evidence supporting the reasonableness of an accused's actions to be put before a jury while avoiding 'any unintentional broadening' of the test of self-defence.[402]

2.3.6 Submission to Parliament by the VLRC

In November 2004, the Commission's Defences to Homicide – Final Report was tabled in parliament. It recommended the abolition of the partial defence of provocation,[403] changes to the definition of self-defence, the recognition of excessive self-defence as a partial defence[404] and the introduction of specific concepts of family violence to facilitate expert evidence on it.[405] Following these recommendations, the Crimes (Homicide) Act[406] was enacted in 2005 to: repeal the defence of provocation; codify the law of self-defence to better accommodate the experiences of victims of family violence who kill in non-confrontational circumstances; enact the offence of defensive homicide;[407] and to specify the meaning of family violence so expert evidence could be more effectively used to substantiate the application of self-defence in family violence cases.[408]

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[398] Ibid.
[399] Ibid.
[400] *Defences to Homicide – Final Report* (n 70) 75.
[401] Ibid.
[402] Ibid. To that extent, Walker's and Stark's models were not directly enshrined in the 2005 reforms to self-defence: see Chapter 3, *The reformulated doctrine of self-defence* at 2.3.6.1, *The enactment of defensive homicide* at 2.3.6.2 and *Evidence of family violence – s 9AH* at 2.3.6.3.
[403] Ibid xx.
[404] Ibid xxii.
[405] Ibid xxiii.
[406] *2005* (Vic) ('*Crimes Act*').
[407] The Parliament of Victoria did not introduce a defence of 'excessive self-defence'. Defensive homicide was characterised as an offence.
[408] Kirkwood, McKenzie and Tyson (n 144) 6.

2.3.6.1 The reformulated doctrine of self-defence

The reformed statutory test of self-defence was stated in section 9AC of the Crimes Act:[409]

> 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.[410]

While the test was subjective, a jury was required to consider whether an accused's subjective belief under section 9AC was reasonable.[411]

2.3.6.2 The enactment of defensive homicide

Pertinently, section 9AC was qualified by the offence of defensive homicide under section 9AD of the Crimes Act.[412] Section 9AD provided that:

> A person who… 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.[413]

Further, accused were only entitled to rely on self-defence if they had used lethal force under a belief that they, or another, were at risk of death or serious injury.[414] Following the VLRC's recommendations, section 9AD was intended to apply to killings occurring in the context of family violence where accused had genuinely held subjective beliefs that their actions were necessary but could not persuade a jury that they had objectively

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[409] *1958* (Vic) s 9AD. See Chapter 3, *Rawls' Justice as Fairness – situating Victoria's previous framework within a theoretical setting through the conceptualisation of a 'standard of justice'* at 3.2.4.1(a) where the enactment of the *Crimes (Homicide) Act 2005 (Vic)* is argued to reflect Rawls' *Justice as Fairness*.
[410] Ibid s 9AC.
[411] Kirkwood, McKenzie and Tyson (n 144) 6.
[412] *1958* (Vic).
[413] Ibid s 9AD.
[414] Ibid s 9AC.

reasonable grounds for this belief.[415] The Attorney-General stated that the law had 'evolved from a bygone era [where] the law was concerned with violent confrontations between two males of roughly equal strength [where] a threat of death or serious injury was immediate'.[416] Such comments directly acknowledged the challenges victims of family violence had faced concerning immediacy and proportionality.[417]

Defensive homicide was intended to be a 'halfway house' between a complete acquittal and a conviction for murder so that more victims of family violence would be encouraged to plead not guilty to murder on the basis of self-defence as it was no longer a matter of 'all or nothing'.[418] However, submissions to the VLRC had pointed out any 'excessive self-defence' providing a 'middle ground' would hinder women from being acquitted of murder and other offences.[419] Such submissions argued that excessive self-defence could lead to 'compromise verdicts' where women had killed in response to family violence whereas men who had killed in response to confrontations involving immediate violence could simply be acquitted of murder.[420] The Commission's response was that that this had possibly already occurred in practice (prior to the enactment of defensive homicide) due to the option of manslaughter.[421]

2.3.6.3 Evidence of family violence

Acknowledging the Commission's recommendations for a social context framework for evidence of family violence, sections 9AC and 9AD of the Crimes Act[422] were supported by section 9AH. It provided for 'the admission of evidence highlighting the relationship

[415] Office of the Attorney-General, 'Hulls Announces Major Reform to Homicide Laws' (Media Release, 4 October 2005).
[416] Ibid.
[417] Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1843 (Rob Hulls, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1836 (Bruce Mildenhall).
[418] Office of the Attorney-General (n 415). It should be noted that defensive homicide differed to the 'excessive self-defence' formulation proposed by the VLRC: see also *Defences to Homicide – Final Report* (n 70) xxix, 105. See Chapter 7, *Original insights concerning trials of victims of family violence – The consequences of the abolition of provocation, the enactment of defensive homicide and the complexity of the law* at 7.3.1.1(b)..
[419] Neave (n 128) 18.
[420] Ibid.
[421] Ibid.
[422] *Crimes Act* (n 406).

and social context of family violence to be admitted in cases of homicide'[423] and self-defence. It had several sub-sections.

Sub-section 9AH(1) provided that, for murder, defensive homicide or manslaughter in circumstances where family violence was alleged, a person may have believed and may have held reasonable grounds for believing that his or her conduct was necessary to defend himself or another person or to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.[424] This could apply even where he or she had responded to a harm that was not immediate or where the response entailed a use of force in excess of the force involved in the harm or threatened harm.[425] The provision addressed the doctrinal hurdles of imminence and proportionality in the common law of self-defence.[426]

(a) Relevance of evidence of family violence

Sub-section 9AH(2) provided that evidence of a kind referred to in section 9AH(3) may be relevant in determining whether a person had carried out conduct while believing it to be necessary to defend him or herself or another person or to prevent or terminate the unlawful deprivation of his or her liberty or liberty of another person.[427]

It also provided that evidence referred to in section 9AH(3) may be relevant in determining whether a person had reasonable grounds for a belief that his or her conduct was necessary to defend him or herself or another person or to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.[428] Because section 9AH(2) indicated that family violence 'may be' relevant to these matters of self-defence, it indicated an underlying need for judges to determine the question of relevance on a case by case basis.[429]

[423] Kirkwood, McKenzie and Tyson (n 144) 10.
[424] *Crimes Act* (n 406) ss 9AH(1)(a)-(b).
[425] Ibid ss 9AH(1)(c)-(d).
[426] Naylor and Tyson (n 389) 76.
[427] *Crimes Act* (n 406) ss 9AH(1)(a)-(b).
[428] Ibid ss 9AH(2)(a)-(b)
[429] Douglas (n 382) 100.

(b) Forms of evidence of family violence

Following from section 9AH(2), section 9AH(3) provided that relevant evidence consisted of 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[430] and further, the cumulative effect, including psychological effect, on the person or a family member of such violence.[431]

Additionally relevant evidence could also consist of:

> the social, cultural or economic factors that impacted on the person or a family member affected by family violence.[432]
>
> the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser and the psychological effect of violence on people who were or had been in a relationship affected by family violence.[433]
>
> the social or economic factors that impact on people who were or had been in a relationship affected by family violence.[434]

Violence was given an expanded definition in section 9AH(4). It consisted of

> physical abuse;[435]
>
> sexual abuse;[436]
>
> psychological abuse[437] (which need not involve actual or threatened physical or sexual abuse), including but not limited to: intimidation;[438]
>
> harassment;[439]

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[430] *Crimes Act* (n 406) s 9AH(3)(a).
[431] Ibid s 9AH(3)(b).
[432] Ibid s 9AH(3)(c).
[433] Ibid ss 9AH(3)(d)-(e).
[434] Ibid s 9AH(3)(f).
[435] Ibid s 9AH(4)(a).
[436] Ibid s 9AH(4)(b).
[437] Ibid s 9AH(4)(c).
[438] Ibid s 9AH(4)(c)(i).
[439] Ibid s 9AH(4)(c)(ii).

damage to property;[440]

threats of physical abuse, sexual abuse or psychological abuse; [441] and,

in relation to a child, causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.[442]

Lastly, section 9AH(5) emphasised that, without limiting the definition of violence in section 9AH(4), a single act could amount to abuse and that a number of acts forming part of a pattern of behaviour could amount to abuse, even though some or all of those acts, when viewed in isolation, may have appeared minor or trivial.[443]

(c) Significance of sections 9AH

Prior to section 9AH, admissible evidence of family violence did not extend to its broader social context.[444] Victims of family violence no longer needed to exhibit a kind of syndrome or show an immediate link between the family violence which they had experienced and the actions which they had taken in response to it.[445] Schuller et al. found that the presentation of the social context of an abused person's experiences circumvented juror perceptions of dysfunction[446] and that a battered person's 'behaviour [was] best characterised as reasonable within the context of [an] abuser's behaviour, and not the product of a mental health problem'.[447] It was recognised as an 'explanatory or educative provision'[448] reflecting 'a more comprehensive understanding of family violence as coercive [and] controlling behaviour'.[449] Additionally, the provision's inclusion of psychological abuse countenanced a place for Stark's 'coercive control'

[440] Ibid s 9AH(4)(c)(iii).
[441] Ibid s 9AH(4)(c)(iv).
[442] Ibid ss 9AH(4)(c)(v)(A)-(B).
[443] Ibid s 9AH(5).
[444] Kirkwood, McKenzie and Tyson (n 144) 8.
[445] Rob Hulls, 'Foreword: Complexity and Violence, the Political Need for Reform' in Kate Fitz-Gibbon and Arie Freiberg, *Homicide Law Reform in Victoria*: *Retrospect and Prospects* (The Federation Press, 2015) vii.
[446] Regina Schuller et al, 'Rethinking Battered Woman Syndrome' (2004) 36(2) *Canadian Journal of Behavioural Science* 128.
[447] Ibid.
[448] Douglas (n 382) 98.
[449] McKenzie et al (n 43) 28.

paradigm for family violence (discussed at 2.3.5.2). That is, section 9AH canvassed patterns of coercion and control rather than acts of violence committed by perpetrators and their psychological effects.[450]

Despite these innovations, the extent to which the Crimes (Homicide) Act 2005 (Vic) assisted female victims of family violence became the subject of considerable debate.

2.4 The operation of the Crimes (Homicide) Act 2005 (Vic) and its application to female victims of family violence

In September 2013, a review of the Crimes (Homicide) Act 2005 (Vic) by the Victorian Department of Justice ('VDJ') reported 28 defensive homicide prosecutions since its enactment.[451] Of those 28 convicted for defensive homicide, 25 were male and 26 of the victims were male.[452] By 2014, convictions had risen to 33 of which 27 of these involved males killing other males predominantly in violent altercations.[453] This reflected traditional understandings of the context of self-defence as confrontations between males of approximately equal strength rather than deaths in circumstances of family violence.[454]

Significantly, the Domestic Violence Resource Centre of Victoria ('DVRCV') identified 31 prosecutions of male killings of intimate partners or ex-partners between 2005 and 2013.[455] Of these, 14 were convicted of murder following guilty pleas, 10 were convicted after a trial, four were sentenced for manslaughter after a trial and two were sentenced for manslaughter as a result of guilty pleas.[456] It also identified seven murder convictions of women who had killed their intimate partners.[457]

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[450] The same may be said of the reformed law of self-defence and the current evidence of family violence provision reflected in section 322J of the *Crimes Act 1958* (Vic) which is explored at 2.5.2.3.
[451] Department of Justice, 'Defensive Homicide: Proposals for Legislative Reform', *Victoria State Government* (Consultation Paper, September 2013) vii <https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2018/07/23/3f7c88ccc/defensivehomicideconsultationpaper2013.pdf> ('*Defensive Homicide: Proposals for Legislative Reform*').
[452] Ibid.
[453] Madeleine Ulbrick, Asher Flynn and Danielle Tyson, 'The Abolition of Defensive Homicide: A Step Towards Populist Punitivism at the Expense of Mentally Impaired Offenders' (2016) 16(1) *Melbourne University Law Review* 28-34.
[454] Kirkwood, McKenzie and Tyson (n 144) 12.
[455] Ibid 10.
[456] Ibid.
[457] Ibid 9.

2.4.1 Responsiveness to victims of family violence

The DVRCV examined the seven prosecutions of female victims of family violence under the Crimes (Homicide) Act 2005 (Vic) to consider the ways in which family violence was recognised, whether gendered stereotyping was apparent, what defences were relied on and what the outcomes were.[458]

It identified consistent themes. All women had experienced repeated 'physical, psychological or sexual violence, or coercive, controlling behaviour by the deceased'.[459] Further, except in one case, immediate confrontations had prompted the killings[460] and weapons were used.[461] Each accused had been charged with murder.[462] Most significantly, none had successfully raised self-defence.

In the seven cases, each accused had attempted to plead guilty to the lesser offences of manslaughter or defensive homicide.[463] Three manslaughter pleas (Elizabeth Downie, Melissa Kulla and Veronica Hudson) and two defensive homicide pleas (Karen Black and Jemma Edwards) were accepted by the OPP.[464] Two women (Jade Kells and Eileen Creamer) had their pleas rejected and proceeded to trial alongside one woman (Jade Kells) who was found guilty of manslaughter and the other (Eileen Creamer) of defensive homicide.[465]

2.4.1.1 Recognition of the impact of family violence

Although section 9AH of the Crimes Act[466] permitted greater use of expert evidence on the dynamics of family violence including its cumulative effects from experts, Kirkwood, McKenzie and Tyson reported in 2013 that that the only expert evidence used in the prosecutions of female victims of family violence were conventional psychiatric and psychological assessments that did not relate to the broader social context of family

[458] Ibid 10.
[459] Ibid 41.
[460] Ibid.
[461] Ibid.
[462] Ibid.
[463] Ibid 42.
[464] Ibid.
[465] Ibid 41.
[466] *Crimes Act* (n 406).

violence.[467] They claimed that there had been no change by the legal profession to recognise the capacity of family violence to lead to outright acquittals on the basis of self-defence.[468] However, Naylor and Tyson noted that cases following that research, did not support this finding.[469] They noted that in DPP v Bracken[470] and DPP v Williams,[471] section 9AH was used in a more holistic manner which involved an expert forensic psychiatrist and Professor of Law (respectively).[472]

In Bracken,[473] Phillip Bracken killed his female partner, Helen Curtis, by shooting her five times with a rifle at point-blank range.[474] He was charged with murder and was acquitted on the basis of self-defence.[475] At trial, it was not disputed that Curtis had suffered from 'several serious mental health issues', had regularly verbally abused Bracken and had 'sometimes physically abused him during their four-year relationship'.[476] Further, on the day of the killing, Curtis had threatened to kill Bracken's father.[477] Expert evidence was adduced by a forensic psychiatrist who gave social framework evidence on 'psychological entrapment' which often led victims to stay in abusive relationships.[478]

In Williams,[479] Angela Williams was charged with murder after killing her partner, Doug Kally, by hitting him 16 times with a pick-axe.[480] She buried Kally's body in 2008 and confessed four years later.[481] She was acquitted of murder but was found guilty of defensive homicide.[482] At trial, it was not disputed that Kally was a very heavy drinker and frequent marijuana user.[483] It was also not disputed that he was very dominant, controlling, verbally and physically abusive, had a long history of inflicting serious

[467] *Defences to Homicide – Final Report* (n 70) 141 cited in Naylor and Tyson (n 389) 80. See also Kirkwood, McKenzie and Tyson (n 144) 47.
[468] Kirkwood, McKenzie and Tyson (n 144) 47.
[469] Naylor and Tyson (n 389) 80.
[470] [2014] VSC 94 ('*Bracken*').
[471] [2014] VSC 304 ('*Williams*').
[472] Naylor and Tyson (n 389) 79.
[473] *Bracken* (n 470).
[474] Ibid.
[475] Ibid.
[476] Naylor and Tyson (n 389) 82.
[477] Ibid.
[478] Ibid.
[479] *Williams* (n 471).
[480] Ibid.
[481] Ibid.
[482] Ibid.
[483] Ibid.

violence on others and had occasionally punched or kicked holes in the walls of their family home.[484] For the first time in a homicide trial since 2005,[485] general context evidence had been given about 'the dynamics of family violence and the ways in which women kill'[486] and further, evidence about the psychological reasons as to why women stay with violent partners.[487]

As Naylor and Tyson observed, Bracken and Williams showed an 'increasingly nuanced' comprehension of family violence.[488] Collom noted that the counsel in these cases had recognised the potential cumulative effects of family violence and that 'defendants could kill in self-defence in response to non-physical forms of family violence'.[489] Douglas also observed that this appeared to have been 'strongly influenced by [section] 9AH' which suggested that 'the provision may [have had] an educative effect'.[490] However, in the sentencing of Angela Williams, Hollingworth J commented that it did 'not appear that evidence or arguments such as these were considered in the other defensive homicide cases which involved female offenders and their male victims, in a family violence context'.[491]

The DVRCV concluded that there had been little evidence, if any, to suggest that the reformed law on self-defence could be utilised successfully by female defendants.[492] There had been 'a failure to understand how prior family violence [affected] women's responses to abusive, intimidating or threatening behaviour [and] a lack of understanding of why victims [remained] in abusive relationships'.[493] Further, there had been 'little recognition of the cumulative impact of various forms of family violence, gender-based stereotypes which [influenced] perceptions of what [were] reasonable and proportional [responses] and an inadequate use of the family violence social context evidence

[484] Ibid.
[485] Ibid.
[486] Ibid.
[487] Ibid. See also J Collom, 'Victoria's self-defence law in intimate partner homicide cases: An Improvement? A case study of Bracken and Williams' (Honours Thesis, Monash University 2015).
[488] Naylor and Tyson (n 389) 79.
[489] Collom, (n 487) 21.
[490] Ibid 106.
[491] *Williams* (n 471) [37] Hollingworth J.
[492] Kirkwood, McKenzie and Tyson (n 144) 49. See Chapter 7, *Recognition of the impact of family violence* at 7.1.1.
[493] Ibid.

provisions'.[494] In the DVRCV's view, the seven prosecutions of female victims of family violence reflected a 'systemic failure to recognise the nature and impact of family violence'.[495]

2.4.1.2 The application of defensive homicide to victims of family violence

Despite its unfavourable assessment of the operation of section 9AH, the DVRCV maintained that defensive homicide could be an appropriate outcome for women who kill abusive partners because it was specifically introduced with family violence in mind.[496] However, it observed a 'double-bind' in that its continued use, as a default option for women who had killed violent partners, reduced the likelihood of self-defence being tested.[497] As a result, the DVRCV argued that defensive homicide as an offence could not be abolished until it was shown that female victims of family violence could successfully raise self-defence.[498]

Naylor and Tyson pointed to other researchers, advocacy groups, media and government agencies identifying that the reforms had benefitted female victims of family violence.[499] Specifically, they claimed that until 2010, only two women had killed their violent intimate partners.[500] Both cases were discontinued as they were unlikely to result in a conviction.[501] This was represented by the VDJ as evidence of the reforms having benefitted women.[502]

Others held different views. Byrne contended that such evidence was 'equivocal'.[503] More specifically, defensive homicide was both complex and inhibiting the effectiveness

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[494] Ibid.
[495] Ibid 3.
[496] Ibid 51.
[497] Ibid.
[498] Ibid. See Chapter 3, *John Rawls' Theory of Justice – Argument: Imperfect Procedural Justice caused by manifestations of injustice arising with relevant prosecutions* – at 3.2.4.1(c).
[499] Naylor and Tyson, (n 389) 76.
[500] Ibid.
[501] *Defensive Homicide: Proposals for Legislative Reform* (n 451) 31. See also Chapter 3, *Application of Rawls to relevant prosecutions* at 3.2.4.2; *Manifestations of injustice in trials* at 3.2.4.2(a); *Manifestations of injustice in pleas of mitigation, sentencing hearings or appellate hearings where the accused was found guilty by way of trial* at 3.2.4.2(b) and *Manifestations of injustice where the accused pleaded guilty* at 3.2.4.2(c).
[502] Naylor and Tyson, (n 389) 76.
[503] Greg Byrne, 'Simplifying Homicide Laws for Complex Situations' in Kate Fitz-Gibbon and Arie Freiberg (ed), *Homicide Law Reform in Victoria: Retrospects and Prospects* (The Federation Press, 2015) 152.

of other attempts to recognise the circumstances of women who had used lethal force in the context of family violence.[504] For instance, Douglas observed that it had been 'very difficult for female victims of family violence to meet the threshold required to succeed in a claim of self-defence'.[505] Byrne pointed out that defensive homicide led to reasonable people, including jurors, commonly disagreeing over when it was necessary to use lethal force in self-defence or when its use was reasonable.[506] Defensive homicide required fine distinctions to be drawn in a context where reasonable people held different views making it very difficult for it to achieve its objectives.[507]

Byrne also pointed out that in the absence of defensive homicide, a verdict of unlawful and dangerous act manslaughter was 'virtually always available' to juries meaning that the need for a 'safety-net' was limited.[508] Fitz-Gibbon observed that in its almost 10-year operation, it was questionable whether jury verdicts in defensive homicide cases had been based on the law. They could have been based on the tendency of juries to compromise by convicting for lesser offences when given options and complicated directions;[509] for example, acquittal by self-defence, defensive homicide, manslaughter or murder.[510]

(a) The prosecution of Luke Middendorp—a catalyst for the abolition of defensive homicide

The debates over the utility of defensive homicide to victims of family violence were partially sparked by Luke Middendorp's conviction for defensive homicide in R v Middendorp.[511] It renewed perceptions that the criminal courts had inadequate understandings of intimate partner violence and prompted a review by the VDJ.[512]

Luke Middendorp fatally stabbed his ex-partner Jade Bownds in 2008.[513] At trial, Middendorp pleaded not guilty to the charge of murder. He claimed that Bownds had

[504] Ibid.
[505] Heather Douglas, 'A consideration of the merits of specialised homicide offences and defences for battered women' (2012) 45(3) *Australian & New Zealand Journal of Criminology* 377.
[506] Byrne (n 503) 148.
[507] Ibid 149.
[508] Ibid 152.
[509] Fitz-Gibbon (n 142) 140.
[510] Ibid.
[511] [2010] VSC 202 ('*Middendorp*').
[512] Fitz-Gibbon (n 142) 133.
[513] Ibid.

come towards him with a knife and that he had acted in self-defence.[514] Bownds was stabbed four times. As she lay dying, Middendorp said 'you had it coming, you got what you deserved, you filthy slut'.[515]

Evidence of considerable family violence by Middendorp included Bownds contacting the police.[516] Middendorp was also in breach of bail conditions and an intervention order.[517] The defence accepted that Middendorp had injured Bownds several times but it described the relationship as 'tempestuous'[518] and claimed that Bownds always attacked Middendorp first.[519]

The jury found Middendorp not guilty of murder but guilty of defensive homicide.[520] The jury accepted that Middendorp had genuinely but unreasonably believed that it was necessary to defend himself from Bownds.[521] McKenzie et al. subsequently drew attention to the disparities in size between Middendorp and Bownds. Middendorp was 'more than twice her size (186 cm tall) and weighed 90 kg, whereas Jade weighed just 50 kg'.[522] Maher argued that Middendorp demonstrated that the law was still unable to adequately recognise 'patterns of family violence' particularly given the breaches of bail and intervention orders, differences in strength and size and Middendorp's comments after stabbing Bownds in the back.[523] Further, the seriousness of his lethal action was minimised in sentencing by being described as 'a foolish act'.[524]

The law was perceived as having failed to adequately account for Bownds' significant vulnerability at the time of her death and the heightened likelihood of violence following the separation from Middendorp.[525] The reaction to it prompted a review of the operation of defensive homicide by the VDJ.

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[514] Ibid.
[515] The Crown, 'Opening Address', Submission in *R v Middendorp* [2010] VSC 202, 1 March 2010, 81.
[516] *Middendorp* (n 515) cited in McKenzie et al (n 43) 153.
[517] *Middendorp* (n 515) [20] (Byrne J).
[518] Ibid [3] (Byrne J).
[519] Ibid [6] (Byrne J).
[520] Middendorp was sentenced to 12 years imprisonment with a non-parole period of 8 years: ibid [19], [29] (Byrne J).
[521] McKenzie et al (n 43) 153.
[522] Ibid.
[523] J Maher, 'Commentary on R v Middendorp' in Heather Douglas et al (ed), *Australian Feminist Judgments Righting and Rewriting Law* (Hart Publishing, 2014) 324.
[524] *Middendorp* (n 473) [17] (Byrne J).
[525] Fitz-Gibbon (n 142) 133.

2.5 The abolition of defensive homicide and enactment of the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic)

After Middendorp, there was considerable discussion about whether defensive homicide had become a new excuse for men's violence against women.[526] The VDJ review concluded that defensive homicide had 'inappropriately [provided] a partial excuse for men who [had killed]'[527] and that 'there [were] no clear [benefits] to having defensive homicide as part of [a] legal framework for women who [killed] in response to family violence'.[528]

2.5.1 The abolition of defensive homicide

The VDJ's position was based on the high proportion of the use of defensive homicide by men on charges of murder trials of other men in circumstances not involving family violence.[529] The LIV challenged its position noting that this should have been anticipated as most homicides are committed by men rather than women[530] and that men are also more likely to be the victims of homicide.[531]

In the LIV's view, that more men had been convicted of defensive homicide than women did not detract from its utility.[532] It argued that defensive homicide was 'an appropriate middle ground between murder and acquittal' as it represented levels of culpability that were needed in the law.[533] The LIV reasoned that:

> The criminal law recognises human fallibility, and defensive homicide addresses this issue whilst at the same time indicating that killing another person, in the absence of reasonable grounds for the belief that it is necessary to do so, is a very serious offence. It allows the offender, in circumstances reflecting a lesser degree

[526] See, eg, S Capper and M Crooks, 'New homicide laws have proved indefensible' (23 May 2010) *The Sunday Age* 23; A Howe, 'Another name for murder' (2010) *Sydney Morning Herald* (2010) 1; Naylor and Tyson (n 389) 76.
[527] *Defensive Homicide: Proposals for Legislative Reform* (n 451) vii.
[528] Ibid ix.
[529] Ibid.
[530] See Jack Dearden and Warwick Jones, 'Homicide in Australia: 2006-2007 National Homicide Monitoring Program Annual Report' *Australian Institute of Criminology* (Annual Report, 2008) cited in Law Institute of Victoria, Submission No 1 to Department of Justice, *Defensive Homicide – Review of the Offence of Defensive Homicide* (13 September 2010) 3.
[531] Law Institute of Victoria (n 530).
[532] Ibid 4.
[533] Ibid.

> of culpability, to avoid the label of "murderer", which should only be applied to the most serious type of offending, that is, unlawful killing done with the intent to kill or [cause] grievous bodily harm.[534]

Further, the LIV maintained that an offender's gender was irrelevant and that the criminal law had to treat all people equally where they had similar states of mind and levels of moral culpability.[535]

The VDJ was not persuaded. It maintained that the 'price of having defensive homicide for the comparatively small number of women who [killed was] substantially outweighed by the cost of inappropriately excusing men who kill'.[536] Further, it claimed that the abolition of defensive homicide would encourage more women to pursue self-defence.[537] However, the DVRCV noted that this 'appealing prospect' could not be supported by evidence.[538] Based on the prosecution of women for intimate partner homicides between 2005 and 2013, the DVRCV believed that women would plead guilty to manslaughter or murder as opposed to proceeding to trial and running the risk of being found guilty of murder.[539] In its view, the law of self-defence had not been given an opportunity to develop to appropriately accommodate the circumstances of victims of family violence.[540]

Similarly, Naylor and Tyson argued that 'retaining defensive homicide and reviewing its operation in light of the educative role played by the reforms [would have been] more constructive'.[541] As King et al. emphasised, Williams indicated 'that defensive homicide [had operated] as intended … as a safety net between murder and an outright acquittal'.[542]

Supporting the view of the VDJ, Toole argued that the reforms had activated pre-existing stereotypes in ways which resulted in convictions for defensive homicide where

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[534] Ibid.
[535] Ibid.
[536] *Defensive Homicide: Proposals for Legislative Reform* (n 451) ix.
[537] Ibid.
[538] Kirkwood, McKenzie and Tyson (n 144) 50.
[539] Ibid.
[540] Julia Tolmie (n 208) 40 cited in Kirkwood, McKenzie and Tyson (n 144) 50.
[541] Naylor and Tyson (n 389) 80.
[542] Charlotte King et al, 'Did Defensive Homicide in Victoria Provide a Safety-Net for Battered Women Who Kill? A Case Study Analysis' (2016) 42(1) *Monash University Law Review* 175.

'complete acquittals seemed to have been more appropriate'.[543] Fitz-Gibbon and Pickering also concluded that the law could have been further reformed to accommodate the dynamics of family violence 'in … an arguably more accurate legal category of self-defence'.[544]

Supporting a reformulated test for self-defence, the DVRCV emphasised that such a reform be accompanied by 'shifts in the legal profession and culture around the recognition of family violence and women's responses to it'.[545] Douglas similarly argued that 'more than statute reform' was required to change women's experiences of justice.[546] This was consistent with the DVRCV's case analyses that the effectiveness of the reformed law depended on how the legal profession understood and applied the law on family violence.[547] This depended on its level of understanding of the dynamics of family violence.[548] The Victorian government's subsequent decision to abolish defensive homicide was controversial.

2.5.2 The enactment of the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic)

In June 2014, the Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 was introduced.[549] The Attorney-General, Robert Clark, stated in a media release that the Bill would abolish defensive homicide because it had 'allowed killers to avoid a conviction for murder … when in fact there was no reasonable justification for the attack they inflicted on their [victims]'.[550]

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[543] Kellie Toole, 'Self-Defence and the Reasonable Woman: Equality before the New Victorian Law' (2012) 36(1) *Melbourne University Law Review* 286.
[544] Kate Fitz-Gibbon and Sharon Pickering, 'Homicide Law Reform in Victoria, Australia - From Provocation to Defensive Homicide and Beyond' (2012) 52(1) *British Journal of Criminology* 180.
[545] Kirkwood, McKenzie and Tyson (n 144) 51.
[546] Douglas (n 523) 378.
[547] New South Wales Select Committee on the Partial Defence of Provocation, Parliament of New South Wales, *The partial defence of provocation* (Report, 2013) 188 cited in Kirkwood, McKenzie and Tyson (n 144) 5.
[548] *The partial defence of provocation* (n 547).
[549] Victoria, *Parliamentary Debates*, Legislative Council, (25 June 2014), 2127-2130.
[550] Robert Clark, 'Defensive Homicide Abolition to Stop Killers Getting Away With Murder' (Media Release, 22 June 2014). See also Victoria, *Parliamentary Debates*, Legislative Council (25 June 2014), 2127-2130.

The Attorney-General also noted that the legislation introduced a 'clearer, simpler' test for self-defence for all offences.[551] Further, that it would 'help [jurors] … better assess self-defence in a family violence context, so that where the actions of a family violence victim [were] genuine and reasonable in the circumstances as the victim [saw] them, they [would] be acquitted altogether'.[552] Lastly, it would enable common misconceptions about family violence to be 'proactively addressed at the start of a trial'.[553]

In 2014 the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) was enacted. It amended the Crimes Act 1958 (Vic), abolishing the offence of defensive homicide which was, in part, replaced by redrafted provisions on self-defence supplemented by supporting family violence provisions and related provisions in the Jury Directions Act 2015 (Vic).

2.5.2.1 The revised doctrine of self-defence

Section 322K of the Crimes Act 1958 (Vic) states the revised test for self-defence. It presently provides that -

> (1) A person is not guilty of an offence if the person carries out the conduct constituting the offence in self-defence.[554]
>
> (2) A person carries out conduct in self-defence if[555]
>
> (a) the person believes that the conduct is necessary in self-defence;[556] and
>
> (b) the conduct is a reasonable response in the circumstances as the person perceives them.[557]

[551] *Parliamentary Debates* (n 549).
[552] Ibid.
[553] Ibid.
[554] *Crimes Act* (n 406) s 322K(1).
[555] Ibid s 322K(2).
[556] Ibid s 322K(2)(a).
[557] Ibid s 322K(2)(b).

(3) This section only applies in the case of murder if the person believes that the conduct is necessary to defend the person or another person from the infliction of death or really serious injury.[558]

(a) Congruence with and divergence from the common law

The first limb of self-defence in section 322K represents the common law on self-defence in Zecevic.[559] However, the second limb requires that the accused's conduct be reasonable in the subjective circumstances as perceived by the accused.[560] The issue of the reasonableness of the accused's response is objective insofar as it is not concerned with what the accused believed was necessary to respond to the circumstances as they perceived them to be. [561] Further, it is not concerned with whether the accused's belief about what was a necessary response was a reasonable one or whether they had reasonable grounds for that belief. [562]

This represents the test in section 418(2) of the Crimes Act 1900 (NSW) for self-defence. It differs from the common law. The common law required 'reasonable grounds' for a belief in the necessity of self-defence.[563] Instead, a jury is required to assess the response of the accused, not of a reasonable person, and may consider their age, gender, state of health and surrounding physical circumstances.[564] Further, the reasonableness of the response must be assessed considering the objective proportionality of the conduct to the perceived threat[565] but disproportionate responses or responses to non-imminent threats may still be reasonable where family violence is in issue.[566]

Significantly, section 322K also makes it clear that a person may claim to have acted in self-defence, for example, in order to 'prevent or terminate … unlawful deprivation of

[558] Ibid s 322K(3). See also Chapter 3, *Application of Rawls to relevant prosecutions–Reflective Equilibrium–predicating qualitative analysis within the Rawlsian lens* at 3.2.4.2(e) where the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) is argued to reflect Rawls' conception of *reflective equilibrium.*
[559] *Zecevic* (n 233).
[560] Crofts et al (n 176) 956.
[561] Ibid.
[562] Ibid.
[563] *R v Katarzynski* [2002] NSWSC 613 ('*Katarzynski*'). See also *R v Forbes* [2005] NSWCCA 377; *Ward v R* [2006] NSWCCA 321.
[564] *Katarzynski* (n 564).
[565] *Flanagan v R* [2013] NSWCCA 320.
[566] *Crimes Act* (n 406) s 322M.

liberty' which is potentially relevant for victims of family violence.[567] However, section 322K will only apply in the case of murder if the accused believed that the conduct was necessary to defend themselves or another from the infliction of death or really serious injury.[568] Significantly, section 322H expands the definition of 'really serious injury' to include a 'serious sexual assault'[569] which more closely reflects the common law on self-defence[570] and is particularly important in the context of family violence.[571]

2.5.2.2 Family violence and self-defence

For those who kill violent partners in response to family violence, a new section 322M provides that, for the purposes of section 322K, where self-defence is in issue:

> (1) [A] person may believe that the person's conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if:[572]
>
> (a) the person is responding to a harm that is not immediate; or[573]
>
> (b) the response involves the use of force in excess of the force involved in the harm or threatened harm.[574]

Further, that:

> (2) … Evidence of family violence may be relevant in determining whether:[575]
>
> (a) a person has carried out conduct while believing it to be necessary in self-defence; or[576]

[567] Ibid s 322K note 2.
[568] Ibid s 322K(3).
[569] Ibid s 322H.
[570] *Zecevic* (n 233) [681]-[683].
[571] Byrne (n 503) 149.
[572] *Crimes Act* (n 406) s 322M(1).
[573] Ibid s 322M(1)(a).
[574] Ibid s 322M(1)(b).
[575] Ibid s 322M(2).
[576] Ibid s 322M(2)(a).

(b) the conduct is a reasonable response in the circumstances as a person perceives them.[577]

2.5.2.3 Evidence of family violence

A new section 322J(1) of the Crimes Act[578] gives guidance on what is evidence of family violence:

> (1) Evidence of family violence, in relation to a person, includes evidence of any of the following:[579]
>
> (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;[580]
> (b) the cumulative effect, including psychological effect, on the person or a family member of that violence;[581]
>
> (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;[582]
>
> (d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;[583]
>
> (e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;[584]

[577] Ibid s 322M(2)(b).
[578] *Crimes Act* (n 406).
[579] Ibid s 322J(1).
[580] Ibid s 322J(1)(a).
[581] Ibid s 322J(1)(b).
[582] Ibid s 322J(1)(c).
[583] Ibid s 322J(1)(d).
[584] Ibid s 322J(1)(e).

(f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.[585]

(a) Definition of family member

Expanding the meaning of family, section 322J(2) provides that:

[C]hild means a person who is under the age of 18 years.[586]

Family relation to a person, includes:

(a) a person who is or has been married to the person;[587]

(b) or a person who has or has had an intimate personal relationship with the person;[588]

(c) or a person who is or has been the father, mother, step-father or step-mother of the person;[589]

(d) or a child who normally or regularly resides with the person;[590]

(e) or a guardian of the person;[591]

(f) or another person who is or has been ordinarily a member of the household of the person.[592]

(b) Definition of violence

Additionally, section 322J(2) defines family violence, in relation to a person, as violence against that person by a family member.[593] Violence means:

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[585] Ibid s 322J(1)(f). These amendments were retained from the 2005 reforms and the recommendations from the VLRC which indicated that the social-context provisions themselves, were adequate.
[586] Ibid s 322J(2).
[587] Ibid s 322J(2)(a).
[588] Ibid s 322J(2)(b).
[589] Ibid s 322J(2)(c).
[590] Ibid s 322J(2)(d).
[591] Ibid s 322J(2)(e).
[592] Ibid s 322J(2)(f).
[593] Ibid s 322J(2).

(a) Physical abuse;[594]

(b) sexual abuse;[595]

(c) psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to the following;[596]

(i) intimidation;[597]

(ii) harassment;[598]

(iii) damage to property;[599]

(iv) threats of physical abuse, sexual abuse or psychological abuse;[600]

(v) in relation to a child[601]

(A) causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member;[602]

(B) putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.[603]

Further, section 322J(3) states:

Without limiting the definition of violence in sub section (2),

(a) a single act may amount to abuse for the purposes of that definition;[604] and

[594] Ibid s 322J(2)(a)
[595] Ibid s 322J(b).
[596] Ibid s 322J(2)(c).
[597] Ibid s 322J(2)(c)(i).
[598] Ibid s 322J(2)(c)(ii).
[599] Ibid s 322J(2)(c)(iii).
[600] Ibid s 322J(2)(c)(iv).
[601] Ibid s 322J(2)(c)(v).
[602] Ibid s 322J(2)(A).
[603] Ibid s 322J(2)(B).
[604] Ibid s 322J(3)(a).

(b) a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.[605]

2.5.2.4 Family violence jury directions

To facilitate the effectiveness of these provisions at trial, the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) provided for jury directions on how family violence evidence, its scope and significance, may be relevant to self-defence and duress.[606] Presently, Part 6 of the Jury Directions Act[607] applies to criminal proceedings where self-defence or duress in the context of family violence is in issue.[608]

(a) Request and provision of directions at trial

Under section 58 of the Jury Directions Act 2015 (Vic):

> (1) Defence counsel (or, if the accused is unrepresented, the accused) may request at any time that the trial judge direct the jury on family violence in accordance with section 59 and all or specified parts of section 60.[609]
>
> (2) The trial judge must give the jury a requested direction on family violence, including all or specified parts of section 60 if so requested, unless there are good reasons for not doing so.[610]
>
> (3) If the accused is unrepresented and does not request a direction on family violence, the trial judge may give the direction in accordance with this Part if the trial judge considers that it is in the interests of justice to do so.[611]

[605] Ibid s 322J(3)(b).
[606] Naylor and Tyson (n 389) 77.
[607] *2015* (Vic) ('*Jury Directions Act*').
[608] Ibid s 55.
[609] Ibid s 58(1).
[610] Ibid s 58(2).
[611] Ibid s 58(3).

Further, the trial judge 'must give the direction as soon as practicable after the request is made'[612] and significantly, 'may give the direction before any evidence is adduced in [a] trial'.[613] Lastly, '[t]he trial judge may repeat a direction … at any time in [a] trial'.[614]

(b) Relevance of family violence to self-defence and duress

In giving a direction under section 58, section 59 provides that the trial judge must inform the jury that:

> (a) Self-defence or duress (as the case requires) is, or is likely to be, in issue in the trial;[615] and
>
> (b) as a matter of law, evidence of family violence may be relevant to determining whether the accused acted in self-defence or under duress (as the case requires);[616] and
>
> (c) in the case of self-defence, evidence in the trial is likely to include evidence of family violence committed by the victim against the accused or another person whom the accused was defending;[617] and
>
> (d) in the case of duress, evidence in the trial is likely to include evidence of family violence committed by another person against the accused or a third person.[618]

(c) Content of family violence directions

Under section 60, the trial judge may include any of the following matters (in giving directions under section 58):

> (a) [T]hat family violence[619] is not limited to physical abuse and may include sexual abuse and psychological abuse;[620]

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[612] Ibid s 58(4)(a).
[613] Ibid s 58(4)(b).
[614] Ibid s 58(5).
[615] Ibid s 59(a).
[616] Ibid s 59(b).
[617] Ibid s 59(c).
[618] Ibid s 59(d).
[619] Ibid s 60(a)
[620] Ibid s 60(a)(i).

(i) may involve intimidation, harassment and threats of abuse;[621]

(ii) may consist of a single act;[622]

(iii) may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial.[623]

Further, if relevant, the trial judge may also direct that:

(b) experience shows that:[624]

(i) people may react differently to family violence and there is no typical, proper or normal response to family violence;[625]

(ii) it is not uncommon for a person who has been subjected to family violence[626]

(A) to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;[627]

(B) not to report family violence to police or seek assistance to stop family violence;[628]

(iii) decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by[629]

(A) family violence itself;[630]

(B) cultural, social, economic and personal factors;[631] and that

[621] Ibid s 60(a)(ii).
[622] Ibid s 60(a)(iii).
[623] Ibid s 60(a)(iv).
[624] Ibid s 60(b).
[625] Ibid s 60(b)(i).
[626] Ibid s 60(b)(ii).
[627] Ibid s 60(b)(A).
[628] Ibid s 60(b)(B).
[629] Ibid ss 60(b)-(B)(iii).
[630] Ibid ss 60(b)-(B)(iii)-(A).
[631] Ibid ss 60(b)-(B)(iii)-(B).

> (c) as a matter of law, evidence that the accused assaulted the victim on a previous occasion does not mean that the accused could not have been acting in self-defence or under duress (as the case requires) in relation to the offence charged.[632]

2.5.2.5 Significance of family violence jury directions

The family violence jury directions are significant for two primary reasons. Firstly, Part 6 of the Jury Directions Act 2015 (Vic) allows social context directions to be given early in a trial before any evidence is heard.[633] As Byrne notes, such evidence tends to form part of the accused's case, making it the last evidence adduced.[634] One disadvantage is the manner in which jurors tend to process information. As Byrne observes:

> Jurors do not … absorb information like black boxes, piece it together and make sense of it at the conclusion of the trial. Instead, their approach to the evidence tends to confirm the "story model" or jury decision-making; they actively process the evidence as it emerges, evaluating it and attempting to fit it into an evolving story which makes sense to them.[635]

Byrne draws on research that expert evidence addressing misconceptions about sexual violence is more effective if given before complainants give evidence[636] as such evidence may be 'resistant to later reinterpretation' if the direction is given afterwards.[637] Pertinently, Cossins concludes that directions early in a trial combined with jury directions in summation address juror misconceptions more effectively than expert witnesses.[638]

Secondly, it addresses misconceptions relating to family violence. It makes clear that family violence is not limited to physical abuse but may include sexual and psychological abuse and involve intimidation, harassment and threats of abuse.[639] These directions draw on the research on women who remain in abusive relationships and the extent to which

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[632] Ibid s 60(c).
[633] Byrne (n 503) 150.
[634] Ibid.
[635] Warren Young, Yvette Tinsley and Neil Cameron, 'The effectiveness and efficiency of jury decision-making' (2000) 24(1) *Criminal Law Journal* 91 cited in Byrne (n 503) 150.
[636] Byrne (n 503) 150.
[637] Annie Cossins and Jane Goodman-Delahunty, 'Misconceptions or Expert Evidence in Child Sexual Assault Trials: Enhancing Justice and Jurors Common Sense' (2013) 22(1) *Journal of Judicial Administration* 91 cited in Byrne (n 465) 150.
[638] Ibid.
[639] *Jury Directions Act* (n 607) s 60(a)(ii).

they are perceived as irrational or unreasonable; a phenomenon which made it more difficult for claims of self-defence to be recognised.[640]

Observing that many in the community believe that family violence is only limited to physical violence and that other forms of abuse are less serious,[641] Byrne maintains that these explanations to juries in relevant cases will provide better context for assessing claims of self-defence.[642] They are argued to give jurors a better understanding when determining whether the accused believed it was necessary to act in self-defence and whether the response was reasonable in the circumstances as perceived by them.[643]

2.6 Jury decision-making

Criminal trials involve complex information, defence and prosecution arguments, witness testimonies, other evidence and judicial directions.[644]

When individuals are placed in 'positions of high cognitive demand', Mossiere, Maeder and Pica observe that they tend to 'unconsciously rely on cognitive shortcuts to aid them in reducing complex tasks'.[645] Although generally effective, Evans observes that such shortcuts can lead to 'systematic errors in reasoning known as cognitive biasing or stereotyping'.[646] McKimmie et al. point out that the 'formation of positive or negative stereotypes about a person or group has the potential to interfere in decision-making and influence verdicts.'[647]

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[640] Byrne (n 503) 151. See also Chapter 3, *Socio-legal method and research design* at 3.4.3.1 where a link can be made to Ehrlich's belief that legal research should not only test legal rules themselves, but their actual life as well. A significant convergence between academic and professional legal research arises.. See also Chapter 7, *Academic and practical significance* at 7.5.1.
[641] Ibid.
[642] Ibid.
[643] Ibid.
[644] Mossiere, Maeder and Pica (n 272) 5.
[645] Ibid.
[646] Jonathon Evans, 'Heuristic and analytic processes in reasoning' (1984) 75(1) *British Journal of Psychology* 451-468; Jonathon Evans, 'Dual-Processing Accounts of Reasoning, Judgment and Social Cognition' (2008) 59(1) *Annual Review of Psychology* 265.
[647] Blake McKimmie et al, 'Stereotypical and counter-stereotypical defendants: Who is he and what was the case against her?' (2013) 19(3) *Psychology, Public Policy and Law* 343. See also Lori Colwell, 'Cognitive Heuristics in the Context of Legal Decision Making' (2005) 23(2) *American Journal of Forensic Psychology* 17-41; Cynthia Esqueda and Lisa Harrison, 'The Influence of Gender Role Stereotypes, the Woman's Race and Level of Provocation and Resistance on Domestic Violence Culpability Attributions' (2005) 53(11) *Sex Roles* 821-834; Amos Tversky and Daniel Kahneman, 'Judgment under uncertainty: Heuristics and biases' (1974) 185(4157) *Science* 1124-1131; Amos Tversky and Daniel Kahneman,

Family violence jury directions seek to manage this. They reflect the extensive literature on the non-legal factors which have been found to influence jury and practitioner decision-making particularly, in the context of family violence and self-defence. Research also shows that social-demographic characteristics of jurors can influence their decision-making.[648] The significant factors are now considered and are of relevance to the question of whether Victoria's reforms have increased justice in the accessibility of self-defence and whether unjust gender, racial, professional or interpretive risks remain

2.6.1 Gender

A juror's gender can influence their decision-making.[649] Eisenberg and Lennon, Mossier, Maeder and Pica found that women tend to be more empathic and emotionally sensitive as jurors.[650] Accordingly, Forster et al. observe that female jurors are more likely to sympathise with a victim and, regarding conviction, be harsher compared with males.[651] This is more likely to occur in matters concerning child abuse, sexual assault[652] and, arguably, other forms of family violence.

Finn considers that these results are influenced by women relating to such cases on a more personal level, leading to increased elicitation of emotionality compared with more traditional male attitudes to sex roles.[653] Where women are charged with killing abusive husbands, Schuller, Hastings, Smith and Olson maintain that the same phenomenon

'Availability: A heuristic for judging frequency and probability' (1973) 5(2) *Cognitive Psychology* 207-232.

[648] Mossiere, Maeder and Pica (n 272) 6.

[649] Ibid.

[650] Nancy Eisenberg and Randy Lennon, 'Sex Differences in Empathy Related Capacities' (1983) 94(1) *Psychological Bulletin* 100-131 cited in Mossiere, Maeder and Pica (n 235) 6.

[651] R ForsterLee et al, 'The effects of defendant race, victim race, and juror gender on evidence processing in a murder trial' (2006) 35(1) *Behavioural Sciences & the Law* 179-198. See also Joanna D Pozzulo, 'The effects of victim gender, defendant gender and defendant age on juror decision making' (2010) 37(1) *Criminal Justice and Behaviour* 47-63.

[652] See, eg, Rosalie Kern, Terry Libkuman and Stacey Temple, 'Perceptions of domestic violence and mock jurors' (2007) 22(12) *Journal of Interpersonal Violence* 1515-1535; Jodi Quas et al, 'Effects of victim, defendant, and juror gender on decisions in child sexual assault cases' (2002) 32(10) *Journal of Applied Social Psychology* 1993-2021; Michael Bagby et al, 'Racial prejudice in the Canadian legal system: Jury decisions in a simulated rape trial' (1994) 18(3) *Law and Human Behaviour* 339-350; Donald Burke et al, 'Effects of victim's and defendant's physical attractiveness on the perception of responsibility in an ambiguous domestic violence case' (1990) 5(3) *Journal of Family Violence* 199-207.

[653] Jerry Finn, 'The relationship between sex role attitudes and attitudes supporting marital violence' (1986) 14(5) *Sex Roles* 235-244.

occurs.[654] Their analysis is that 'the victimised woman becomes the defendant and female jurors seem to demonstrate similar relatedness and sympathy toward the defendant as they do in cases where women are the victims'.[655]

Significantly, a study conducted by T'Meika Knapp on Victoria's previous framework of self-defence and evidence of family violence confirmed that non-legal considerations, such as the gender of all parties involved (juror, deceased, accused) and the relationship between the accused and the deceased impact on juror decisions regarding the application of self-defence.[656] Specific to self-defence and defensive homicide, the results of the study indicated that 'the accused's gender in particular and the gender combination of the accused person and deceased person and the relationship between them, all … [influenced a] participant's decisions regarding verdict, acceptance of the accused person's belief (in the necessity of self-defence), and assessment of the reasonableness of this belief'.[657]

This indicated that the reasonable grounds element did 'not necessarily match community sentiment and as an objective measure … [was] … impacted by a juror's subjective beliefs'[658] relating to their gender. Although the study participants did not have the benefit of judicial directions, it provided direct insight into the community's views on the application and interpretation of the law.[659] For example, where a female killed a male, she was judged differently compared with the reverse although the conduct in each scenario was identical. This highlighted how gender can impact on applying self-defence legislation.[660] The assessment of the former reasonable grounds element was found to be largely based on 'a specific jury member's perception of the scenario and the accused person's recollection of events [which had] the potential to be impacted by any number of personal ideals, opinions, schemas and prejudices' and, most significantly, gender.[661]

As the present law requires a reasonable response, the finding of Knapp's study on reasonableness are directly relevant to how it enables victims to evidence reasonableness.

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[654] Regina Schuller, Vicki Smith and James Olson, 'Juror's decisions in trials of battered women who kill: The role of prior beliefs and expert testimony' (1994) 24(4) *Journal of Applied Social Psychology* 316-337.
[655] Mossiere, Maeder and Pica (n 272) 6.
[656] T'Meika Knapp, 'Murder, Self Defence, Defensive Homicide? Impacts of Gender and Relationship' (PhD Thesis, Deakin University, 2010) viii.
[657] Ibid ix.
[658] Ibid x.
[659] Ibid 8.
[660] Ibid 110.
[661] Ibid 109.

Its findings of gendered understandings of reasonableness in self-defence remain directly relevant to juror's perception of victims of family violence and their claims of a reasonable response under the present law.

2.6.1.1 Schema theory and jury deliberations

Knapp argued that these phenomena were explained by schema theory.[662] It is based on a hypothesis that to derive meaning from social situations and appropriately respond to social cues, individuals followed internal schemas or 'scripts'.[663] In essence, 'expectations [drive] perception and interpretation of different social events and situations'.[664] As Fiske and Taylor observe:

> In ambiguous situations or situations in which we have little information, individuals tend to rely on predetermined expectations, or schemas, which develop according to past experiences and as a function of being raised in a particular culture at a particular time.[665]

Once a schema has been triggered, individuals look for specifics within the situation that match it, including on men and women, and disregard information inconsistent with their preconceived views.[666] The more entrenched the schema is the more salient the inconsistent event or information must be for it to be noticed and assimilated into the schema.[667]

(a) Relevant findings concerning jury deliberations

As Gillespie observes, it is not uncommon for women to be perceived by men as 'very emotional, submissive, excitable in a minor crisis, passive, and gentle'.[668] Such

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[662] Ibid 79.
[663] Michael Wiederman, 'The Gendered Nature of Sexual Scripts' (2005) 13(4) *The Family Law Journal* 496-502 cited in Knapp (n 656) 79.
[664] Knapp (n 656) 11.
[665] See Susan Fiske and Shelley Taylor, *Social Cognition* (McGraw-Hill Book Company, 2nd ed, 1991) cited in Knapp (n 656) 11.
[666] K Rojahn and T.F Pettigrew, 'Memory for schema-relevant information: A meta-analytic resolution' (1992) 31(1) *British journal of Social Psychology* 81-109; Galen Bodenhausen, 'Stereotypic biases in social decision making and memory: Testing process models of stereotypic use' (1988) 55(5) *Journal of Personality and Social Psychology* 726-737.
[667] See, eg, Achim Schuetzwohl, 'Surprise and schema strength' (1998) 24(5) *Journal of Experimental Psychology: Learning, Memory and Cognition* 1182-1199.
[668] See, eg, C K Gillespie, *Justifiable Homicide: Battered Women, Self-Defence and the Law* (Ohio Statute University Press, 1990).

characterisations are argued to reflect 'the traditional views of what society considers stereotypically appropriate behaviour for "normal" women'.[669] Hoddell et al.,[670] for example, undertook a study which explored perceptions of the gendered nature of family violence through a scenario in which a victim of abuse killed the abuser with a shotgun.[671] It compared how mock jurors perceived battered women with battered men who killed their abusers. It found that mock jurors were more likely to convict a man than a woman who had killed an abusive partner, which was partially mediated by sympathy toward both the victim and the accused.[672]

It found that participants were three times more likely to convict when a man killed an abusive wife than when a woman had killed an abusive husband.[673] The abuser's gender was predictive of sympathy toward the victim.[674] Participants were more sympathetic toward women who had been killed by husbands than they were toward men who had been killed by wives[675] and were more sympathetic toward female defendants who killed abusive husbands than male defendants who had killed abusive wives.[676]

Consequently, Mossiere et al have maintained that men commonly embrace a number of schemas regarding female victims of family violence; that they are 'passive and dependent, provoke their own beatings, enjoy the violence and can easily leave an abusive relationship'.[677] It is conceivable that such beliefs have influenced juror perceptions of

[669] Sharon Allard, 'Rethinking battered woman syndrome: A Black Feminist Perspective' (1991) 1(1) A *UCLA Women's Law Journal* 191-207.
[670] Hoddell et al (n 27).
[671] Ibid.
[672] The study involved 189 undergraduate college students from a large US research university. Of these 49 (26.1%) were men and 129 (73%) were women. They were aged 18 to 59. Across all conditions, the conviction rate was 52.7%. Of these 47.3% of participants found the defendant not guilty by reason of self-defence, 41.5% of participants guilty of manslaughter and only 11.2% guilty of murder. The study also considered whether stereotypes about the physical stature of men and women impacted on juror gender in jury deliberations: ibid 495-503.
[673] Ibid 503.
[674] Ibid.
[675] Ibid.
[676] Ibid 501.
[677] Mossier, Maeder and Pica (n 272) 4. See also Brenda Russel and Linda Melillo, 'Attitudes toward battered women who kill: Defendant typicality and judgments of culpability' (2006) 33(1) *Criminal Justice and Behaviour* 219-241. See also M Dodge and E Greene, 'Jurors and expert conceptions of battered women. Victims and Violence' (1991) 6(4) *Violence and Victims* 271-282; Lenore Walker, Roberta Thyfault and Angela Browne, 'Beyond the Juror's Ken: Battered Women' (1982) 7(1) *Vermont Law Review* 1-14.

the reasonableness of a victim's actions, especially, if victims remained in abusive relationships.[678]

It remains unclear whether Victoria's family violence jury directions mitigate against these biases affecting how reasonableness is assessed under the new test for self-defence. These biases have implications for extent to which the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) has increased access to self-defence and to justice.

2.6.2 Race

Mossiere et al's research also affirmed that the race of a victim of family violence could influence jury decision-making in homicide trials.[679] The battered person's syndrome theory had been criticised as misrepresenting women's experience of family violence as it had largely developed through the experiences of Caucasian women of particular social backgrounds.[680] The Supreme Court of Canada acknowledged this in R v Mallott.[681] It noted:[682]

> It is possible that those women who are unable to fit themselves within the stereotype of a victimised, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided. For instance, women who have demonstrated too much strength or initiative, women of colour, women who are professionals, or women who might have fought back against their abusers on

[678] Mossiere, Maeder and Pica (n 272) 4. See also Diane Follingstad et al, 'Decisions to Prosecute Battered Women's Homicide Cases: An Exploratory Study' (2015) 30(1) *Journal of Family Violence* 859-874; Megan Haselschwerdt et al, Divorcing mothers' use of protective strategies: Differences over time and by violence experience' (2015) 6(1) *Psychology of Violence* 182-192; Thelma Riddell, Marilyn Ford-Gilboe and Bevery Leipert, 'Strategies Used by Rural Women to Stop, Avoid or Escape From Intimate Partner Violence' (2008) 30(1) *Health Care for Women International* 134-159. Mary Ann Dutton et al, 'Ecological Model of Battered Women's Experience over Time' *National Criminal Justice Reference Service* (Final Report, 2005) <www. ncjrs.gov/pdffiles1/nij/grants/213713.pdf>; Jessica Goodkind, Cris Sullivan and Deborah Bybee, 'A Contextual Analysis of Battered Women's Safety Planning' (2004) 10(1) *Violence Against Women* 514-533; Lisa Goodman et al, 'The Intimate Partner Violence Strategies Index: Development and Application' (2003) 9(2) *Violence Against Women* 163-186.

[679] Mossiere, Maeder and Pica (n 272) 6. See also Brian Bornstein and Michelle Rajki, 'Extra-legal factors and product liability: The influence of mock jurors' demographic characteristics and intuitions about the cause of an injury' (1994) 12(2) *Behavioural Sciences & the Law* 127-147.

[680] *Osland* (n 177) [161] (Kirby J).

[681] (1998) 155 DLR (4th) 513, [528] (Major J).

[682] Ibid.

> previous occasions, should not be penalised for failing to accord with the stereotypical image of the archetypal battered woman.[683]

Douglas subsequently argued that women who were acquitted on self-defence tended to be 'benchmark battered women'.[684] They were 'smaller than their partners, white, drug-free, monogamous and without a criminal record'.[685] They had also suffered severe physical abuse over many years, attempted to leave the relationship and had sought assistance from the police.[686] Other literature suggested that it was more difficult for poor women and women of colour to be seen as worthy of help, and thus, less likely to be perceived as victims in the criminal justice system.[687]

2.6.2.1 Racial composition studies

Several US studies found that African-American accused tended to be treated more harshly in comparison to white accused in varying criminal cases.[688] Similarly, Ruttenberg found that allegations of rape by African-American women tended to be treated less seriously than those of Caucasian women.[689] Meta-analyses conducted by Devine and Caughlin indicated that there was 'a small effect of racial bias in decision-making present across relevant studies and that the effect increased when certain moderators [were] considered (for example, the race of the participants or victims)'.[690]

Victoria's family violence jury directions provide for guidance that 'decisions made by a person subjected to family violence about how to address, respond to or avoid family

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[683] *Osland* (n 177) [161] (Kirby J).
[684] Douglas (n 523) 377.
[685] Ibid.
[686] Ibid.
[687] Mossiere, Maeder and Pica (n 272) 5. See also, Michele Bograd, 'Strengthening Domestic Violence Theories: Intersections of Race, Class, Sexual Orientation and Gender' (1999) 25(3) *Journal of Marital and Family Therapy* 275-289; Allard (n 669).
[688] Further, African-American women addicted to drugs were more likely to be convicted of crimes than similarly situated white women: Miriam Ruttenberg, 'A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy' (1994) 2(171) *Journal of Gender, Social Policy and the Law* 171-199. See also Jeffrey Rachlinski et al, 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) 3(1) *Cornell Law Faculty Publications* 1215;; O Mitchell, 'A meta-analysis of race and sentencing research: Explaining the inconsistencies' (2005) 21(1) *Journal of Quantitative Criminology* 439-466; Bagby et al (n 652).
[689] Miriam Ruttenberg, 'A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy' (1994) 2(171) *Journal of Gender, Social Policy and the Law* 171-199.
[690] Mossiere, Maeder and Pica (n 272) 7. See also Dennis Devine and David Caughlin, 'Do they matter? A meta-analytic investigation of individual characteristics and guilt judgments' 20(2) *Psychology, Public Policy and Law* (2014) 109-134.

violence may be influenced by cultural, social, economic and personal factors'.[691] Whether such directions mitigate against juror biases around the ethnicity of an accused remains unexplored. As such biases may affect how reasonableness is assessed under the new test for self-defence in family violence homicides, they also have implications for whether the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) has increased justice in the accessibility of self-defence.

2.6.3 Juror interpretation and personal application of law

Following the enactment of the Crimes (Homicide) Act 2005 (Vic), Weinberg JA observed that the criminal law had:

> [B]ecome so complex that it is almost the exception rather than the rule that a case runs smoothly, and without significant error. Of all the branches of the law, it is surely the criminal law that should be most readily accessible and easily understood. The reality is quite different … many aspects of the criminal law … can only be described as incomprehensible.[692]

Babic v The Queen[693] indicates that trials involving family violence were no exception. Neave and Harper JJA specifically set out the 'excessively complex' directions that a trial judge was required to give to a jury on defensive homicide.[694]

Pertinently, interviews of judges and counsel by Fitz-Gibbon and Pickering found that their experience was that:

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[691] *Jury Directions Act* (n 607) s 60(B)(iii)(B). See also Chapter 3, *Ehrlich's sociology of law – Identification and extrapolation of non-legal phenomena* at 3.4.3.1(a) as Ewald's concepts of objectivity and inequality within the norm parallel the discussions of schema and stereotyping.

[692] Mark Weinberg, 'The Criminal Law: A Mildly Vituperative Critique' (2011) 35(3) *Melbourne University Law Review* 1177.

[693] (2010) 28 VR 297 ('*Babic*').

[694] [Y]ou may find the accused not guilty of murder because the prosecution has not proved beyond reasonable doubt that the accused did not believe it was necessary to do what he/she did to defend him/herself or another person from death or really serious injury. There again you must go on to consider whether he/she is guilty of defensive homicide. "He/she will be guilty of that crime only if the prosecution proves beyond reasonable doubt that the accused had no reasonable grounds for having the belief which you either found he/she held or alternatively which he/she said they held and the prosecution did not disprove. In that second case, you should assume, when considering whether the prosecution has proved the accused is guilty of defensive homicide, that the accused did hold the asserted belief: ibid [318] (Neave and Harper JJA).

> [t]he juror directions under the legislation were . . . mind-boggling and unbelievably convoluted and described by judicial respondents as incomprehensible, too complex and very complicated.[695]

More generally, a 2006 survey of Victorian Supreme and County Courts judges found that most viewed the 'over-intellectualisation' and complexity of jury directions as major impediments to effective communications with juries.[696] This was part of a process which led to the tabling of the VLRC report: Jury Directions: Final Report to Parliament. It made 52 recommendations to reduce the complexity of judicial directions to juries in criminal trials.[697] It led to the Simplification of Jury Directions report in 2012[698] and to the Jury Directions Act 2015 (Vic). Byrne recognised the importance of these jury directions reforms in deciding factual issues in accordance with the law and ensuring a fair trial. In his opinion, it shifted 'the emphasis from focusing on whether jury directions are technically legally correct to whether the jury is likely to understand the jury directions.'[699]

Byrne argued that jury directions should be comprehensible to ordinary members of the public sitting on juries who have no particular knowledge of the law.[700] Victoria's previous law of self-defence and defensive homicide was complex. Knapp's study, referred to earlier, provides some basis for assessing the impact of complex jury directions on self-defence and reasonableness under the Crimes (Homicide) Act 2005 (Vic).

2.6.3.1 The interpretation of 'reasonableness'–Knapp's study

Of Knapp's 259 study participants who concluded that the accused person's belief in the necessity of their actions was based on reasonable grounds, 'only 6.9% correctly concluded that the verdict should be a full acquittal [whereas] 93.1% of participants

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[695] Fitz-Gibbon and Pickering (n 544) 167. See also Byrne (n 503) 146.
[696] Elizabeth Najdovski-Terziovski, Jonathan Clough and James Ogloff, 'In your own words: A survey of judicial attitudes to jury communication' (2008) 18(2) *Journal of Judicial Administration* 80.
[697] See Victorian Law Reform Commission, *Jury Directions: Final Report* (Report No 17, July 2009). See also Queensland Law Reform Commission, *A Review of Jury Directions* (Report No 66, December 2009) and New South Wales Law Reform Commission, *Jury Directions* (Report No 136, 2012).
[698] It was compiled by Weinberg J in consultation with the VDJ, Supreme Court and the Judicial College of Victoria: Mark Weinberg, *Simplification of Jury Directions Project: a Report to the Jury Directions Advisory Group August 2012* (Report, August 2012) 70-95.
[699] Byrne (n 503) 146.
[700] See, eg, *R v Adomako* [1995] 1 AC 171, [189] (Lord Mackay).

incorrectly concluded that the verdict should be manslaughter'.[701] Of the 60 participants who concluded that the accused person's belief was not based on reasonable grounds, '90.0% correctly concluded that the verdict should be manslaughter' (or defensive homicide).[702]

Despite very few acquittals, (7.5% of all cases where a murder verdict was not given) most acquittals were based on a belief of reasonable grounds having been established (75.0%).[703] That being said, of the participants who did base their beliefs on a finding of reasonable grounds, 'only 6.9% correctly rendered a verdict of acquittal'.[704]

Of the 107 male participants who concluded 'that the accused person's belief in the necessity of their actions was based on reasonable grounds, only 8.4% correctly concluded that the verdict should be a full acquittal [whereas] 91.6% incorrectly concluded that the verdict should be manslaughter'.[705] Further, of the 152 female participants who concluded that the accused person's belief in the necessity of their actions was based on reasonable grounds, 'only 5.9% correctly concluded that the verdict should be a full acquittal [whereas] 94.1% incorrectly concluded that the verdict should be manslaughter'.[706] Lastly, of the 36 female participants who concluded that 'the accused person's belief was not based on reasonable grounds, 91.7% correctly concluded that the verdict should be manslaughter'.[707]

Although Knapp's participants did not have the benefit of jury directions, it is questionable to what extent homicide verdicts concerning victims of family violence [under the Crimes (Homicide) Act 2005 (Vic)] were based on the elements of the law (and interpretations of reasonableness) as opposed to compromise verdicts (manifesting as a result of a range of options and complex directions) pertaining to murder, defensive homicide, manslaughter and self-defence.[708]

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[701] Knapp (n 656) 67.
[702] Ibid.
[703] Ibid.
[704] Ibid.
[705] Ibid.
[706] Ibid 68.
[707] Ibid.
[708] Fitz-Gibbon (n 142) 140. This research links to schema theory at 2.6.1.1 and matters of reasonableness in behaviour. Although reforms to the *Jury Directions Act 2015* (Vic) responded to a perceived need to simplify jury directions, the family violence directions focus on the need to ensure that jurors acquire a better understanding of family violence. See also Chapter 3, *Gender* at 3.4.2.1, *Race* at 3.4.2.2, *Professional*

2.6.3.2 Perceptions of reasonableness

Compromise verdicts of guilt for lesser offences in self-defence cases involving long-term abuse may also have been affected by limited understandings of reasonableness in the context of family violence. An accused's behaviour may have been affected by abuse while also being a rational response to the circumstances of abuse.[709] As recounted by Sheehy, Stubbs and Tolmie, these two issues were sometimes difficult to reconcile.[710] That is, defences based on the trauma arising from abuse may have reinforced idea belief that a victim's behaviour was due to a psychological condition and not the product of a reasonable response to the circumstances victims found themselves in.[711]

In this context it is significant, as Byrne points out, that the rationale of defensive homicide was never explained to juries despite it being intended to overcome misunderstandings of family violence:[712]

> The trial judge's task was to explain the law but this did not require the trial judge to explain the rationale for the law. How would a jury have interpreted its existence? Would the jury have thought that it was an option for them because a woman who [killed] in response to family violence is not acting reasonably or would often not be acting reasonably? This interpretation would be understandable in the context of common misconceptions [concerning] family violence.[713]

Fitz-Gibbon also observed that 'if those within the law [were] unable to assess the actions of persons who [killed] in response to prolonged family violence meaningfully, then the law of homicide [was] likely to lead to injustice regardless of the formation of legal categories'.[714] At 2.6.4.1, the literature suggests that victims of family violence were depicted as unreasonable. This, alongside the complexity of the law, may have

understandings of family violence and plea decisions at 3.4.2.3 and *Juror interpretation and personal application of law* at 3.4.2.4.

[709] Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'When Self-Defence Fails' in Kate Fitz-Gibbon and Arie Freiberg (ed), *Homicide Law Reform in Victoria: Retrospect and Prospects* (The Federation Press, 2015) 111. See also Chapter 7, *Original insights concerning trials of victims of family violence* at 7.3.1.1.

[710] Ibid.

[711] Ibid.

[712] Byrne (n 503) 147.

[713] Ibid.

[714] Fitz-Gibbon (n 142) 141.

contributed to juries returning compromise verdicts under the Crimes (Homicide) Act 2005 (Vic) based on their perceptions of reasonableness.

Byrne suggests that Victoria's new test for self-defence and its accompanying family violence provisions and directions 'should be more intuitive for jurors and therefore easier to apply'.[715] The extent to which the reasonableness of a response may be interpreted to increase the accessibility of self-defence to victims of family violence remains unclear.

2.6.4 Professional understandings of family violence and plea decisions

Practitioners are required to act on their client's instructions and advance the best case they can within legal and ethical parameters.[716] Client instructions are limited by their knowledge of the law. The culture and understanding of the legal profession around family violence directly influences pleas and trials.[717]

2.6.4.1 Understandings of family violence

Of significance to the research, the VRCFV explored the prosecution of offences that take place in the context of family violence.[718] It considered concerns about the way in which

[715] This is because the test avoids an 'excessive focus' on the quality of the 'belief' and an examination of the quality of the reasons for a person's belief that it was necessary to act in self-defence. This is useful where jurors do not understand the dynamics of family violence in that the test highlights that the relevant circumstances are what the accused perceives them to be: Byrne (n 503) 149.
[716] McKenzie et al (n 43) 89.
[717] Ibid 89. See Chapter 7, *Professional understandings of family violence and plea decisions*at 7.3.4.
[718] *Royal Commission into Family Violence* (n 89) 189.

the criminal law dealt with women who commit homicide in response to family violence.[719] It also made reference to the DVRCV in relation to its commentary on its reported under-use of family violence provisions in the Jury Directions Act and Crimes Act by legal practitioners.

In prosecuting female victims of family violence between 2005 and 2013, the DVRCV observed that practitioners were focused on physical forms of family violence and gave little significance to the psychological harm from coercion, intimidation and sexual violence.[720] These last factors extended the cumulative impact of family violence and contributed to perceptions of danger.[721] Practitioners also struggled to understand why women had not left their violent partners.[722]

They were described by counsel and presiding judges as 'helpless, dependent and irrational, or as unstable and angry'.[723] Karen Black was described as 'unassertive and timid',[724] Eileen Creamer as a 'rather gullible woman, a rather foolish woman, a rather dependent sort of person';[725] and Veronica Hudson as a 'very dependent person'.[726] Jade Kells was 'angry, aggressive and vengeful', Elizabeth Downie was presented as 'unstable' and 'angry', and[727] Jemma Edwards, 'sick', 'dependent', having 'impaired judgment' and lacking 'strength of character'.[728]

The DVRCV highlighted a common thread in these cases. None were perceived as rational actors who had killed their violent partners on a reasonable belief that it was necessary to defend themselves against the risk of death or really serious injury.[729]

[719] Ibid.
[720] Kirkwood, McKenzie and Tyson (n 144) 39. See 2.2.3 *Victorian Institutional Responses*. See also Chapter 7, *A systemic failure to recognise the nature and impact of family violence* at 7.2.1.
[721] Ibid.
[722] Ibid.
[723] Ibid 46.
[724] Ibid.
[725] Ibid.
[726] Ibid.
[727] Ibid.
[728] Ibid.
[729] Ibid.

Kirkwood, McKenzie and Taylor drew attention to the failure by practitioners to introduce a broader range of evidence on family violence.[730]

Although the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) was intended to further 'educate the community and legal profession about family violence',[731] Naylor and Tyson questioned whether it would promote a greater understanding of family violence in the profession or change the daily practices of judges and lawyers.[732] They repeated the need for 'comprehensive, consistent, and ongoing training' for legal professionals to combat the common myths about and barriers to disclosing family violence, including how the use of expert evidence [could] assist in [supporting] a defence of self-defence'.[733] Such commentary aligns with the VRCFV's conclusion that these issues were unlikely to be addressed by further legislative amendments – rather – improvement of training and education among legal practitioners and the judiciary.[734] It follows that the extent to which practitioner understandings of family violence have increased following the reforms requires investigation. These matters also have implications for plea negotiations.

2.6.4.2 Plea decisions

Plea negotiations[735] in cases of lethal responses to family violence between the prosecution and defence sometimes lead to charges being settled with pleas of guilty to lesser charges, such as manslaughter.[736] In Victoria, these negotiations are resolved on the basis of 'the strength of evidence including any admissions; any probable defences; the views of the victims and the informant; the accused's criminal history; and the likely length of a trial'.[737] There is limited transparency if offers are rejected. Such decisions are

[730] 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: Kirkwood, McKenzie and Tyson (n 144) 46.
[731] *Parliamentary Debates* (n 549). See also Weinberg (n 698).
[732] Naylor and Tyson (n 389) 73.
[733] Ibid 72.
[734] *Royal Commission into Family Violence* (n 89) 225.
[735] See Chapter 3, *Selection of relevant prosecutions* at 3.2.3. See also Chapter 3, *Professional understandings of family violence and plea decisions* 3.4.2.4 and Chapter 6, *Professional understandings of family violence and plea decisions*at 6.2.2.3.
[736] McKenzie et al (n 43) 77.
[737] Ibid 77. See also Kerri Judd QC, 'Policy of the Director of Public Prosecutions for Victoria' *Office of Public Prosecutions Victoria* (Policy Document, 17 December 2019) 2-5 <http://www.opp.vic.gov.au/getattachment/6beb7d86-d539-4443-871f-cc4165557ea4/DPP-Policy.aspx>.

not made public[738] and any discussions between practitioners and clients remain privileged.

With regard to the VRCFV**,** the Commission highlighted a discrete issue raised by the DVRCV/Monash University report concerning 'overcharging' – the phenomenon of prosecutors charging women with murder but accepting guilty pleas for manslaughter or the now repealed defensive homicide.[739] Based on an Australian wide study, Byrne observed that 85% of prosecutions where women were charged with homicide offences in the context of family violence commenced with charges of murder.[740] In 63% of cases, the prosecution accepted a plea to manslaughter.[741] Although Tolmie acknowledged that not all victims of family violence would be acting in self-defence,[742] Tyson et al. observed that 8 out of 10 women in their study of the Crimes (Homicide) Act 2005 (Vic) stated that they had killed to protect themselves from an immediate attack by the deceased.[743] Further, the majority of these women pleaded guilty to the lesser offences of manslaughter and defensive homicide.[744] Byrne observed that women may have decided, between 2005 and 2014, that it was better to plead guilty to defensive homicide or manslaughter rather than raise self-defence at trial and risk being found guilty of murder.[745]

As highlighted by the VRCFV, the DVRCV proposed that this issue could be resolved by consultation between police and prosecutors about appropriate charges. [746] The DVRCV noted that the 2010 Australian Law Reform Commission and NSW Law Reform Commission report *Family Violence: A National Legal Response* identified charging practices as an issue warranting review by the states, and suggested that enhancing prosecutorial guidelines in Victoria may help prosecutors determine the appropriate charge.[747]

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[738] McKenzie et al (n 43) 77. See 2.2.3, *Victorian Institutional Responses* at page 22.
[739] *Royal Commission into Family Violence* (n 89) 201.
[740] Sheehy, Stubbs and Tolmie (n 709) 386 cited in Byrne (n 503) 152.
[741] Ibid.
[742] Tolmie (n 146) 42.
[743] Danielle Tyson et al, 'Effects of Reforms on Responses to Women who Kill Intimate Violent Partners' in Kate Fitz-Gibbon and Arie Freiberg (ed), *Homicide Law Reform in Victoria: Retrospect and Prospects* (The Federation Press, 2015) 79.
[744] Ibid.
[745] Byrne (n 503) 147.
[746] *Royal Commission into Family Violence* (n 89) 201. See also Domestic Violence Resource Centre Victoria, Submission 945, 70–1.
[747] Pertinently, the DVRCV suggested the establishment of a specialist domestic homicide list for courts and a specialist 'domestic homicide' unit within the Office of Public Prosecutions. However, the

However, there is no transparency in plea bargaining in Victoria.[748] Fitz-Gibbon states that, as a result, we do not know why those who killed in response to family violence and who may have had a genuine belief that they were defending themselves, decided to plead guilty to defensive homicide rather than test their claims of self-defence.[749] As Byrne points out, identifying why women pleaded guilty to defensive homicide or manslaughter could 'shed further light on the operation of [Victoria's] homicide laws'.[750]

Although the VDJ maintained that the abolition of defensive homicide would encourage more women to pursue self-defence at trial,[751] the absence of a partial defence to murder, and the prospect of an 'all or nothing' approach to trials may lead more women to plead guilty to murder or manslaughter as opposed to proceeding to trial and being convicted of murder.[752]

As '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',[753] women who plead guilty to lesser offences (due to the above reasons) may be deprived of potentially valid claims to self-defence.[754] Accordingly, the abolition of defensive homicide may presently be viewed as an experiment[755] that may leave female defendants in a precarious situation[756] until cases under the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) show that it has adequately accommodated responses to family violence in the context of plea negotiations.

Commission believed that the entire profession needed to be familiar with the nature of family violence: ibid.

[748] See, eg, Asher Flynn and Kate Fitz-Gibbon, 'Bargaining with Defensive Homicide: Examining Victoria's Secretive Plea Bargaining System Post-Law Reform' (2011) 35(3) *Melbourne University Law Review* 905.

[749] Fitz-Gibbon (n 142) 132.

[750] Byrne (n 503) 132.

[751] Department of Justice (n 451) ix.

[752] Kirkwood, McKenzie and Tyson (n 144) 50.

[753] Sheehy, Stubbs and Tolmie (n 740). See also *The partial defence of provocation* (n 547) 166.

[754] Sheehy, Stubbs and Tolmie (n 740).

[755] Kirkwood, McKenzie and Tyson (n 144) 50.

[756] Ibid.

Fitz-Gibbon anticipated the difficulties in administering this legislation generally. She maintained, 'if we are truly to rid the Victorian law of homicide of the "ghosts of the past",[757] be it provocation or defensive homicide, it is essential to continue to engage those within the system on what has been learnt from prior attempts at reform and what is sought from the latest package of law reform'.[758] This research aims to do as she suggested.

2.7 Conclusion

This chapter has reviewed the literature concerning international and domestic research on family violence. Such literature maintains that gender inequality and attitudes about gender roles and violence against women increase the risk of family violence and intimate partner homicide. It also showed that the effects of family violence were not well accommodated within the common law of self-defence and provocation. The chapter explored the concept of battered person's syndrome and the learned helplessness which underlies it. It remains an issue for expert evidence but it must be relevant to specific elements of defences. Responding to the issues canvassed in the literature, the Crimes (Homicide) Act 2005 (Vic) sought to increase justice in the accessibility of self-defence. It abolished the defence of provocation, codified self-defence and introduced a new offence of defensive homicide. It also introduced comprehensive family violence provisions to accommodate women's experiences and provide juries with relevant social contexts to understand women's experiences. However, the legislation was complex and poorly understood. Significantly, it failed to give women greater access to apparently valid claims to self-defence. As a result, the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) was enacted. It abolished defensive homicide. It revised the law on self-defence and added provisions on jury directions in an attempt to help jurors better assess self-defence in a family violence context. The chapter concluded by canvassing sociological research on non-legal factors which have limited victims of family violence from obtaining justice in trials and in plea bargaining.

[757] Fitz-Gibbon (n 142) 141.
[758] Ibid.

CHAPTER 3
METHODOLOGY AND THEORETICAL FRAMEWORK

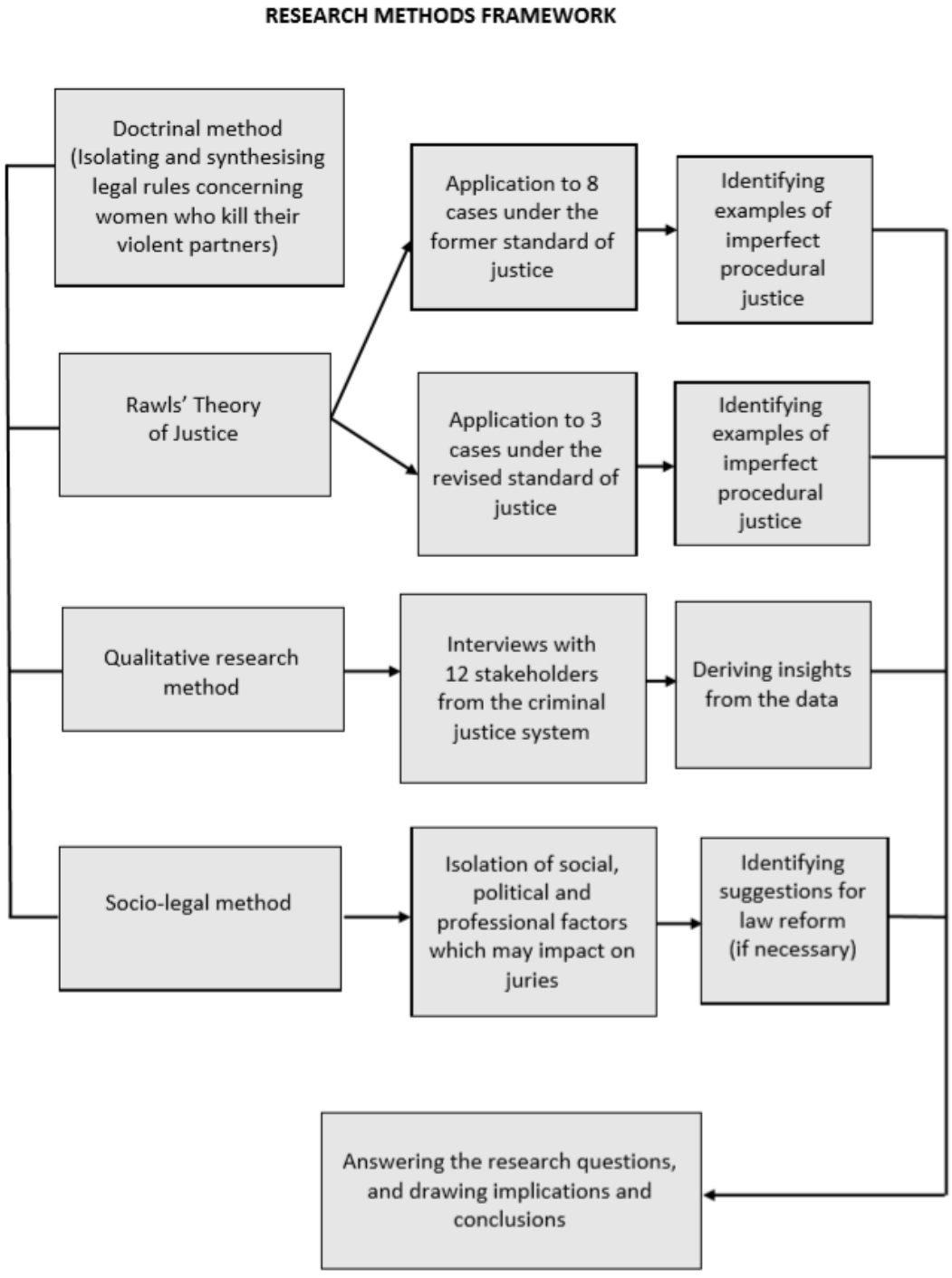
3.1 Introduction

The preceding chapter reviewed the literature concerning domestic violence with particular reference to women who kill their violent partners. Victorian government responses and their effectiveness in giving women access to self-defence were also considered. This chapter outlines and describes the methodology and theoretical approaches which were informed by the literature and adopted to answer the research questions outlined in Chapter 1 at [1.2]. A mixed-methods approach combining doctrinal, qualitative and socio-legal methods was used to generate data. John Rawls' Theory of Justice[1] was then used as a theoretical lens in which to interpret the results.. A mixed-methods research design was adopted in the belief that it was not only acceptable to mix methods from different research paradigms, but desirable as well.[2] In using the mixed-methods approach,[3] biases intrinsic to single-method approaches were circumvented[4] resulting in a more holistic analysis of the data.[5]

Figure 3–1 Research Methods Framework provides a visual overview of the interrelationships between the methods and theory used in this research.

[1] John Rawls' *Theory of Justice* (Harvard University Press, 1st ed, 1971).
[2] Martyn Denscombe, 'Communities of Practice: A Research Paradigm for the Mixed Methods Approach' (2008) 2(3) *Journal of Mixed Methods Research* 274.
[3] Ibid.
[4] Ibid 272.
[5] Ibid.

Figure 3-1: Research Methods Framework



3.2 Doctrinal method and research design

Although legal research is multi-faceted and may encompass, for example, empirical research (resonating with the social sciences), historical research (resonating with the humanities) and research into institutions and processes,[6] it commences with doctrinal research.[7] Doctrinal research involves the 'systematic exposition, analysis and critical evaluation of legal rules and their interrelationships'.[8] Further, it involves the 'rigorous analysis' and 'creative synthesis' of doctrinal strands which result in the extraction of general principles or legal rules from these primary materials.[9]

In treating the identification, analysis and evaluation of legal rules as a starting-point or platform for research,[10] doctrinal research may then be used to generate further research.[11] In this research, doctrinal research grounds the use of Rawls' theory of justice to ascertain whether the law unjustly failed to accommodate victims of family violence who were alleged to have killed their violent partners. Legal research is essential for governments and legal entities in developing policy and legislation.[12]

3.2.1 Generation of relevant legal data

In order to address the first aim of research and establish whether the previous law of self-defence and family violence evidence unjustly failed to accommodate the experiences of family violence victims who were alleged to have killed their violent partners in criminal prosecutions, this research had to first identify the relevant previous law and then examine its operation (through an appropriate theoretical lens) using a sample of relevant prosecutions. The same process was then adopted concerning the present law. Hypotheses could then be developed by way of inductive analysis.[13]

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[6] Council of Australian Law Deans, Submission to Department of Education, Science and Training (DEST), *Research Quality Framework*, May 2005, 1.
[7] Ibid.
[8] Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A discipline assessment for the Commonwealth Tertiary Education Commission* (AGPS, 1987) 9.10 - 9.15.
[9] Council of Australian Law Deans (n 6) 3.
[10] Ibid.
[11] Ibid 1.
[12] Council of Australian Law Deans (n 6) 6.
[13] Marnix Snel, 'Source-usage within doctrinal legal inquiry: choices, problems and challenges' (2014) 4(1) *Law and Method* 11.

3.2.2 Selection of relevant statutory rules, common law rules, interpretive norms and procedural values

To identify the relevant law, doctrinal research method was used to collate, synthesise and critically examine[14] Victorian legislation[15] and common law[16] concerning self-defence which was operative between the enactment of the Crimes (Homicide) Act 2005 (Vic) and the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic). Interpretive norms and procedural values which included, for example, the rules of statutory interpretation were then considered[17] in order to provide a framework for the analyses of relevant prosecutions.

The same process was then used for those principles which were operative following the enactment of the Crimes (Abolition of Defensive Homicide Act 2014 (Vic). All relevant primary and secondary materials that could have either significantly or marginally affected Victorian legal processes, decisions and outcomes were accessed and evaluated. This process necessitated the use of legal databases covering Victoria, including LexisNexis, TimeBase LawOne, WestLaw, AustLII and BarNet Jade. At the conclusion of this process, all relevant materials were tabled into an annexure labelled Annexure B.

3.2.3 Selection of relevant prosecutions

Once all relevant legal materials had been tabled, only prosecutions that concerned intimate partner homicides involving domestic violence, which were committed by women in Victoria under the Crimes (Homicide) Act 2005 (Vic) and the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) were considered for analysis. This process also necessitated the use of legal databases covering Victoria, including LexisNexis, TimeBase LawOne, WestLaw, AustLII and BarNet Jade.

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[14] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do' (2012) 17(1) *Deakin Law Review* 84.

[15] Only Victorian statutory rules were considered as the prosecutions selected dealt with offences committed and prosecuted in Victoria.

[16] The *Crimes (Homicide) Act 2005 (Vic)* codified the common law defence of self-defence. Any common law or statutory rules concerning this defence which operated in other States and Territories were considered to the extent that they were of relevance to Victoria.

[17] Secondary sources consisting of journal articles and other texts were also consulted: Hutchinson and Duncan (n 14) 116.

It was immaterial whether or not the accused had been found guilty of a homicide offence by way of trial or whether the accused had pleaded guilty to a lesser homicide offence and had been sentenced.

Under the previous law, the selection included prosecutions in which the accused could have raised self-defence but decided not to do so. It included prosecutions in which the Crown had disproven self-defence beyond reasonable doubt, but detailed analysis of the facts of the case and the surrounding statutory rules concerning family violence, suggested strongly that acquittal was the appropriate verdict, or alternatively, that the case should have been discontinued because of cogent evidence of self-defence, particularly having regard to the Policy of the Director of Public Prosecutions.[18] Although 13 publically available cases which involved intimate partner violence were identified, five prosecutions[19] were excluded on the basis that they, in the assessment of the researcher, did not support acquittals or discontinuances on the basis of self-defence.

To make such an assessment, the researcher considered the legal onus of the prosecution, the evidential burden of the defence, the documented evidence of the prosecutions and the law of self-defence as explicated in the research.

Where the law was capable of supporting an acquittal or discontinuance, the prosecutions qualifying for analysis were: *R v Kulla* [2010] VSC 60; *R v Black* [2011] VSC 152; *R v Creamer* [2011] VSC 196; *R v Edwards* [2012] VSC 138; *R v Kells* [2012] VSC 53; *R v Hudson* [2013] VSC 184; *DPP* v *Williams* [2014] VSC 304 and *DPP v Kerr* [2014] VSC 374.

Where the law was not capable of supporting an acquittal or discontinuance, the prosecutions which did not qualify for analysis were: *DPP v Felsbourg* [2008] VSC 20;

[18] See Kerri Judd QC, 'Policy of the Director of Public Prosecutions for Victoria' *Office of Public Prosecutions Victoria* (Policy Document, 17 December 2019) 2-5 <http://www.opp.vic.gov.au/getattachment/6beb7d86-d539-4443-871f-cc4165557ea4/DPP-Policy.aspx>.

[19] To make such an assessment, the researcher considered the legal onus of the prosecution, the evidential burden of the defence, the documented evidence of the prosecutions and the law of self-defence as explicated in the research. Where the law was capable of supporting an acquittal or discontinuance, the prosecutions qualifying for analysis were: *R v Kulla* [2010] VSC 60; *R v Black* [2011] VSC 152; *R v Creamer* [2011] VSC 196; *R v Edwards* [2012] VSC 138; *R v Kells* [2012] VSC 53; *R v Hudson* [2013] VSC 184; *DPP* v *Williams* [2014] and *DPP v Kerr* [2014] VSC 374. Where the law was not capable of supporting an acquittal or discontinuance, the prosecutions which did not qualify for analysis were: *DPP v Felsbourg* [2008] VSC 20; *DPP v Turner* [2009] VSC 409; *R v Pitt* [2012] VSC 591; *R v Downie* [2012] VSC 27 and *R v Blackwell* [2013] VSC 499.

DPP v Turner [2009] VSC 409; *R v Pitt* [2012] VSC 591; *R v Downie* [2012] VSC 27 and *R v Blackwell* [2013] VSC 499.

The eight qualifying prosecutions were reviewed to categorise whether the accused had been found guilty by way of trial or whether the accused had pleaded guilty to a lesser homicide offence. In the event that the accused had been found guilty by way of trial, the sentencing judgment was examined to identify the material evidence surrounding the homicide committed by the accused. For the purposes of this task, material evidence consisted of evidence which would have suggested a reasonable possibility of the existence of facts which, if they had existed, would have established self-defence. It equally consisted of evidence which the prosecution had sought to rely upon, in an effort to prove beyond reasonable doubt that the accused had not acted in self-defence.

In other words, the judgments were examined to determine whether or how the accused had (or could have) discharged the evidential burden of self-defence and how the Crown had sought to discharge its legal onus of disproving the question of self-defence beyond reasonable doubt. This was a necessary precursor to establishing whether the Crown had theoretically discharged its legal onus through 'unjust'[21] arguments and whether the Crown and the court had theoretically legitimised a jury's verdict through such arguments and whether the previous law of self-defence and family violence evidence 'unjustly failed' to accommodate the experiences of family violence victims by virtue of such phenomena materialising within the relevant prosecutions.

In the event that the accused pleaded guilty to a homicide offence, the sentencing judgment was, in an identical fashion, examined to identify the material evidence surrounding the homicide committed by the accused that would have been used by both the defence and the Crown to discharge their respective burdens had the matter proceeded to trial. Given that no trial had taken place, this task was necessary to establish whether the accused had 'unjustly'[22] pleaded guilty to a homicide offence; whether the Crown and the court had 'unjustly' dismissed[23] the question of self-defence through 'unjust' arguments and whether the previous law of self-defence and family violence evidence

[21] This term is defined by reference to Rawls' theory of justice.
[22] Ibid.
[23] Ibid.

'unjustly failed' to accommodate the experiences of family violence victims by virtue of such phenomena materialising within the relevant prosecutions.

Once the sentencing judgments had been examined, discussion papers by Kirkwood et al.[24] and McKenzie et al.[25] published by the DVRCV were consulted to explore their analyses of the eight prosecutions which were identified as relevant to this research. Kirkwood et al. examined the extent to which family violence had been recognised within the relevant prosecutions in order to consider how Victoria's previous law of self-defence and evidence of family violence had operated in practice.[26] Similarly, McKenzie et al. considered the ways in which family violence had been 'described, discussed and responded to' by legal professionals in relevant prosecutions.[27]

After documenting the perspectives of these researchers, the law of self-defence and John Rawls' theory of justice was then applied to the eight prosecutions to ascertain if the previous law of self-defence and family violence evidence had unjustly failed to accommodate the experiences of family violence victims in criminal prosecutions [see 3.2.4 below].

Regarding the current law, the same process was then effected and broadened to include prosecutions where the accused had elected to proceed to trial on the basis of self-defence and was acquitted or where the accused had their prosecution discontinued (as different outcomes had arisen under the current law of self-defence). Three prosecutions were identified in this way (being *DPP Reference No 1 of 2017* [2018] VSCA 69, the prosecution of Joanne and Shannon Debono and *R v Donker* [2018] VSC 210). Rawls' theory of justice was then applied to the three prosecutions to determine whether the current law of self-defence and family violence provisions had increased justice in the accessibility of self-defence in comparison to the previous law.

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[24] Debbie Kirkwood, Mandy McKenzie and Danielle Tyson, 'Justice or Judgement? The impact of Victorian homicide law reforms on responses to women who kill intimate partners' *Domestic Violence Resource Centre Victoria* (Discussion Paper, November 2013) 5.
[25] Mandy McKenzie, Debbie Kirkwood, Danielle Tyson and Bronwyn Naylor, 'Out of character? Legal responses to intimate partner homicide by men in Victoria 2005-2014' *Domestic Violence Resource Centre Victoria* (Discussion Paper, 2016)
[26] Kirkwood, McKenzie and Tyson (n 25) 9.
[27] Specifically, how family violence was 'identified and presented', how family violence was 'understood' and what impact it had on explanations concerning perpetrator and victim behaviours: McKenzie et al (n 24) 26.

3.2.4 Theoretical framework of analysis, process of induction and generation of thesis

For the purposes of this research, notions of what was 'just' or 'unjust' and conclusions on whether the law had 'unjustly failed' to accommodate the experiences of family violence victims invariably depended upon a specific theoretical framework[28]—a theory of justice.

3.2.4.1 John Rawls' Theory of Justice

While many theories of justice were available for selection, this research adopted John Rawls' Theory of Justice which encompassed three fundamental precepts–justice as fairness, imperfect procedural justice and reflective equilibrium.[29]

Rawls' neo-Kantian defence of liberalism is one of the most widely read and carefully constructed theories in modern Anglo-American jurisprudence.[30] Complex, internally logical and comprehensive, the social order defended by the theory is an improved version of American liberal democracy.[31] In short, the rights of the individual to personal autonomy and political recognition are paramount.[32]

The researcher determined that Rawls' theory and its accompanying precepts best enabled the researcher to characterise Victoria's previous legal framework as a 'standard of justice' within a theoretical setting, analyse the operation of that standard within that setting, demonstrate that that standard had not been upheld through 'manifestations of injustice' within that setting and to then theorise how this had occurred and how the law may be said to have unjustly failed to accommodate victims of family violence in criminal prosecutions to the extent that it had failed to prevent these manifestations arising in the first instance.

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[28] As research outcomes produced by doctrinal research designs are contingent upon specific theoretical contexts for legal interpretation: Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press, 2007) 21.
[29] See John Rawls, *A Theory of Justice* (Harvard University Press, 1st ed, 1971).
[30] Mari Matsuda, 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice' (1986) 16(3) *New Mexico Law Review* 614.
[31] Ibid.
[32] Ibid.

Rawls' approach has been recognised and used by a range of feminist critics.[33] Initially, Rawls was perceived to have failed to 'exploit the feminist potential of his theorising':[34] that justice as fairness was stripped of its 'feminist potential'.[35] In essence, criticism centred on the extent to which justice as fairness adequately accommodated reasonable pluralism:[36] that is, the accommodation of the public-private demarcation and the question of whether Rawls provided measures to combat women internalising views of themselves as subordinate to men.[37]

With regard to the public-private demarcation, Susan Okin's work was influential in forming opinions that Rawls was anti-feminist.[38] In response to a generation of feminist critique, Okin maintained that families needed to be subjected to the principles of justice if its members were to be free and equal members of society.[39] Okin's work followed the work of Catharine MacKinnon who applied a Marxist critique in her feminism. Under a Marxist lens, the liberal state and its institutions were deemed to have constructed a 'false consciousness' of equality in society.[40] It was argued that the 'male point of view' underpinned liberal societies which left women marginalised.[41]

On the other hand, critics deemed Rawls' political liberalism to be 'replete with resources for addressing feminist concerns'.[42] For example, Laden maintained that Rawls'

[33] See, eg, Ruth Abbey, *Feminist Interpretations of John Rawls* (Penn State University Press, 2013). See also Lisa Schwartzman, 'Feminism, Method and Rawlsian Abstraction' in Abbey, Ruth, ed. *Feminist Interpretations of John Rawls* (Penn State University Press, 2013); Elizabeth Break, 'Rereading Rawls on Self-Respect: Feminism, Family Law, and the Social Biases of Self-Respect' in Abbey, Ruth, ed. *Feminist Interpretations of John Rawls* (Penn State University Press, 2013) and Clare Chambers, 'The Family as a Basic Institution: "A Feminist Analysis of the Basic Structure as Subject" in Abbey, Ruth, ed. *Feminist Interpretations of John Rawls* (Penn State University Press, 2013).
[34] Ibid 1.
[35] Ibid.
[36] Ibid 2.
[37] Ibid.
[38] See Susan Moller Okin, *Justice, gender, and the family* (Basic Books, 1989).
[39] See Susan Moller Okin, 'Forty acres and a mule' for women: Rawls and feminism' (2004) 4(2) *Politics, Philosophy & Economy* 233-248.
[40] See Catherine MacKinnon, *Toward a feminist theory of the state* (Harvard University Press, 1989). See also Catherine MacKinnon, 'Feminism, Marxism, method and the state: An agenda for theory' (1982) 7(3) *Signs: Journal of women in culture and society* 515-544 and Catherine MacKinnon 'Reflections on sex equality under law' (1991) 100(5) *Yale Law Journal* 1281-1328.
[41] Ibid. See also Susan Armstrong, 'Is Feminist Law Reform Flawed? Abstentionists & Sceptics' (2004) 20(1) *Australian Feminist Law Journal* 43-63: Where Armstrong purports to reject the critical approach and suggest that there ought to be feminist participation in law reform.
[42] Ibid.

liberalism was not blind to women's equality,[43] it was merely short-sighted and nevertheless able to address inequality in society.[44] Concurring, Baehr expressed the view that Rawls' 'comprehensive political distinction' rendered a complex account of liberal feminism possible.[45]

Although feminist methodologies and critiques of the law have been instrumental in raising awareness of the difficulties which female victims of family violence have commonly encountered in seeking to avail themselves of the law of self-defence, Rawls' theoretical framework was selected on the basis that it is widely known, accepted and able to ground analyses of the fairness of both judicial processes and outcomes. Rawls' theory of justice is sufficient to encompass feminism and the following analyses may be borne with this in mind. This research does not adopt the Marxist lens propounded by MacKinnon in the belief that participation in law reform is a driver toward equality. The use of Rawls' theory of justice is furthered critiqued and defended in the limitations component of this research design.

(a) Rawls' Justice as Fairness—situating Victoria's previous framework within a theoretical setting through the conceptualisation of a 'standard of justice'

In order to situate Victoria's previous and current legal framework within a theoretical setting, Rawls' precept of justice as fairness required a perception of inequality and a set of principles established in response to that perception.[46] It also required such principles to be established through an 'initial agreement';[47] an agreement reflecting the choice which rational persons seeking to advance their self-interest would have supposedly agreed to as equals when, beneath what Rawls' called a veil of ignorance, they would have been unaware of any advantages or disadvantages that the establishment and

[43] See Anthony Simon Laden, 'Radical liberals, reasonable feminists: reason, power and objectivity in MacKinnon and Rawls' (2003) 133-152 republished in Abbey, Ruth, ed. *Feminist Interpretations of John Rawls* (Penn State University Press, 2013).
[44] **Ibid.**
[45] Specifically, what Rawls calls "the background culture" of society is "the culture of daily life"; it includes citizens' "comprehensive doctrines of all kinds—religious, philosophical, and moral". Comprehensive doctrines are accounts of "what is of value in human life, ideals of personal character, as well as ideals of friendship and associational relationships and much else that is to inform conduct": See Amy Baehr, 'Liberal Feminism: Comprehensive and Political' (2003) republished in Abbey, Ruth, ed. *Feminist Interpretations of John Rawls* (Penn State University Press, 2013) 151.
[46] John Rawls, *A Theory of Justice* (Harvard University Press, 1st revised ed, 2009) 4.
[47] Ibid.

operation of such principles would have posed to their self-interest. That is, advantages or disadvantages that could have materialised by virtue of being male, female and, in the specific context of this research, a perpetrator of family violence or a victim of family violence. Essentially, those advantages or disadvantages which could have materialised by virtue of the natural and societal contingencies which affect such beings.[48] As stated by Rawls, 'no one [knew] [their] place in society, [their] class position or social status; nor [did] [they] know [their] fortune in the distribution of natural assets and abilities, [their] intelligence and strength, and the like'.[49] Rawls believed the veil to be important as it was arguably most conducive to the construction of fair and just rules which would govern the associations of a society. That is, a veil which rendered subjective prejudices and biases obsolete. With regard to a perception of inequality, this research drew on the VLRC's Defences to Homicide: Final Report[50] to inductively infer that there had been a perception of inequality with regard to the operation of the law of self-defence and its application to victims of family violence. This perception was argued to have arisen from concerns that the law was not achieving its objective and focused on three critical themes.

Firstly, due to disparities in strength and size and continuous threats of violence, victims of family violence often killed in ways appearing to be 'at odds' with how self-defence had traditionally been understood—as a defence for those who had used force to preserve life or limb in the context of an immediate altercation. Secondly, the law of self-defence had been seen, insofar as victims of family violence were concerned, to have inadequately accommodated disproportionate responses to threats or pre-emptive responses on unarmed or otherwise defenceless partners performed in the context of ongoing family violence. Thirdly, lethal responses to family violence were commonly perceived to be the product of personal pathology as opposed to sociocultural or socioeconomic circumstances.

On the question of whether a set of principles had been established in response to the perception of inequality illustrated above, this research also drew on the Crimes

[48] Ibid 19.
[49] John Rawls, *A Theory of Justice* (Harvard University Press, revised ed, 1999) 118.
[50] Victorian Law Reform Commission, *Defences to Homicide – Final Report* (Report No 94, October 2004) 194. See Chapter 2, *The work of the Victorian Law Reform Commission* at 2.3.1 where the literature review provides the context for the use of Rawls' *Theory of Justice* in which to create a standard of justice for the evaluation of relevant prosecutions.

(Homicide) Act 2005 (Vic)[51] and the former Attorney-General Robert Hulls' accompanying Media Release which concisely summarised his Second Reading speech which introduced the Crimes (Homicide) Bill.[52] This was undertaken in order to reasonably and inductively infer that the Victorian Parliament had established a set of principles[53] in response to the perception of inequality outlined above.

In order to substantiate that these principles were produced by way of Rawls' initial agreement, it was presumed[54] that rational men, women, perpetrators of family violence and victims of family violence would have agreed to the enactment of such principles and the existence of the inequality which they sought to address under Rawls' veil of ignorance. In other words, the parties agreed that such principles advanced the self-interest of victims of family violence (namely, their interest in their right to protection from the infliction of cruel and painful injury and their right to liberty) without unduly encroaching upon the self-interest of perpetrators of family violence (namely, their interest in their right to life).

In establishing that a perception of inequality had arisen, that a set of principles had been established in response to that perception and that such principles had been established by way of an initial agreement, Rawls' justice as fairness was reasonably and inductively inferred to have materialised through the enactment of the Crimes (Homicide) Act 2005 (Vic).

By Rawls' standard, it was then possible to infer that sections 9AC (self-defence to murder), 9AD (defensive homicide), 9AE (self-defence to manslaughter) and 9AH (evidence of family violence) of the Crimes Act 1958 (Vic) represented 'principles of

[51] And the resulting enactment of sections 9AC (self-defence; murder), 9AD (defensive homicide), 9AE (self-defence; manslaughter) and 9AH (evidence of family violence) into the *Crimes Act 1958* (Vic).
[52] Which stated that, inter alia, the law had 'evolved from a bygone era when the law was concerned with violent confrontations between two males of roughly equal strength when a threat of death or serious injury was immediate': Office of the Attorney-General, 'Hulls Announces Major Reform to Homicide Laws' (Media Release, 4 October 2005). The media statement is a condensed version of his Second Reading speech to the Legislative Assembly on 6 October 2005 introducing the *Crimes (Homicide) Bill* (Hansard Legislative Assembly Book 5, 6 October 2005) 1349-1351.
[53] Specifically, sections 9AC (self-defence; murder), 9AD (defensive homicide), 9AE (self-defence; manslaughter) and 9AH (evidence of family violence). See Chapter 2, *The work of the Victorian Law Reform Commission* at 2.3.1 as the principles may be argued to mirror those established in Chapter 2, *Approach to law reform by the VLRC* at 2.3.1.1. Namely, that the law should be gender neutral, consider distinguishing degrees of moral culpability, simplified and consider barriers of accessibility. See also Chapter 7, *Original insights concerning trials of victims of family violence* at 7.3.1.1(b).
[54] See heading 3.2.6.4 for relevant limitations associated with Rawls' conception of an initial agreement.

justice'–principles which could not be tailored to the interests of the accused or the interests of the Crown (and by extension, the deceased)[55] within a formal process (a prosecution) without infringing the standard of fairness. For the purposes of this research, these principles were argued to represent a 'standard of justice' (Victoria's 'former standard of justice' hereinafter called Victoria's'2005 law).

As part of Rawls' conception of reflective equilibrium [discussed 3.2.4.1(e)], the same reasoning was then applied to the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) in order to conceive of a revised standard of justice (hereinafter called Victoria's '2014 law') which represents the same inequalities dealt with under different legal principles, namely sections 322K, M and J of the Crimes Act 1958 (Vic). These principles are to be read alongside sections 58, 59 and 60 of the Jury Directions Act 2015 (Vic).

(b) Rawls' Imperfect Procedural Justice—the presumption of a defined 'fair outcome' within Victoria's '2005 law' and the impossibility of guaranteeing 'fair outcomes'

To Rawls, the legislative enshrinement of a standard of justice represented an independent criterion for a just or fair outcome within a formal process (for example, a criminal prosecution).[56]

In his conception of perfect procedural justice (appearing in his 1999 revised edition of A *Theory of Justice*), Rawls supposed that justice represented the criterion of a 'just outcome'[60] which was independent of the formal public procedure which was to be used to assess its applicability.[61] Further, that it was possible to devise a procedure which was certain to lead to a just outcome.[62] Although the legislative statement of a conception of justice was assumed to uphold itself in a formal public process,[63] Rawls conceded that

[55] Rawls (n 46) 12.
[56] Ibid 85.
[60] Ibid.
[61] Ibid 74.
[62] Ibid.
[63] Joshua Cohen, For a democratic society' in Samuel Freeman (ed.*) The Cambridge Companion to Rawls* (Cambridge University Press, 2003) 93.

perfect procedural justice was rare, if not impossible, in cases of significant practical interest.[64]

In the view of Rawls, it was impossible to design legal rules so that they always led to a 'correct result'.[65] Even where the law was carefully applied and the proceedings fairly and properly conducted, a criminal prosecution could still reach the 'wrong outcome'.[66] That is, an innocent individual could be found guilty and a guilty individual could be set free.[67] Although there may have been an independent criterion for a 'just outcome', there was no procedure which was sure to lead to it.[68][69] This was described by Rawls as a matter of imperfect procedural justice and therein laid the crux of this research.

If it could be inductively inferred that Rawls' imperfect procedural justice had materialised within the eight prosecutions decided under the previous law and the reasons as to how this had occurred could be characterised as manifestations of injustice, then the extent to which the standard had failed to guard against these manifestations arising would reflect the extent to which the law of self-defence and family violence unjustly failed to accommodate the experiences of victims of family violence. It would then be possible to repeat the same method of inquiry under the current law in order to draw comparisons.

(c) Argument—Imperfect Procedural Justice caused by manifestations of injustice arising within relevant prosecutions–phenomena leading to or contributing to fair outcomes not being obtained amounting to manifestations of injustice if unjust criteria are met

For the purposes of this research, Rawls' imperfect procedural justice could have only logically materialised within a prosecution when the accused should have been found guilty if, and only if, they had committed the offence with which they had been charged.[71] This does not imply that convictions or acquittals in and of themselves amount to fair or unfair outcomes. Factors which may be argued to impinge on proper process must also

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[64] Rawls (n 49) 75.
[65] Ibid.
[66] Ibid.
[67] Ibid.
[68] Rawls' conceptions of perfect procedural justice and imperfect procedural justice are distinguishable from his conception of 'pure' procedural justice which involves situations where there is no criterion for what constitutes a just outcome other than the procedure itself: see Rawls (n 49) Ch 2.
[69] Ibid.
[71] Ibid. See Chapter 2, *The application of defensive homicide to victims of family violence* at 2.4.1.2.

be identified. However, the question of self-defence was logically relevant to this assessment which meant that the research had to substantiate that Victoria's 2005 law and its criterion for the 'fair outcome' were applicable to each of the eight prosecutions. In other words, the 'fair outcome' was attainable having regard to the 'initial agreement' and the 'standard of justice' it produced in response to the perceived inequalities outlined above. For all intents and purposes, this required the research to substantiate that the law of self-defence ought to have resulted in the acquittal of each individual accused within each prosecution.

Accordingly, the research first considered the 'material evidence' surrounding each homicide committed by the accused. In the event that the accused had been found guilty by way of trial, such evidence consisted of evidence which suggested a reasonable possibility of the existence of facts which established self-defence.[72] Separately, material evidence also consisted of the evidence which the prosecution had (or would have) sought to rely upon in an effort to prove beyond reasonable doubt that the accused had not acted in self-defence.[73]

In the event that the accused pleaded guilty to a homicide offence, material evidence consisted of admissible evidence which would have suggested a reasonable possibility of the existence of facts which established self-defence had the matter proceeded to trial. Equally, it was admissible evidence which the prosecution would have sought to rely upon in an effort to prove beyond reasonable doubt that the accused had not acted in self-defence had the matter proceeded to trial. At the conclusion of these processes, Victoria's 2005 law was applied to the facts of each prosecution. That if:[74]

- a disproportionate response to a threat of violence or a response to a non-imminent threat of violence did not, by default, preclude an

[72] *Crimes Act 1958* (Vic) s 322I(1) ('*Crimes Act*'). Although this exposition of the evidential burden of the defence was taken from the amended *Crimes Act 1958* (Vic) of 2014, it was consistent with the common law evidential burden which applied to sections 9AC, 9AD and 9AH of the previous *Crimes Act 1958* (Vic) and, to that extent, was appropriate for the purposes of this task: see, eg, *R v Babic* [1998] 2 VLR 79*; Zecevic v DPP* [1987] 162 CLR 645*; Viro v R* [1978] 141 CLR 88*; R v Dziduch* (1990) 47 A Crim R 378.
[73] *Crimes Act* (n 72) s 322I(2). While this exposition of the legal onus of the prosecution was taken from the amended *Crimes Act 1958* (Vic) of 2014, it was consistent with the common law legal burden which applied to sections 9AC, 9AD and 9AH of the *Crimes Act 1958* (Vic) and, to that extent, was appropriate for the purposes of this task: see, eg, *R v Babic* [1998] 2 VLR 79*; Zecevic v DPP* [1987] 162 CLR 645*; Viro v R* [1978] 141 CLR 88*; R v Dziduch* (1990) 47 A Crim R 378
[74] With reference to sections 9AC, 9AD, 9AE and 9AH of the Crimes *Act 1958* (Vic).

acquittal (or discontinuance) on the basis of self-defence (in the context of a lethal response to family violence) and the evidence suggested a reasonable possibility of the existence of facts which established (or arguably would have) established self-defence; and

- the accused had subjectively believed that it was necessary to act in self-defence of themselves or another from the infliction of death or really serious injury; and[75]
- the accused held objectively reasonable grounds for their subjective belief; and
- the Crown could not disprove (or arguably would not have disproved), beyond reasonable doubt, that the accused had subjectively believed that it was necessary to act in self-defence of themselves or another from the infliction of death or serious injury;

the fair outcome was that the accused ought to have been acquitted of a homicide offence on the basis of self-defence. Alternatively, the accused ought to have had their prosecution discontinued on the basis of self-defence (depending on whether the accused had been tried for a homicide offence or had pleaded guilty to a homicide offence).

After applying Victoria's 2005 law to the eight prosecutions (on a case-by-case basis), it was reasonably and inductively inferred that the standard's criterion for the fair outcome applied to each prosecution and that Rawls' imperfect procedural justice had materialised within each prosecution because each accused had been convicted despite the existence of viable claims to self-defence. It was then necessary to observe how or why imperfect procedural injustice had resulted within the relevant prosecutions.

3.2.4.2 Application of Rawls to relevant prosecutions

Proceeding on the Rawlsian assumption that the principles of the fair outcome within the standard of justice could not and were not to be unjustly tailored to the circumstances of the accused, the Crown and the court, the research proceeded to examine whether the principles underlying the standard of justice had in fact been 'unjustly' tailored to the interests of the Crown or the court (in the event that the accused was found guilty) or

[75] For the purposes of manslaughter, to simply defend him or herself or another person.

whether the interests of the accused had been 'unjustly' dismissed by the accused or the Crown or the court (in the event that the accused pleaded guilty).

Accordingly, the research sought to examine whether the 'initial agreement' had been dishonoured or, at the very least, derogated from through manifestations of injustice [the content of which is discussed at 3.2.4.2(a);(b);(c) and (d)]; phenomena which, at the very least, could be reasonably and inductively theorised to have unjustly prevented the accused from attaining the 'fair outcome' prescribed by the standard of justice. Alternatively, phenomena which, at the very least, could be reasonably and inductively theorised to have unjustly contributed to the accused not attaining the fair outcome prescribed by Victoria's 2005 law.

(a) Manifestations of injustice in trials

Where the accused was tried, a manifestation of injustice arose where the Crown was reasonably perceived to have tailored the principles of the standard of justice to the circumstances of its case by discharging its legal burden through unjust arguments. That is, the Crown presented arguments during trial which had a significant prejudicial effect and were antithetical to the spirit of the initial agreement in the sense that they dishonoured, ignored, trivialised, derogated from or paid insufficient regard to the inequalities[76] which the agreement had sought to address.

Precisely put, a manifestation of injustice arose where there was any evidence, argument or 'trial phenomenon'[77] (which could reasonably be construed as having discharged the evidential burden of self-defence) and that evidence or trial phenomenon:

[76] Firstly, that due to disparities in strength and size and continuous threats of violence, victims of family violence often killed in ways appearing to be 'at odds' with how self-defence had traditionally been understood as - a defence for those who had used force to preserve life or limb in the context of an immediate altercation. Secondly, the law of self-defence had been seen, insofar as victims of family violence were concerned, to have inadequately accommodated disproportionate responses to threats or pre-emptive responses on unarmed or otherwise defenceless partners (performed in the context of ongoing family violence) and that lastly, lethal responses to family violence were commonly perceived to be the product of personal pathology as opposed to sociocultural or socioeconomic circumstances: see heading 3.2.4.1(a)

[77] The expression 'trial phenomenon' was used as a catch-all phrase to elicit any and all communications made by prosecution or defence counsel in the course of discharging their legal onus and evidential burden respectively

- was challenged by argument which cast doubt upon the question of self-defence without necessarily disproving self-defence beyond all reasonable doubt;
- significantly prejudiced, undermined or reduced the prospects of the accused being acquitted on the basis of self-defence; and
- was antithetical to spirit of the initial agreement in the sense that it dishonoured, ignored, trivialised, derogated from or paid insufficient regard to the inequalities which the initial agreement had sought to address.

(b) Manifestations of injustice in pleas of mitigation, sentencing hearings or appellate hearings where the accused was found guilty by way of trial

In the event that the accused was tried and found guilty, a manifestation of injustice arose where the Crown and/or the Court was/were reasonably perceived to have tailored the principles of the standard of justice to the circumstances of the Crown's case by legitimising a jury verdict through unjust arguments. In this context, the arguments were antithetical to the spirit of the initial agreement in the sense that they dishonoured, ignored, trivialised, derogated from or paid insufficient regard to the inequalities which the initial agreement had sought to address. Precisely put, a manifestation of injustice arose where there was an argument or 'hearing-specific phenomenon'[78] which:

- delegitimised the question of self-defence without necessarily disproving the question of self-defence beyond all reasonable doubt;
- significantly prejudiced, undermined or reduced the prospects of the accused being perceived by the community to have acted in self-defence; and
- was antithetical to the spirit of the initial agreement in the sense that it dishonoured, ignored, trivialised, derogated from or paid insufficient regard to the inequalities which the initial agreement had sought to address.

[78] The expression 'hearing-specific phenomenon' was used as a catch-all phrase to elicit any and all relevant communications made by prosecution or defence counsel in the course of their submissions.

(c) Manifestations of injustice where the accused pleaded guilty

In the event that the accused pleaded guilty, the decision to plead guilty itself was characterised as a manifestation of injustice where the standard of justice was arguably applicable to the accused's case. Although theoretically tenuous to speculate upon the exact reasons why individuals with arguably viable claims to self-defence chose to plead guilty, a manifestation of injustice was theorised to have occurred where it was reasonably and inductively inferable that the decision was informed, at the very least, by reasoning which was antithetical to the spirit of the initial agreement in the sense that the reasoning dishonoured, ignored, trivialised, derogated from or paid insufficient regard to the inequalities which the initial agreement had sought to address. Precisely put, a manifestation of injustice arose where:

- there was evidence which suggested a reasonable possibility of the existence of facts which would have established self-defence had the accused been tried; and
- the Crown's argument(s) did not appear sufficient to have been able to have disproven the question of self-defence beyond reasonable doubt had the accused been tried; and
- the decision to plead guilty may be speculated to have been informed by a lack of confidence in the standard's capacity to ensure the fair outcome; or
- the decision to plead guilty may be speculated to have been informed by remorse or shame.

If these factors arose, then the decision to plead guilty was characterised as a manifestation of injustice to the extent that it was antithetical to the spirit of the initial agreement in the sense that it had dishonoured, ignored, trivialised, derogated from or paid insufficient regard to the inequalities which the initial agreement had sought to address.

(d) Manifestations of injustice in pleas of mitigation, sentencing hearings or appellate hearings where the accused pleaded guilty

In the event that the accused pleaded guilty, a manifestation of injustice arose within a plea hearing where the Crown and/or the Court was/were reasonably perceived to have tailored the principles of the standard of justice to the circumstances of the Crown's case by dismissing the question of self-defence through unjust arguments and those arguments were antithetical to the spirit of the initial agreement in the sense that they dishonoured, ignored, trivialised, derogated from or paid insufficient regard to the inequalities which the initial agreement had sought to address. Precisely put, a manifestation of injustice arose where any argument(s) or hearing-specific phenomenon;

- delegitimised the question of self-defence without necessarily disproving the question of self-defence beyond all reasonable doubt;
- significantly prejudiced, undermined or reduced the prospects of the accused being perceived by the community to have acted in self-defence; and
- was antithetical to the spirit of the initial agreement in the sense that it dishonoured, ignored, trivialised, derogated from or paid insufficient regard to the inequalities which the initial agreement had sought to address.

(e) Reflective Equilibrium—predicating qualitative analysis within the Rawlsian lens

At the conclusion of this analysis, it was found that 14 manifestations of injustice had arisen across the relevant eight prosecutions. These were argued to have unjustly prevented the accused from attaining the fair outcome prescribed by Victoria's 2005 law or alternatively, that these manifestations had unjustly contributed to the accused not attaining the fair outcome.

With these injustices in mind, the research subsequently drew upon the Victorian Department of Justice's Defensive Homicide Discussion Paper,[79] relevant academic

[79] Department of Justice, 'Defensive Homicide: Proposals for Legislative Reform', *Victoria State Government* (Consultation Paper, September 2013) vii

commentary and the fact that no female victims of family violence had successfully established self-defence under Victoria's previous framework, to infer that the initial agreement and the 2005 law it produced had been repudiated in each of those cases.

In the event that an initial agreement was repudiated, Rawls conceived that an agreement could be revised in order to resolve the dispute.[80] For example, by agreement, statutes could be amended to address a dispute by way of reflective equilibrium.[81] To Rawls, the process of reflective equilibrium entailed the use of intelligent judgment to coherently move back and forth between moral judgments (inductive intuitions) and moral principles (deductive conclusions applied to cases) in an effort to achieve the strongest 'mutual support' between them'.[82] Although moral judgments were less reliable than conclusions reached from the standpoint of rational self-interest (beneath a veil of ignorance), the standpoint of rational self-interest could nevertheless be used to specify an appropriate moral standpoint in which to consider questions of justice.[83]

To effect this process, this research framed the concerns of the disputing parties as moral judgments if such judgments (in conformity with Rawls) had been reasonably perceived to have been reached in conditions conducive to 'informed judgment'.[84] For all intents and purposes, this amounted to identifying the legal scrutinies of the disputing parties (the VDJ and relevant academic commentators) who had made informed judgments about the 2005 law within their conscientious analyses of the relevant prosecutions.[85]

These judgments were then synthesised and considered together in the view of resolving the dispute.[86] This necessitated a synthesis of the strengths and weaknesses of the informed judgments (insofar as they applied to the manifestations of injustice which were

<https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2018/07/23/3f7c88ccc/defensivehomicideconsultationpaper2013.pdf>.

[80] See Rawls (n 29) 48.

[81] Ibid 48. See also, David Raphael, *Concepts of Justice*, (Oxford University Press, 2001) 2.

[82] Rawls (n 46). See also, Norman Daniels, *Reflective Equilibrium in Theory and Practice* (Cambridge University Press, 1996) 2.

[83] Ibid.

[84] Rawls (n 46). See also, Norman Daniels, 'Wide Reflective Equilibrium and Theory Acceptance in Ethics' (1979) 76(5) *The Journal of Philosophy* 258.

[85] Practically speaking, academic commentary and the Department of Justice's comprehensive review of the operation of defensive homicide were sufficient.

[86] Daniels (n 82).

said to have materialised within the relevant prosecutions) until a revised set of principles was devised.[87]

At the conclusion of this synthesis, the research reasonably and inductively inferred that the process of reflective equilibrium had led to the enactment of the Crimes (Abolition of Defensive Homicide) Act 2014 (Vic), specifically sections 322K, 322M, 322J of the Crimes Act 1958 (Vic) and sections 58, 59 and 60 of the Jury Directions Act 2015 (Vic). These provisions were theorised to represent a Victoria's 2014 law. The2014 law was satisfied if:

- a disproportionate response to a threat of violence or a response to a non-imminent threat of violence did not, by default, preclude an acquittal (or discontinuance) on the basis of self-defence (in the context of a lethal response to family violence); and
- evidence suggested a reasonable possibility of the existence of facts which (or arguably would have) established that:
    - the accused had subjectively believed that it was necessary to act in self-defence of themselves or another from the infliction of death or really serious injury; and
    - the conduct of the accused was an objectively reasonable response (in the circumstances, as the victim subjectively perceived them); and
    - the Crown could not disprove (or arguably would not have disproved), beyond reasonable doubt, that the accused had subjectively believed that it was necessary to act in self-defence of themselves or another from the infliction of death or really serious injury or that the conduct of the accused was an objectively reasonable response (in the circumstances, as the accused subjectively perceived them).

[87] Ibid. See Chapter 2, *The enactment of the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic)* at 2.5.2; *The revised doctrine of self-defence* at 2.5.2.1; *Family violence and self-defence* at 2.5.2.2 and *Evidence of family violence* at 2.5.2.3 for a background to the reformed provisions.

In such cases, the fair outcome, according to Rawls' framework, was that the accused ought to have been acquitted of a homicide offence on the basis of self-defence, or that they ought to have had their prosecution discontinued on the basis of self-defence (depending, respectively, on whether the accused had been tried for a homicide offence, or had pleaded guilty to a homicide offence).

With Victoria's 2014 law in mind, the same method of inquiry was repeated with regard to three relevant prosecutions resolved under this standard. Where an accused was acquitted on the basis of self-defence at trial or where the prosecution of an accused was discontinued, no manifestations of injustice arose. The extent to which this standard was more conducive to upholding its own criterion of a fair outcome within a prosecutions setting was a matter relevant to answering the second subsidiary research question of this research and is explored in Chapters 4 and 5.

3.2.5 Exposition of Thesis

Through the inquiry articulated above, it was theorised that Victoria's previous law of self-defence and family violence evidence, as reflected in the enactment of the Crimes (Homicide) Act 2005 (Vic), embodied Rawls' conception of justice as fairness: a 2005 law which represented a set of criteria for a just outcome. When it came to eight prosecutions under this standard, the criteria were applicable. However, 14 manifestations of injustice arose in these prosecutions with the effect of unjustly preventing each accused from attaining a just outcome: processes reflecting Rawls' conception of imperfect procedural justice.

The extent to which the doctrinal content of the law failed to prevent these injustices arising in the first instance may be regarded as the extent to which Victoria's previous law of self-defence and family violence evidence unjustly failed to accommodate the experiences of victims of family violence in criminal prosecutions, who were alleged to have killed their violent partners.

Additionally, the enactment of the Crimes (Abolition of Defensive Homicide) Act 2014 (Vic) was said to represent Rawls' conception of reflective equilibrium: a process leading to the creation of Victoria's 2014 law. With regard to the three prosecutions analysed

under this standard, the criteria were also applicable. However, in contrast to Victoria's 2005 law, two prosecutions appropriately resulted in acquittal and discontinuance (respectively). However, one manifestation of injustice arose within the third prosecution with the effect of unjustly preventing the accused from attaining a just outcome: a process further reflecting Rawls' conception of imperfect procedural justice.

Having regard to the literature and the conclusions reached, the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) was hypothesised to have increased justice in the accessibility of self-defence to victims of family violence who kill their violent partners in that the standard was more conducive to upholding its own criteria for a 'just outcome'. In other words, the standard was less likely to occasion Rawls' imperfect procedural justice (in comparison to Victoria's 2005 law). Nevertheless, non-legal factors were also theorised to continue to pose foreseeable risks of imperfect procedural justice arising under Victoria's 2014 law.

3.2.6 Limitations

The following practical and theoretical limitations arose with respect to the doctrinal method used by this research and must be read alongside the limitations canvassed in Chapter 8 at [8.4].

3.2.6.1 Limited access to information, implications for legal argument and resulting thesis

Firstly, this research did not have access to the relevant briefs of evidence concerning the eleven prosecutions analysed. Further, as not all Victorian Supreme Court hearings (and their transcripts) were available online, the analysis was limited to the nine sentencing judgments which were available online, a Supreme Court of Appeal judgement on a question of law, and the transcript excerpts of relevant hearings which appeared within the discussion papers Justice or Judgment?[88] and Out of Character?.[89] While regrettable that this research could not procure and analyse each of the complete plea, trial, sentencing and appellate hearing transcripts of all relevant prosecutions, Court Services Victoria provided (on their website, at the time of writing) that the cost of a transcript for

[88] Kirkwood, McKenzie and Tyson (n 24).
[89] McKenzie et al (n 25).

each hearing day was 'approximately $2,139.00'.[90] This cost proved prohibitive to the researcher.

It follows that the legal and theoretical assessments made within this research were limited to the material evidence which was publicly available within the resources outlined above (alongside newspaper materials concerning the prosecution of Gayle Dunlop, Joanne Debono and Shannon Debono on account of their acquittal and discontinuance respectively).

In relation to criminal trials and verdicts delivered by juries, the researcher cannot be certain that virtually all relevant information to the methodology of this research was captured. In relation to prosecutions resolved by guilty pleas and the evidence which was sourced from sentencing judgements (in order to argue self-defence in this research), the candidate acknowledges that the evidence presented by the prosecution reflected a synopsis of the evidence *then* available to it. In such cases, none of the evidence was tested for credibility at trial (as it would have been had the accused pleaded not guilty). In addition, the credibility of any witnesses (expert or otherwise) called by defence counsel was not tested in these instances.

While all assessments were made to the best of the researcher's knowledge of the law and the material evidence which was publicly available at the time of writing, the veracity of any assessment must be considered with these limitations in mind.

3.2.6.2 Jury verdicts, pleas of guilty and respect for judgment of judges, legal practitioners, juries and victims of family violence

Secondly, the researcher acknowledged, appreciated and respected that 9 of the 11 prosecutions analysed were resolved by pleas of guilty or jury verdicts determined by 12 members of the community. In relation to trials, the researcher did not have the benefit that a judge, legal practitioner or juror would have had in personally observing all witnesses, the accused and the directions which a trial judge would have provided to a jury within a trial hearing. Although the researcher's arguments were underpinned by the presumption of innocence, the researcher acknowledges that assessments of the

[90] Court Services Victoria, *Criminal Transcripts* (9 February 2018) Court Services Victoria < https://www.courts.vic.gov.au/court-system/transcripts-and-judgments/criminal-transcripts>.

credibility of the accused would have contributed to a number of decisions to prosecute and the advancement and/or zealousness of such prosecutions. The veracity of any assessment must also be considered with these limitations in mind. ~~In relation to guilty pleas, the researcher could not guarantee that the evidence that might have been available to practitioners and led in sentencing was that same which might have been available had the matter proceeded to trial. These matters all influence the decision making of prosecution and defence counsel.~~

It was not the intention of the researcher to question the judgment of any judges, legal practitioners, jurors or victims of family violence nor should this research be construed as questioning or underscoring the intelligence or competence of any judges, legal practitioners, jurors or victims of family violence.[91] As noted above, the legal and theoretical assessments within this research were made with regard to the legal materials which were publically available. In conformity with Rawls, such assessments were merely intended to reflect a scrutiny of processes, their outcomes and a consideration of whether a theoretical link could be drawn between them.

3.2.6.3 Subjectivity in inductive research

Thirdly, the researcher acknowledged that the generation of theory entailed the subjective generation of conceptual categories from evidence supporting such categories.[92] This can be seen in the degree of subjectivity which underpinned the Rawlsian suppositions advanced earlier at [3.2.4.2]. Reasonable minds may disagree on the most appropriate or cogent use of a structure of subjective suppositions in which to advance a theory of justice. As a result, the Rawlsian analyses of each of the eleven prosecutions cannot be said to represent an unquestionable account of every argument or transaction which occurred within each of the prosecutions.

[91] For example, as McKenzie, Kirkwood, Tyson and Naylor note, the way in which family violence is depicted by legal practitioners is not necessarily an indication of their personal understanding of family violence. Judges and legal practitioners have different roles to play and the adversarial nature of the legal system, legal rules in relation to proof and evidence, instructions and individual characteristics of the accused and the explanations provided in forensic psychiatric assessments may influence the construction of legal narratives: McKenzie et al (n 25) 62.

[92] Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research,* (Aldine Publishing Company, 1967) 23.

While one case was sufficient to generate a theory (with additional cases being used to support the theory),[93] it was acknowledged that the analyses of ten additional cases exposed the research to risks of confirmation bias. Although the researcher cannot guarantee that the research has provided a 'perfect description' of all relevant phenomena, it has sought to discharge its overarching responsibility[94] to produce a theory which accounts for much of it.[95]

3.2.6.4 Critique and defence of Rawls

Lastly, the theoretical premises upon which this research rests have been extensively critiqued. A consideration of these critiques is vital to the legitimacy of a thesis which examines purportedly unjust processes.[96]

Rawls' theory of justice has been criticised for using abstraction (the belief that visions of social life can be constructed without reference to the concrete realities of social life) as a method of inquiry.[97] However, this research examines specific cases and, to that extent, does not rely upon unfettered abstraction.

That being said, on Rawls' conception of justice as fairness, a principal objection may be found in Dworkin's observation that a hypothetical 'initial agreement' is not binding.[98] A further objection may be seen in H.L.A Hart's contention that Rawls' rationalist approach to justice contains a 'deceiving simplicity' as the veil of ignorance cannot be said to account for the prospect of rational individuals disagreeing on the value of conflicting liberties as there are no 'best' or 'worst' positions to supposedly choose from within the veil.[99]

With these criticisms in mind, Rawls' justice as fairness may be deemed 'partially incoherent'.[100] It presupposes that all members of a society are acquainted with human

[93] Ibid 30.
[94] Ibid.
[95] Ibid. See Chapter 8, *Limitations* at 8.4.
[96] Martha Nussbaum, 'Rawls and Feminism' in Samuel Freeman (ed), *The Cambridge Companion to Rawls*, (Cambridge University Press, 2002) 490.
[97] Matsuda (n 30).
[98] See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977).
[99] See, eg, H. L. A. Hart, 'Rawls on Liberty and Its Priority' (1973) 5(3) *The University of Chicago Law Review*. See also Norman Daniels, *Reading Rawls: Critical Studies on Rawls' 'A Theory of Justice'* (Stanford University Press, 1975).
[100] Raphael (n 81) 210.

psychology and the social sciences, despite being unacquainted with any individual facts about their own character, ability and predisposition to self-interest.[101] If a hypothetical person were debarred from having experiential knowledge of his or her own abilities and his or her own society, he or she could not be said to possess any experiential or derived knowledge of any person's ability or that of the society.[102] This arguably denies the necessary conditions within which to devise a 'fair' standard of justice in the first instance.[103] Reasonable pluralism (which characterises societies as 'free' institutions) renders such a task impossible.[104]

While conceded that hypothetical, theoretical agreements do not exhaustively reflect 'societal realities' or mandate that judges, lawyers, juries and victims of family violence resolve cases through hypothetical 'standards of justice', the theoretical approach to this research may be defended on the basis that Rawls' justice as fairness is simply a valid device of representation:[105] a device with which to argue what a society of free and equal persons would have supposedly agreed to as being 'fair'.[106]

At the very least, Rawls' justice as fairness enabled the researcher to realistically demonstrate that questions of justice had been contemplated by lawmakers and that their enacted intentions were not and would not always be realised within legal processes: the very phenomenon contemplated by Rawls' conception of imperfect procedural justice.

This led the researcher to realistically theorise that the occurrence of imperfect procedural justice reflected a failure of Victoria's legal frameworks to fairly accommodate certain members of the community in that it failed to prevent an array of injustices which paid insufficient regard to the elements of justice which had been contemplated by lawmakers.

Concerning Rawls' reflective equilibrium, it was acknowledged that the extrapolation, isolation and collective synthesis of moral judgments would be an imprecise exercise. As Nagel prudently observed, a rigid emphasis upon empirical rationality (in the context of reflective equilibrium) would have invited a theoretically endless list of 'irrelevant

[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Erin Kelly, *Justice as Fairness: A Restatement* (Harvard University Press, 2001) 3.
[105] Ibid 17.
[106] Ibid.

considerations'[107] or emotive biases which would have needed to have been excluded from the minds of those who were argued to have participated in the process of reflective equilibrium.[108] That being said, Rawls appeared to have been willing to admit a degree of emotion into the process of intelligent judgment[109] and it was on this basis that the researcher chose to accept Nussbaum's contention that human emotion was critically important to political discourse[110] to the extent that Kantian biases would not impede rational and fair judgment in this context.[111]

It follows that the process of reflective equilibrium observed within this research recognised emotion as an intelligent and discriminating way of deciding upon what was just and fair.[112] However, the implicit and exhaustive inclusion of all human emotions (positive and negative)[113] could not and should not be read into this research as this would have betrayed an arbitrary delineation of positive ('relevant') and negative ('irrelevant') emotions on the part of the researcher. As such an exercise would have been antithetical to Rawls' desire of fairness (as opposed to moral righteousness),[114] the research disregarded any 'undesirable' judgments to the extent that they, in an extreme sense, would have been publicly indefensible.[115]

For example, in order to account for the risk of arbitrariness, emotions created by fear, anger or ignorance were not considered within the process of reflective equilibrium as they were not conducive to intelligent ('informed') judgment[116] or a piece of research which could be said to have rested upon a fair and rational foundation.[117] This was deemed to serve an additional function and was consistent with Rawls' standpoint of rational self-interest to the extent that it did not delve into matters of moral intuitionism.[118]

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[107] Thomas Nagel, 'Rawls on Justice' in Norman Daniels (ed), *Reading Rawls: Critical Studies on Rawls' 'A Theory of Justice*' (Stanford University Press, 1975) 5.
[108] For the sake of fairness and the sacrosanctity of consent: ibid.
[109] Rawls (n 46) 443. See also Nussbaum (n 96) 489.
[110] Nussbaum (n 96) 489.
[111] Ibid 490.
[112] Ibid.
[113] Ibid.
[114] Raphael (n 81) 200.
[115] Rawls (n 46) 3. See also Kelly (n 104) 485.
[116] Rawls (n 46) 203. See also Nagel (n 107) 107.
[117] Rawls (n 46) 40. See also Nagel (n 107) 107.
[118] Rawls (n 46) 40. As Nagel prudently noted, Rawls' conceptions of justice were to have 'absolute weight' and would ultimately defeat moral intuitionism by way of priority: Daniels (n 107).

It follows that this research should not be construed as supposing what was morally 'right' or 'wrong'[119] with any standards of justice or processes which involved the use of such standards. Accordingly, the eventual enactment of the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) should not be seen as representing a comprehensive theory of human nature[120] or a comprehensive moral doctrine,[121] but rather, a political doctrine[122] tempered by critical political insights which were derived from intelligent judgments made in the pursuit of justice and fairness.

At the heart of the matter, conceptions of justice and their respective principles are not necessarily truths.[123] Theories of justice are exactly that[124] and the same may be said of this thesis.

3.3 Qualitative method and research design

3.3.1 Generation of relevant data

In order to answer the overarching research question posed by this thesis, expert-opinion was sought from professional stakeholders on the operation of both the previous and reformed law. To elicit this feedback, 30 interview questions were devised. They were based on the literature and the theoretical conclusions reached in chapter 4. 15 of these questions related to the qualitative design of this research whereas 15 related to the socio-legal design of this research. The interview questions are recorded in Annexure C. This qualitative research design was characterised as deductive research in that it began with a thesis derived from inductive observation and relevant literature before acquiring data to either support or falsify the thesis.[125]

3.3.2 Semi-structured interviews and interview themes

[119] Rawls (n 46) 16. See also Raphael (n 81).
[120] Rawls (n 46) 16. See also Nussbaum (n 96) 492.
[121] See, e.g. John Rawls, 'Justice as Fairness: Political Not Metaphysical' (1985) 14(3) *Philosophy and Public Affairs* 223-252.
[122] Ibid.
[123] Rawls (n 46) 21.
[124] Ibid 50.
[125] Russell Bernard, *Research Methods in Anthropology: Qualitative and Quantitative Approaches* (AltaMira Press, 5th ed, 2011) 7.

The interview questions were semi-structured in nature. A semi-structured interview is an interview guided by a set of relevant issues to be explored[126] and is an appropriate method of data collection in qualitative research.[127] Using this approach, a process of 'narrative inquiry' was undertaken in order to obtain new and beneficial insights into the operation of the law as well as the complex social processes which underpinned its operation in practice.

3.3.3 Ethical considerations in the qualitative research

Prior to undertaking the interviews, the researcher addressed the associated ethical issues, ensuring observance of the principles and the guidelines outlined in the National Statement on Ethical Conduct in Human Research (2007)[128] and The Australian Code for the Responsible Conduct of Research (2018)[129]. Table 3–1 briefly summarises how ethical issues were appraised and managed in the qualitative research.

Table 3-1: Research ethics and the current research

Key considerations for ethical research	**How these considerations were managed**

[126] See, e.g., National Health and Medical Research Council, *National Statement on Ethical Conduct in Human Research* (2007) Australian Government National Health and Medical Research Council <https://www.nhmrc.gov.au/_files_nhmrc/publications/attachments/e72_national_statement_may_2015_150514_a.pdf>.

[127] Semi-structured interviews are recognised as an appropriate method of data collection in qualitative research under the under the NSECHR: ibid.

[128] National Health and Medical Research Council (n 126).

[129] National Health and Medical Research Council, *Australian Code for the Responsible Conduct of Research* (2007) National Health and Medical Research Council <https://nhmrc.gov.au/about-us/publications/australian-code-responsible-conduct-research-2007>; Victoria University, *Research Integrity Policy and Procedures* (2018) Victoria University < https://policy.vu.edu.au/view.current.php?id=00075>.

The research is meritorious.[130]	There are demonstrable benefits to knowledge and practice, informing policy makers and the legal profession of the law's operation in practice and identifying non-legal factors which could affect the operation of the 2014 law.
The methodology adopted is appropriate for answering the research questions. [131]	The mixed methods approach adopted provides a holistic framework for understanding the research problem and for answering the research questions.
Sampling procedures outline clear criteria for inclusion and exclusion of potential participants. [132]	Purposive sampling of 'information-rich' sources (judges, legal practitioners, forensic psychologists and legal academics in the field), who are able and qualified to provide informed answers to the research questions.
The principles of informed consent and voluntary participation are upheld in procedures for enlisting participation and continuance in the research. [133]	Provision of a clear 'Explanatory statement' outlining the purpose, aims and nature of the research; an 'Informed Consent' form which participants signed; and explanations of informed consent at the time of the interview.
Key considerations for ethical research	**How these considerations were managed**
Participants are adequately informed about both the potential risks and the benefits of the research. [134]	Risks and benefits of the research were identified in the Explanatory Statement and reinforced by the researcher at the time of the interview. The project was classified as 'Low Risk' for the expert professionals who participated in the research.

[130] National Health and Medical Research Council (n 126) 10.
[131] Ibid.
[132] Ibid. The matter of eligibility for sampling and recruitment is discussed in Annexure D.
[133] Ibid 17.
[134] Ibid 13.

Data collection procedures adequately capture and accurately record responses of participants. [135]	Interviews were audio-recorded and fully transcribed to ensure accurate recording of participants' responses.
Participant confidentiality and privacy is maintained in the reporting of the research.	Participants were given pseudonyms and care was taken in reporting of their responses to ensure that they were not identifiable.
Research data integrity and participant confidentiality and privacy are maintained in the management and safe storage of research data. [136]	The researcher prepared a Research Data and Materials Plan compliant with the ACFTRCOR and VURIP requirements to ensure safe and secure storage at the University, and is following that approach.
Research data should be retained for the specified data retention period and then destroyed by secure and irreversible means.	Processes for the retention and final destruction of research data are covered in the researcher's Research Data and Materials Plan, and will be implemented as described there.

A complete account of ethical processes followed alongside eligibility for sampling and recruitment is given in Annexure D. The HREC granted ethics approval for the research on 24 October 2017.

3.3.4 Participant interviews and demographics

Following ethics approval, eligible judges were then invited to participate in the research through an invitation prepared by the researcher and tabled in Annexure E.[137] Eligible barristers and solicitors were then contacted and the same invitation was extended. The same process applied to eligible forensic psychologists and eligible professors of law.

3.3.4.1 Interviews

Once participants had agreed to participate in the research, the researcher liaised with the participants to arrange a convenient time in which to conduct a 40 to 60 minute semi-

[135] Ibid.
[136] See National Health and Medical Research Council (n 126) and Victoria University (n 129).
[137] The invitation contained a background to the study, an informed consent form and the interview questions which each participant would be asked.

structured interview. Before each interview commenced, participants were asked whether they had any questions, were reminded that they could freely withdraw at any time without prejudice and were then asked to sign an informed consent form. The interview then commenced. The responses of each interviewee were then transcribed by professional transcribers. When all transcripts had been generated, participants were supplied with a copy of their transcript to verify the accuracy of their responses.

3.3.4.2 Demographics and saturation

It was necessary to determine how many interviews were sufficient to attain data saturation[138] as a failure to reach saturation risked impacting the quality of the research and its validity.[139] Data saturation occurs 'when there is sufficient information to replicate the study when the ability to obtain additional new information has been attained, and when further coding is no longer feasible'.[140]

In a study conducted by Guest, Bunce and Johnson concerning 60 in-depth interviews, the authors systematically documented the degree of data saturation and variability over the course of thematic analyses.[141] They operationalised saturation and made evidence-based recommendations regarding non-probabilistic sample sizes for the interviews.[142] Based on the data set, they found that saturation occurred within the first twelve interviews.[143]

Accordingly, this research adopted a sample size of 12 with the goal of data saturation in mind (as sample sizes rarely account for the principle of saturation).[144] That being said,

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[138] See Greg Guest, Arwen Bunce and Laura Johnson, 'How many interviews are enough? An experiment with data saturation and variability' (2006) 18(1) *Field Methods* 59-82.
[139] See Glenn Bowen, 'Naturalistic inquiry and the saturation concept: a research note' (2008) 8(1) *Qualitative Research* 137-152. See also Cicely Kerr, Annabel Dixon and Diane Wild, 'Assessing and demonstrating data saturation in qualitative inquiry supporting patient-reported outcomes research' (2014) 10(3) *Expert Review of Pharmacoeconomics & outcomes research* 269-81.
[140] Patricia Fusch and Lawrence Ness, 'Are We There Yet? Data Saturation in Qualitative Research' (2015) 20(9) *The Qualitative Report* 1408.
[141] Ibid.
[142] Ibid.
[143] Ibid.
[144] Wayde Morse, Damon Lowery and Todd Steury reviewed 560 dissertations and concluded that sample sizes were rarely, if ever, chosen for data saturation reasons: Wayde Morse, Damon Lowery and Todd Steury 'Exploring Saturation of Themes and Spatial Locations in Qualitative Research Public Participation' (2014) 27(5) *Society & Natural Resources* 557-571.

data saturation is not 'strictly about numbers', rather, the overall depth of data.[145] In asking multiple participants the same questions, the researcher avoided a 'constantly moving target',[146] ensured sufficient depth and by the 12th interview, could not identify any new data or themes (with regard to the coding parameters stipulated under 3.3.5) and therefore attained saturation.[147]

The 12 participants consisted of one retired judge, nine legal practitioners, one forensic psychologist and one professor of law. Of the nine legal practitioners, eight were barristers of whom four were Queen's Counsel and one was a specialist criminal law solicitor. The mean average years of professional experience among the legal practitioners was 29.[148] Of the 12 participants, eight were male and four were female. See Annexure F for the demographic details of participants.

3.3.5 Data analysis

This research used NVivo (qualitative data analysis software) to code and analyse the 12 interview transcripts. This decision to use NVivo was made because it enables users to efficiently create data matrices as a means of comparing participant answers within the coding process[149] and to efficiently store and sort large volumes of rich, text-based data where deep levels of analysis are required.[150] The transcripts were then coded based on the questions themselves At the conclusion of the coding process, the interview responses were analysed in order to assess whether Victoria's 2005 law unjustly failed to accommodate victims of family violence who killed their violent partners and whether Victoria's 2014 law had increased justice in the accessibility of self-defence for victims of family violence who killed their violent partners.

3.3.5.1 Coding

[145] See Elizabeth Burmeister and Leanne Aitken, 'Sample size: How many is enough?' (2012) 25(4) *Australian Critical Care* 271-274.
[146] Guest, Bunce and Johnson (n 138).
[147] Fusch (n 140) 1409.
[148] Assessed from the date of each practitioner's admission to legal practice.
[149] NVivo, *NVivo for Researchers* (2018) NVivo <https://www.qsrinternational.com/nvivo/who-uses-nvivo/researchers>.
[150] NVivo, *What is Qualitative Research* (2018) <http://www.qsrinternational.com/nvivo/nvivo-community/blog/what-is-qualitative-research>.

Based on the questions and the responses, the researcher first assessed whether Victoria's 2005 law unjustly failed to accommodate the experiences of family violence victims who had killed their violent partners and faced criminal prosecution. The researcher then assessed whether Victoria's 2014 law had increased justice in the accessibility of self-defence in that it was more conducive to upholding its own criterion for a just outcome in comparison to the 2005 law. The results addressed subsidiary research questions 1 and 2 alongside the overarching question outlined at [1.2].

(a) Veracity of thesis and resolution of research questions

Questions 6[151] and 7[152] were directly relevant to the question of whether Victoria's 2005 law had, in the expert opinion of the participants, unjustly failed to achieve its objective. If the majority of participants answered 'no' to question 6 and 'yes' to question 7, the proposition that Victoria's former standard had not achieved its objective was supported.

Questions 16,[153] 17[154] and 18,[155] were directly relevant to the question of whether Victoria's 2014 law had increased justice in the accessibility of self-defence by reducing the risk of imperfect procedural justice arising under the standard (in comparison to Victoria's 2005 law). If the majority of participants answered 'yes' to question 16, 'yes' to question 17 and 'yes' to question 18, the proposition that Victoria's 2014 law had achieved its objective was supported.

(b) Quantifying 'justice' in the accessibility of self-defence

Lastly, the extent to which justice could be said to have increased (in the context of answering the overarching research question and second subsidiary research question) was a question of degree contingent upon the framework outlined in Table 3-2 below.[156]

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[151] Did the 2005 framework of self-defence, defensive homicide and evidence of family violence provide a satisfactory framework to accommodate the dynamics of family violence?

[152] Did the 2005 framework limit the possibility of complete acquittals (for victims of family violence) on the basis of self-defence where evidence pointed to a reasonable possibility of its existence that could not be negated by the Crown beyond reasonable doubt?

[153] Have the reforms created a framework for self-defence which adequately accommodates the dynamics of family violence?

[154] Do the reforms increase the likelihood of victims of family violence being completely acquitted on the basis of self-defence?

[155] Overall, do you think the new framework is fairer; will it or does it make self-defence more accessible to female victims of family violence?

[156] This framework was constructed by way of qualitative meta-analysis where a rigorous secondary qualitative analysis of the primary qualitative findings was employed to achieve two goals. Namely, a more

Table 3–2: Degree of agreement with questions 16, 17 and 18 (collectively)

Number of participants	Degree of agreement
1–3 participants	Trivial degree
4–6 participants	Partial degree
7–8 participants	Significant degree
9–11 participants	Substantial degree
12 participants	Conclusive degree

To address the original contributions to knowledge relating to the first subsidiary research question,[157] the researcher explored the responses to questions 4,[158] 5,[159] 8[160] and 10[161] Through this process, the research identified the values, attitudes, beliefs and opinions of the participants concerning the 2005 law and the following concepts:

- the legal advice given to victims of family violence;
- the plea decision making of practitioners;
- the prosecution of victims of family violence;
- the pathologising of victims of family violence;
- the consequences of the abolition of provocation;
- the enactment of defensive homicide

comprehensive description of the phenomenon researched in the primary study (including its ambiguities and differences), and an assessment of the influence of the method of investigation on its findings: Ladislav Timulak, 'Meta-analysis of qualitative studies: A tool for reviewing qualitative research findings in psychotherapy' (2009) 19(5) *Psychotherapy Research* 591-600. See also Deborah Finfgeld, 'Metasynthesis: The State of the Art – So Far' (2003) 13(7) *Qualitative Health Research* 893-904.

[157] Namely, to investigate whether the previous law of self-defence and evidence of family violence had unjustly failed to accommodate the experiences of family violence victims in criminal prosecutions who were alleged to have killed their violent partners.

[158] Were common law rules on provocation fair to victims of family violence who killed their violent partners?

[159] Was common law provocation unsalvageable or beyond reform when defensive homicide was introduced to address its perceived deficiencies?

[160] Was there a concern by defence lawyers and prosecutors about jurors not understanding these forms of family violence which led to pleas of guilty where a viable claim of self-defence existed?

[161] Some writers suggest that the concept of battered person syndrome leads to lawyers and psychiatrists, judges and jurors pathologising victims. They suggest that this pathologising … leads to them being seen as incapable of forming the reasonable grounds for a subjective belief in the necessity of self-defence. Is this true from your experience? If so, did the concept of defensive homicide contribute to this? If not, defensive homicide did not contribute to this?

- the directions given to juries; and
- the capacity of Victoria's 2005 law to accommodate the dynamics of family violence.

To address the original contributions to knowledge relating to the second subsidiary question of this research,[162] the same process was then applied to questions 11,[163] 12,[164] 13,[165] 14[166] and 15.[167] Through this process, the research identified the values, attitudes, beliefs and opinions of the participants concerning the 2014 law and the following concepts:

- the reformulated doctrine of self-defence;
- the operation of Victoria's social context provisions;
- the operation of the family violence jury directions at trial;
- the consequences of the abolition of defensive homicide; and
- the capacity of Victoria's 2014 law to accommodate the dynamics of family violence.

3.3.5.3 Commentary—original commentary, contributions to knowledge and literature

The researcher then provided commentary based on an analysis of the data obtained from the responses. This commentary was divided into two groups. The first group discussed what was learnt concerning the success or otherwise of the 2005 law. The second theme discussed what was learnt about the operation of the 2014 law and whether it had achieved

[162] To consider whether the reforms have increased justice in the accessibility of self-defence (to victims of family violence who purport to kill their violent partners in self-defence).
[163] Are the 2014 reforms which replaced defensive homicide with the revised form of self-defence in section 322K justified?
[164] Does section 322K and its associated provisions overcome the limits of defensive homicide? [Prompt: If they have previously indicated that defensive homicide was misunderstood: Has s 322K (and associated provisions) removed the misunderstandings and problems surrounding defensive homicide?
[165] In the context of s 322K, does the social context provisions on family violence make its use more just? [Prompt: Do the provisions in the *Jury Directions Act 2015* (Vic) contribute to this?]
[166] Does the new framework for self-defence in the context of family violence sufficiently guard against lawyers and psychiatrists, judges and jurors pathologising victims? Does it assist in them being seen as people capable of engaging in reasonable conduct in the circumstances as they, a victim of family violence, perceives them? [Prompt depending on answer: So victims of family violence are still at risk/are not at risk of being perceived as not being capable of behaving reasonably under the new provisions?]
[167] Based on your experience, are there any beneficial or harmful unintended consequences from the new framework including the *Jury Directions Act 2015* (Vic)]?

its objective of increasing justice in the accessibility of self-defence to victims of family violence.

While there are no standard methods for arriving at the essential meanings and deeper implications of what is said in interviewers,[168] the researcher considered what was learnt from the interviews, what connective threads emerged from the responses and how such connections could be explained.[169] As these standpoints are fundamental to qualitative research,[170] such an approach was deemed to be conducive to providing answers to the research questions and how the responses had been consistent or inconsistent with or advanced what had been learnt from the review of the literature.[171]

3.3.5.4 Exclusion of responses

While a degree of selectivity informed the coding process of data analysis,[172] the researcher acknowledged his responsibility to the academic, legal and wider communities to provide a complete and accurate account of the data.[173] In conformity with the ACFTRCOR, the researcher took all reasonable steps to ensure that findings were accurately reported.[174] This included the reporting of any and all negative findings which were contrary to the researcher's hypothesis.[175] In the event that data was excluded from analysis, exclusion was performed on clear grounds,[176] namely, that the data did not address, or was irrelevant to the aims of research.

3.3.6 Limitations

The following practical and theoretical limitations arose with respect to the qualitative methodology used by this research and must be read alongside the limitations canvassed in Chapter 8 at [8.4].

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[168] Steinar Kvale, *Interviews: An Introduction to Qualitative Research Interviewing* (SAGE Publications, 1996) 180.
[169] Irving Seidman, *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences* (Teachers College Press, 1998) 110.
[170] Kvale (n 168).
[171] Seidman (n 169).
[172] Paul Oliver, *Student's Guide to Research Ethics* (Open University Press, 2nd ed, 2010) 162.
[173] *National Statement on Ethical Conduct in Human Research* (n 113).
[174] Ibid.
[175] Ibid.
[176] Oliver (n 172) 162. For example, anecdotes concerning violent altercations between two males (which did not result from family violence) were excluded from analysis.

3.3.6.1 Sample size—access to judges, legal practitioners, forensic psychologists and academics

Firstly, significant difficulties were experienced in recruiting judges, legal practitioners, psychologists and academics. While all reasonable efforts were made to contact and recruit serving judges of the Supreme Court, access was prohibited on the ground that the Supreme Court did not wish to speak on matters which might come before the Supreme Court. After liaising with the Judicial Services Coordinator, the researcher was informed by email that:

> The email request was received at a very busy time for the Court with all Judges focussed on finalising Court and judgments prior to a short summer break. Having since had an opportunity to discuss the matter with some of our judicial officers … it is unusual for a sitting judge to speak about matters that might come before the court for adjudication. As such, our judges are disinclined to be interviewed.[177]

With regard to legal practitioners, forensic psychologists and academics, many prospective participants did not respond to emails or phone calls. Alternatively, many were consistently unavailable or did not wish to participate. Further, although it was the intention of this research to accrue expert-opinion from an equal distribution of male and female participants, 66% of participants were ultimately male and 33% of participants were female. Lastly, given that the research interviewed 12 participants, it is prudent to acknowledge that the sample may not have been sufficiently large enough[178] to be deemed 'representative' of the judiciary, the legal profession, the psychology profession and the academic profession (notwithstanding the attainment of data saturation).

3.3.6.2 Predetermined coding and confirmation bias

Secondly, as previously discussed, theories are naturally generated through conceptual categories or conceptual properties from evidence.[179] Although this phase of the research

[177] Email from the Judicial Services Coordinator (Supreme Court of Victoria) to Principal Supervisor dated 30 January 2018.
[178] Oliver (n 172) 146. See also Chapter 8, *Limitations* at 8.4.
[179] Glaser and Strauss (n 92).

was deductive,[180] the process of using evidence to assess the veracity of predetermined concepts and ideas which were generated through the abovementioned coding processes[181] exposed the researcher to further risks of confirmation bias. In other words, this research design exposed itself to the possibility of only finding what it had 'coded for'. To mitigate against such bias, the transcripts were reviewed several times to ensure that responses beyond the predetermined coding values (that were nevertheless relevant to the research) were not excluded. For example, judgment was exercised where participants hedged, waffled or otherwise did not answer 'yes' or 'no' neatly.

3.3.6.3 Generalisability

Lastly, the limited sample size and possible coding biases may have created implications for generalisability.[182] Although qualitative research strives to provide adequate analyses for others to determine whether there are other circumstances in which findings may be applicable, the ACFTRCOR provided that it was not strictly necessary to generalise the results of this research.[183]

Regrettably, it was not within the scope and word-limit of this thesis to deal with legal frameworks in other Australian or international jurisdictions. That being said, there is nothing precluding law reform bodies from considering Victoria's current legal framework (and the findings of this research) as a device for comparative analysis.

3.4 Socio-legal method and research design

Although the law may be regarded as a discipline which is primarily concerned with the interpretation of statutes, cases, doctrines and principles,[184] legal scholar and sociologist, Eugen Ehrlich, maintained that formalistic (strictly doctrinal) approaches to the study of law were often technical, mechanical and artificial[185] to the extent that such approaches trivialised, discounted or ignored the notion that legal rules were not self-enforcing. In

[180] In having the benefit of a predetermined theory which was generated through the inductive process followed within the doctrinal research design of this research.
[181] Glaser and Strauss (n 92).
[182] Oliver (n 172) 162.
[183] *National Statement on Ethical Conduct in Human Research* (n 126).
[184] Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research* (Hart Publishing, 2005) 22.
[185] Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8(8) *Columbia Law Review* 606.

other words, they ignored the fact that legal rules required mobilisation by human beings.[186]

Ehrlich argued that non-legal norms and those legal-norms which decision-makers used to decide legal disputes could be viewed as two separate matters as individuals did not always strictly act according to the legal rules which were to be applied in resolving legal processes.[187] While decision-makers were not legally authorised to disregard legal norms in favour of non-legal norms, Ehrlich did not believe that social order was expressed through legal-norms alone.[188] It was unacceptable to presume that the question of what decision-makers 'ought' to do was solely determined by legal rules.[189]

With Ehrlich's position in mind, the doctrinal and qualitative elements of this research were never intended to reflect the criminal law as an institution which produced decisions and verdicts through statutes and decided cases alone. Instead, they were intended to form the basis of an investigation into the relationship between Victoria's 2014 law and any non-legal factors which conceivably influenced a juror's 'mobilisation' of it.[190] Through such an investigation, the third and fourth subsidiary research questions would be addressed.

3.4.1 Generation of relevant socio-legal data

[186] Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 *Law Quarterly Review* 632-650.
[187] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Taylor & Francis, 1st ed, 2001) 10. It is prudent to note that Ehrlich wrote of the Austro-Hungarian legal system which, as a civil law system, was controlled by professional judges with little lay participation in comparison to that of common law juries. For the purposes of this research, relevant decision-makers concern Victorian jurors and the concepts of Ehrlich are transposed accordingly.
[188] Ibid 129.
[189] Ibid 10.
[190] Garry Goodpaster, 'Social Dimensions of Law and Justice by Julius Stone' (1967) 43(1) *Indiana Law Journal* 45.

This research has employed socio-legal methodology to identify any gender,[191] race,[192] interpretative[193] or professional[194] factors (non-legal factors) which could influence a jury's assessment of self-defence and consequently reduce a just accessibility to self-defence for victims of family violence who kill their violent partners. In the event that such factors existed and were deemed to pose a foreseeable risk of imperfect procedural justice arising under Victoria's 2014 law, socio-legal methodology was then used to generate suggestions for law reform which would address such factors.

Although acknowledged that socio-legal research designs could be either empirical or theoretical,[195] both empirical and theoretical investigations were undertaken in the belief that more meaningful theoretical conclusions would be produced[196] for analysis.

3.4.2 Empirical socio-legal research

The empirical approach was first observed by deductively assessing the scientific validity[197] of the sociological hypothesis pronounced in Chapter 4 that non-legal factors continued to pose foreseeable risks of imperfect procedural justice arising under Victoria's 2014 law. This enabled the researcher to determine whether the hypothesis had a basis in reality, in the practical application of the law.[198] Questions 19 to 29[199] of the

[191] For the purposes of this research, gender factors concerned values, perceptions and beliefs of jurors concerning the gender of an accused.
[192] For the purposes of this research, racial factors concerned values, perceptions and beliefs of jurors concerning the race of an accused.
[193] For the purposes of this research, professional factors concerned practitioner understandings of family violence and legal decision-making in the prosecution and defence of victims of family violence; factors which play a part in determining whether a jury is required to assess a matter of self-defence in the first instance and the matter it is required to assess itself. Additionally, practitioner approaches to prosecutions and pleas are considered.
[194] For the purposes of this research, juror interpretation and personal application of law concerned juror comprehensions, uses and applications of legal rules beyond strictly formalistic or legalistic approaches to the interpretation of the law.
[195] Current Sociology, 'The sociology of law' (1972) 20(3) *Current Sociology* 15.
[196] Ibid.
[197] Ibid.
[198] Ibid. The sociological questions devised stem from the discussion of non-legal factors which affect the accessibility of self-defence discussed in Chapter 2, *Jury decision-making* at 2.6; 2.6.1; 2.6.2; 2.6.3 and 2.6.4 (respectively).
[199] These questions afforded participants the opportunity to share their views on potential victim stereotyping, victim pathologising, social and psychological realities of victims of family violence, gender/racial politics, juror applications of law, juror reasoning, value judgments, plea-negotiations in the context of family violence, professional understandings of family violence and professional confidence in the reforms.

interview questions were relevant to this assessment and were informed by the factors outlined in Chapter 2 at [2.6]. Their relevance is illustrated below.

3.4.2.1 Gender

Firstly, question 19[200] was designed to gauge whether the participants believed that stereotypes of women, stereotypes of victims of family violence and social misconceptions concerning family violence (i.e., social factors) would continue to play a part in a juror's assessment of self-defence under the reformed law (the 2014 law) and, if so, whether Victoria's family violence jury directions addressed these phenomena adequately. If seven or more participants answered 'yes' to question 19, the proposition that gender factors posed a foreseeable risk of imperfect procedural justice materialising under Victoria's 2014 law was deemed to be supported.

3.4.2.2 Race

Question 20[201] was designed to measure whether the participants believed that the race of an accused could continue to play a part in a juror's assessment of self-defence under the reformed law and, if so, whether Victoria's family violence jury directions addressed this phenomenon adequately. If seven or more participants answered 'yes' to question 20, the proposition that racial factors posed a foreseeable risk of imperfect procedural justice materialising under Victoria's 2014 law was also deemed to be supported.

3.4.2.3 Professional understandings of family violence and plea decisions

Questions 27,[202] 28,[203] and 29[204] were designed to gauge whether the participants believed that the removal of defensive homicide had left victims of family violence

[200] Are there any stereotypes of women, family violence or gaps in jurors' knowledge about family violence that the *Jury Directions Act* fails to deal with adequately?
[201] Commentators caution that gender and racial politics may play a part in a juror's assessment of self-defence in the context of family violence. If you agree, does the *Jury Directions Act* adequately deal with this?
[202] Does the removal of defensive homicide leave victims of family violence more susceptible to plea-bargains which do not adequately acknowledge the dynamics of family violence?
[203] If so, what facets of the new test for self-defence or jury directions overcome this pressure to plead guilty and to what degree?
[204] To what extent do the reforms increase the judicial and professional understanding of what family violence is and its relevance in the context of self-defence? {Prompt: Have you seen changes in the way in which family violence is understood? Are defence lawyers more likely to use self-defence?] See Chapter 2, *Plea decisions* at 2.6.4.2.

susceptible to plea negotiations which inadequately reflected the dynamics of family violence and if not, whether the facets of the new test for self-defence could be attributed to this phenomenon. Further, whether professional understandings of the dynamics of family violence had increased with the effect of inspiring greater confidence in defence counsel to champion self-defence. Lastly, whether prosecutors attained a greater understanding of the dynamics of family violence.[205]

If seven or more participants answered 'yes' to question 27 or 'no' to questions 28 or 29, the proposition that professional factors posed a foreseeable risk of imperfect procedural justice materialising under Victoria's 2014 law was deemed to be supported.

3.4.2.4 Juror interpretation and personal application of law

Questions 21,[206] 22,[207] 23,[208] 24,[209] 25[210] and 26[211] were designed to gauge whether the participants believed the new self-defence test's requirement of a reasonable response (in comparison to the former test's requirement of reasonable grounds) made it less likely for victims of family violence to be pathologised by practitioners and juries (if they believed that victims of family violence were ever pathologised in practice).

These questions were also designed to discover whether participants believed that:

- the new test's requirement that juries consider the reasonableness of a victim's response in the circumstances as the victim perceived them adequately directed juries to examine the realities of a victim of family violence;
- victim pathologising could continue under this requirement;
- juries may employ impermissible reasoning in applying the new test;

[205] And the relevance of such an understanding to the discretion to prosecute under the Policy of the Director of Public Prosecutions for Victoria.
[206] The reformed test used is whether the conduct of the accused is an objective test of a *reasonable response*. Does this make it more difficult to stereotype or pathologise family violence victims than the previous requirement of *reasonable grounds*?
[207] How far does 'the circumstances' as the accused perceives them extend? Do 'the circumstances' consist of the subjective reality of the victim of family violence?
[208] If it is understood as including the subjective reality for the victim of family violence would this invite further victim pathology and perpetuation of stereotypes by practitioners, judges and jurors? [Prompt: Would the circumstances be perceived as potentially irrational because of the perceived pathological state of the victim?]
[209] Judges will give directions to juries about family violence and its use but is there a risk of jurors employing impermissible reasoning in considering the application of section 322K?
[210] Is it conceivable that jurors may apply their own standards based on their personal values?
[211] Is it possible that jurors may perceive the law as they are directed on it as providing a 'license to kill'?

- juries may be influenced by their own personal values in applying the new test;
- reservations like those reflected in Kirby J's warning in Osland v R[212] could influence jurors in applying the new test; and
- whether compromise verdicts were less likely to result under Victoria's 2014 law.

If seven or more participants answered 'no' to question 21 or question 22, the proposition that juror interpretation and personal application of law posed a foreseeable risk of imperfect procedural justice materialising under Victoria's 2014 law was deemed to be supported. The same would occur if seven or more participants answered 'yes' to questions 23, 24, 25 or 26.

3.4.2.5 Resolution of thesis

Table 3-3 below presents the researcher's decision table showing links between the number of non-legal factors considered to pose a foreseeable risk of imperfect procedural justice and the consequential extent of support for the thesis produced in Chapter 4 at [4.6].

[212] As stated by Kirby J, '… [there is a] need for caution in the reception of testimony concerning BWS. It is not a universally accepted and empirically established scientific phenomenon. Least of all does the mere raising of it, in evidence or argument, cast a protective cloak over an accused, charged with homicide, who alleges subjection to a long-term battering or other abusive relationship. No civilised society removes its protection to human life simply because of the existence of a history of long-term physical or psychological abuse. If it were so, it would expose to unsanctioned homicide, a large number of persons who, in the nature of things, would not be able to give their version of the facts: *Osland v The Queen* [1998] HCA 75 [165] (Kirby J).

Table 3-3: Decision table showing links between the number of non-legal factors considered to pose a foreseeable risk of imperfect procedural justice and the consequential extent of support for the 'thesis' in Chapter 4 at [4.6].

Number of non-legal factors considered to pose a foreseeable risk of imperfect procedural justice	**Decision on the consequent support for the 'thesis' produced in Chapter 4 at [4.6].** **The thesis produced in Chapter 4 is deemed:**
0 of 4	False
1 of 4	Minimally accurate (25%)
2 of 4	Partially accurate (50%)
3 of 4	Mostly accurate (75%)
4 of 4	Conclusively supported (100% accuracy)

If no factors were seen as posing such a risk, the conclusion would be that the 'thesis' would be considered false, and if all four factors were considered to pose such a risk, the conclusion would be that the thesis was conclusively supported. One, two or three factors would be considered to provide varying degrees of support for the thesis.

3.4.3 Theoretical inductive socio-legal design

At the conclusion of the empirical inquiry, the researcher continued to employ Ehrlich's foundation[213] to identify the 'specific content' of those professional and other phenomena which could conceivably influence juror decision making under Victoria's 2014 law, and

[213] With references to Francois Ewald's 'objectivity in the norm' and Roscoe Pound's pragmatic sociology of law reform: see heading 3.4.3.1(a).

further, to provide a social contextualisation of the phenomena which would explain their source and how Victoria's 2014 law intersected with such phenomena.

Although the discipline of sociology was perceived to encompass various methods to the study of law and society, the research ultimately chose Ehrlich's approach as Ehrlich's approach had commonly been used by researchers to produce original research incorporating new ideas about law, specifically, conclusions concerning the social 'reality of law', the 'reality of certain legal rules', 'legal life itself' and the 'facticity' of the law.[214]

Despite Ehrlich's Fundamental Principles of the Sociology of Law having first been published in 1936, the work of Ehrlich has recently been used in the methodological work of Marc Hertogh.[215] Additionally, Javier Trevino recently addressed reasons for the 'disappearance' of references to Ehrlich before demonstrating that his work was still relevant today and 'very much at the cutting edge of socio-legal research'.[216] For instance, Nelken used Ehrlich's work in a 2016 consideration of legal globalisation.[217] Furthermore, Ehrlich's legal sociology and the complex emotions of experiencing the problematic behaviour of other people were considered in the work of Mikhail Antonov.[218]

In light of the continued use of Ehrlich, the researcher concluded that Ehrlich's approach would be most conducive to a discussion of non-legal phenomena and their intersection with Victoria's 2014 law. This phase of the research was characterised as inductive to the extent that it developed explanations from observation[219] and had the effect of facilitating future research by producing hypotheses for deductive scrutiny.[220]

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[214] Current Sociology (n 195).
[215] See, eg, March Hertogh, *Living Law: Reconsidering Eugen Ehrlich* (Bloomsbury Publishing, 2008); Marc Hertogh, *Nobody's Law* (Palgrave Pivot London, 2018) 65-83.
[216] A. Javier Trevino, *On Eugen Ehrlich, Fundamental Principles of the Sociology of Law – Classic Writings in Law and Society* (Routledge, 2017) 129-156.
[217] See David Nelken, *Legal Sociology and the Sociology of Norms – Concepts of Law* (Routledge, 2016) 149-164.
[218] See Mikhail Antonov, 'Eugen Ehrlich and Leon Petrazycki: Are Emotions a Viable Criterion to Distinguish Between Law and Morality?' in *Russian Legal Realism* (Springer Cham, 2018) 127-138.
[219] Snel (n 13). A link may be drawn to Knapp's and Byrne's commentary on assessments of reasonableness: see Chapter 2, *Perceptions of reasonableness* at 2.6.3.2.
[220] Current Sociology (n 195). See also Chapter 2, *The work of the Victorian Law Reform Commission* at 2.3.1 and *The application of defensive homicide to victims of family violence* at 2.4.1.2 where the VLRC and VDJ may be characterised as contemporary examples of socio-legal research.

3.4.3.1 Ehrlich's sociology of law

As mentioned earlier, Ehrlich's sociology of law stood for the proposition that social-legal research should not only test legal rules themselves, but the 'actual life' of legal rules as well.[221] To Ehrlich, this proposition compelled researchers to highlight and distinguish those legal rules which were mobilised by jurors from those unwritten rules of society[222] which informed the actual operation or use of those laws in practice.

(a) Identification and extrapolation of non-legal phenomena

How would sociologists identify that part of the 'living', 'natural' or socially unwritten law that had not been embodied in legal materials yet remained a large and important part thereof?[223] In the eyes of Ehrlich, there was no other way to do this other than to 'open one's eyes and inform oneself by observing life attentively; … [by asking] people [questions] and [considering] their replies'.[224] This led the researcher to reanalyse the responses of the interview participants through Ehrlich's lens (a socio-legal lens applied to qualitative data) in order to identify those non-legal norms which could conceivably influence the intended operation of the law.[225]

In re-analysing the interview transcripts, the researcher first sought to distinguish non-legal phenomena from legal phenomena within the responses. To Ehrlich, this could be achieved by separating those forces which could reasonably be construed as operating independently of those legal norms of decision-making (the written law and the common law or, more specifically, Victoria's 2014 law).[226]

For the purposes of this research, non-legal phenomena consisted of any values, attitudes, beliefs or opinions which could reasonably be construed as being independent of the law's positivist interpretation[227] and practical mobilisation in practice. While juror

[221] Ehrlich (n 187) 498. See Chapter 2, *Significance of the family violence jury directions* at 2.5.2.5.
[222] Ibid.
[223] Ibid.
[224] Ibid.
[225] Nicholas Timasheff, *An Introduction to the Sociology of Law* (Transaction Publishers, 2002) 19.
[226] Ehrlich (n 187) 41. See also Andre Nollkaemper, 'The Distinction Between Non-Legal and Legal Norms in International Affairs: an Analysis with Reference to International Policy for the Protection of the North Sea from Hazardous Substances' (1998) 13(3) *The International Journal of Marine and Coastal Law* 355 as an example of the identification and distinction of legal and non-legal norms in legal research.
[227] For instance, statutory interpretation, interpretation of the common law and the application of statutory and common law principles to facts in issue (assisted by judicial directions).

interpretations of the law were regarded as 'legal' exercises, any social values, attitudes, beliefs or opinions (beyond those established by law) which could reasonably be conceived as having an influence on the law's interpretation and practical mobilisation in practice were regarded as non-legal phenomena.[228]

The notion of 'conceivable influence' was linked to Ehrlich's contention that it would be unacceptable to presume that the question of what juries 'ought' to do was determined solely by legal-norms.[229] This inquiry was assisted by Francois Ewald's notions of objectivity and inequality within the 'norm'. To Ewald, norms possessed the capacity to create inequalities[230] and this reflected the only objectivity which they could provide.[231] In a fitting parallel to Rawls' justice as fairness,[232] Ewald's norm invited:

> [E]ach one of us to imagine ourselves as different from … others, forcing [us] to turn [our backs] upon [our] own particular … individuality and irreducible particularity. The [identified] norm [illustrates] the equality of individuals just as surely as it [would make] apparent the [inequalities] among them.[233] [Here], the norm [could be seen as] … producing social law; a law constituted with reference to the particular society it [purported] to regulate as opposed to a set of [universal truths].[234]

It followed that if the identified non-legal norms could reasonably be construed as reflecting an interest shared among members of the community that arguably advanced the self-interest of one over another (consistent with Rawls' veil of ignorance), the norms could then be said to reveal a sense of inequality amongst the community. If so, the norms were regarded as having conceivable influence over juries and their decision-making as the norms represented unjust interests which self-interest, beyond Rawls' veil of

[228] Any phenomena which may conceivably influence decision-making beyond those defined as legal norms.
[229] See Ehrlich (n 187).
[230] Francois Ewald, 'Norms, Discipline, and the Law' (1990) 30(1) *Law and the Order of Culture* 154.
[231] Ibid.
[232] Encompassing those hypothetical agreements of justice which members of a society would arguably agree to as not unduly encroaching upon their self-interest if they were debarred of all prior knowledge of their own particular advantages and disadvantages owing to their natural qualities.
[233] Ewald (n 230).
[234] Ibid 155. See also Chapter 2, *Schema theory and jury deliberations* at 2.6.1.1 where Ewald's concepts of objectivity and inequality parallel the discussions of schema and stereotyping in the literature.

ignorance, would unfairly seek to protect (at the expense of the community).[235] At this point, the norms were ascribed a term of single meaning in order to establish a set of terminological points of reference.[236]

(b) The risk of imperfect procedural justice

At the conclusion of the inquiry illustrated above, the norms were inductively theorised to have particular sources (or 'causes'). However, it was not suggested that intangible phenomena could be explained by an invisible logic of causality.[237] Instead, the repetition of the norms and their multiple occurrences were contended to imbue such social facts with weight and meaning.[238] As Ewald maintained, the repetition of occurrences brought social facts into existence.[239]

Once the source of the norms had been identified, a discussion was entered into concerning the law's present formulation and its capacity to invoke and perpetuate such norms in conformity with the socio-legal maxim that the law could be regarded as the product of social life.[240] This discussion reflected an inductive examination of Victoria's 2014 law and its intersection with purported social realities:[241] a matter relevant to any conceivable risk of imperfect procedural justice that the standard had not accounted for.

3.4.3.2 Roscoe Pound's sociology of law reform

As mentioned earlier, the preceding inquiries served to provide suggestions for law reform which were designed to mitigate against any sociological risks of imperfect procedural justice which could arise under Victoria's 2014 law. In providing suggestions for law reform, this research adopted Roscoe Pound's sociological jurisprudence of pragmatism in law reform.

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[235] This was consistent with Ehrlich's belief that the interests of a dominant group must coincide with the interests of the whole society or, at the very least, the majority of the members of the association so that other members would obey the norms established by the dominant group: ibid 60.
[236] Ibid 150.
[237] Ibid 144.
[238] Ibid.
[239] Ibid.
[240] Current Sociology (n 195).
[241] Ibid 13.

To Pound, the law had to not only be conscientiously, adequately and fairly designed to secure, protect and promote the interests of society,[242] it had to be able to realistically do so as well.[243] Haack provides a contemporaneous account of the developments of legal pragmatism and evidences its continued relevance.[244] Pertinently, Barzun traces Pound's influence and his relevance to legal pragmatism today in the same symposium as Haack[245] alongside Rorty who has been influential in the more recent use of pragmatism in legal thought.[246]

At the heart of the matter, pragmatism is not so much concerned with what is 'true' but with what is found to work or be useful. As stated in the Stanford Encyclopaedia of Philosophy:

> Pragmatism is a philosophical tradition that – very broadly – understands knowing the world as inseparable from agency within it. This general idea has attracted a remarkably rich and at times contrary range of interpretations, including: that all philosophical concepts should be tested via scientific experimentation, that a claim is true if and only if it is useful (relatedly): if a philosophical theory does not contribute directly to social progress then it is not worth that much), that experience consists in transacting with rather than representing nature, that articulate language rests on a deep bed of shared human practices that can never be fully made explicit.[247]

In essence, the pragmatist researcher chooses research methods based on their usefulness and appropriateness to solve specific research problems (including methods which enable cross checking). As put by Stone, 'the point of pragmatic inquiry is to ascertain whether an idea is meaningful and productive'.[248] Accordingly, the notion of 'truth' is associated

[242] A. Javier Trevino, 'Sociological Jurisprudence' in Reza Banakar and Max Travers (eds), *Law and Social Theory* (Hart Publishing, 2nd ed, 2013) 46.
[243] Ibid.
[244] Susan Haack, 'The Pragmatist Tradition: Lessons for Legal Theorists' (2018) 95(5) *Washington University Law Review* 1049.
[245] Charles Barzun, 'Three Forms of Legal Pragmatism' (2017) 95(5) *Washington University Law Review* 1009-1010.
[246] See Richard Rorty and Hilary Putnam, *The revival of pragmatism: New essays on social thought, law and culture* (Duke University Press, 1998). See also Richard Rorty, 'Pragmatism and law: A response to David Luban' (1997) 18(1) *Cardozo Law Review* 75.
[247] Stanford Encyclopaedia of Philosophy, 'Pragmatism', *Stanford Encyclopaedia of Philosophy* (Article, 16 August 2008).
[248] Rebecca Stone, 'Does Pragmatism Lead to Pluralism' (2006) 16(4) *Theory & Psychology* 558.

with the functionality or utility of ideas: what works or what is useful.[249] It is also constructed from past experiences with reality being 'experience funded' and '… made largely out of previous truths' and the accumulation of one's experiences.[250]

For these reasons, the pragmatist researcher is always open to new evidence and takes an open-minded approach to research in the belief that society should seek ideas which work meaningfully in life and discard the idea that truth can be achieved through the uncovering of an essential, pre-existing reality.[251] That being said, pragmatism is not solely concerned with the usability of knowledge. [252] The quality of the knowledge acquisition process is equally important.[253] Accordingly, pragmatist researchers must present rigorous and thorough research to demonstrate integrity and authenticity throughout the process of research.[254]

It cannot be overlooked that Ehrlich and Pound differed over the role of law and the concept of norms.[255] Specifically, Ehrlich 'insisted on the importance of social forces and developments as the major influence on "living law" as compared to mere legislative and judicial enactments'.[256] This was distinct from Pound who conceived of the 'law' as a 'highly specialised form of social control' applied through a body of authoritative precepts in a judicial or administrative setting.[257]

As observed by Cotterrell, Pound's position came to be seen as 'conservative' and 'intellectually compromised' as it centred on a belief in the judicial process.[258] Pertinently, Levine conceived of Pound's work as a response to 'the rise of social science as an alternative, civil-law-affiliated, administrative paradigm that threatened the

[249] Ibid 556.
[250] Ibid 560.
[251] Ibid.
[252] Robin Whittemore, Susan Chase and Carol Lynn Mandle, 'Validity in qualitative research' (2001) 11(4) *Qualitative health research* 525.
[253] Ibid.
[254] Ibid.
[255] David Nelken, 'Law in action or living law? Back to the beginning in sociology of law 1' (1984) 4(2) *Legal studies* 157-174.
[256] Ibid.
[257] Roscoe Pound, 'Sociology of Law and Sociological Jurisprudence' (1943) 5(1) *The University of Toronto Law Journal* 1-20.
[258] Ibid.

academic interests of the law schools, the professional concerns of the bar and the core constitutional principles of judicial supremacy'.[259]

As a result, Pound's position was eclipsed by legal realism and then, the sociology of law.[260] Legal realism challenged the belief that the judiciary would safeguard the virtues and values of law[261] whereas the sociology of law conceived of legislators being the most significant agents of change in contemporary law (as opposed to jurists).[262] For these reasons, Farrand summarised Cotterrell's position to reflect that:

> Sociological jurisprudence is not another school of jurisprudence. It's not another phrase for legal philosophy. It's not interchangeable with sociology of law. It's an empirically guided, values-and-experience-driven understanding of law, exhibited by legal experts who can be considered jurists. They have expertise in exploring conditions for the well-being of the idea of law.[263]

Despite the limitations of sociological jurisprudence, Cotterrell went on to state that:

> What is of continuing importance about early sociological jurisprudence is that it saw problems of relating state regulatory ambitions to popular aspirations and experience as central to juristic responsibilities (perhaps the most important part of them). By contrast, sociology of law has often tended to see these only as political problems about the efficient formulation and implementation of state regulation, on which social science might advise. The fundamental lesson of sociological jurisprudence is the need to make legal regulation socially responsive, properly informed about social conditions and aware of popular sentiment and experience, is a necessary and fundamental concern for jurists and not just for politicians, legislators and administrators.[264]

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[259] Noga Morag-Levine, *Sociological Jurisprudence and the Spirit of the Common Law* (2018) (Oxford University Press, 2018).
[260] Ibid 11. See also Edward White, 'From sociological jurisprudence to realism: Jurisprudence and social change in early twentieth century America' (1972) 58(6) *Virginia Law Review* 999.
[261] Ibid.
[262] Ibid.
[263] Ben Farrand, 'Book Review: Sociological Jurisprudence: Juristic Thought and Social Inquiry' (2019) 29(1) *Social & Legal Studies* 149-154.
[264] Roger Cotterell, *Sociological Jurisprudence – Past and Present* (Routledge, 2017) 11. See Chapter 2, *Significance of family violence directions* at 2.5.2.5 where Byrne's commentary justifies Cotterrell's claims of the continued importance of legal research informed by sociological research. See also Chapter 7, *Academic and practical significance* at 7.6.1 as Cotterrell's position reflects how academic and practical contributions merge into and overlap with each other.

Accordingly, Cotterrell reaffirmed the importance of 'renewing and refurbishing some aspirations of sociological jurisprudence, but with a much more serious and sustained engagement with contemporary social science than [what] happened [during] Pound's time'.[265] This was because of the need to obtain reliable and empirical social knowledge and insight to address problems of moral distance which pointed towards the significance of sociology in the administration of justice at all levels (as well as the processes of state law-making).[266]

In the submission of the researcher, the sociology of law and sociological jurisprudence are not incompatible. Rather, they are symbiotic and blended accordingly within this research.

(a) Social interests

With Pound's approach of pragmatism in mind, it was imperative to first survey and infer those social interests which had pressed upon lawmakers for recognition and satisfaction.[267] These interests were primarily found in the interview responses to questions 1,[268] 2[269] and 3[270] and questions 19 to 29.[271] The responses to question 30[272] were also consulted as question 30 sought to elicit suggestions for law reform.

(b) Reconciliation

Once these interests had been identified, suggestions for law reform were produced with the goal of pragmatically harmonising the written law with those non-legal phenomena identified through Ehrlich's perspective. In other words, the suggestions were designed to increase justice in the accessibility of self-defence[273] without unduly encroaching upon

[265] Ibid 8-9.
[266] Ibid 11.
[267] Roscoe Pound, 'A Survey of Social Interests' (1943) 57(1) *Harvard Law Review* 17. See also Chapter 2, *Approach to law reform by the VLRC* at 2.3.1.1.
[268] Why in your view is a just response to battered person's syndrome important?
[269] Of the five most significant issues that the criminal justice system has to deal with, where would you rank it?
[270] Would other participants in the criminal justice system see it as being as important as you do?
[271] Those questions which were considered under Ehrlich's sociology of law.
[272] Do you have any suggestions to better address family violence where self-defence is in issue?
[273] In other words, to increase the likelihood of decision-making being fairer in light of a perceived risk of *imperfect procedural justice*.

the values, attitudes, beliefs and opinions of the community so as not to undermine the fair and just use of the law in practice.

This approach was consistent with Ehrlich's contention that the interests of a dominant group must coincide with the interests of the whole society or, at the very least, the majority of the members of the society so that other members would obey the norms established by the dominant group.[274] Further, it did so without falling foul of the Poundian contention that law reform had to ensure a legal order which could be realised in social life lest the law fail in its purpose.[275]

3.4.4 Limitations

The following theoretical and pragmatic limitations arose with respect to the socio-legal research design adopted within this research and must be read alongside the limitations canvassed in Chapter 8 at [8.4].

3.4.4.1 The fluctuating nature of norms

Firstly, in working with norms, it could not be overlooked that their relativity was time-bound.[276] Rhetorically speaking, how could norms function as common reference points when their content was liable to change through the passage of time?[277] Would something 'unstable' offer any security to those who were required to make legislative decisions?[278] With these questions in mind, it was fair to question whether socio-legal research designs were truly 'stable' and functioned as common standards or preconditions for their own conclusions.[279]

[274] In the view of the author, Ehrlich's notion conformed to Rawls' framework in that both theoretical standpoints could reasonably be construed as 'devices of representation': Ehrlich (n 174) 60. See also Chapter 2, *The doctrine of provocation* at 2.3.2.1.
[275] Current Sociology (n 195).
[276] Ewald (n 230) 156.
[277] Ibid 158.
[278] Ibid.
[279] Ibid

Accordingly, it was implicitly acknowledged that norms possessed a largely temporal basis and that human subjectivities were influenced by the passage of time.[280] Although the 'expiration date' of the data's reliability (for the purposes of law reform) could not be quantified, regularities within the data nevertheless reflected a degree of normative objectivity within a particular window of time.[281] That being said, it was not possible to provide an exhaustive account of all conceivable social values which operated within Victoria at any given period.

3.4.4.2 Subjectivity, morality and representation in norms

Secondly, Pound observed that the sociological study of values had been criticised as a 'subjective' and 'unscientific' pursuit (in that it provided unreliable data for evaluative decision-making).[282] Pertinently, empirical legal research has historically been found 'sorely wanting'.[283]

With reference to Epstein and King's rules of inference, legal research which aspires to achieve a descriptive truth about the world should be as objective and even-handed as possible.[284] It must also be fully transparent in its procedures and claims and be supported by a rigorous methodology[285] and, in addition, draw on the considerable body of research on law found in other disciplines.[286]

Such rules may be infringed where inadequate descriptions of sample selections are supplied[287] or where inadequate representativeness and[288] measurements of variables are apparent.[289] The same may be said of overly confident and definitive conclusions.[290] Although conceded that each researcher inevitably creates his or her own socio-legal

[280] Ibid. See Chapter 2, *The doctrine of provocation* at 2.3.2.1.
[281] Ibid.
[282] Roscoe Pound, *Jurisprudence Volume 1* (West Publishing Company, 1959) 345.
[283] See Lee Epstein and Gary King, 'The Rules of Inference', (2002) 69(1) *University of Chicago Law Review* 1-134. See also Frank Cross, Michael Heise and Gregory Sisk, 'Above the Rules: A Response to Epstein and King' (2002) 69(1) *The University of Chicago Law Review* 136.
[284] Epstein and King (n 283) 76.
[285] Ibid 38.
[286] Ibid 56.
[287] Cross, Heise and Sisk (n 283) 138.
[288] Ibid 141.
[289] Ibid 142.
[290] Ibid 146.

research,[291] it is the submission of the researcher that the data produced within this research design may be deemed reliable for the purposes of political decision-making (in conformity with Rawls' conceptions of justice as a political doctrine).

This is contended on the basis that the research has made its best, conscientious effort to provide a precise account of its methods of data generation and classification of data.[292] The rules of inference have also compelled the researcher to examine its presumptions and present its inferences clearly[293] so that scholars may replicate the method if necessary.[294]

3.4.4.3 Pragmatism in law reform

Lastly, although the use of socio-legal research was intended to provide legislators with social data with which to evaluate the pragmatic efficacy of their potential choices,[295] it was not possible or appropriate to provide suggestions for law reform[296] for every conceivable societal phenomenon.[297] However, if legislators are aware of the beliefs and attitudes of the community and how they correspond to black-letter foundational principles, they are advantaged in that their decisions are grounded in what is known about society and the participation of individuals in legal processes.[298] This, in the submission of the researcher, provides legislators with an additional rational source of legitimisation for their decisions.[299]

Notwithstanding the preceding limitations, this research design led to the discovery of matters which would not have been discovered under the doctrinal gaze alone.[300] It also produced a more holistic analysis of the qualitative data in the sense that it addressed legal

[291] Current Sociology (n 195) 12.
[292] Ibid 142.
[293] Ibid 143.
[294] Cross, Heise and Sisk (n 283) 137.
[295] Ibid 18.
[296] Rob Hulls, 'Foreword: Complexity and Violence, the Political Need for Reform' in Kate Fitz-Gibbon and Arie Freiberg, *Homicide Law Reform in Victoria: Retrospect and Prospects* (The Federation Press, 2015) viii.
[297] Ibid.
[298] Current Sociology (n 195) 18.
[299] Ibid 19.
[300] Banakar and Travers (n 184). There is room for disagreement over how far principle may need to give way to practice and what might appear to be true but which is ineffective: see Chapter 8, *Limitations* at 8.4.

phenomena in its social context alongside the underlying societal structures which shaped and determined the nature of the law[301] and its use in practice.[302]

3.5 Conclusion

This chapter has outlined and described the research methods and theoretical frameworks used to answer the research questions posed by this thesis.

Doctrinal method was used to identify, analyse and synthesise the legal rules which governed victims of family violence who killed their violent partners in Victoria.

John Rawls' theory of justice was applied to eight cases heard under Victoria's 2005 law to isolate any examples of imperfect procedural justice. These were cases in which women were not able to access self-defence. Rawls theory of justice was then applied to the three cases heard under the 2014 law. This was done to further isolate any examples of imperfect procedural justice under Victoria's 2014 law.

Qualitative research method was used to interview 12 stakeholders in the criminal justice system to discover if they had any significant insights into the application of the 2005 and 2014 laws in order to assess the veracity of the thesis and address research questions 1 and 2 alongside the overarching research question.

Socio-legal research method was used to discover if there were non-legal factors which impacted on jury members and practitioners and posed risks of imperfect procedural justice under the reformed law despite compelling evidence of self-defence.

In the next chapter, the eight relevant cases heard under Victoria's 2005 law are analysed using Rawls theory of justice. The same analysis is then applied to the relevant three cases heard under Victoria's 2014 law.

[301] Ibid.
[302] Ibid.

CHAPTER 4
JOHN RAWLS' THEORY OF JUSTICE APPLIED

4.1 Introduction

Chapter 3 presented the methodological and theoretical framework adopted to answer the research questions. This chapter further explicates Rawls' theory of justice. His theoretical framework is then applied to the eight relevant cases heard under Victoria's 2005 law to ascertain whether the previous law of self-defence and family violence evidence unjustly failed to accommodate the experiences of family violence victims in criminal prosecutions who were alleged to have killed their violent partners. The chapter then applies Rawls' theory of justice to the three relevant cases heard under Victoria's 2014 law.

4.2 Rawls' Justice as Fairness, Imperfect Procedural Justice and Victoria's 2005 law

4.2.1 Justice as Fairness

To Rawls, the basic structure of a society was the primary subject of justice.[1] A basic structure would amount to a public system of rules which would enable all individuals in a society to act together in pursuit of the greatest sum of benefits to all.[2] In the design of a public system of rules to this end, the objective was to establish a social system which would ensure that all public outcomes were just regardless of what those outcomes ultimately were.[3]

[1] John Rawls, *A Theory of Justice: Revised Edition* (Harvard University Press, 1st rev ed, 1999) 73.
[2] Ibid.
[3] Ibid 74. As was discussed in Chapter 3, *justice as fairness* has been embodied in the *Crimes (Homicide) Act 2005* (Vic). The Act's relevant provisions represented the criterion of a *just outcome*—which was used as a theoretical *standard of justice*: see Chapter 3, *Rawls' Justice as Fairness, situating Victoria's previous*

One would naturally be inclined to question when the design of such rules would be necessary, what these rules would be, who would decide upon them and how. Through Rawls' conception of justice as fairness, such questions may be answered and the criterion of a just outcome, identified.

On the need for a system of rules, Rawls' concept of justice as fairness first required an initial situation, or 'perception of inequality', which warranted principles being established to remedy that inequality.[4] As explored in the literature review, the VLRC's 2004 Report on reforming the then-existing defences or partial defences to homicide[5] had followed concerns about how the criminal law had accommodated women who killed their violent partners in comparison to its treatment of violent men who killed their female partners in situations where the woman had left her partner or had threatened to leave her partner.[6]

The VLRC identified four primary barriers which female defendants had experienced in relation to the law of self-defence and its intersection with family violence. It specifically highlighted that female accused who killed their violent partners:

- had experienced substantial difficulties in demonstrating that the level of defensive force used was reasonable and proportionate in the circumstances;
- had difficulty in explaining the reasonableness of their actions given the apparent existence of alternative options (such as leaving or calling for assistance);
- found it difficult to establish the nature of threat and harm; and
- found it difficult in explaining why they reasonably believed they had to kill.[7]

framework within a theoretical setting through the conceptualisation of a 'standard of justice' at 3.2.4.1(a). This standard of justice underpins the case analyses which follow at 4.3.

[4] Rawls (n 1) 4.

[5] Victorian Law Reform Commission, *Defences to Homicide – Final Report* (Report No 94, October 2004) xv.

[6] Marcia Neave, 'The more things change– the more they stay the same' in Kate Fitz-Gibbon and Arie Frieberg (eds), *Homicide Law Reform in Victoria: Retrospects and Prospects* (The Federation Press, 2015) 15.

[7] *Defences to Homicide – Final Report* (n 5) 70.

The VLRC's findings reflected that a perception of inequality existed in the operation of the law of self-defence and its application to victims of family violence in Victoria—a perception underpinned by three fundamental issues:

1. Due to disparities in strength and size and continuous threats of violence, victims of family violence often killed in ways appearing to be 'at odds' with how self-defence had traditionally been understood—as a defence for those who had used force to preserve life or limb in the context of an immediate altercation.
2. The law of self-defence had inadequately accommodated disproportionate responses to threats or pre-emptive responses on unarmed or otherwise defenceless partners (performed in the context of ongoing family violence).
3. Lethal responses to family violence were commonly perceived to be the product of personal pathology as opposed to socio-cultural or socio-economic circumstances.

With regard to the question of whether a set of principles had been established in response to the perception of inequality referred to above, a Media Release[8] by the then Attorney-General Robert Hulls indicated that the enactment of the Crimes (Homicide) Act 2005 (Vic) reflected that the law had 'evolved from a bygone era [where] the law was concerned with violent confrontations between two males of roughly equal strength [and] a threat of death or serious injury was immediate'.[9] In essence, the enactment of defensive homicide was intended to address the doctrinal challenges of immediacy and proportionality which victims of family violence had traditionally faced—legal notions which often caused juries to doubt that victims of family violence had believed that their actions were necessary or that their beliefs were reasonable.[10]

[8] Office of the Attorney-General, 'Hulls announces major reform to homicide laws' (Media Release 4 October 2005).
[9] Ibid. Note that the Media Release in the preceding footnote is a very concise summary of the Attorney General's second reading speech: Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1843 (Rob Hulls, Attorney-General)
[10] Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1843 (Rob Hulls, Attorney-General). Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1836 (Bruce Mildenhall).

Defensive homicide was also intended to operate as a 'halfway house' between a complete acquittal and a conviction for murder so that more victims of family violence would be encouraged to plead not guilty to murder on the basis of self-defence.[11] The acceptance of the VLRC's recommendations by the Victorian Parliament and its enactment of the Crimes (Homicide) Act 2005 (Vic) reflected that a set of principles had been designed in response to a perception of inequality.

In answering the question of 'who' decided upon these principles and how, Rawls postulated that the principles of justice for the basic structure of a society were to be the product of an 'original agreement':[12] that is, those principles which free and rational members of society concerned with furthering their own interests would have agreed to in an initial position of equality which established the fundamental terms of their association.[13] Just as each individual to this agreement was required to decide by rational reflection what constituted his or her good (a system of ends which would have been rational for him or her to pursue), so too were the collective group of individuals required to decide what was to be considered just and unjust.[14]

In order to reconcile the theoretically endless list of competing values and interests amongst the contracting members of society, Rawls supposed that a process of deliberation would take place within a veil of ignorance:[15] that is, a veil under which no individual would know his or her place in society, his or her class position, social status, fortune, ability, intelligence, strength, psychology, conception of good and beyond.[16]

To Rawls, this ensured that no-one would be advantaged or disadvantaged by the choice of principles, the outcome of natural chance or the contingency of social circumstances.[17] In other words, the principles of justice would be the result of a 'fair' agreement as all parties had been similarly situated and could not have designed principles to favour themselves.[18]

[11] *Defences to Homicide – Final Report* (n 5) xxix.
[12] Rawls (n 1) 10.
[13] Ibid.
[14] Ibid 11.
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid.

The relevant provisions of the Crimes (Homicide) Act 2005 (Vic) may be said to have satisfied such criteria. Rational men, women, perpetrators of family violence and victims of family violence would have agreed to such principles (including the inequalities such principles sought to address) under Rawls' veil of ignorance. That is, whilst ignorant of the advantages or disadvantages which men, women, victims of family violence and perpetrators of family violence would have experienced in the criminal justice system.[19]

As noted by the VLRC, community acceptance of a new defence would have been unlikely if it were not framed in gender-neutral terms,[20] and further, that a specific defence for female victims of family violence risked being perceived as providing women in violent relationships with a 'license to kill'.[21] With such considerations in mind, the relevant provisions of the Crimes (Homicide) Act 2005 (Vic) arguably advanced the self-interest of victims of family violence (namely, their interest in their right to protection from the infliction of cruel and painful injury and their right to liberty) without unduly encroaching upon the self-interest of perpetrators of family violence (namely, their interest in their right to life).

In supposing that these principles were the product of rational decision-making within a hypothetical situation of equal liberty, these principles may be said to have been reached without recourse to natural endowment and social circumstance.[22] Hence:

- the codification of self-defence in section 9AC;
- the enactment of defensive homicide in section 9AD;
- the enactment of manslaughter self-defence in section 9AE; and
- the stipulation of a social context framework of evidence of family in section 9AH

may be said to have reflected principles of justice.

[19] For example, women being perceived as having overreacted with lethal force due to a 'battered pathology' or being questioned as to why they did not leave the relationship: *Defences to Homicide – Final Report* (n 5) 65.
[20] Ibid.
[21] Ibid.
[22] Rawls (n 1) 14.

These principles may be characterised as a standard; [23] in this case, Victoria's 2005 law.[24] That if,

- a disproportionate response to a threat of violence or a response to a non-imminent threat of violence did not, by default, preclude an acquittal (or discontinuance) on the basis of self-defence (in the context of a lethal response to family violence); and
- evidence suggested a reasonable possibility of the existence of facts which established (or arguably would have established) that:
    - the accused had subjectively believed that it was necessary to act in self-defence of themselves or another from the infliction of death or really serious injury; and[25]
    - the accused held objectively reasonable grounds for their subjective belief; and
    - the Crown could not disprove (or arguably would not have disproved), beyond reasonable doubt, that the accused had subjectively believed that it was necessary to act in self-defence of themselves or another from the infliction of death or really serious injury or that the accused held reasonable grounds for that subjective belief;

the fair outcome was that the accused ought to have been acquitted of a homicide offence on the basis of self-defence. Alternatively, the accused ought to have had their prosecution discontinued on the basis of self-defence (depending on whether the accused had been tried for a homicide offence or had pleaded guilty to a homicide offence).

4.2.2 Imperfect Procedural Justice

To Rawls, this conception of justice could be used as a basis for the scrutiny of public processes and their outcomes.[26] In his conception of perfect procedural justice [appearing in his revised edition of A *Theory of Justice* in 1999 and previously discussed at

[23] Ibid 11.
[24] Ibid 11.
[25] For the purposes of manslaughter, to simply defend him or herself or another person.
[26] Rawls (n 1) 11.

3.2.4.1(b)], Rawls supposed that justice represented the criterion of a 'just outcome'[27] which was independent of the formal public procedure which was to be used to assess its applicability.[28] Further, that it was possible to devise a procedure which was certain to lead to a just outcome.[29] Although the legislative statement of a conception of justice was assumed to uphold itself in a formal public process,[30] Rawls conceded that perfect procedural justice was rare, if not impossible, in cases of significant practical interest.[31]

In the view of Rawls, it was impossible to design legal rules so that they always led to a 'correct result'.[32] Even where the law was carefully applied and the proceedings fairly and properly conducted, a criminal prosecution could still reach the 'wrong outcome'.[33] That is, an innocent individual could be found guilty and a guilty individual could be set free.[34] Although there may have been an independent criterion for a 'just outcome', there was no procedure which was sure to lead to it:[35] a phenomenon described by Rawls as a matter of imperfect procedural justice.[36]

Having regard to Rawls' theoretical framework presented in this and the previous chapter, his concept of imperfect procedural justice may be observed within the following eight prosecutions of victims of family violence under Victoria's 2005 law.

[27] Ibid 85.
[28] Ibid 74.
[29] Ibid.
[30] Joshua Cohen, For a democratic society' in Samuel Freeman (ed.) *The Cambridge Companion to Rawls* (Cambridge University Press, 2003) 93.
[31] Rawls (n 1) 74.
[32] Ibid 75.
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid.

4.3 Relevant prosecutions

4.3.1 R v Kulla [2010] VSC 60

4.3.1.1 Material evidence

In R v Kulla,[37] Hussein Mumin and Melissa Kulla had been in a de-facto relationship for four months before Kulla stabbed and killed Mumin.[38] Their relationship was characterised as one of 'mutual abuse'[39] where 'violent fights … between [them]'[40] were commonplace due to their frequent and excessive consumption of alcohol. To the prosecution, they were two 'very troubled people … with disabilities'.[41]

Mumin was born in Somalia. His mother died when he was a small child, and his father died during the Somalian civil war.[42] Traumatised, Mumin experienced difficulty securing employment in Australia and in learning English.[43] Before long, he had convictions relating to offences for violence (including armed robbery) and had spent periods imprisoned.[44] Before his death, Mumin was under a court-ordered justice plan,[45] as he suffered from a mild intellectual disability and an alcohol-related brain injury.[46] Whilst Mumin had the support of a range of public services, Kulla had 'no support from anyone.'[47]

In a report by psychologist Bernard Healey, Kulla was found to have an IQ of 72.[48] Neuropsychologist Dr Lindsay Vowels testified that Kulla, had great 'difficulty with selective inhibition and was self-monitoring to recognise errors and inappropriate responses.'[49] In sentencing, Justice King observed that Kulla had a 'lengthy history of drug and alcohol abuse,'[50] and that she had been removed from her mother's care due to

[37] [2010] VSC 60 ('*Kulla Kulla Melissa*').
[38] Ibid [10], [19] (King J).
[39] Ibid [32] (King J).
[40] Ibid [15] (King J).
[41] Ibid [32] (King J).
[42] Ibid [4] (King J).
[43] Ibid [5] (King J).
[44] Ibid [6] (King J).
[45] Ibid.
[46] Ibid.
[47] Ibid [16] (King J)
[48] Ibid [61] (King J).
[49] Ibid [62] (King J).
[50] Ibid [64] (King J).

'severe neglect',[51] had suffered physical and sexual abuse 'from the time [she was] born'[52] and had attempted suicide several times.[53]

Kulla had been abducted and stabbed in the chest, attacked with a screwdriver, assaulted with a hammer and beaten with a stock whip on a regular basis.[54] Justice King went on to comment that, as a country, 'we should be thoroughly ashamed of ourselves that [Kulla] had been neglected and abused in the manner that [she had] been … and [that] we, as a society, [had done] nothing to stop it'.[55]

In a relationship described as '… highly dysfunctional, threatening and damaging … to both [Kulla] and … [Mumin]',[56] the pair were observed to have been occasionally happy and content together before things would change.[57] However, after the stabbing and death of Mumin, Kulla stated in her formal interview to Police that after Mumin's caretaker Mr Te Paki had left Mumin's residence on 10 September 2008, Kulla began to cook a meal for herself and Mumin.[58] While cooking, Mumin started to argue with Kulla.[59] After taking food out of the oven, Mumin threw the oven tray at Kulla and threatened to kill her.[60] He then began to push Kulla around and grab at her clothes.[61]

Mumin then picked up a knife in the kitchen and said that he would kill Kulla.[62] As Kulla attempted to disarm Mumin, the knife was alleged to have plunged into Mumin's chest whilst it was under his control.[63] After Mumin collapsed, Kulla, in panic, hid the knife behind the washing machine, attempted to help Mumin by wiping up his blood and then flagged down a taxi driver.[64] The physical evidence found by the police supported Kulla's claim that Mumin had thrown the oven tray at Kulla.[65] Additionally, in the last paragraph

[51] Ibid [38] (King J).
[52] Ibid [35] (King J).
[53] Ibid.
[54] Ibid [60] (King J).
[55] Ibid [51] (King J).
[56] Ibid [16] (King J).
[57] On one occasion, Mumin chased Kulla in a 'very threatening manner', whereupon he grabbed Kulla and pulled off all her clothes: ibid
[58] Ibid [25] (King J).
[59] Ibid.
[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid [26] (King J).

of its opening, the Crown stated that it was 'unable to say precisely what [had] happened between them in the lead up to the stabbing'.[66] Kulla was charged with murder before offering to plead guilty to manslaughter by an unlawful and dangerous act.[67] She was subsequently sentenced to six years imprisonment with a non-parole period of three years.[68]

4.3.1.2 The law of self-defence

With the presumption of innocence in mind,[69] Kulla held a viable claim to self-defence, which ought to have resulted in the discontinuance of her prosecution for murder. Mumin's threatening conduct and subsequent approach with a kitchen knife would have discharged the evidential burden of self-defence and led Kulla to subjectively believe[70] that her conduct was necessary to defend herself from the infliction of death or really serious injury pursuant to section 9AC of the Crimes Act 1958 (Vic).[71] As section 9AC codified the subjective limb of self-defence as pronounced in Zecevic,[72] the determination of whether Kulla believed her actions to be necessary consisted of two separate yet interrelated questions.[73] The first of these was whether Kulla believed that it was necessary to defend herself at all, and the second, whether she believed it was necessary to respond in the way that she did given the threat as she perceived it.[74]

Having regard to the material evidence and Mumin's armed attack, it is unlikely that the Crown would have persuaded a jury beyond a reasonable doubt that Kulla had not believed that it was necessary to defend herself. With regard to Kulla's response, namely, her attempt to disarm Mumin, it is equally unlikely that the Crown would have persuaded

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[66] Ibid.
[67] Ibid [60] (King J).
[68] Ibid.
[69] As the accused's prosecution was resolved by plea of guilty, the evidence sourced amounts to a synopsis of the evidence which was available to the prosecution at the time. As a result, none of the evidence was tested for credibility at trial (as it would have been had the accused pleaded not guilty). Additionally, the credibility of any witnesses (expert or otherwise) which may have been called by defence counsel was not tested at trial. In other words, the evidence which might have been available at trial is not necessarily the same as that which was presented at sentence. See 3.2.6.1.
[70] The test imposed under section 9AC was ruled to be purely subjective: *Babic v The Queen* [2010] VSCA 198 ('*Babic*')
[71] *Crimes Act* 1958 (Vic) s 9AC ('*Crimes Act*').
[72] *Babic* (n 70).
[73] See *Zecevic v DPP* (1987) 162 CLR 645 ('*Zecevic*').
[74] Ibid.

a jury beyond a reasonable doubt that Kulla had not believed that it was necessary to engage in a struggle with Mumin, attempt to disarm him and ultimately stab him.

These arguments would have been supported by the common law's requirement that a jury assess what Kulla herself had believed as opposed to what the ordinary reasonable person would have believed in the circumstances.[75] Further, it was immaterial whether Kulla's belief was mistaken[76] or created by intoxication:[77] it was only required that such a belief be genuinely held.[78] Lastly, as a person who had reacted instantly to imminent danger, Kulla could not have been expected to have precisely weighed the exact measure of self-defensive action which was required.[79]

With these considerations in mind and the proportionality of Kulla's response being just one factor for consideration in the determination of whether she believed that her actions were necessary,[80] it is unlikely that the Crown would have persuaded a jury beyond a reasonable doubt that Kulla had not genuinely held a necessary belief to act in self-defence.

On the basis of section 9AC, Mumin's threatening conduct and subsequent approach with a kitchen knife would have also led Kulla to have possessed objectively reasonable grounds for her belief in the necessity of self-defence [pursuant to section 9AD of the Crimes Act 1958 (Vic)].[81]

As section 9AD codified the objective limb of self-defence as pronounced in Zecevic,[82] the determination of whether Kulla held reasonable grounds for her belief in the necessity of self-defence would have required consideration of whether Kulla (as opposed to the hypothetical reasonable person)[83] held no reasonable grounds for her belief in the

[75] Ibid. See also *Viro v R* [1978] HCA 9 – 141 CLR 88 ('*Viro*'); *Conlon v R (1993)* 69 Crim R 92 ('*Conlon*').
[76] *R v McKay* [1957] VR 560 ('*McKay*').
[77] *Conlon* (n 75); *R v Katarzynski* [2002] NSWSC 613 ('*Katarzynski*').
[78] *McKay* (n 76).
[79] *R v Palmer* [1971] AC 814 ('*Palmer*'). See also *Zecevic* (73); *Conlon* (n 75).
[80] See *Zecevic* (N 80); *R v Portelli* (2004) 10 VR 259 (*'Portelli*'); [2004] VSCA 178; *R v Carrington* [2007] VSC 422 ('*Carrington*').
[81] *Crimes Act* (n 71) s 9AD.
[82]
[83] At common law, it was possible to take into account the accused's state of intoxication in determining whether the accused believed his or her actions were necessary, as well as in determining whether that belief was based on reasonable grounds. However, the *Crimes Act 1958* (Vic) provided that if any part of an element of a relevant offence, or of a defence to a relevant offence, [relied] on a person having reasonable

circumstances as she perceived them to be;[84] a belief which Kulla might reasonably have held in all the circumstances.[85] In resolving these considerations, a jury would have been required to consider the circumstances outlined in Table 4–1.

Table 4–1: Factors which a jury should take into account when determining self-defence under the Crimes (Homicide) Act 2005 (Vic)

Factors—The subjective belief in the necessity of conduct in self-defence	**Case or legislative authority**
1. A subjective belief that the conduct was necessary to defend themselves from the infliction of death or really serious injury	Crimes Act 1958 (Vic) s 9AC
2. A belief in the necessity of responding in the way in which they did given the threat(s) as they perceived them	Zecevic v DPP (1987) 162 CLR 645; See also Viro v R [1978] HCA 9 – 141 CLR 88; Conlon v R (1993) 69 Crim R 92.

Table 4–1: Factors which a jury should take into account when determining self-defence under the Crimes (Homicide) Act 2005 (Vic) (cont'd)

Factors—The subjective belief in the necessity of conduct in self-defence	**Case or legislative authority**
3. What the accused believed, as opposed to the ordinary reasonable person	R v Hector [1953] VLR 543 ('Hector')
4. The proportionality of the response to the perceived threat being relevant to the determination of whether they believed that their actions were necessary	R v Portelli (2004) 10 VR 259 ('Portelli'); [2004] VSCA 178; R v Carrington [2007] VSC 422 ('Carrington'). Zecevic v DPP (1987) 162 CLR 645;
5. The personal characteristics of the accused, such as any deluded beliefs she held or any excitement, affront or distress she was experiencing	Grosser v R (1999) 73 SASR 584 ('Grosser'); R v Walsh (1991) 60 A Crim R 419 ('Walsh'). R v Wills [1983] 2 VR 201 ('Wills')
Factors—The existence of objectively reasonable grounds for the subjective belief in the necessity of conduct in self-defence	**Case or legislative authority**

grounds for a belief, in determining whether those reasonable grounds existed, regard [was] [to] be had to the standard of a reasonable person who [was] not intoxicated: *Conlon* (n 75); *Crimes Act* (n 71) s 9AJ(2).

[84] See *Portelli* (n 80); Viro (n 75)

[85] See *Zecevic* (n 73); R v Wills [1983] 2 VR 201 ('Wills').

1. The surrounding circumstances	R v Wills [1983] 2 VR 201 ('Wills'). Zecevic v DPP (1987) 162 CLR 645.
2. All of the facts which were within the accused's knowledge	R v Wills [1983] 2 VR 201 ('Wills'). Zecevic v DPP (1987) 162 CLR 645
3. The relationship between the parties involved	R v Hector [1953] VLR 543 ('Hector')
4. The prior conduct of the victim	R v Besim [2004] VSC 169 ('Besim').
5. The personal characteristics of the accused, such as any deluded beliefs she held or any excitement, affront or distress she was experiencing	Grosser v R (1999) 73 SASR 584 ('Grosser'); R v Walsh (1991) 60 A Crim R 419 ('Walsh'). R v Wills [1983] 2 VR 201 ('Wills')
6. The proportionality of the accused's response	Zecevic (n 170); R v Portelli (2004) 10 VR 259 ('Portelli') [2004] VSCA 178.
7. The accused's failure to retreat	R v Howe (1958) 100 CLR 448 ('Howe'). Zecevic v DPP (1987) 162 CLR 645
8. Circumstances of family violence	Crimes Act 1958 (Vic) s 9AH.

In resolving these considerations and ultimately determining whether there were no reasonable grounds for Kulla's belief that it was necessary to do what she did[86] (as opposed to whether Kulla had acted unreasonably in the circumstances),[87] it is submitted that Kulla possessed reasonable grounds for the belief referred to in section 9AC given that she:

- was in close proximity to an aggressive and threatening Mumin;
- was aware of his approach with a knife; and
- was aware of his intoxication and impaired faculties.

On the basis of Kulla's relationship with Mumin and his prior conduct, Kulla may further be said to have held reasonable grounds for her belief given that their relationship was one of violence and dysfunction. Additionally, Mumin had threatened to kill her.

Having regard to Kulla's personal characteristics alongside any distress she had experienced, it is submitted that Kulla would have experienced significant fear when

[86] *R v Hendy* [2008] VSCA 231 ('*Hendy*').
[87] Ibid.

Mumin threw the oven tray, threatened to kill her and then approached her with a knife in rapid succession. This fear would have been exacerbated by a personal quality, namely an IQ of 72.

In considering the proportionality of Kulla's response, it is prudent to note that the neuropsychological assessment report prepared by Dr Lindsay Vowels which was tendered during the plea in mitigation of sentence indicated that Kulla had 'greater difficulty with selective inhibition and was self-monitoring to recognise errors and inappropriate responses'.[88] Such evidence could have led a jury to perceive that Kulla's use of force was in excess of that represented by Mumin's threatened harm. However, the existence of family violence in their relationship would have enabled Kulla to rely upon section 9AH of the Crimes Act[89] to demonstrate that she may have possessed reasonable grounds for her belief.[90]

That being said, the necessity of recourse to section 9AH would have been questionable given that Mumin had threatened to kill Kulla, thrown a tray at her and then approached her with a knife in seemingly rapid succession. In giving proper weight to the predicament of Kulla which may have afforded little, if any, opportunity for calm deliberation and detached reflection,[91] Crown arguments against the proportionality of Kulla's single stabbing would have been, in the submission of the researcher, overzealous.

Having regard to the material evidence and the considerations addressed above, it is unlikely that the Crown would have persuaded a jury beyond a reasonable doubt that Kulla (as opposed to the hypothetical reasonable person)[92] had not held reasonable grounds for her belief that it was necessary to defend herself—a belief which she could be said to have reasonably held given the matters addressed above. Put another way, a

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[88] Dr Lindsay M Vowels (a Member of the College of Clinical Neuropsychologists and Clinical Psychologists) did not believe that Kulla was attempting to exaggerate her cognitive disabilities as an excuse for offending behaviour: *Kulla Kulla Mellisa* (n 36) [62] (King J).
[89] *Crimes Act* (n 71) s 9AH.
[90] Ibid ss 9AH(1)-(3).
[91] *Zecevic* (n 73).
[92] At common law, it was possible to take into account the accused's state of intoxication in determining whether the accused believed his or her actions were necessary, as well as in determining whether that belief was based on reasonable grounds. However, the *Crimes Act 1958* (Vic) provided that if any part of an element of a relevant offence, or of a defence to a relevant offence, [relied] on a person having reasonable grounds for a belief, in determining whether those reasonable grounds existed, regard [was] [to] be had to the standard of a reasonable person who [was] not intoxicated: *Conlon* (n 75); *Crimes Act* (n 71) s 9AJ(2).

hypothetical reasonable jury, properly instructed, having considered all the circumstances of the case and each factor within its broader context,[93] would have likely found Kulla not guilty of murder, defensive homicide or manslaughter on the basis of self-defence.

4.3.1.3 Manifestations of injustice and imperfect procedural justice

Despite the doctrinal content of the law having provided Melissa Kulla with an avenue to acquittal, Kulla chose not to take this avenue. In light of the obligations of confidentiality which practitioners have to their clients, the reason(s) for Kulla's decision can only be deduced by speculation. It is plausible that Kulla's decision may have been informed by an uncertainty as to how a jury would have perceived her and her behaviour amidst a relationship of 'mutual violence' in which she remained. If such anxiety existed, it would have undoubtedly been exacerbated by the struggle having been 'alleged' alongside the prospect of a lengthier sentence of imprisonment had she been found guilty by way of trial. It is also open to question whether the family violence provisions were explained to Kulla in language which she understood and whether counsel appreciated the inequalities which the 2005 law sought to address. These are matters which competent practitioners would have prudently advised her of.

Alternatively, Kulla may have pleaded guilty out of shame, remorse or a desire to account for the death Mumin, for whom she cared. Notwithstanding the myriad of possible explanations for Kulla's decision, a common thread exists between them. Victoria's 2005 law did not inspire confidence in Kulla to proceed to trial despite the existence of a viable claim to self-defence.

Kulla's decision may be said to have been antithetical to the spirit of Victoria's 2005 law in the sense that the decision paid insufficient weight to the inequalities which the standard had sought to address, particularly those matters canvassed by the family violence provisions. On this basis, given the strength of her claim to self-defence Kulla's decision to plead guilty to manslaughter by an unlawful and dangerous act itself represented the first manifestation of injustice to arise under Victoria's 2005 law: an act which unjustly prevented Kulla from meeting the criterion of a just outcome established

[93] See *Zecevic* (n 73), *R v Dziduch* (1990) 47 A Crim R 378 ('*Dziduch*') and *Portelli* (n 80).

under Victoria's 2005 law and led to Rawls' conception of imperfect procedural justice arising within her prosecution.

While the legislative principles in Victoria's 2005 law could be presumed to uphold themselves, the prosecution of Melissa Kulla reflected Rawls' imperfect procedural justice in the sense that no assurances could be made that the prosecutions process would yield a just outcome for Kulla without a risk of failure.[94] Although the standard of justice had established an independent criterion for a just outcome, the proceedings nevertheless reached an unfair outcome in that Kulla, an innocent accused, was convicted.

The extent to which the written, doctrinal content of Victoria's 2005 law failed to inspire confidence in Kulla to proceed to trial on the basis of self-defence reflects the extent to which Victoria's previous law of self-defence and family violence provisions unjustly failed to accommodate her experiences.

4.3.2 R v Black [2011] VSC 152

4.3.2.1 Material evidence

On Friday 30 October 2009 at approximately 8.30am, Karen Black returned from nightshift work to her home in Corio, Victoria.[95] Black woke her de-facto husband, Wayne Clarke, and they went shopping.[96] On the way, Clarke began to criticise Black whilst suggesting sexual intercourse over the weekend.[97] The pair subsequently went a local hotel where Clarke ordered a jug of beer.[98] Clarke then drove Black home even though he had become 'quite drunk'.[99]

During their relationship, Black's son, Clint Black, observed that Clarke would treat Black 'like shit if he'd been drinking'.[100] In such cases, Clarke would become a 'tormentor'[101] and Clint, having at times seen bruises on Black,[102] would have to 'pull

[94] Rawls (n 1) 85.
[95] *R v Black* [2011] VSC 152, [1] (Curtain J) ('*Black*').
[96] Ibid.
[97] Ibid.
[98] Ibid.
[99] As noted by Curtain J, the deceased was found to have a blood alcohol content of 0.22 grams per 100 millilitres of blood (sourced from another paragraph): ibid [4] (Curtain J).
[100] Ibid [7] (Curtain J).
[101] Ibid.
[102] Ibid.

him up [as] it was getting a bit out of hand'.[103] Returning from an outing with friends, Black discovered that a knife and a gold coin had been placed on her pillow.[104] Clarke never explained why he had done this and became increasingly possessive of Black.[105] This led Black to never go out socially without Clarke again.[106]

Black gave evidence that Clarke would poke her with his finger, jab her in the chest, jab her on the forehead and sometimes force himself upon her sexually.[107] No longer being sure of what Clarke might do to her,[108] Black would lock herself in her room whenever Clarke 'got past that point with his drinking'.[109] Although Black herself did not describe Clarke's abuse as physical, a report prepared by Mr Jeffrey Cummins indicated that in light of the history of family violence, intimidation, verbal harassment, degrading comments and unwanted sexual contact, Black had experienced physical domestic violence.

On returning home on that Friday, Black and Clarke began to argue over Clarke not wanting to work that night.[110] During the argument, Clarke made reference to Black's children (including Clint), which exacerbated the argument.[111] Black moved to the kitchen and Clarke followed her.[112] Moments later, Clarke came up to Black and began 'sticking his chest out' before pinning Black into the corner of the kitchen.[113] Clarke then began to hit Black before Black told him that he was 'pushing it too far'.[114] At this point, Black grabbed a kitchen knife and Clarke responded by continuing to corner her and egging her on.[115] Black then stabbed Clarke twice in the chest.[116]

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[103] Ibid.
[104] Ibid [14] (Curtain J).
[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Ibid [14] (Curtain J)
[109] Ibid.
[110] Ibid [1] (Curtain J).
[111] Ibid.
[112] Ibid.
[113] Ibid.
[114] Ibid.
[115] Ibid.
[116] Ibid.

After Clarke had been stabbed, Black went to Clint's bedroom and told him that she had hurt Clarke.[117] Clint told Black to leave and called an ambulance.[118] On arrival, the paramedics found Clarke not breathing, unconscious and with no pulse.[119] Attempts to resuscitate Clarke at Geelong Hospital failed.[120] Black subsequently went to Geelong Police Station and stated that she had stabbed Clarke.[121] In her record of interview, Black stated that she 'could not justify what had happened';[122] that she 'had not [meant] to' but, at the time, had also 'wanted to kill him'.[123] She stated that Clarke was 'coming closer and closer to [her] and was pointing his finger at [her]… [She] was thinking [that] because he was so drunk he … probably [wanted] to force himself on [her] sexually and … was just thinking well what else [could he] do to me.'[124]

Black was subsequently charged with murder before offering to plead guilty to defensive homicide. She was convicted of defensive homicide and sentenced to nine years imprisonment with a non-parole period of six years.[125]

4.3.2.2 The law of self-defence

With the presumption of innocence in mind,[126] Karen Black, like Melissa Kulla, held a viable claim to self-defence which ought to have resulted in the discontinuance of her prosecution for murder. In response to the Crown's charge of murder, Clarke's prior violence, aggressive approach, subsequent pinning of Black into a corner and her belief that Clarke was going to sexually assault her would have discharged the evidential burden of self-defence. It would have led Black to subjectively believe[127] that her conduct was

[117] Ibid [2] (Curtain J).
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Ibid.
[123] Ibid.
[124] Ibid [18] (Curtain J).
[125] Ibid [27] (Curtain J).
[126] As the accused's prosecution was resolved by plea of guilty, the evidence sourced amounts to a synopsis of the evidence which was available to the prosecution at the time. As a result, none of the evidence was tested for credibility at trial (as it would have been had the accused pleaded not guilty). Additionally, the credibility of any witnesses (expert or otherwise) which may have been called by defence counsel was not tested at trial. In other words, the evidence which might have been available at trial is not necessarily the same as that which was presented at sentence. See 3.2.6.1.
[127] The test imposed under section 9AC was ruled to be purely subjective: *Babic* (n 70).

necessary to defend herself from the infliction of really serious injury[128] pursuant to section 9AC of the Crimes Act 1958 (Vic).[129]

As established in Zecevic,[130] determining whether Black believed her actions to be necessary consisted of two separate yet interrelated questions:[131] firstly, whether Black believed that it was necessary to defend herself at all and, secondly, whether she believed it was necessary to respond as she did given the threat as she perceived it.

Having regard to the material evidence, including Clarke's aggressive approach, it is unlikely that the Crown would have persuaded a jury beyond a reasonable doubt that Black had not believed that it was necessary to defend herself. With regard to Black's response, namely, her decision to pre-emptively stab Clarke, it is equally unlikely that the Crown would have persuaded a jury beyond a reasonable doubt that Black had not believed that it was necessary to stab Clarke to prevent a really serious injury.[132]

These arguments would have been bolstered by the common law's requirement that a jury assess what Black herself[133] had believed as opposed to what the ordinary reasonable person would have believed in the circumstances.[134] Under the common law, it was immaterial whether Black's belief was mistaken[135] or created by intoxication[136] if such a belief were genuinely held.[137] Both the Crown and the Court characterised Black's response as disproportionate and the common law provided that a highly disproportionate

[128] Although the *Crimes Act 1958* (Vic) had not defined *really serious injury*, sexual abuse was recognised under section 9AH as a form of family violence, a recognition of the impact of sexual abuse as a serious psychological and potentially physical injury: Kirkwood, McKenzie and Tyson, 'Justice or Judgment?: The impact of Victorian homicide law reforms on responses to women who kill intimate partners', *Domestic Violence Resource Centre Victoria* (Discussion Paper, November 2013), 19.
[129] *Crimes Act* (n 71) s 9AC.
[130] *Babic* (n 70); *Zecevic* (n 73).
[131] *Zecevic* (n 73).
[132] As mentioned in the material evidence, Black feared that she would experience sexual abuse and had 'gotten to a point where she no longer knew what Clarke would do to her': *Black* (n 95) [12] (Curtain J).
[133] As stated by Black, '[Clarke] was then coming closer and closer to [her] and was pointing his finger at [her], and [she] was thinking because he was so drunk he would probably want to force himself on [her] sexually and [she] was just thinking well what else could he do to [her]? The situation also reminded Black of [her] father and in those circumstances, [Black] stabbed [Clarke] twice in the chest': ibid.
[134] *Zecevic* (n 73). See also, *Viro* (n 75); *Conlon* (n 75).
[135] *McKay* (n 76).
[136] *Conlon* (n 75); *Katarzynski* (n 77).
[137] *McKay* (n 76).

response could indicate an intention to use circumstances for aggression or retaliation as opposed to self-defence.[138]

However, as family violence had been alleged,[139] section 9AH provided that Black could have believed that her conduct was necessary to defend herself even though her response may be said to have involved the use of force in excess of the force involved in the threatened harm which Clarke presented.[140] This, and the proportionality of Black's response being just one factor for consideration in the determination of whether she believed that her actions were necessary,[141] mean that it is unlikely that the Crown would have persuaded a jury beyond a reasonable doubt that Black had not genuinely held a necessary belief to act in self-defence.

In the context of section 9AC, it is submitted that Clarke's threatening conduct and subsequent approach with a kitchen knife would have also led Black to have possessed objectively reasonable grounds for her belief in the necessity of self-defence pursuant to section 9AD of the Crimes Act 1958 (Vic).[142] As section 9AD codified the objective limb of self-defence as stated in Zecevic,[143] determining whether Black held reasonable grounds for her belief in the necessity of self-defence would have required consideration of whether Black (and not a hypothetical reasonable person)[144] held no reasonable grounds for her belief in the circumstances as she perceived them to be;[145] a belief which Black might reasonably have held in all the circumstances.[146]

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[138] *Zecevic* (n 73).
[139] *Crimes Act* (n 71) ss 9AH(3)(b)-(e).
[140] Ibid ss 9AH(1)(a)-(d).
[141] See *Zecevic* (n 73); *Portelli* (n 80); *Carrington* (n 80).
[142] Ibid s 9AD.
[143] See *Babic* (n 70); *Zecevic* (n 73).
[144] At common law, it was possible to take into account the accused's state of intoxication in determining whether the accused believed his or her actions were necessary, as well as in determining whether that belief was based on reasonable grounds. However, the *Crimes Act 1958* (Vic) provided that if any part of an element of a relevant offence, or of a defence to a relevant offence, [relied] on a person having reasonable grounds for a belief, in determining whether those reasonable grounds existed, regard [was] [to] be had to the standard of a reasonable person who [was] not intoxicated: *Conlon* (n 75); *Crimes Act* (n 71) s 9AJ(2).
[145] See *Portelli* (n 80); *Viro* (n 75).
[146] See *Zecevic* (n 73); *Wills* (n 85).

In determining whether there were no reasonable grounds for Black's belief[147] (as opposed to whether Black had acted unreasonably in the circumstances),[148] a jury would have been directed to consider the factors given in Table 4–1.

With regard to the surrounding circumstances and the facts within Black's knowledge, she may be said to have held reasonable grounds for her belief to have acted in self-defence as she was in close proximity to Clarke, who was threatening, aggressive and pinning her into a corner whilst intoxicated. Additionally, throughout the course of their relationship, Clarke had physically, sexually and emotionally abused Black whilst intoxicated. In considering Black's relationship with Clarke and his prior conduct (including an implied threat to kill reflected in the placing of a knife on Black's pillow), Black may further be said to have held reasonable grounds for her belief.

Having regard to Black's personal characteristics[149] alongside any false beliefs or distress she had experienced, it is submitted that Black would have experienced real distress when Clarke cornered her amidst a relationship of physical, sexual and emotional abuse. This distress would have undoubtedly been exacerbated by the personal characteristics she developed through her personal experiences with her physically and emotionally abusive father who was an alcoholic; a father who had been violent to Black and her mother.[150] One of her brothers, a violent alcoholic, had also been physically abusive to her.[151] In addition, she had experienced sexual abuse during her childhood.[152]

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[147] See *Hendy* (n 86).
[148] Ibid.
[149] As acknowledged by Curtain J, Black's father was a physically and emotionally abusive alcoholic. He was violent towards Black and her mother. An older sister, whom Black regarded as her protector, was killed by a drunk driver when Black was 13. Such was the attitude of Black's father and brothers to that driver that Black's family was advised to move from Ballarat to Geelong. This, they did, and upon settling in Geelong, Black did not resume schooling. Black entered the workforce at 14, working in a cake shop for five years. She married at 18, and that marriage produced three sons. Black's husband was also an alcoholic, and that marriage ended when she was in her late 20s. Of Black's two brothers, one was described as a heavy drinker, the other was described as a violent alcoholic who was also physically abusive towards Black. Black was also subjected to sexual abuse in her childhood years. One of her sons was also an alcoholic and, by reason of Black's drinking habits as described to Mr Cummins, he formed the opinion that at the time of the offending, Black would have attracted a diagnosis of binge drinking (a variant of alcohol dependence).Mr Cummins opined that Black's binge drinking was very much related to her relationship with Mr Clarke and, as such, would have to be monitored in the future, but was not otherwise a risk factor: *Black* (n 95) [10] (Curtain J).
[150] Ibid.
[151] Ibid.
[152] Ibid.

The proportionality of Black's response would have been challenged by the Crown's contention that her decision to stab Clarke twice was disproportionate to any immediate threat which Clarke had posed and that Black's belief that Clarke could have turned the knife on her (or that she was at risk of really serious injury)[153] was not based on reasonable grounds.[154]

However, as affirmed in Osland,[155] an accused was entitled to forestall a threatened attack before it began.[156] Although immediacy would have affected the determination of whether Black held reasonable grounds to justify a pre-emptive strike,[157] the existence of family violence in their relationship ensured that section 9AH of the Crimes Act[158] would have assisted in substantiating that she possessed reasonable grounds for her belief even if it was perceived that she had responded to a harm that was not immediate or in excess of the force concerning Clarke's threatened harm.[159]

Having regard to the material evidence and the considerations addressed above, it is not certain that the Crown would have persuaded a jury beyond a reasonable doubt that Black (as opposed to the hypothetical reasonable person)[160] had not held reasonable grounds for her belief that it was necessary to defend herself. In other words, a hypothetical reasonable jury, lawfully instructed, having considered all the circumstances of the case and each factor within its broader context,[161] could have found Black not guilty of murder, defensive-homicide or manslaughter on the basis of self-defence.

4.3.2.3 Manifestations of injustice and imperfect procedural justice

[153] That being said, Black was subjected to sexual abuse: ibid.
[154] Ibid [8] (Curtain J).
[155] *R v Osland* [1998] HCA 75 ('*Osland*').
[156] Provided reasonable grounds for the belief existed: see, eg, *Osland* (n 155); *Viro (n 75)*; *Conlon* (n 75).
[157] *Osland* (n 155).
[158] *1958* (Vic).
[159] Ibid ss 9AH(1)-(3).
[160] At common law, it was possible to take into account the accused's state of intoxication in determining whether the accused believed his or her actions were necessary, as well as in determining whether that belief was based on reasonable grounds. However, the *Crimes Act 1958* (Vic) provided that if any part of an element of a relevant offence, or of a defence to a relevant offence, [relied] on a person having reasonable grounds for a belief, in determining whether those reasonable grounds existed, regard [was] [to] be had to the standard of a reasonable person who [was] not intoxicated: *Conlon* (n 75); *Crimes Act* (n 71) s 9AJ(2).
[161] *Zecevic* (n 73); *Dziduch* (n 93); *Portelli* (n 80).

Parallel to Kulla, the law provided Karen Black with an avenue to acquittal yet she too chose not to avail herself of the opportunity to have her claim to self-defence assessed by a jury. The reasons for this decision are speculative.

Firstly, the Crown had expressed an intention to rely upon Black's statement that she 'could not justify what had happened' as evidence of an intention to kill without lawful excuse[162] notwithstanding the conceivability of the statement having been made in a state of shock. Secondly, Black was ashamed and remorseful and had regretted what she had done.[163] Her actions in promptly going to the police and entering a plea of guilty to defensive homicide evidenced a desire to account for the death of a man whom she loved or to obtain a discount for a plea of guilty.

While it is conceded that Black's statement would have been prejudicial to her claim to self-defence in a trial, her statement and her regret do not necessarily detract from the belief which Black may be said to have reasonably held in all the circumstances[164] at the time she stabbed Clarke. Again, it would appear that Victoria's 2005 law did not inspire confidence in Black to rely on it in a trial despite the existence of viable evidence.

With these considerations in mind, Black's decision may also be said to have been antithetical to the spirit of Victoria's 2005 law as it paid insufficient regard to the inequalities which the standard had sought to address. In this case, due to disparities in strength and size[165] and continuous threats of violence, she had killed in a way which was 'at odds' with how self-defence had been understood: as a defence used in the context of an immediate altercation.

Further, the law of self-defence had been seen to have inadequately accommodated disproportionate responses to threats or pre-emptive responses on unarmed or otherwise defenceless partners in the context of ongoing family violence. On this basis, given the strength of her claim to self-defence Black's decision to plead guilty to defensive homicide represents the second manifestation of injustice to have arisen under Victoria's

[162] Further, that she 'could not justify' what she had done. The Crown rely upon this statement as an indication that Black had the necessary intention to kill or cause really serious injury to the deceased, which was further evidenced by the location, nature and number of stab wounds: *Black* (n 95) [6] (Curtain J).
[163] Ibid [11] (Curtain J).
[164] *Zecevic* (n 73); *Wills* (n 85).
[165] As Black mentioned, Clarke was 'a lot taller' than she was; he liked to stick his chest out 'because he [was] a lot taller than [her]': *Black* (n 95) [8].

2005 law; an act which unjustly prevented her from attaining the criterion of a just outcome.

The prosecution during Black's plea in mitigation did not dispute that she had been subjected to a long history of family violence at the hands of Clarke.[166] However, it characterised Black's experiences as being 'limited to threats, intimidation, harassment and jabbing and prodding,'[167] to show 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.[168] This was a significant distortion of the evidence[169] as forensic psychologist Jeffrey Cummins stated that Black had been subjected to physical, sexual and emotional abuse. The prosecution's contention failed to recognise sexual abuse as a form of family violence under section 9AH[170] and as a serious psychological injury.[171]

In light of these observations, it was significant of Black's defence counsel to have conceded to the Crown's assessment of Black's belief as being unreasonable;[172] that such a belief be characterised as unreasonable despite counsel having suggested that the belief had been informed by a 'serious background of family violence'.[173] Although defence counsel was only leading argument concerning Black's moral culpability, the phenomenon which counsel described was the precise phenomenon which section 9AH and Victoria's 2005 law had sought to address.

The mischaracterisation of Clarke's sexual abuse may also be seen in both the judge's characterisation of Black's acquiescence as a matter of '[giving] in' to Clarke's demands'.[174] Pertinently, the word 'rape' was never mentioned in the plea hearing.[175]

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[166] Department of Justice, 'Defensive Homicide: Proposals for Legislative Reform', *Victorian State Government* (Consultation Paper, September 2014) 9.
[167] *Black* (n 95) [8] (Curtain J).
[168] Ibid.
[169] See *Black* (n 95).
[170] *Crimes Act* (n 71) s 9AH(4).
[171] Kirkwood, McKenzie and Tyson (n 128).
[172] *Black v The Queen* [2012] VSCA 75, [18] (Buchanan, Bongiorno and Hollingworth JJA) (*'Black [No 2]'*).
[173] Ibid.
[174] Ibid [8] (Buchanan, Bongiorno and Hollingworth JJA).
[175] Research has demonstrated that being intimidated into sexual intercourse is sometimes not perceived to be a matter of 'real rape' notwithstanding the abundance of research which suggests that subjection to sexual violence by an intimate partner may cause greater adverse psychological consequences than physical violence itself: See, e.g. D Parkinson, *Raped by a partner: nowhere to go; no-one to tell* (Research Report, 2008); CT Taft et al, 'Coping among victims of relationship abuse: a longitudinal examination' (2007) 22(4) *Violence and Victims* 408-18; Jennifer Bennice et al, 'The Relative Effects of Intimate Partner

Although the judge stated that Clarke had cornered Black and was verbally intimidating her, he emphasised that 'he was not armed' and that she had '…stabbed him twice [which] may be said to [have been] disproportionate to the threat he [had] posed'.[176]

In the view of the DVRCV, the discounting of the 'cumulative impact'[177] of Clarke's violence led to the perception of an overreaction on the part of Black.[178] Douglas argued that greater emphasis had been placed on the violence in the homicide whilst the accumulation of violence and its effects were afforded less weight.[179] Black's violent response in the context of ongoing threats and abuse over a long period were ignored or overlooked.[180]

The Crown's contention and the Court's purported trivialisation of Clarke's prior sexual abuse showed an unjust preoccupation with the proportionality of Black's response. This focussed on whether Black acted unreasonably in the circumstances[181] as opposed to whether she held reasonable grounds for her belief that it was necessary to do what she did.[182] This critical distinction in the law of self-defence was a question which a jury never had the opportunity to consider. As a result, both the Crown and the Court may be said to have unjustly failed to legitimise the application of self-defence without necessarily disproving its application beyond all reasonable doubt.

Having regard to the reasoning of both the Court and the Crown, their conclusions may be said to have been antithetical to the spirit of Victoria's 2005 law in the sense that the reasoning dishonoured, trivialised and paid insufficient regard to the inequalities which the standard had sought to address: specifically that, due to disparities in strength and size and continuous threats of violence, victims of family violence often killed in ways appearing to be 'at odds' with how self-defence had traditionally been understood—as a

Physical and Sexual Violence on Post-Traumatic Stress Disorder Symptomatology' (2003) 18(1) *Violence Victoria* 87-94; Susan Ehrlich, *Representing Rape: Language and Sexual Consent* (Routledge, 2001); Kirkwood, McKenzie and Tyson (n 128) 19.

[176] *Black [No 2]*, [5] (Buchanan, Bongiorno and Hollingworth JJA).

[177] *Black* (n 95) [22] (Curtain J).

[178] Kirkwood, McKenzie and Tyson (n 128) 20.

[179] Heather Douglas, 'Social Framework Evidence: Its Interpretation and Application in Victoria and Beyond; in Kate Fitz-Gibbon and Arie Frieberg (eds.), *Homicide Law Reform in Victoria: Retrospects and Prospects* (Federation Press, 2015) 102.

[180] Ibid 103.

[181] *Hendy* (n 86).

[182] Ibid.

defence for those who had used force to preserve life or limb in the context of an immediate altercation.

Further, the law of self-defence had been seen, insofar as victims of family violence were concerned, to have inadequately accommodated disproportionate responses to threats or pre-emptive responses on unarmed or otherwise defenceless partners (in the context of ongoing family violence). On this basis, the Crown and the Court's analyses of Black's response may be said to represent the third and fourth manifestations of injustice to have arisen under Victoria's 2005 law: phenomena which unjustly prevented Black from being perceived as having been eligible to attain the criterion of a just outcome established under Victoria's 2005 law.

While the legislative enshrinement of Victoria's 2005 law was presumed to uphold itself within a prosecutions setting, the prosecution of Karen Black further reflected Rawls' conception of imperfect procedural justice in the sense that no assurances could ever be made that the prosecutions process would yield a just outcome for Black, that the process could be guaranteed to uphold Victoria's 2005 law without fail.[183] Although the standard had established an independent criterion for a just outcome, the proceedings may nevertheless be said to have reached an unfair outcome in that Black, an arguably innocent accused, was convicted.

In the submission of the researcher, the extent to which the written, doctrinal content of Victoria's 2005 law failed to inspire confidence in Black to proceed to trial on the basis of self-defence and failed to prevent both the Crown and the Court's trivialisation of Clarke's violence may be regarded as the extent to which Victoria's previous law of self-defence and family violence evidence unjustly failed to accommodate the experiences of Karen Black.

4.3.3 R v Creamer [2011] VSC 196

4.3.3.1 Material evidence

[183] Rawls (n 1) 85.

On Saturday 2 February 2008, Eileen Creamer returned to her home and husband in Moe at lunch time after spending the previous evening with a lover.[184] In a marriage described by the Court as 'dysfunctional',[185] Eileen Creamer engaged in extramarital affairs with the encouragement of her husband,[186] David Creamer, who was also engaged in extramarital affairs.[187]

David and Eileen Creamer married in South Africa during 1997.[188] In early 2000, David migrated to New Zealand and Eileen joined him eight months later.[189] In April 2006, David left New Zealand to work in Australia, leaving Eileen in New Zealand.[190] In May 2007, Eileen decided to 'take the chance of somehow making [her marriage] work' after David had asked her to join him in Australia.[191]

Throughout his time in Australia, David engaged in several extramarital affairs, in particular, a relationship with Marion Trewarn.[192] After moving to the Latrobe Valley, David made frequent trips to Melbourne and it was in that context that Eileen placed an advertisement in a local paper and commenced a sexual relationship with CS in September 2007.[193] Eileen and David then travelled to South Africa in December 2007 for their son's wedding.[194]

During their trip, David expressed a desire to renew his relationship with his former wife, Lynn, and his two sons.[195] David then stayed in South Africa several weeks after Eileen had returned to Australia. He subsequently reunited with his family to the extent that he spoke of remarrying Lynn and returning to South Africa.[196] When David and Eileen both returned to Australia, they moved into their new house located in Moe.[197] At this time, David and Eileen occupied separate bedrooms but David would '[punch Eileen] and

[184] *R v Creamer* [2011] VSC 196, [5] (Coghlan J) ('*Creamer*').
[185] Ibid [6] (Coghlan J).
[186] Ibid [7] (Coghlan J).
[187] Ibid.
[188] Ibid [6] (Coghlan J).
[189] Ibid.
[190] Ibid.
[191] Ibid [8] (Coghlan J).
[192] Ibid.
[193] Ibid [9] (Coghlan J).
[194] Ibid [10] (Coghlan J).
[195] Ibid.
[196] Ibid.
[197] Ibid [11] (Coghlan J).

[force her] to have sex with him' because she had become 'withdrawn' due to her relationship with CS.[198] Further, David had been pressuring Eileen to engage in 'group sex' with him: something she did not wish to do.[199]

Evidence was located on their joint computer which demonstrated David's attempts to arrange such encounters although such encounters never eventuated as Eileen 'found various means of avoiding [them]'.[200] The Court accepted that these were the circumstances which Eileen had faced when she returned home on Saturday 2 February 2008.[201] However, Eileen's version of events differed in terms of the information she provided to police, her psychologist and her psychiatrist.[202]

Eileen stated that when she returned home, David 'repeatedly questioned, harassed and intimidated [her] about why [she] had not returned home on Friday evening'.[203] She also found two men speaking to David and believed that David was organising for the men to have 'group sex' with her.[204] After telling David that she would not have 'group-sex' with the men, Eileen alleged that David became 'nasty' and started to abuse her with phrases such as 'drunken whore', 'bitch' and 'cunt',[205] and started to pinch her and smack her face.[206]

After napping, Eileen woke to find David hitting her vagina with a stick.[207] He then asked her to 'smell his semen-stained sheets' before following her around the house, telling her about the women he had slept with.[208] At this point, Eileen sought to leave the house and David responded by '[grabbing her] purse from [her]' and telling her that she 'wasn't going anywhere'.[209] He then called her a 'half-caste white bastard'.[210] When Eileen saw the stick mentioned earlier, she 'snapped' and began hitting him.[211] At this point, David

[198] Ibid.
[199] Ibid [14] (Coghlan J).
[200] Ibid [7] (Coghlan J).
[201] Ibid [15] (Coghlan J).
[202] Ibid [5] (Coghlan J).
[203] Ibid [15] (Coghlan J).
[204] *Creamer v The Queen* [2012] VSCA 182, [4] (Weinberg JA) ('*Creamer [No 2]*').
[205] Transcript of Proceedings, *R v Creamer [2011] VSC 196* (Supreme Court, 196, Coghlan J, 1-4, 7-11, 14-18, 21-25 and 28 February 2011) 1224 quoted in Kirkwood, McKenzie and Tyson (n 128) 24.
[206] Ibid quoted in Kirkwood, McKenzie and Tyson (n 128) 24.
[207] Ibid quoted in Kirkwood, McKenzie and Tyson (n 128) 24.
[208] Ibid quoted in Kirkwood, McKenzie and Tyson (n 128) 24.
[209] Transcript of Proceedings (n 205) 1229 quoted in Kirkwood, McKenzie and Tyson (n 128) 25.
[210] Ibid quoted in Kirkwood, McKenzie and Tyson (n 128) 25..
[211] Ibid quoted in Kirkwood, McKenzie and Tyson (n 128) 25..

was alleged to have become 'extremely angry with her'.[212] She ran from the room and was then dragged back into the room where David then grabbed a knife from the kitchen.[213] The pair struggled and David was said to have then attempted to place his penis inside her mouth and urinate on her.[214] Eileen stated that David then threatened to 'finish [her] off'.[215] It was at this moment that Eileen said she had stabbed David.[216] She subsequently ran to the school opposite their house in order to hide.[217]

As Eileen ran from the house, David followed her out and called for her to come back.[218] When she returned to the house, she heard David in the shower.[219] She then found David dead the next morning.[220] Speaking to police, Eileen denied any involvement in David's death and omitted to mention the two men who David had spoken to.[221] She had, however, received bruising to her genitalia consistent with the attack she had described: an attack she had reported to her general practitioner.[222] The objective evidence was that Eileen had struck David to the head repeatedly both in and outside the house which was inconsistent with Eileen's version of events.[223] However, the evidence disclosed that there had been a struggle which led to David's death.[224]

Eileen was charged with murder and subsequently offered to plead guilty to manslaughter.[225] This was rejected by the prosecution whereby Eileen elected to proceed to trial on the basis that she was not guilty of murder, but defensive homicide or manslaughter.[226] On 3 March 2011, Eileen was convicted of defensive homicide and was subsequently sentenced to 11 years imprisonment with a non-parole period of seven years.[227]

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[212] *Creamer (n 184)* [23] (Coghlan J).
[213] However, Coghlan J was not prepared to find that this was said to Creamer: ibid [21] (Coghlan J).
[214] Ibid.
[215] Ibid.
[216] Ibid.
[217] Ibid [22] (Coghlan J).
[218] Ibid [23] (Coghlan J).
[219] Ibid.
[220] Ibid.
[221] Ibid [16] (Coghlan J).
[222] Ibid [17] (Coghlan J).
[223] *Creamer [No 2]* (n 204) [28] (Weinberg JA).
[224] *Creamer* (n 184) [17] (Coghlan J).
[225] *Creamer [No 2]* (n 204) [30] (Weinberg JA).
[226] *Creamer* (n 184) [1] (Coghlan J).
[227] *Creamer [No 2]* (n 204) [1] (Weinberg JA).

4.3.3.2 The law of self-defence

Eileen possessed a claim to self-defence which could have resulted in her acquittal of the charge of murder, defensive homicide or manslaughter had she decided to run her trial on that basis.

In response to the charge of murder, David's prior punching, rape, hitting of Eileen's genitalia and alleged threat to kill successfully discharged the evidential burden of self-defence at trial and would have led Eileen to subjectively believe[228] that her conduct was necessary to defend herself from the infliction of death or really serious injury[229] pursuant to section 9AC of the Crimes Act 1958 (Vic).[230]

As established earlier, section 9AC required the jury to determine whether Eileen believed that it was necessary to defend herself at all and, secondly, whether she believed it was necessary to respond in the way that she did given the threat as she perceived it.[231] Having regard to the material evidence and David's conduct, the Crown would not have been able to persuade a jury beyond a reasonable doubt that Eileen had not believed that it was necessary to defend herself. With regard to her response, namely, to repeatedly beat David's head and stab him, the Crown would also have been unable to have persuaded a jury beyond a reasonable doubt that Eileen had not believed that it was necessary to beat and stab David to prevent death or a really serious injury.

Having considered section 9AC, it is submitted that David's attack on Eileen's genitalia would have been able to have been put to a jury as a basis to substantiate that Eileen possessed objectively reasonable grounds for her belief in the necessity of self-defence pursuant to section 9AD of the Crimes Act 1958 (Vic).[232] As section 9AD codified the objective limb of self-defence as described in Zecevic,[233] the determination of whether Eileen held reasonable grounds for her belief in the necessity of self-defence would have required the jury to consider whether Eileen (as opposed to the hypothetical reasonable

[228] The test imposed under section 9AC was ruled to be purely subjective: *Babic* (n 70).
[229] It is conceivable that David's attack upon Creamer's vagina led to such a belief. Although the *Crimes Act 1958* (Vic) had not defined *really serious injury*, sexual abuse was recognised under section 9AH as a form of family violence: a recognition of the impact of sexual abuse as a serious psychological and potentially physical injury: Kirkwood, McKenzie and Tyson (n 128) 19.
[230] *Crimes Act* (n 71) s 9AC.
[231] *Zecevic* (n 73).
[232] *Crimes Act* (n 71) s 9AD.
[233] *Babic* (n 70); *Zecevic* (n 73).

person)[234] held no reasonable grounds for her belief in the circumstances as she perceived them to be:[235] a belief which Eileen might reasonably have held in all the circumstances.[236]

In resolving these considerations and ultimately determining whether there were no reasonable grounds for Eileen's belief that it was necessary to do what she did[237] as opposed to whether Eileen had acted unreasonably in the circumstances,[238] the jury would have been required to consider the factors set out in Table 4-1.

With regard to the surrounding circumstances and the facts within Eileen's knowledge, Eileen may be said to have held reasonable grounds for her belief to have acted in self-defence as her genitalia had been forcibly attacked amidst a dysfunctional relationship. In consideration of Eileen's relationship with David and his prior conduct (including forced sexual intercourse and coercive attempts to arrange group-sex against her will), Eileen may further be said to have held reasonable grounds for her belief that David, especially in that particular moment, had threatened and assaulted her and according to her testimony had sexually abused her.

Having regard to the personal characteristics of Eileen alongside any false beliefs or distress she had felt, it is submitted that Eileen would have experienced substantial distress when she woke to David beating her genitalia. Further, in considering the proportionality of Eileen's response, the strength of Eileen's claim would have been significantly affected by her having 'viciously [bludgeoned David] … to the head and body' as well as 'stabbing him in the upper abdomen':[239] a transaction deemed by the Court of Appeal as being 'grossly disproportionate' and 'objectively unnecessary' in order to defend herself.[240]

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[234] At common law, it was possible to take into account the accused's state of intoxication in determining whether the accused believed his or her actions were necessary, as well as in determining whether that belief was based on reasonable grounds. However, the provided that if any part of an element of a relevant offence, or of a defence to a relevant offence, [relied] on a person having reasonable grounds for a belief, in determining whether those reasonable grounds existed, regard [was] [to] be had to the standard of a reasonable person who [was] not intoxicated: *Conlon* (n 75); *Crimes Act* (n 71) s 9AJ(2).
[235] See *Portelli* (n 80); *Viro* (n 75).
[236] See *Zecevic* (n 73); *Wills* (n 85).
[237] *Hendy* (n 86).
[238] Ibid.
[239] *Creamer* (n 204) *[No 2]* [51] (Weinberg JA).
[240] Ibid.

Although the proportionality of Eileen's response would have affected the determination of whether she held reasonable grounds for her belief,[241] the existence of family violence within Eileen's relationship with David would have enabled her to rely on section 9AH of the Crimes Act[242] to argue that she may nevertheless have possessed reasonable grounds for her belief even if a jury had perceived that she had responded to a harm that was not immediate or had responded in excess of the force involved in David's threatened harm.[243]

Having regard to the material evidence and the considerations addressed above, it is not certain that the Crown would have persuaded a jury beyond a reasonable doubt that Eileen (as opposed to the hypothetical reasonable person)[244] had not held reasonable grounds for her belief that it was necessary to defend herself: a belief which she could be said to have reasonably held given the matters addressed above. In other words, a hypothetical reasonable jury, lawfully instructed, having considered all the circumstances of the case and each factor within its broader context,[245] could have found Eileen not guilty of murder, defensive-homicide or manslaughter on the basis of self-defence.

4.3.3.3 Manifestations of injustice and imperfect procedural justice

Although the jury's decision to acquit Eileen of murder meant that they had rejected the contention advanced by the Crown that Eileen had killed David in a premeditated fashion (after learning of David's renewed relationship with his former wife),[246] it is necessary to examine whether the Crown's contention unjustly tailored the circumstances of Eileen Creamer's matter to its own interests while unjustly undermining her prospects of successfully arguing self-defence in a manner antithetical to the spirit of Victoria's 2005 law.

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[241] *Osland* (n 155).
[242] *1958* (Vic).
[243] Ibid ss 9AH(1)-(3).
[244] At common law, it was possible to take into account the accused's state of intoxication in determining whether the accused believed his or her actions were necessary, as well as in determining whether that belief was based on reasonable grounds. However, the *Crimes Act 1958* (Vic) provided that if any part of an element of a relevant offence, or of a defence to a relevant offence, [relied] on a person having reasonable grounds for a belief, in determining whether those reasonable grounds existed, regard [was] [to] be had to the standard of a reasonable person who [was] not intoxicated: *Conlon* (n 75); *Crimes Act* (n 71) s 9AJ(2).
[245] *Zecevic* (n 73); *Dziduch* (n 93); *Portelli* (n 80).
[246] *Creamer* (n 204)[6] (Weinberg JA).

At trial, the Crown first drew attention to David having met with his ex-wife[247] and making a commitment to reunite with her and their sons.[248] It then highlighted that Eileen had sent an email to a psychic asking for a 'spell' to stop her husband from returning to his first wife.[249] With Eileen having previously sent abusive emails and used condom(s) to 'warn off' other women,[250] the Crown was able to advance a case theory to the effect that Eileen was not a victim of family violence, that she had simply murdered David to prevent him from leaving her.[251] To support this theory, the Crown relied on the testimony of psychiatrist Dr Ruth Vine who stated that:

> 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.[252]

Through such evidence, the Crown argued that there was no domestic violence in Eileen's relationship with David.[253]

While conceded that Eileen's freedom of movement and her extramarital relations did not accord with the traditionally coercive nature of abusive relationships,[254] David's emotional abuse of Eileen brings into question the extent to which Eileen may be said to have had complete autonomy in her relationship with David. In Eileen's evidence to her psychologist:

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[247] Kirkwood, McKenzie and Tyson (n 128) 25.
[248] Ibid.
[249] Ibid.
[250] Ibid.
[251] To the Crown, Eileen's actions '… had nothing to do with domestic violence and … everything to do with her obsession to keep David … living with her': Transcript of Proceedings (n 209) 1435 quoted in Kirkwood, McKenzie and Tyson (n 128) 25. In essence, the Crown argued that the 'lies' she had told reflected that she 'really had no excuse for killing him': Transcript of Proceedings (n 243) 196 quoted in Kirkwood, McKenzie and Tyson (n 128) 25. This contention was strengthened by forensic evidence which did not entirely match Eileen's version of events: Kirkwood, McKenzie and Tyson (n 128) 25. It was also bolstered by Eileen's attempts to conceal her involvement in the murder by hiding her bloodstained clothes and disposing of the weapons involved in the altercation: Kirkwood, McKenzie and Tyson (n 128) 25.
[252] Transcript of Proceedings (n 202) 1058 quoted in Kirkwood, McKenzie and Tyson (n 128) 25.
[253] Ibid 199 quoted in Kirkwood, McKenzie and Tyson (n 128) 25..
[254] Kellie Toole, 'Self-Defence and the Reasonable Woman: Equality before the Victorian Law' (2012) 36(1) *Melbourne University Law Review* 283.

> [She] couldn't control it. [She] had no control over the situation. The more [she] told David how [she] felt, it didn't seem to bother him.[255] [She] couldn't stand up to David. David was always in control. If [she] ever stood up to David and said no, there were always consequences, he would get angry with [her], he wouldn't talk to [her for] days … [and would] just pretend [she] wasn't even there.[256]

These comments (including the psychologist's report observing that David had 'used threats to leave [Eileen] as a way of manipulating her')[257] remain significant in light of the Crown's contention that Eileen killed David in circumstances of jealousy. The Crown's contention unjustly discounted evidence of David having held the threat of leaving Eileen 'over her head' in order to sexually coerce her: evidence that her experiences were frightening in terms of what David 'wanted of her' and what he 'had in mind for her'.[258]

Although it was the Crown's prerogative to the use the evidence available to it in the manner which it did, the Crown may reasonably be perceived to have tailored the circumstances of Eileen's matter to its interests by discharging its legal burden through the unjust argument that there was no domestic violence in Eileen's relationship with David.[259]

It is conceivable that this argument would have cast doubt upon the applicability of self-defence without necessarily disproving it beyond a reasonable doubt (all whilst significantly prejudicing the prospects of Eileen having been acquitted on the basis of self-defence) in a manner antithetical to the spirit of Victoria's 2005 law. In doing so, the Crown may be said to have dishonoured, ignored or trivialised the inequalities which the standard of justice had sought to address. In this case, that the law of self-defence had been seen, insofar as victims of family violence were concerned, to have inadequately accommodated disproportionate responses to threats (in the context of ongoing family violence). On this basis, the Crown's case theory itself may be said to represent the fifth

[255] Transcript of Proceedings (n 209) 1196 quoted in Kirkwood, McKenzie and Tyson (n 128) 26.
[256] Ibid 1198 quoted in Kirkwood, McKenzie and Tyson (n 128) 27.
[257] Ibid 1338–76 quoted in Kirkwood, McKenzie and Tyson (n 128) 27..
[258] The Crown's depiction of Eileen appeared to nullify the weight of Eileen's evidence, namely, that she became afraid for her life when David began to struggle with her. As noted in the defence counsel's opening address, Eileen was 'very fearful of her husband … and particularly fearful of him in respect of his desire to get her to have sex with other men in his presence': Kirkwood, McKenzie and Tyson (n 128) 26..
[259] Transcript of Proceedings (n 209) 199 quoted in Kirkwood, McKenzie and Tyson (n 128) 25.

manifestation of injustice to have arisen under Victoria's 2005 law: a matter which unjustly contributed to Eileen Creamer not attaining the criterion of a just outcome established under the standard.

The sentencing Court's decision to 'largely [disregard] any physical violence perpetrated by … [David] towards … [Eileen and treat her] case rather as one where she was simply overwhelmed by the events surrounding [her]'[260] may also be said to have been antithetical to the spirit of Victoria's 2005 law. It was significant of the Court to have reached this conclusion when it accepted Eileen's concern that she was 'being forced into a sexual scenario which [she did] not want':[261] an element of family violence relevant to the question of self-defence and the formulation of reasonable grounds to have believed in the necessity of self-defence.[262]

As defence counsel highlighted at trial, David had sexually abused Eileen in the past and had used her to 'live out his sexual fantasies'.[263] For David, sex was 'a way of maintaining control and power in [their] relationship'.[264] Pertinently, David was alleged to have broken into their home in New Zealand before anally raping Eileen.[265] However, as she did not inform anyone and chose to accompany David to Australia weeks later, the Court rejected her allegation.[266]

It is well-documented that victims of rape and sexual assault often avoid informing others of their experiences due to a sense of deep shame and self-blame.[267] It would not have been fanciful to suggest that it was for these reasons why Eileen did not corroborate all

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[260] *Creamer [No 2]* (n 204) [41] (Weinberg JA).
[261] The DVRCV opined that there was consistency between Eileen's evidence at trial with what she had told police and expert witnesses; that, in the face of constant psychological coercion, she would be 'unable to stand up to her husband' to prevent, among other things, group sex from occurring: Kirkwood, McKenzie and Tyson (n 128) 27; *Creamer* (n 184) [38] (Coghlan J).
[262] *Crimes Act* (n 71), s 9AH.
[263] Transcript of Proceedings (n 205) 1508 quoted in Kirkwood, McKenzie and Tyson (n 128) 25.
[264] Ibid 1507 quoted in Kirkwood, McKenzie and Tyson (n 128) 25.
[265] *Creamer (n 184)* [32] (Coghlan J).
[266] However, Eileen maintained that she initially denied her involvement because she had panicked and was frightened of what she had done. As maintained by her defence, '[Eileen] tried to disassociate herself from any possible motive for killing him'. From this perspective, the DVRCV concluded that it was not surprising that Eileen Creamer did not initially disclose to police exactly what had happened or the extent of abuse in her relationship: Kirkwood, McKenzie and Tyson (n 128) 27.
[267] See, eg, Silke Meyer, 'Why women stay: a theoretical examination of rational choice and moral reasoning in the context of intimate partner violence' 45(2) *Australian & New Zealand Journal of Criminology* 179-93; Vivian Enander, 'A fool to keep staying: battered women labelling themselves stupid as an expression of gendered shame' (2010) 16(1) *Violence Against Women* 5-31.

of her alleged experiences with David. Eileen explained that she had been too ashamed to tell anyone about what had occurred within her relationship with David.[268] In the face of constant psychological coercion, it was open to suggest that Eileen believed that she would have been 'unable to stand up to her husband' to prevent group sex from occurring (among other things).[269]

In sentencing Eileen on the basis that she was simply overwhelmed by her circumstances, it was also open to suggest that the Court paid insufficient regard to the cumulative effect (including psychological effect) of family violence[270] and the psychological effect of violence on people who are or have been in a relationship affected by family violence.[271] In the eyes of the Court, Eileen was 'out of control' and was unlikely to have 'actually [remembered] all of the details of what occurred'.[272]

In sentencing Eileen on this basis, the Court unjustly legitimised the jury's verdict by reducing Eileen's prospects of being perceived by the community as having acted in self-defence. This was antithetical to the spirit of Victoria's 2005 law given that the Court had trivialised the inequalities which the standard had sought to address. In this instance, that lethal responses to family violence were commonly perceived to be the product of personal pathology as opposed to socio-cultural or socio-economic stressors.

On this basis, the Court's analysis of Eileen's response may be said to represent the sixth manifestation of injustice to have arisen under Victoria's 2005 law: a phenomenon which unjustly prevented Eileen from being perceived as having been eligible to attain the criterion of a just outcome established under the standard.

While the legislative enshrinement of Victoria's 2005 law was presumed to uphold itself within a prosecutions setting, the prosecution of Eileen Creamer again reflected Rawls' conception of imperfect procedural justice in the sense that no assurances could be made that the prosecutions process would yield a just outcome for her or that the process could

[268] Transcript of Proceedings (n 209) 1167 quoted in Kirkwood, McKenzie and Tyson (n 128) 27.
[269] Kirkwood, McKenzie and Tyson (n 128) 28.
[270] *Crimes Act* (n 71) s 9AH(3)(b).
[271] Ibid s 9AH(3)(d). As highlighted by the DVRCV, Eileen's matter demonstrated a lack of understanding about how psychological manipulation, sexual degradation and coercive control were forms of family violence: Kirkwood, McKenzie and Tyson (n 128) 28.
[272] *Creamer* (n 184) [29] (Coghlan J).

be guaranteed to uphold Victoria's 2005 law without fail.[273] Although the standard of justice had established an independent criterion for a just outcome, the proceedings may nevertheless be said to have reached an unfair outcome in that Eileen Creamer, an arguably innocent accused, was convicted of defensive homicide.

The extent to which the 2005 law failed to inspire the Crown to lead its case in a manner which adequately reflected Eileen Creamer's experiences of family violence and failed to prevent the Court from trivialising Eileen's experiences of family violence may be regarded as the extent to which Victoria's previous law of self-defence and family violence evidence unjustly failed to accommodate her experiences.

4.3.4 R v Edwards [2012] VSC 138

4.3.4.1 Material evidence

In R v Edwards,[274] Jemma Edwards married James Edwards in 1998, with James having divorced his former wife in 1986[275] following a turbulent relationship which involved several instances of domestic violence.[276] In 2006, Jemma and James relocated to Highett, Victoria, in a house belonging to James' mother, Peg.[277] Prior to Peg's death in 2010, James was violent to her on several occasions.[278]

Described as a 'loner' and a 'heavy drinker', James was often 'violent and confrontational'.[279] In 2010, Jemma obtained an intervention order against James after having 'suffered domestic violence at the hands of [James] on a number of occasions'.[280] Pertinently, there was a 'lengthy and well-documented history' of James' attacks upon Jemma (including his daughter, Megan) from 1999 onwards.[281] Additionally, across 1999, 2000, 2002, 2003, 2004 and 2005, the police were called to intervene as James had

[273] Rawls (n 1) 85.
[274] [2012] VSC 138 ('*Edwards*').
[275] Ibid [4] (Weinberg JA).
[276] Ibid.
[277] Ibid [5]-[6] (Weinberg JA).
[278] Ibid [6] (Weinberg JA)
[279] Ibid [7] (Weinberg JA).
[280] Ibid [7] (Weinberg JA).
[281] Ibid [11] (Weinberg JA).

been ‘drunk, abusive and violent’ on each occasion.[282] Further instances of violence occurred between 2006 and 2010, which led Jemma to seek the intervention order referred to above.[283]

Significantly, in 2005 during an altercation between Jemma and James, Jemma stabbed James four times with a corkscrew-knife which led to James placing an intervention order against Jemma.[284] In the week prior to 18 January 2011, Jemma’s mother noticed a large bruise on Jemma’s hand. Jemma then told her that James had grabbed her ‘really hard’ and assaulted her.[285] On 13 September 2011, a friend described Jemma as having ‘having deteriorated mentally’.[286] The following day, she appeared as if she had been crying and attended a medical clinic to seek help for anxiety.[287] Over the next day, others saw Jemma ‘not coping’ and acting ‘irrationally’.[288] On the night of 17 January 2011, a neighbour then overheard Jemma and James having a ‘serious domestic dispute’.[289]

At approximately 10am on the morning of 18 January 2011, another neighbour heard Jemma, but not James, yelling and screaming for approximately 5 minutes.[290] At 10.04am, Jemma had telephoned Ambulance Victoria asking them to attend her residence as a ‘man [had] been stabbed’ by an offender who ‘had fled’.[291] At 10.10am, paramedics arrived at the scene and observed Jemma standing at the front door, dressed in a nightgown with blood ‘spattered over it’.[292] Jemma did not appear to be drug or alcohol affected despite the paramedics having smelt alcohol on her breath.[293]

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[282] Ibid.
[283] Ibid.
[284] Ibid [13] (Weinberg JA).
[285] Ibid [15] (Weinberg JA).
[286] As acknowledged by Weinberg JA, Edwards suffered from a significant history of psychiatric illness concerning anxiety and depression. Edwards had been admitted to psychiatric care on two occasions prior to 18 January 2011. At that date, Edwards was complying with a community treatment order, having been diagnosed as bipolar and manic depressive. Lastly, Edwards was unfit to be interviewed in the immediate aftermath of the killing of the deceased: ibid [9] (Weinberg JA).
[287] Ibid [13] (Weinberg JA).
[288] Ibid [16] (Weinberg JA).
[289] Ibid [17] (Weinberg JA).
[290] Ibid [18] (Weinberg JA).
[291] Ibid [19] (Weinberg JA).
[292] Ibid [20] (Weinberg JA).
[293] Ibid.

On entering the paramedics found James lying next to a chair that had been tipped over with a 'large pool of blood … emanating from his body'.[294] James had sustained thirty wounds made by either a knife or a spear-gun:[295] a number of which may have been inflicted post-mortem.[296] When the police arrived, Jemma told them that two men had killed James.[297] Jemma was subsequently assessed as being unfit for interview and was taken to a psychiatric unit as an involuntary patient.[298]

After her release, two weeks later, Jemma was formally interviewed.[299] Jemma confessed to having killed James but maintained that she had acted in self-defence.[300] Jemma claimed that on the night before James died, he had been up all night drinking and making repeated threats to her.[301] She recalled that 'this has been going on for – really badly for the last few months. He … strangled [her] and kicked [her] and … punched [her]'.[302] Further, over the preceding nights, he had repeatedly told her that 'he [was] going to kill [her]'.[303] When Jemma woke up on the morning of James' death, James was still drunk and began to punch, push and kick her.[304] Jemma reported that:

> [James] 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

[294] At that stage, the homicide squad assumed control of the investigation. They made an assessment of the crime scene. A detective observed that save for the chair which had been overturned next to the deceased, the area appeared undisturbed. In particular the rear door seemed not to have been accessed since there was no blood trailing in that direction. The detective noted that a large brown-handled knife was lying next to the deceased, and an unloaded spear gun was at his feet. In addition, a spear was located next to a buffet table facing away from the kitchen, and resting on a pair of shoes. Blood stained bare partial footprints were observed in the front sitting room which continued along a path from the front door of the house: ibid [24] (Weinberg JA).

[295] The post-mortem examination revealed a number of incised injuries to the upper and lower body. Although the evidence does not reveal the precise number of wounds inflicted, it was agreed during the course of the plea that, in broad terms, the deceased had sustained about 30 or so separate injuries. Of these, about six involved significant stab wounds. A majority of the injuries were inflicted in the upper body and head area, but there were also some wounds to the legs, fingers and forearms. There was, in addition, a large ovoid wound 2 centimetres in depth to the midline of the back. That wound was suspected of having been caused by the spear that was located at the scene: ibid [25] (Weinberg JA).

[296] Ibid [26] (Weinberg JA).

[297] Ibid [22] (Weinberg JA).

[298] Ibid [3] (Weinberg JA).

[299] Ibid.

[300] Ibid.

[301] Ibid [27] (Weinberg JA).

[302] Ibid [28] (Weinberg JA).

[303] Ibid.

[304] Ibid.

> to set me on fire and ruin my pretty face so no-one would ever look at me ever again. And I panicked.[305]

Jemma claimed that she then grabbed a spear gun, which James had fired at her in the past, and shot it at him to 'stop him because [she] was so petrified'.[306] The spear was said to have bounced off of James.[307] At this moment, according to Jemma's statement:

> [James] 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.'[308]

However, the prosecution alleged that Jemma could not account for a lack of a disturbance at the scene. It pointed to inconsistencies in her story, which go both to evidence of guilty mind and her credibility. The inconsistencies included:

- her reported attempt at mouth-to-mouth resuscitation had not disturbed any blood located around James' mouth;
- she had 'panicked' when lying to the ambulance officer;
- she had attributed the scent of alcohol emanating from her mouth to her attempt to resuscitate James;
- she had altered her story after it was disclosed that blood was found on the inside of the felled seat next to James;
- she could not account for the position of the stab wounds high around James' armpit on his left-hand side; and
- she had maintained her story that James came at her with a knife and that she had not stabbed him whilst he was asleep at a table.[309]

[305] Ibid.
[306] Ibid.
[307] Ibid.
[308] Ibid.
[309] Ibid [29] (Weinberg JA).

Jemma Edwards was subsequently charged with murder. She offered to plead guilty to defensive homicide and this was accepted by the prosecution.[310] In April 2012, she was sentenced to seven years imprisonment with a non-parole period of four and a half years.

4.3.4.2 The law of self-defence

With the presumption of innocence in mind,[311] Jemma Edwards also held a viable claim to self-defence which ought to have resulted in the discontinuance of her prosecution for murder. James' punching of her as well as his threats to disfigure, immolate and kill her would have discharged the evidential burden of self-defence and led her to subjectively believe[312] that her conduct was necessary to defend herself from the infliction of death or really serious injury[313] pursuant to section 9AC of the Crimes Act 1958 (Vic).[314]

The determination of whether Jemma believed her actions to be necessary consisted of two separate yet interrelated questions as indicated in earlier accounts of the law of self-defence.[315] Having regard to the material evidence alongside James' violence and threats, it is unlikely that the Crown would have persuaded a jury beyond a reasonable doubt, particularly given the family violence directions the judge would give, that Jemma had not believed it to be necessary to defend herself. With regard to Jemma's response, namely, her decision to fire a spear-gun and stab James repeatedly, it is equally unlikely that the Crown would have persuaded a jury beyond a reasonable doubt that she had not believed it to be necessary to do so to prevent her death or really serious injury.

These arguments would have been supported by the common law's requirement that a jury assess what Jemma herself had believed (particularly, someone who had suffered from bipolar and manic depressive disorders) as opposed to what an ordinary reasonable

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[310] Ibid [48] (Weinberg JA).
[311] As the accused's prosecution was resolved by plea of guilty, the evidence sourced amounts to a synopsis of the evidence which was available to the prosecution at the time. As a result, none of the evidence was tested for credibility at trial (as it would have been had the accused pleaded not guilty). Additionally, the credibility of any witnesses (expert or otherwise) which may have been called by defence counsel was not tested at trial. In other words, the evidence which might have been available at trial is not necessarily the same as that which was presented at sentence. See 3.2.6.1.
[312] The test imposed under section 9AC was ruled to be purely subjective: *Babic* (n 70).
[313] Although the *Crimes Act 1958* (Vic) had not defined *really serious injury*, sexual abuse was recognised under section 9AH as a form of family violence, a recognition of the impact of sexual abuse as a serious psychological and potentially physical injury: Kirkwood, McKenzie and Tyson (n 128) 19.
[314] *Crimes Act* (n 71) s 9AC.
[315] *Zecevic* (n 73).

person would have believed in the circumstances.[316] Further, it was immaterial whether Jemma's belief was mistaken[317] or created by intoxication[318] as the common law merely required that her belief be genuinely held.[319]

That being said, it would have been open to the Crown to characterise Jemma's response as disproportionate and in such circumstances as the common law provided that this could have indicated an intention to use the circumstances for aggression or retaliation as opposed to self-defence.[320] However, the pathologist who examined James could not exclude the possibility that a number of wounds had been inflicted post-mortem.[321] Further, as family violence had been alleged,[322] section 9AH provided that Jemma may nevertheless have believed her conduct to be necessary to defend herself even though her response appeared to have involved the use of force in excess of the force involved in the threatened harm which James presented.[323]

With these considerations in mind and the proportionality of Jemma's response being just one factor for consideration in the determination of whether she believed her actions to be necessary,[324] it is unlikely that the Crown would have persuaded a jury beyond a reasonable doubt that she had not genuinely held a belief in the necessity of self-defence.

Having considered section 9AC, it is submitted that James' conduct would have led Jemma to have possessed objectively reasonable grounds for her belief in the necessity of self-defence pursuant to section 9AD of the Crimes Act 1958 (Vic).[325] The determination of whether Jemma held reasonable grounds for her belief in the necessity of self-defence would have required consideration of whether Jemma, as opposed to the hypothetical reasonable person,[326] held no reasonable grounds for her belief in the

[316] Ibid. See also, *Viro* (n 75); *Conlon* (n 75).
[317] *McKay* (n 76).
[318] *Conlon* (n 75); *Katarzynski* (n 77).
[319] *McKay* (n 76).
[320] *Zecevic* (n 73).
[321] *Edwards* (n 274) [26], (Weinberg JA).
[322] *Crimes Act* (n 71) ss 9AH(3)(b)-(e).
[323] Ibid s 9AH(1)(a)-(d).
[324] See *Zecevic* (n 73); *Portelli* (n 80); *Carrington* (n 80).
[325] *Crimes Act* (n 71) s 9AD.
[326] At common law, it was possible to take into account the accused's state of intoxication in determining whether the accused believed his or her actions were necessary, as well as in determining whether that belief was based on reasonable grounds. However, the *Crimes Act 1958* (Vic) provided that if any part of an element of a relevant offence, or of a defence to a relevant offence, [relied] on a person having reasonable

circumstances as she perceived them to be:[327] a belief which she might reasonably have held in all the circumstances.[328]

In resolving these considerations and determining whether there were no reasonable grounds for Jemma's belief that it was necessary to do what she did,[329] as opposed to whether she had acted unreasonably in the circumstances,[330] a jury would have been permitted to consider the factors given in Table 4–1.

With regard to the surrounding circumstances and the facts within her knowledge, Jemma may be said to have held reasonable grounds for her belief to have acted in self-defence as she was in close proximity to James who had been violent to her and had threatened to immolate and kill her. Relevantly, throughout the course of their relationship, James had been consistently abusive and violent to her. In further consideration of Jemma's relationship with James and his increasingly violent conduct toward her in the days preceding his death, Jemma may further be said to have held reasonable grounds for her belief.

Having regard to the personal characteristics of Jemma, alongside any false beliefs or distress she had experienced, it is submitted that Jemma would have experienced considerable distress when James began to abuse her, after having recently threatened to burn and kill her. This distress would have undoubtedly been exacerbated by her personal characteristics of having suffered from bipolar and major depressive disorders (alongside the cumulative effects of James' violence across their relationship).

In considering the proportionality of Jemma's response, the strength of her claim would have been challenged by the Crown's contention that her decision to fire a spear-gun and stab James repeatedly was disproportionate to any immediate threat which James had posed to her. However, it would have been open to Jemma to rely upon section 9AH to substantiate that she nevertheless possessed reasonable grounds for her belief in the necessity of self-defence notwithstanding the perceived disproportionality of her

grounds for a belief, in determining whether those reasonable grounds existed, regard [was] [to] be had to the standard of a reasonable person who [was] not intoxicated: *Conlon* (n 75); *Crimes Act* (n 71) s 9AJ(2).
[327] See *Portelli* (n 80); *Viro* (n 75).
[328] See *Zecevic* (n 73); *Wills* (n 85).
[329] See *Hendy* (n 86).
[330] Ibid.

response. In light of the pathologist's finding that it was not possible to exclude that Jemma may have inflicted a number of wounds upon James post-mortem, the predicament of Jemma, who had just been beaten and threatened with disfigurement, immolation and death, would have afforded little, if any, opportunity for calm deliberation or detached reflection.[331]

The Court acknowledged that no one other than Jemma knew precisely what took place on the morning of 18 January 2011.[332] Having regard to the material evidence and the considerations addressed above, it is far from certain that the Crown would have persuaded a jury beyond a reasonable doubt that Jemma, as opposed to the hypothetical reasonable person,[333] had not held reasonable grounds for her belief that it was necessary to defend herself: a belief she could reasonably be said to have held given the matters addressed above. In other words, a hypothetical reasonable jury, lawfully instructed, having considered all the circumstances of the case and each factor within its broader context,[334] could have found Jemma not guilty of murder, defensive-homicide or manslaughter on the basis of self-defence.

4.3.4.3 Manifestations of injustice and imperfect procedural justice

In a recurring theme, the doctrinal content of the law provided Jemma Edwards with an avenue to acquittal yet she chose not to avail herself of the opportunity to have her matter assessed by a jury. Having regard to the material evidence, the reasons for this decision can only be speculative. However, in having panicked, Jemma lied to Police and thus placed herself in a precarious position. While only Jemma knew precisely what eventuated on the morning of 18 January 2011, the Crown would have likely capitalised upon her demeanour in an attempt to disprove her account beyond a reasonable doubt notwithstanding the conceivability of her lies having been made within a period of immense stress and shock.

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[331] *Zecevic* (n 73); *Dziduch* (n 93); *Portelli* (n 80).
[332] *Edwards* (n 274) [32] (Weinberg JA).
[333] At common law, it was possible to take into account the accused's state of intoxication in determining whether the accused believed his or her actions were necessary, as well as in determining whether that belief was based on reasonable grounds. However, the *Crimes Act 1958* (Vic) provided that if any part of an element of a relevant offence, or of a defence to a relevant offence, [relied] on a person having reasonable grounds for a belief, in determining whether those reasonable grounds existed, regard [was] [to] be had to the standard of a reasonable person who [was] not intoxicated: *Conlon* (n 75); *Crimes Act* (n 71) s 9AJ(2).
[334] *Zecevic* (n 73); *Dziduch* (n 93); *Portelli* (n 80).

Research has demonstrated that victims of family violence often carry a sense of self-blame and fear that their accounts will not be believed.[335] At times, they may initially seek to conceal their involvement in the death of their partner.[336] It would have been a great risk to proceed to trial on this footing and a prudent practitioner would have advised Jemma accordingly. Having regard to the material evidence, it was likely that Jemma did not wish to take this risk. Jemma was ultimately remorseful for having killed James: a man who she had 'loved most in the world'.[337] Nevertheless, it would appear that Victoria's 2005 law did not inspire confidence in Jemma to proceed to trial despite the existence of a viable claim to self-defence.

Having regard to these considerations, Jemma's decision may be said to have been antithetical to the spirit of Victoria's 2005 law in the sense that the decision paid insufficient regard to the inequalities which the standard had sought to address. In this case, that due to disparities in strength and size and continuous threats of violence, victims of family violence often killed in ways appearing to be 'at odds' with how self-defence had traditionally been understood—as a defence for those who had used force to preserve life or limb in the context of an immediate altercation. Further, the law of self-defence had been seen, insofar as victims of family violence were concerned, to have inadequately accommodated disproportionate responses to threats or pre-emptive responses on unarmed or otherwise defenceless partners, in the context of ongoing family violence. On this basis, Jemma's decision to plead guilty to defensive homicide may be said to represent the seventh manifestation of injustice to have arisen under Victoria's 2005 law: an act which unjustly prevented Jemma from attaining the criterion of a just outcome which the standard had established.

Turning to the sentencing of Jemma Edwards, it was significant of the Court to have asked defence counsel whether Jemma fit 'the profile of a battered woman'.[338] Although defence counsel stated that he 'didn't want to throw that [phrase] around as a diagnosis

[335] See, eg, Michelle Fugate et al, 'Barriers to Domestic Violence Help Seeking: Implications for Intervention' (2005) 11(3) *Violence Against* Women, 290-310.
[336] Mandy McKenzie et al, 'Out of Character - Legal Responses to intimate partner homicides by men in Victoria 2005-2014', *Domestic Violence Resource Centre Victoria* (Discussion Paper, 2016) 35 <http://www.dvrcv.org.au/sites/default/files/out_of_character_dvrcv.pdf>.
[337] *Edwards* (n 271) [40] (Weinberg JA).
[338] Transcript of Proceedings, *R v Edwards [2012] VSC 138* (Supreme Court, 138, Weinberg JA, 11 April 2012) 38 quoted in Kirkwood, McKenzie and Tyson (n 128) 23.

so easily',[339] that was 'essentially the concept [they were] talking about'.[340] Defence counsel went on to state that there had been 'a very well documented history of domestic violence that fit precisely the circumstances in which it was perceived [that defensive homicide] would apply'.[341] In response, his Honour Justice Weinberg stated: '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 [the] legislation'.[342]

Despite the collective hesitation of the Court and counsel, counsel proceeded to maintain that Jemma had become 'deeply entrained in the alternative reality of an abusive relationship' and that this affected her capacity to make what appeared 'to the outsider to be objectively rational decisions'.[343] The Court subsequently sentenced Jemma on the basis that she had spontaneously responded to a perceived threat[344] in 'highly emotional circumstances':[345] that her plea reflected that there could not have been any reasonable grounds for her to have believed that she was at risk of death or really serious injury at the time.[346]

An examination of this case by Tyson et al. suggested that Jemma's history of abuse had adversely affected her judgment and, as a result, she lacked the capacity to rationally assess her circumstances.[347] In the view of the DVRCV, Jemma's irrationality and her portrayal as a 'battered woman' undermined an argument that she had reasonable grounds for her belief that she might be seriously injured or killed by her husband.[348] It encouraged the view that she was 'unreasonably fearful for her life and [she] had retaliated with

[339] Ibid quoted in Kirkwood, McKenzie and Tyson (n 128) 23.
[340] As reflected in the transcript of proceedings, Ms Edwards' lengthy history in an abusive relationship was argued to have likely to have 'impaired her judgment; [preventing] her from thinking clearly or making calm or rational choices': ibid 36-39 quoted in Kirkwood, McKenzie and Tyson (n 128) 23-24.
[341] Ibid.
[342] Ibid.
[343] Ibid.
[344] *Edwards* (n 274) [43] (Weinberg JA).
[345] Ibid.
[346] Weinberg JA also considered that the wounds inflicted upon James Edwards were disproportionate to any threat that he posed to Jemma Edwards: ibid [49] (Weinberg JA).
[347] Danielle Tyson et al, 'Effects of Reforms on Responses to Women who Kill Intimate Violent Partners' in Kate Fitz-Gibbon and Arie Freiberg (ed), *Homicide Law Reform in Victoria: Retrospect and Prospects* (The Federation Press, 2015) 79.
[348] Kirkwood, McKenzie and Tyson (n 128) 23.

violence on the day of the killing'[349] due to a history of abuse having adversely affected her judgment.[350]

It is submitted that this view unjustly pathologised a victim of family violence in a manner antithetical to the spirit of Victoria's 2005 law. That is, the view delegitimised the application of self-defence without necessarily disproving it beyond all reasonable doubt, whilst significantly prejudicing Jemma's prospects of being perceived by the community as having acted in self-defence by ignoring or trivialising an inequality which Victoria's 2005 law sought to address. This represents the eighth manifestation of injustice to have arisen under the 2005 law. Jemma was thus prevented from attaining the criterion of a just outcome established under the 2005 law.

While the legislative enshrinement of Victoria's 2005 law was presumed to uphold itself within a prosecutions setting, the prosecution of Jemma Edwards further reflected Rawls' conception of imperfect procedural justice in the sense that no assurances could ever be made that the prosecutions process would yield a just outcome for her.[351] Although the standard of justice had established an independent criterion for a just outcome, the proceedings may nevertheless be said to have reached an unfair outcome in that Jemma Edwards, an arguably innocent accused, was convicted of defensive homicide.

The extent to which the 2005 law failed to inspire confidence in Jemma Edwards to proceed to trial on the basis of self-defence and failed to prevent the Court from unjustly pathologising her experiences of family violence may be regarded as the extent to which Victoria's previous law of self-defence and family violence evidence failed to accommodate her experiences.

4.3.5 R v Kells [2012] VSC 53

4.3.5.1 Material evidence

[349] Ibid.
[350] Again, Ms Edwards' lengthy history in an abusive relationship was argued to have likely to have 'impaired her judgment; [preventing] her from thinking clearly or making calm or rational choices'. It was also stated that 'people who stay in violent or abusive relationships may tolerate abuse for long periods of time before retaliating with violence': Transcript of Proceedings (n 338) 36-39 quoted in Kirkwood, McKenzie and Tyson (n 128) 23-24.
[351] Rawls (n 1) 85.

Jade Kells and Dean Pye were in a relationship for approximately five months before his death on 26 January 2010.[352] In a 'fractious' relationship of frequent arguments and mutual abuse, Kells once challenged Pye by text message in November 2009 to return to their home in Rye so that she could stab him.[353] Although Pye left to live elsewhere, Kells joined him in Tootgarook one week later.[354]

On the night of 25 January 2010, neighbours of Pye and Kells reported hearing loud and violent arguments between the pair.[355] Numerous calls were then made to '000' by neighbours, Pye and Kells.[356] The dispute concerned an allegation that Pye had stolen $1,000.00 and multiple mobile phones from Kells.[357] Following several police attendances,[358] Kells had thrown objects out of the window and was described as 'aggressive, uncooperative, not interested in what [the police] had to say, … wanting to get [her] money back, erratic, upset and distraught'.[359] Kells subsequently left the house and returned between 6:00am and 7:00am.[360]

Returning, Pye was not at home but returned shortly after.[361] Immediately the argument continued and Kells called '000' at 7:07am to report that Pye would not 'give [her] stuff back'.[362] Further, she alleged that he had choked her and 'smashed [her] up' against a wall.[363] After the call concluded, Kells had a scuffle with Pye.[364] Kells maintained that Pye then went to their bedroom and that this led her to fear that Pye was going to kill or really seriously injure her.[365] She then decided to arm herself with a knife from the kitchen.[366]

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[352] *R v Kells* [2012] VSC 53, [2] (Macaulay J) ('*Kells*').
[353] Kells stated to police that they had both threatened to stab each other 'millions of times'. She had separated from Pye on several occasions but always managed to reconcile with him: ibid [2], [44] (Macaulay J).
[354] Ibid [2] (Macaulay J).
[355] Ibid [3] (Macaulay J).
[356] Ibid.
[357] Ibid.
[358] Ibid.
[359] Ibid [4] (Macaulay J).
[360] Ibid [5] (Macaulay J)
[361] Ibid.
[362] Ibid.
[363] Ibid.
[364] Ibid [6] (Macaulay J).
[365] Kirkwood, McKenzie and Tyson (n 128) 29.
[366] *Kells* (n 348) [6] (Macaulay J).

At this moment, Kells approached the bedroom door and pushed it open to find Pye coming at her unarmed.[367] Pye was stabbed in the chest which penetrated his heart.[368] By 7:11am, Kells had called '000' screaming that she had stabbed Pye in the chest.[369] He died at the scene.[370]

Kells was charged with murder.[371] At committal, she entered a plea of not guilty to murder.[372] Kells then offered to plead guilty to manslaughter but this was refused by the Crown.[373] She then defended the murder charge on the basis of self-defence.[374] A jury subsequently convicted her of manslaughter by an unlawful and dangerous act on 13 December 2011.[375] She was sentenced to eight years imprisonment with a non-parole period of five years.[376]

4.3.5.2 The law of self-defence

Jade Kells possessed a claim to self-defence which ought to have resulted in her complete acquittal at trial. Pye's choking, forceful push into a wall, prior threats to stab her and his behaviour on the morning of his death would have successfully discharged the evidential burden of self-defence and led Kells to subjectively believe[377] that her conduct was necessary to defend herself from the infliction of death or really serious injury[378] pursuant to section 9AC of the Crimes Act 1958 (Vic).[379]

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[367] Ibid.
[368] The Crown was initially confused by the presence of a very large amount of blood at the scene suggesting there had been an attempt on Kells' behalf to clean up the scene before calling emergency services. The blood later turned out to be Kells' blood, shed somewhat earlier, as a consequence of a medical procedure of her own. There were also numerous superficial injuries which, relying on the opinion of Professor Stephen Cordner, the Crown presented as being defensive injuries sustained by Mr Pye defending himself from Kells' assaults: ibid [6], [24] (Macaulay J).
[369] Ibid [6] (Macaulay J).
[370] Ibid.
[371] Ibid [1] (Macaulay J).
[372] Ibid.
[373] Ibid.
[374] Ibid [20] (Macaulay J).
[375] Ibid [1] (Macaulay J).
[376] Ibid [68] (Macaulay J).
[377] The test imposed under section 9AC was ruled to be purely subjective: *Babic* (n 70).
[378] Although the *Crimes Act 1958* (Vic) had not defined *really serious injury*, sexual abuse was recognised under section 9AH as a form of family violence, a recognition of the impact of sexual abuse as a serious psychological and potentially physical injury: Kirkwood, McKenzie and Tyson (n 128) 19.
[379] *Crimes Act* (n 71) s 9AC.

With section 9AC having codified the subjective limb of self-defence pronounced in Zecevic,[380] the jury ought to have determined that Kells believed it to be necessary to defend herself and respond in the way that she did to the threat as she perceived it.[381] In other words, the Crown could not have persuaded the jury beyond a reasonable doubt that Kells had not believed that it was necessary to defend herself and that she had not believed that it was necessary to stab Pye to prevent death or really serious injury.

It is submitted that Pye's attack upon Kells amidst their fractious relationship (involving prior intimate partner violence) could have been put to a jury to substantiate that she had possessed objectively reasonable grounds for her belief in the necessity of self-defence pursuant to section 9AD of the Crimes Act 1958 (Vic).[382] The determination of whether she had held reasonable grounds for her belief in the necessity of self-defence would have required the jury to consider whether Kells, as opposed to the hypothetical reasonable person,[383] held no reasonable grounds for her belief in the circumstances as she perceived them to be:[384] a belief which she might reasonably have held in all the circumstances.[385]

In resolving these considerations and ultimately determining whether there were no reasonable grounds for Kells' belief that it was necessary to do what she did[386] (as opposed to whether she had acted unreasonably in the circumstances),[387] the jury would have been required to consider the factors given in Table 4–1.

With regard to the surrounding circumstances and the facts within Kells' knowledge, Kells may be said to have held reasonable grounds for her belief to have acted in self-defence as she had been choked and forcibly pushed into a wall during a relationship involving violence. Given Pye's prior conduct, including threats to stab, Kells may further

[380] *Babic* (n 70); *Zecevic* (n 73).
[381] *Zecevic* (n 73).
[382] *Crimes Act* (n 71) s 9AD.
[383] At common law, it was possible to take into account the accused's state of intoxication in determining whether the accused believed his or her actions were necessary, as well as in determining whether that belief was based on reasonable grounds. However, the *Crimes Act 1958* (Vic) provided that if any part of an element of a relevant offence, or of a defence to a relevant offence, [relied] on a person having reasonable grounds for a belief, in determining whether those reasonable grounds existed, regard [was] [to] be had to the standard of a reasonable person who [was] not intoxicated: *Conlon* (n 75); *Crimes Act* (n 71) s 9AJ(2).
[384] See *Portelli* (n 80); *Viro* (n 75).
[385] See *Zecevic* (n 73); *Wills* (n 85).
[386] *Hendy* (n 86).
[387] Ibid.

be said to have held reasonable grounds for her belief that she was at risk of death or really serious injury.

Having regard to the personal characteristics of Kells alongside any false beliefs or distress she had experienced, it is submitted that Kells would have experienced significant distress when she was attacked by Pye in this manner. As observed by the Court, Kells' personality was characterised by significant borderline and antisocial traits[388] which stemmed from her father having sexually assaulted her.[389] Further, Kells had a history of violent partners, one of whom had threatened to 'bash her'.[390] In essence, Kells' dysfunctional personality had its genesis in her disturbed early environment and would leave her fearful that anyone close to her would exploit or harm her.[391]

In considering the proportionality of Kells' response, her response involved a single, acute blow and a degree of spontaneity:[392] matters favouring the establishment of reasonable grounds. However, Pye was unarmed and this would have adversely affected the determination of whether Kells did have reasonable grounds.[393] That being said, the existence of intimate partner violence within Kells' relationship with Pye would have enabled Kells to rely upon section 9AH of the Crimes Act[394] to substantiate that she may nevertheless have possessed reasonable grounds for her belief even if the jury perceived that she had responded to a harm that was in excess of the force involved in Pye's threatened harm.[395]

Having regard to the material evidence and the considerations addressed above, it is significant that the Crown managed to persuade the jury beyond a reasonable doubt that Kells, as opposed to the hypothetical reasonable person,[396] had not held reasonable grounds for her belief that it was necessary to defend herself. In other words, the jury,

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[388] *Kells* (n 352) [48] (Macaulay J).
[389] Ibid [43] (Macaulay J).
[390] Ibid.
[391] Ibid [47] (Macaulay J).
[392] Ibid [58] (Macaulay J).
[393] *Osland* (n 155).
[394] *1958* (Vic).
[395] Ibid ss 9AH(1)-(3).
[396] At common law, it was possible to take into account the accused's state of intoxication in determining whether the accused believed his or her actions were necessary, as well as in determining whether that belief was based on reasonable grounds. However, the *Crimes Act 1958* (Vic) provided that if any part of an element of a relevant offence, or of a defence to a relevant offence, [relied] on a person having reasonable grounds for a belief, in determining whether those reasonable grounds existed, regard [was] [to] be had to the standard of a reasonable person who [was] not intoxicated: *Conlon* (n 75); *Crimes Act* (n 71) s 9AJ(2).

having been lawfully instructed, could have found Kells not guilty of murder, defensive-homicide or manslaughter on the basis of self-defence after considering all of the circumstances of her case and each element of self-defence within the framework of the family violence provisions.[397]

4.3.5.3 Manifestations of injustice and imperfect procedural justice

Although the jury's decision to acquit Jade Kells of murder meant that it had rejected the Crown's contention that Kells had intended to kill or cause really serious injury to Pye in an 'angry, violent response to a domestic argument',[398] the Crown's management of its case may be said to have unjustly tailored the circumstances of Kells' matter to its own interests while unjustly undermining her prospects of successfully arguing self-defence in a manner antithetical to the spirit of Victoria's 2005 law.

At trial, it was not until the 9th day that a reference to 'family violence' or section 9AH of the Crimes Act 1958 (Vic) was made.[399] By this time, the presentation of evidence had concluded: the Crown and the defence having both completed their closing addresses to the jury.[400] In the jury's absence, counsel for the defence submitted to the trial judge that although the Crown and the defence 'had not actually discussed section 9AH of the Crimes Act', he 'assumed that it applied in the case' and that it should be mentioned in the judge's charge to the jury.[401]

By the Crown's own admission, the practical significance of this omission was that the Crown would have conducted 'its case in a different way'.[402] In other words, the Crown may have conceivably chosen not to depict Kells as a woman who:

- had a 'tendency to act aggressively and to resort to the use of weapons when confronted by, or [becoming] angry with, partners';[403]

[397] *Zecevic* (n 73); *Dziduch* (n 93); *Portelli* (n 80).
[398] *Kells* (n 352) [13] (Macaulay J).
[399] Kirkwood, McKenzie and Tyson (n 128) 27.
[400] Ibid.
[401] Transcript of Proceedings (n 361) 666 quoted in Kirkwood, McKenzie and Tyson (n 128) 31.
[402] Ibid quoted in Kirkwood, McKenzie and Tyson (n 128) 31.
[403] Evidence was also led by the Crown of several incidents involving a former partner, Mr Meyer, a partner of some five years with whom Kells had two children with. On one occasion, Kells resorted to a corkscrew to stab him, and on two other occasions, to a broken bottle and then a knife with which to threaten him. That evidence was led to rebut [Kells'] claim to have acted in self-defence, and to present [Kells] as the true aggressor in this incident: *Kells* (n 352) [12] (Macaulay J).

- exaggerated and fabricated the event of Pye having assaulted her; and
- inflicted the stab wound which killed Pye in an 'angry, violent response to a domestic argument'.[404]

Further, the Crown may not have chosen to argue that Pye, who was under the influence of a concoction of sedatives, was not 'a sitting duck'.[405]

Although the trial judge ultimately determined that he held an obligation to address section 9AH,[406] it is unlikely that that decision had a significant impact upon the jury so late in the trial. It is submitted that the jury's verdict ultimately reflected that Kells' defence was sufficient to nullify a charge of murder but insufficient to warrant complete acquittal on the basis of self-defence. The verdict was undoubtedly influenced by the Crown's presentation of its case against Kells: a case it may have run differently had section 9AH been mobilised.

Although it was again the Crown's prerogative to the use the evidence available to it, it nevertheless failed to address the family violence provisions earlier in the trial. As a result of this failure, the Crown may reasonably be perceived to have tailored the circumstances of Kells' matter to its interests by discharging its legal burden through the unjust argument that her history of abusive, volatile relationships made it more likely that she had decided to kill or seriously injure Pye without any lawful excuse. Put another way, it is conceivable that the Crown's presentation of Kells as inherently 'erratic'[407] was sufficient to have cast doubt upon the applicability of self-defence without necessarily disproving it beyond a reasonable doubt, all whilst significantly prejudicing the prospects of Kells having been acquitted on the basis of self-defence, in a manner antithetical to the spirit of Victoria's 2005 law.

In doing so, the Crown may be said to have dishonoured, ignored or trivialised the inequalities which the standard of justice had sought to address. In this case, that lethal responses to family violence were commonly perceived to be the product of a personal pathology as opposed to socio-cultural or socio-economic circumstances. On this basis,

[404] Kirkwood, McKenzie and Tyson (n 128) 30.
[405] Kirkwood, McKenzie and Tyson (n 128) 30.
[406] Ibid
[407] As put by the Crown, '… this [was] a very strong case of murder … the evidence, when you [looked] at it, and [analysed] it properly, [was] that she was erratic all night, violent and aggressive': Ibid

the Crown's argument itself may be said to represent the ninth manifestation of injustice to have arisen under Victoria's 2005 law: an act which unjustly contributed to Jade Kells not attaining the criterion of a just outcome established under Victoria's 2005 law.

A similar theme may further be observed in the sentencing of Jade Kells. In sentencing Kells, the Court concluded that the jury's verdict implied that Kells had 'too readily resorted to a violent retaliatory response'[408] and that what had occurred was due to her 'tendency to confront conflict with a violent solution'[409] as she had a 'series of opportunities to avoid the final confrontation'.[410] Although the Court acknowledged that the stabbing of Pye 'occurred after a long night of frustration and angry conflict, and was possibly [accompanied] … by intense emotional feeling, sleep deprivation and, possibly, a weakened physical state',[411] the Court emphasised that 'there were options available to [her] to escape the confrontation, options [she] did not pursue'.[412]

Although the common law of self-defence established that an accused's failure to retreat was relevant to the assessment of self-defence,[413] it was not a decisive factor. These comments, when viewed in the context of Kells having been portrayed as 'erratic' and having been identified by the Court as possessing anti-social and borderline personality traits, would appear to pathologise Kells instead of entertaining whether her defensive response arose directly from family violence.

In a similar fashion to the sentencing of Karen Black, the Court's approach appeared to focus on whether Jade Kells had acted unreasonably in the circumstances[414] as opposed to whether she held reasonable grounds for her belief that it was necessary to do what she did:[415] a critical distinction within the law of self-defence.

The Court's approach unjustly pathologised a victim of family violence in a manner antithetical to the spirit of Victoria's 2005 law, particularly having regard to the VLRC's recommendations that a social-context framework containing evidence of family violence

[408] *Kells* (n 352) [13] (Macaulay J).
[409] Ibid [14] (Macaulay J).
[410] Ibid [59] (Macaulay J).
[411] Ibid [11] (Macaulay J).
[412] Ibid.
[413] *Zecevic* (n 73). See also *R v Howe* (1958) ('*Howe'*).
[414] *Hendy* (n 86).
[415] Ibid.

be used to challenge the pathologising of victims of family violence. On this basis, the Court's approach may be said to represent the tenth manifestation of injustice to have arisen under Victoria's 2005 law. As a result, Kells was prevented from attaining a just outcome as established under the standard, by depicting her as someone who was ineligible to attain Rawls' criterion.

While the legislative enshrinement of Victoria's 2005 law was presumed to uphold itself within a prosecutions setting, the prosecution of Jade Kells further reflected Rawls' conception of imperfect procedural justice in the sense that no assurances could ever be made that the prosecutions process would yield a just outcome in that the process could not be guaranteed to uphold Victoria's 2005 law without fail.[416] Although the standard of justice had established an independent criterion for a just outcome, the proceedings may nevertheless be said to have reached an unfair outcome in that Jade Kells, an arguably innocent accused, was convicted of manslaughter by an unlawful and dangerous act.

4.3.6 R v Hudson [2013] VSC 184

4.3.6.1 Material evidence

Veronica Hudson and Edward Heron were in an 'on and off' relationship for several years prior to his death on 26 December 2011.[417] Born in 1956, Heron spent a significant period of time in the youth justice and prison environment.[418] He was 16 years older than Hudson and, at a young age, was removed from his family and placed in a foster care facility in South Australia.[419] In 1985, Heron was convicted of a violent robbery and sentenced to six years imprisonment with a minimum of three years.[420] Subsequently, in July 1996, he was convicted of the manslaughter of his first cousin and sentenced to six years and one month imprisonment.[421]

Hudson also possessed a lengthy criminal history dating back to 1987.[422] Since 1987, Hudson had been convicted of loitering for prostitution and unlawful possession.[423] She

[416] Rawls (n 1) 85.
[417] *R v Hudson* [2013] VSC 184, [1] (King J).
[418] Ibid [13] (King J).
[419] Ibid.
[420] Ibid.
[421] Ibid.
[422] Ibid [2] (King J).
[423] Ibid [3] (King J).

had also been convicted of malicious damage, assault, assaulting police, offensive behaviour, common assault, larceny, disorderly behaviour and breaching suspended sentences of imprisonment.[424] Additionally, between 1999 and 2010, Hudson had resisted police in the execution of their duty, driven intoxicated and without a licence and had assaulted a member of the public service.[425] She had also behaved in an indecent manner in a public place and had, on two occasions, attempted arson.[426] The totality of Hudson's prior offending was linked to her 'serious problems in respect of alcohol'[427] and a life which read 'like a horror story'.[428]

Born to an Aboriginal father who she had never met, Hudson grew up with four half-siblings,[429] one of whom suffered from schizophrenia and another from bipolar disorder.[430] As well as a significant substance abuse history, Hudson was removed from and her family and became a state ward. As a result, her education was ultimately 'ad hoc' and 'neglected'.[431] She was sexually abused as a young child[432] and recalled that people were 'always sticking things into [her]'.[433] By 13, Hudson was living in Kings Cross (Sydney) and working as a prostitute.[434] She eventually became suicidal and developed a habit of cutting herself until she returned to Melbourne when she was 22 years of age.[435]

At this time, Hudson was in a relationship with Robert Lovett. In a consistent theme with her prior relationships, this relationship was just as violent.[436] After becoming pregnant, Hudson moved to New South Wales where she was arrested. Her son, Harley, was born

[424] The longest sentence of imprisonment was in 1992, when Hudson was sentenced for common assault, assault with intent to rob, break enter and steal and malicious wounding, to 16 months imprisonment with a non-parole period of four months, by the Central Local Court in New South Wales. On the same date, Hudson was sentenced to the rising of the court for one count of stealing, one count of assault police, one count of larceny, three counts of failing to appear, two counts of goods in custody, one count of stealing from a dwelling house, one count of assault occasioning actual bodily harm: ibid.
[425] Ibid [4]-[6] (King J).
[426] Ibid.
[427] Ibid [6] (King).
[428] Ibid.
[429] Ibid [14] (King J).
[430] Ibid.
[431] Ibid.
[432] Ibid [16] (King J).
[433] Ibid.
[434] Ibid [15] (King J).
[435] Ibid [16] (King J).
[436] Ibid.

while she was in custody.[437] Upon her release, Hudson became involved in another abusive relationship with Stephen Munjaloon. This too was a very violent relationship, which led to her being pushed into the path of a four-wheel drive vehicle, sustaining serious injuries.[438] Hudson spent 16 months in hospital where she learned to walk again, whilst her child, Harley, was in the care of child services.[439]

One month after her relationship with Munjaloon ended, Hudson commenced her relationship with Heron.[440] The pair would drink excessively which would continue on and off over the years of their relationship.[441] Their relationship became 'appallingly violent'[442] where Heron would cut her 'arms, hands, throat' and pull her 'teeth out with pliers … [He was] very jealous, very suspicious, always [believed] that [she was] having sex with any male that [she] met, including … [her] son, [her] son's friends or any male around the area'.[443] The more he drank, the worse his jealousy became.[444]

On 1 March 2006, a domestic violence order (the equivalent of an intervention order in Victoria) was consented to by Mr Heron in Alice Springs, which prevented him from assaulting Hudson or visiting her unit.[445] Six days later, Heron waited near it and assaulted her when she arrived.[446] The Court stated that characterising the incident as an assault downplayed 'the significance and horror of the injuries and suffering that [Heron] inflicted upon [her]'.[447] In sentencing Heron for his attack upon Hudson, Martin AJ stated:

> You struck her several times to her face with your left and right fists whereupon she fell over. One might have thought that such a retaliation in itself although unjustified with the result that she was then on the ground and totally defenceless would cause you to stop what you were doing. But you didn't. You resorted to kicking her in the face and back with your right foot which was clad in sand shoes

[437] Hudson had been a heroin user up until the time of her pregnancy. She ceased at that time and did not resume: ibid.
[438] Ibid.
[439] Ibid.
[440] Ibid [17] (King J).
[441] Ibid.
[442] Ibid [18] (King J).
[443] Ibid.
[444] Ibid.
[445] Ibid [19] (King J).
[446] Ibid.
[447] Ibid.

> at the time. That wasn't enough; you then bent down over her and what could only be regarded as being a very deliberate act, you bit her above her left breast. You then continued by placing both your feet together and jumping up and down on her face, her back and her head. She remained on the ground and she stayed there until morning too fearful to move, and you initially, and I say callously, ignored her pleas to ring an ambulance until about 7am on the morning of 8 March. You were asked by police why it was that you assaulted her and you responded that she brings out the nasty in you and that would be quite an understatement.[448]

In referring to Heron's criminal record, he commented that Heron possessed 'a very bad criminal record demonstrating [his] capacity for paying disregard to the law and court orders, but perhaps more importantly [his] capacity for violence'.[449] Following the attack, Hudson was 'so afraid of Heron that when he told [her] that [she] could not leave or seek medical treatment for what he had done to [her], she just stayed there on the floor, in [her] house, too scared to move all night'.[450]

In the morning, Hudson was permitted to call for help.[451] Heron was sentenced to five years imprisonment for one count of unlawfully causing grievous bodily harm.[452] When Heron went to prison, Hudson was 'passed back' to her previous violent partner, Steve Munjaloon.[453] Upon Heron's release, Heron 'tracked [Hudson] down, found where [she] was living and [Hudson] returned to him instantly, out of a combination of love, fear, lack of choices and hopelessness'.[454]

Over time, the members of both Heron and Hudson's families came to believe that Hudson would die as a result of their relationship.[455] In a letter to the Court, Hudson's son, Harley, stated that:

> They were both drinking a lot and their relationship was very violent … I couldn't handle watching Woody abuse my mother any more, and I went to stay with my

[448] Ibid.
[449] Ibid.
[450] Ibid [20] (King J).
[451] Ibid.
[452] Ibid.
[453] Ibid [22] (King J).
[454] Ibid.
[455] Ibid [23] (King J).

> grandmother. I was so frustrated because when Stephen or I tried to defend her or protect her, she would turn on us and defend Woody … I think she was too afraid of him and wanted to make sure he wouldn't be angry with her, so she would stick up for him … It was like she was totally fixated on Woody, even despite all the harm he was causing her … Even though mum used to try and hide it from me, I knew how bad things were … Even though Woody was a little bloke, he was very unpredictable and I was definitely afraid of him. He was the kind of guy where you wouldn't know if he would stab you in the back when you weren't looking. One weird thing about him was that he could be really charming and nice about five percent of the time, but he didn't seem to have a conscience at all. That was another reason I wanted to get mum away from him. I have never met a person with such obsessive jealousy, and it was a problem every day. At Debbie's house, he would even follow her when she went to the toilet, and stand outside the door. He followed her everywhere she went. I am 100 percent sure that Woody would have killed mum eventually. All of us in the family knew that one day one of them would kill the other but we all thought it would be Woody who did it.[456]

Three days prior to Heron's death, Hudson was taken to Bendigo Hospital and transferred to the Alexander Bayne Centre, a psychiatric facility.[457] Hudson's throat had been 'cut from ear to ear' although not deeply.[458] The Court commented that 'it would appear that [Heron] may have been responsible for the infliction of [the] injury'.[459] The Court reached this conclusion by observing that when Hudson had been in a position to say to people who had inflicted this injury (namely, when Heron and the police were not present), Hudson indicated that Heron had inflicted the injury.[460] When Heron was around or when the police asked if Heron had inflicted the injury on her, Hudson would state that the injury was self-inflicted.[461] Hudson was involuntarily held at the centre for two days before being released into the custody of Heron, the day before he died.[462] Upon returning home, their drinking recommenced.[463]

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[456] Ibid [28] (King J).
[457] Ibid [23] (King J).
[458] Ibid.
[459] Ibid [24] (King J).
[460] Hudson told those involved in her care at the Alexander Bayne Centre that it was the deceased, Edward Heron, who had cut her throat: ibid.
[461] Ibid.
[462] Ibid.
[463] Ibid [26] (King J).

On 26 December 2011, Heron and Hudson were at their tent at the Bendigo Show Grounds Caravan Park.[464] It was not a proper tent in that the tent hung from a tree without any pegs or poles.[465] The Court observed that the circumstances in which they were residing were 'very poor'.[466] From 10am in the morning, Heron and Hudson were seen drinking.[467] This continued throughout the day and after 3pm, Heron and Hudson were observed arguing outside their tent.[468] According to witnesses, there was constant 'yelling, screaming and abuse'.[469] One witness, Patricia Hinneberg, stated that every day there was a physical dispute between the pair.[470] In her words:

> I have seen the man hit the woman just about every day. This would involve punches and slaps but I also saw him poke her in the face with his fingers, in the face a number of times. She would just sit screaming at him but not hitting back at him.[471]

According to another witness, Mr Mahardy, Hudson was heard assuring Heron that:

> [She] didn't fuck the blokes on the hill and … [she] wanted to go back to Alice Springs and [Heron told her] he couldn't go back as he was wanted for raping that girl. Some of the people on the other side of the fence, the ones referred to as the blokes on the hill, would yell at [Heron] to leave [Hudson] alone.[472]

Subsequently, at 4:20pm, Hudson was seen to push Heron with one hand, which led to Heron falling over.[473] At this moment, Hudson jumped onto Heron and straddled him across the stomach and chest before stabbing him once with a knife.[474] Immediately after, Hudson was seen carrying a black-handled knife and saying 'I've killed him and I want him to live'.[475] Neighbour Lawrence Hinneberg described Hudson as appearing 'frantic' and that she was crying.[476] After calling '000' and requesting an ambulance, she told the

[464] Ibid [9] (King J).
[465] Ibid.
[466] Ibid.
[467] Ibid.
[468] Ibid.
[469] Ibid [29] (King J).
[470] Ibid.
[471] Ibid.
[472] Ibid.
[473] Ibid [9] (King J).
[474] Ibid.
[475] Ibid.
[476] Ibid.

Ambulance Victoria receptionist that she had stabbed Heron. Robyn Mahardy, a nurse who was camping at the showgrounds, came to assist and determined that Heron had died.[477]

Hudson was arrested and taken to the Bendigo Police Station, where she was examined by a doctor and found unfit to be interviewed.[478] Having viewed the audio-visual copy of the interview, the Court observed that Hudson was distressed over the death of Heron.[479] Although the stabbing may initially have been motivated by alcohol and anger, the Court identified that the stabbing had to be viewed in the context of Hudson's personal history and the history of her relationship with Heron.[480] Based on these histories, the Court concluded that Hudson had been subjected to 'constant violence' by Heron and that 'everyone appeared powerless to prevent it including [herself]'.[481] Her life had clearly 'been one where [she had] lacked the power to do much to make it better or worth living': a tragedy in the true sense.[482]

The prosecution chose to prosecute Hudson for murder. It subsequently accepted Hudson's offer to plead guilty to manslaughter by an unlawful and dangerous act.[483] On 26 April 2013, Hudson was sentenced to six years of imprisonment with a non-parole period of three years.[484]

4.3.6.2 The law of self-defence

On any view of the facts, with the presumption of innocence in mind,[485] Hudson held a compelling claim to self-defence, which ought to have resulted in the discontinuance of her prosecution for murder. Heron's history of severe violence towards Hudson and his abusive demeanour at their Bendigo residence would have discharged the evidential

[477] Ibid.
[478] Ibid.
[479] Ibid [10] (King J).
[480] Ibid [12] (King J).
[481] Ibid [30] (King J).
[482] Ibid.
[483] Ibid [1] (King J).
[484] Ibid [39] (King J).
[485] As the accused's prosecution was resolved by plea of guilty, the evidence sourced amounts to a synopsis of the evidence which was available to the prosecution at the time. As a result, none of the evidence was tested for credibility at trial (as it would have been had the accused pleaded not guilty). Additionally, the credibility of any witnesses (expert or otherwise) which may have been called by defence counsel was not tested at trial. In other words, the evidence which might have been available at trial is not necessarily the same as that which was presented at sentence. See 3.2.6.1.

burden of self-defence and led Hudson to subjectively believe[486] that her conduct was necessary to defend herself from the infliction of death or really serious injury, pursuant to section 9AC of the Crimes Act 1958 (Vic).[487]

The determination of whether Hudson believed her actions to be necessary would have required the jury to consider whether Hudson believed that it was necessary to defend herself at all and, secondly, whether she believed it was necessary to respond in the way that she did given the threat as she perceived it.[488]

Having regard to the material evidence and Heron's history of severe violence toward Hudson, it is unlikely that the Crown would have persuaded a jury beyond a reasonable doubt that she had not believed that it was necessary to defend herself. With regard to Hudson's response, namely, her single stabbing, it is equally unlikely that the Crown would have persuaded a jury beyond a reasonable doubt that she had not believed that it was necessary to push Heron and ultimately incapacitate him.

These arguments would have been strengthened by the common law's requirement that a jury assess what Hudson herself had believed as opposed to what the ordinary reasonable person would have believed in the circumstances,[489] and further, that it was immaterial whether Hudson's belief was mistaken[490] or created by her intoxication:[491] the common law merely required that her belief be genuinely held.[492] Lastly, as a person who had reacted instantly to imminent (and continuous) danger, Hudson could not have been expected to have precisely weighed the exact measure of self-defensive action which was required.[493]

With these considerations in mind and the proportionality of Hudson's response being just one factor for consideration in the determination of whether she believed that her actions were necessary,[494] it is unlikely that the Crown would have persuaded a jury

[486] The test imposed under section 9AC was ruled to be purely subjective: *Babic* (n 70).
[487] *Crimes Act* (n 71) s 9AC.
[488] *Zecevic* (n 73).
[489] Ibid. See also, *Viro* (n 75); *Conlon* (n 75).
[490] *McKay* (n 76).
[491] *Conlon* (n 75); *Katarzynski* (n 77).
[492] *McKay* (n 76).
[493] See *R v Palmer* [1971] AC 814 *('Palmer')*; *Zecevic* (n 73); *Conlon* (n 75).
[494] See *Zecevic* (n 73); *Portelli* (n 80); *Carrington* (n 80).

beyond a reasonable doubt that she had not genuinely held a necessary belief to act in self-defence.

Heron's prior severe beatings of Hudson, cutting of Hudson's throat and threatening conduct on the day of his death would have established objectively reasonable grounds for her belief in the necessity of self-defence, pursuant to section 9AD of the Crimes Act 1958 (Vic).[495] The determination of whether Hudson held reasonable grounds for her belief in the necessity of self-defence would have required consideration of whether she, as opposed to the hypothetical reasonable person,[496] held no reasonable grounds for her belief in the circumstances as she perceived them to be:[497] a belief which Hudson might reasonably have held in all the circumstances.[498] In resolving these considerations and ultimately determining whether there were no reasonable grounds for Hudson's belief that it was necessary to do what she did[499] (as opposed to whether she had acted unreasonably in the circumstances),[500] a jury would have been required to consider the factors listed in Table 4–1.

With regard to the surrounding circumstances and the facts within her knowledge, Hudson may be said to have held reasonable grounds for her belief to act in self-defence in that Heron had continuously subjected Hudson to severe, cruel and brutal violence. As established by the material evidence, Heron's prior conduct would have been instrumental in providing reasonable grounds for her belief. As observed by her defence counsel, Hudson told staff members of a local support service that she felt imprisoned by Heron, that she was 'never allowed to be alone for more than 10 minutes'[501] and was continuously

[495] *Crimes Act* (n 71) s 9AD.
[496] At common law, it was possible to take into account the accused's state of intoxication in determining whether the accused believed his or her actions were necessary, as well as in determining whether that belief was based on reasonable grounds. However, the *Crimes Act 1958* (Vic) provided that if any part of an element of a relevant offence, or of a defence to a relevant offence, [relied] on a person having reasonable grounds for a belief, in determining whether those reasonable grounds existed, regard [was] [to] be had to the standard of a reasonable person who [was] not intoxicated: *Conlon* (n 75); *Crimes Act* (n 71) s 9AJ(2).
[497] See *Portelli* (n 80); *Viro* (n 75).
[498] See *Zecevic* (n 73); *Wills* (n 85).
[499] *Hendy* (n 86).
[500] Ibid.
[501] Transcript of Proceedings, *R v Hudson [2013] VSC 184* (Supreme Court, 184, King J, 11, 26 April 2013) 18 quoted in Kirkwood, McKenzie and Tyson (n 128) 36.

'terrified that [Heron] would slit her throat again'.[502] In the words of her defence counsel, she was 'basically being held hostage' in the tent in which she lived.[503]

Having regard to these beliefs, Hudson's personal characteristics and the distress she experienced, it is submitted that Hudson would have experienced significant distress when Heron abused her and prodded her face, after years of violence. Pertinently, Hudson was physically and sexually abused since a child and appeared powerless to prevent this as an adult.[504] Her distress would have undoubtedly been exacerbated by this personal history as indicated by her diagnosis of post-traumatic stress disorder.

In considering the proportionality of her response, Hudson only used a single stabbing to incapacitate Heron and immediately exclaimed that she had wanted Heron to live. In the unlikely event that such evidence would have led a jury to initially perceive that her response involved the use of force in excess of the force involved in Heron's threatened harm or that she had responded to a non-imminent threat, the existence of family violence within their relationship would have enabled Hudson to rely upon section 9AH of the Crimes Act[505] to illustrate that she may nevertheless have possessed reasonable grounds for her belief.[506] Further, in giving proper weight to Hudson's predicament, which may have afforded little, if any, opportunity for calm deliberation and detached reflection,[507] Crown arguments against the proportionality of Hudson's single stabbing would have been, it is submitted, overzealous.

Having regard to the material evidence and the considerations addressed above, it is unlikely that the Crown would have persuaded a jury beyond a reasonable doubt that Hudson, as opposed to the hypothetical reasonable person,[508] had not held reasonable grounds for her belief that it was necessary to defend herself: a belief which she could be

[502] Ibid quoted in McKenzie et al (n 332) 36.
[503] Ibid 16.
[504] *Hudson* (n 417) [30] (King J).
[505] *Crimes Act* (n 71).
[506] Ibid ss 9AH(1)-(3).
[507] *Zecevic* (n 73).
[508] At common law, it was possible to take into account the accused's state of intoxication in determining whether the accused believed his or her actions were necessary, as well as in determining whether that belief was based on reasonable grounds. However, the *Crimes Act 1958* (Vic) provided that if any part of an element of a relevant offence, or of a defence to a relevant offence, [relied] on a person having reasonable grounds for a belief, in determining whether those reasonable grounds existed, regard [was] [to] be had to the standard of a reasonable person who [was] not intoxicated: *Conlon* (n 75); *Crimes Act* (n 71) s 9AJ(2).

said to have reasonably held. In other words, a hypothetical reasonable jury, lawfully instructed, having considered all the circumstances of Hudson's case and each factor within its broader context,[509] would have found Hudson not guilty of murder, defensive-homicide or manslaughter on the basis of self-defence.

4.3.6.3 Manifestations of injustice and imperfect procedural justice

The conviction of Veronica Hudson represented the most profound injustice to have arisen under the operation of Victoria's 2005 law. Although it is not certain what led to Hudson's decision to plead guilty, it is acknowledged that Hudson's offer to plead guilty to manslaughter was offered at an early stage and that the Court perceived her to have been 'incredibly remorseful for what she [had] done'.[510] Indeed, Hudson was suicidal after the killing.[511]

The DVRCV speculated that Hudson may have pleaded guilty because she felt responsible for Heron's behaviour and extremely guilty for what she had done (a matter ultimately raised by her defence counsel).[512] Pertinently, Hudson came to believe that she deserved to be punished by Edward Heron (as well as the other men in her life).[513] She felt that punishment was appropriate because she 'made them angry' or 'upset them'.[514] When one views these beliefs in the context of one who suffers from dependent personality disorder, post-traumatic stress disorder and substance abuse dependency,[515] it is not fanciful to suggest that Hudson may have believed that it was wrong to have defended herself from the abuse of Edward Heron and that she ought to have felt guilty and ashamed for having protected herself, possibly, for the first time in her adult life.

Although Hudson's decision to plead guilty was her legal and personal right, the doctrinal content of the law provided her with a compelling avenue to acquittal which she chose not to pursue. That is, Victoria's 2005 law did not inspire confidence in Hudson to

[509] *Zecevic* (n 73); *Dziduch* (n 93); *Portelli* (n 80).
[510] *Hudson* (n 417) [37] (King J).
[511] Transcript of Proceedings (n 496) 45 quoted in Kirkwood, McKenzie and Tyson (n 128) 37.
[512] Kirkwood, McKenzie and Tyson (n 128) 37.
[513] *Hudson* (n 417) [37] (King J).
[514] Ibid [27] (King J).
[515] Ibid [35] (King J).

proceed to trial despite the existence of a compelling claim to self-defence. It was thereby significant of the Court to have stated that many aspects of Hudson's matter were identical to that of Melissa Kulla's; that their tragedies were 'remarkably similar'.[516]

With these considerations in mind, Hudson's decision may be said to have been antithetical to the spirit of Victoria's 2005 law in the sense that the decision paid insufficient regard to the inequalities which the standard had sought to address. In this case, due to disparities in strength and size and continuous threats of violence, victims of family violence often killed in ways appearing to be 'at odds' with how self-defence had traditionally been understood as a defence for those who had used force to preserve life or limb in the context of an immediate or spontaneous altercation. Further, the law of self-defence had been seen, insofar as victims of family violence were concerned, to have inadequately accommodated disproportionate responses to threats or pre-emptive responses on unarmed or otherwise defenceless partners performed in the context of ongoing family violence.

On this basis, Hudson's decision to plead guilty to manslaughter by an unlawful and dangerous act itself represented the eleventh manifestation of injustice to have arisen under Victoria's 2005 law: an act which unjustly prevented her from attaining the criterion of a just outcome established under Victoria's 2005 law and occasioning Rawls' imperfect procedural justice.

While the legislative enshrinement of Victoria's 2005 law was presumed to uphold itself within a prosecutions setting, the prosecution of Veronica Hudson further illustrated Rawls' imperfect procedural justice in the sense that no assurances could ever be made that the prosecutions process would yield a just outcome for Hudson, or that the process could be guaranteed to uphold Victoria's 2005 law without fail.[517] Although the standard of justice had established an independent criterion for a just outcome, the proceedings nevertheless reached an unfair outcome in that Hudson, an innocent accused, was convicted. In the submission of the author, the extent to which the written, doctrinal content of Victoria's 2005 law failed to inspire confidence in Hudson to proceed to trial on the basis of self-defence may be regarded as the extent to which Victoria's previous

[516] Ibid [38] (King J).
[517] Rawls (n 1) 85.

law of self-defence and family violence evidence unjustly failed to accommodate the experiences of Veronica Hudson.

4.3.7 DPP v Williams [2014] VSC 304

4.3.7.1 Material evidence

Angela Williams was born in November 1968.[518] At age 8, she witnessed her 14 year old brother, Vincent, drown during a family duck shooting expedition.[519] Her family traumatised, William's father was so distraught that he fired shots into a car which she, her mother, and remaining brother, Jason, were sitting in.[520] Williams eventually dropped out of school at the start of year 12.[521] She became much closer to Jason after Vincent's death, only for him to die in a motorcycle accident in Western Australia.[522] Having also observed a friend commit suicide,[523] Williams began to suffer from depression and post-traumatic stress disorder.[524]

When she was 17 years of age, Williams met Douglas Kally, who was 25 years of age.[525] Kally was Williams' first sexual partner and it was her first serious relationship.[526] They were together for 23 years and had two children. It was not disputed by the Crown, defence and the Court that Kally had been 'dominant' and 'controlling' through their relationship.[527] Further, Williams had few friends and was heavily dependent on Kally.[528] It was also established that Kally was a heavy drinker and would belittle, abuse and call Williams derogatory names (such as 'slut') in front of other people when he had been drinking.[529] As Williams rarely drank alcohol, Kally would expect Williams to drive him around and sometimes demanded that she pick him up late at night after heavy drinking sessions.[530]

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[518] *DPP v Williams* [2014] VSCA 94 (*'Williams'*) [41] (Hollingworth J).
[519] Ibid.
[520] Ibid.
[521] Ibid.
[522] Ibid [43] (Hollingworth J).
[523] Ibid [44] (Hollingworth J).
[524] Ibid [48] (Hollingworth J).
[525] Ibid [25] (Hollingworth J).
[526] Ibid.
[527] Ibid.
[528] Ibid.
[529] Ibid.
[530] Ibid.

Kally had a 'long history' of inflicting serious physical violence against a number of people.[531] Having 'problems controlling his temper and his behaviour', Kally's violence once extended to sexual aggression towards at least one woman.[532] Kally also had a history of using and selling marijuana, and drugs were once found in their family home.[533] He previously persuaded Williams to 'take the rap' for him so that he would not face a sentence of imprisonment as he already had convictions for drug dealing.[534]

Kally, when angry, punched or kicked holes in the walls of the family home.[535] In a statement given to the police in 2008 concerning Kally's disappearance, Williams stated that: 'to be honest [Kally] could go over the top with me and the kids, but it didn't happen all the time.'[536] In 2012, Williams mentioned the existence of 'family violence' to the police and when asked whether her children had heard Williams and Kally arguing the night before Kally disappeared, she stated that: '[the kids] always heard [them] arguing. And Doug hitting me and stuff like that. And kicking the kids sometimes. It's been happening for 23 years.'[537] Williams also said that her children had seen Kally 'hitting and fighting with [her] before' and that 'to them, [it was] probably not unusual'.[538]

The Court ultimately accepted that, over a long period, Kally had been physically violent towards Williams and their children, and that Kally would push, shove, threaten and abuse them all. His behaviour was 'abusive, belittling and controlling, [and had] involved both physical and psychological abuse'.[539]

Between 10 and 24 July 2008, Williams drove to the home of a mutual friend, David Grainger, and told him that she had had an argument with Kally and that Kally had ultimately asked her to drop him off at the train station so that he could go and live in his favourite fishing location, Kiama, NSW.[540] Later that day, Williams sent a message to her children telling them to come to Grainger's house that evening where they would stay for

[531] Ibid.
[532] Ibid.
[533] Ibid.
[534] Ibid.
[535] Ibid.
[536] Ibid [22] (Hollingworth J).
[537] Ibid [17] (Hollingworth J).
[538] Ibid.
[539] Ibid [26] (Hollingworth J).
[540] Ibid [4] (Hollingworth J).

the next three to four days.[541] The Crown alleged that Williams never dropped Kally at the train station and that she had already killed him after an argument the night before she had gone to Grainger's.[542] However, Williams stated in her record of interview that she did drop Kally at the train station and had killed him a few days later when she went home early one morning and found that he had unexpectedly returned.[543]

By her account, Kally began 'yelling and screaming abuse' at Williams as she entered their home.[544] He pushed her, shoved her, punched her in the chest, pulled her hair, hit her, 'knocked [her] down a few times' and called her a slut.[545] Williams subsequently asked Kally to stop, to 'leave [her] alone', but he would not stop.[546] At this moment, Williams grabbed a pickaxe from behind their bedroom door where various tools were kept.[547] Kally began to goad her, yelling words to the effect of 'Go on. Do it. Do it. Like that, you fucking fat slut'.[548] Stating that she 'felt in danger for [her] life' and believing that no other options to defend herself existed, Williams struck Kally repeatedly with the pickaxe.[549]

Williams struck Kally to the back of the head and neck area 16 times, causing 'eight penetrating depressed skull fractures, and bleeding and swelling in the brain'.[550] The forensic pathologist who performed the autopsy could not say whether any particular blow was fatal but that Kally would have died within a relatively short period after receiving the blows.[551] At this time, Williams left Kally on their bed before returning to Grainger's house.[552] Within a day of killing Kally, Williams wrapped his body in a tarpaulin, taped it up, wrapped some rope around it and buried him in their backyard.[553]

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[541] The Crown alleged that Williams never dropped Mr Kally at the train station, and had already killed him after an argument the night before she went to Mr Grainger's. However, Williams told police in her record of interview that she did drop Mr Kally at the train station, and only killed him a few days later, when she went home early one morning and found that he had returned unexpectedly. Williams said that she killed him after a fight that morning: ibid [4]-[5] (Hollingworth J).
[542] Ibid [5] (Hollingworth J).
[543] Ibid.
[544] Ibid [15] (Hollingworth J).
[545] Ibid.
[546] Ibid.
[547] Ibid.
[548] Ibid.
[549] Ibid.
[550] Ibid.
[551] Ibid [3] (Hollingworth J).
[552] Ibid [15] (Hollingworth J).
[553] Ibid [7] (Hollingworth J).

She then cleaned Kally's blood from the bedroom before disposing of the mattress and pickaxe.[554]

Following Kally's death, Williams engaged in a series of lies concerning Kally's whereabouts in order to conceal his death.[555] She told family and friends that Kally had 'gone interstate and … had asked [her] and [their] children to move there with him, but [she] did not want to go for various reasons'.[556] A few months later, at a social event at Grainger's house, Williams staged a telephone call and pretended that Kally had called her.[557] When she returned to the group, she said that Kally had invited her to join him in Kiama but that she had declined.[558]

Just before her son's 20th birthday in September 2008, Williams give him a surf watch that belonged to Kally and said that Kally had sent it by post as a birthday present.[559] Kally had been in infrequent contact with his own family who feared that he mixed with 'unsavoury characters' through his 'drug-dealing activities' and they knew that he had 'walked out on at least one previous partner and children' yet some of his family members accepted that he had moved interstate.[560] Further, Williams' staged phone call and a surf watch 'gift' removed any residual doubts among their mutual friends.[561]

When the police first investigated Kally's disappearance in 2008, Williams provided a statement and repeated these lies.[562] Williams persisted with these lies until the police began actively reinvestigating Kally's disappearance in November 2012.[563] On 21 December 2012, at her father's insistence,[564] Williams admitted to the police that she had struck Kally repeatedly with the pickaxe after a fight and made full admissions concerning the disposal of his body, tidying up, dropping Kally at the train station, staying at

[554] Ibid.
[555] Ibid [8] (Hollingworth J).
[556] Ibid.
[557] Ibid [9] (Hollingworth J).
[558] Ibid.
[559] Ibid [10] (Hollingworth J).
[560] Ibid [12] (Hollingworth J).
[561] Ibid.
[562] Ibid [11] (Hollingworth J).
[563] Ibid [13] (Hollingworth J).
[564] Ibid.

Grainger's for a few days and having driven home early one morning to find Kally in their bedroom.[565]

Williams subsequently cooperated with police in a video re-enactment, took them to the location of the disposed pickaxe and instructed them where to dig up her backyard. They found Kally's body wrapped and taped in a tarpaulin in the manner she had described.[566] When asked why she reacted the way that she did, Williams said that she was '… sick of him beating [her] up. And hitting [her]. [He'd] threatened [her] all the time.'[567]

Williams was subsequently charged with the murder of Douglas Kally.[568] The prosecution refused offers to plead guilty to defensive homicide[569] and Williams was subsequently convicted of defensive homicide by way of trial.[570]

4.3.7.2 The law of self-defence

Williams possessed a viable claim to self-defence which ought to have resulted in her acquittal of the charge of murder, defensive homicide or manslaughter.

Kally's undisputed violence towards Williams and their children, as well as his conduct in pushing, shoving, pulling her hair and knocking her over was sufficient to discharge the evidential burden of self-defence at trial and led Williams to subjectively believe[571] that her conduct was necessary to defend herself from the infliction of death or really serious injury[572] pursuant to section 9AC of the Crimes Act 1958 (Vic).[573]

It is submitted that Kally's combination of pushing, shoving, pulling of her hair and knocking her over could have been put to a jury as a basis to substantiate that Williams possessed objectively reasonable grounds for her belief in the necessity of self-defence pursuant to section 9AD of the Crimes Act 1958 (Vic).[574] As section 9AD codified the

[565] Ibid [14] (Hollingworth J).
[566] Ibid [16] (Hollingworth J).
[567] Williams' children, Simone and Spencer, also gave evidence at trial of physical violence and threats by Mr Kally, towards both Williams and themselves: ibid [18] (Hollingworth J).
[568] Ibid [1] (Hollingworth J).
[569] Ibid [49] (Hollingworth J).
[570] Ibid [1] (Hollingworth J).
[571] The test imposed under section 9AC was ruled to be purely subjective: *Babic* (n 70).
[572] Although the *Crimes Act 1958* (Vic) had not defined *really serious injury*, sexual abuse was recognised under section 9AH as a form of family violence, a recognition of the impact of sexual abuse as a serious psychological and potentially physical injury: Kirkwood, McKenzie and Tyson (n 128) 19.
[573] *Crimes Act* (n 71) s 9AC.
[574] Ibid s 9AD.

objective limb of self-defence as pronounced in Zecevic,[575] the determination of whether Williams had held reasonable grounds for her belief in the necessity of self-defence would have required the jury to consider whether Williams, as opposed to the hypothetical reasonable person,[576] held no reasonable grounds for her belief in the circumstances as she perceived them to be;[577] a belief which she might reasonably have held in all the circumstances.[578]

In resolving these considerations and ultimately determining whether there were reasonable grounds for Williams' belief that it was necessary to do what she did[579] as opposed to whether she had acted unreasonably in the circumstances),[580] the jury would have been required to consider the factors listed in Table 4–1.

In considering the surrounding circumstances and the facts within Williams' knowledge, it is submitted that Williams had been the subject of domineering and controlling violence for 23 years.[581] In awareness of Kally's history of violence to other people and her belief that no other options were available to her, Williams may be said to have held reasonable grounds for her belief to have acted in self-defence.

With regard to their relationship and Kally's prior violent conduct spanning 23 years (including physical violence to her and their children), Williams could further be said to have held reasonable grounds for her belief that self-defence was required. Having regard to the personal characteristics of Williams alongside any false beliefs or distress she had experienced, it is submitted that Williams, having suffered from post-traumatic stress disorder and Kally's violence over a long period of time, would have experienced substantial distress when Kally began to use the same violence and belittling language that characterised their relationship.

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[575] *Babic* (n 70); *Zecevic* (n 73).
[576] At common law, it was possible to take into account the accused's state of intoxication in determining whether the accused believed his or her actions were necessary, as well as in determining whether that belief was based on reasonable grounds. However, the *Crimes Act 1958* (Vic) provided that if any part of an element of a relevant offence, or of a defence to a relevant offence, [relied] on a person having reasonable grounds for a belief, in determining whether those reasonable grounds existed, regard [was] [to] be had to the standard of a reasonable person who [was] not intoxicated: *Conlon* (n 75); *Crimes Act* (n 422) s 9AJ(2).
[577] See *Portelli* (n 80); *Viro* (n 75).
[578] See *Zecevic* (n 73); *Wills* (n 85).
[579] *Hendy* (n 86).
[580] Ibid.
[581] *Williams* (n 518) [25] (Hollingworth J).

In considering the proportionality of Williams' response, the strength of her claim would have been affected by her having struck Kally 16 times with a pickaxe.[582] However, the existence of substantial and protracted family violence within their relationship would have enabled Williams to rely upon section 9AH of the Crimes Act[583] in order to argue that she may have possessed reasonable grounds for her belief, even if a jury had initially perceived that she had responded to a harm that was not immediate or had responded in excess of the force involved in Kally's threatened harm.[584]

It is acknowledged that Williams concealed the death of Kally and lied about his death for several years without regard to Kally's family and friends. This represented an aggravating feature of her offending[585] which was unlikely to yield favour from the jury, notwithstanding the literature which demonstrates that many women fear that their family and friends will not believe that they have been subjected to family violence.[586] This may lead victims to conceal the death of their partners,[587] as ultimately seen in Osland.[588]

Having regard to the material evidence and the considerations addressed above, it is significant that the Crown managed to persuade the jury beyond a reasonable doubt that Williams, as opposed to the hypothetical reasonable person,[589] had not held reasonable grounds for her belief that it was necessary to defend herself. In other words, the jury, having been lawfully instructed, could have found Williams not guilty of murder, defensive-homicide or manslaughter on the basis of self-defence after considering all of the circumstances of her case and each element of self-defence within its broader context.[590]

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[582] Ibid [3] (Hollingworth J).
[583] *1958* (Vic).
[584] Ibid ss 9AH(1)-(3).
[585] *Williams* (n 518) [39] (Hollingworth J).
[586] Helen Baker, 'The significance of shame in the lives of women who experience male violence' (2013) 34(1) *Liverpool Law Review* 145-171. See also *Defences to Homicide – Final Report* (n 5).
[587] McKenzie et al (n 336) 35.
[588] Deborah Kirkwood, 'In defence of self-defence for women' (1997) 1(3) *Women Against Violence* 10.
[589] At common law, it was possible to take into account the accused's state of intoxication in determining whether the accused believed his or her actions were necessary, as well as in determining whether that belief was based on reasonable grounds. However, the *Crimes Act 1958* (Vic) provided that if any part of an element of a relevant offence, or of a defence to a relevant offence, [relied] on a person having reasonable grounds for a belief, in determining whether those reasonable grounds existed, regard [was] [to] be had to the standard of a reasonable person who [was] not intoxicated: *Conlon* (n 75); *Crimes Act* (n 71) s 9AJ(2).
[590] *Zecevic* (n 73); *Dziduch* (n 93); *Portelli* (n 80).

4.3.7.3 Manifestations of injustice and imperfect procedural justice

Although the jury's decision to acquit Williams of murder meant that they had rejected the contention advanced by the Crown that Williams had intended to kill Kally without lawful excuse, it is necessary to examine whether the Crown's contention unjustly tailored the circumstances to its own interests while unjustly undermining her prospects of successfully arguing self-defence in a manner antithetical to the spirit of Victoria's 2005 law.

At trial, in a similar fashion to the prosecution of Eileen Creamer, the Crown urged the jury to find that there was 'only limited family violence' in the relationship of Angela Williams and Douglas Kally;[591] a questionable summation in light of Kally's extensive abuse which was acknowledged by the Court to have 'not [been] in dispute'.[592] By urging the jury to make such a finding, it is submitted that the Crown unjustly undermined Williams' prospects of acquittal.

Although the sentencing Court aptly noted, 'in coming to the verdict which they did, the jury must have been satisfied that the killing took place in the context of a history of family violence which was considerably more serious than the prosecution suggested',[593] it is conceivable that the Crown's strategy made Williams' decision to conceal the death of Kally all the more adverse to her prospects of acquittal.

The Crown's questionable assessment placed the jury in the unenviable position of having to determine whether perceived 'limited' forms of family violence rendered Williams' response a murderous one or whether certain forms and periods of family violence warranted her acquittal. On the one hand, Williams had struck Kally 16 times with a pickaxe and concealed his death without regard to his family, friends and the broader community. On the other hand, the jury accepted that there had been a legitimate belief in the necessity of self-defence against Kally. It is not fanciful to suggest that this dichotomy presented an appealing compromise in a conviction of defensive homicide.

Although it was the Crown's prerogative to the use the evidence available to it in the manner which it did, it may reasonably be perceived to have unjustly tailored the

[591] *Williams* (n 518) [19] (Hollingworth J).
[592] Ibid [5] (Hollingworth J).
[593] Ibid [19] (Hollingworth J).

circumstances of Williams' matter to its own interests by discharging its legal burden through the unjust argument that there was only limited domestic violence in Williams' relationship with Kally.[594] It is conceivable that the Crown's proposition was sufficient to have cast doubt on the applicability of self-defence without itself necessarily disproving its applicability beyond a reasonable doubt, all whilst significantly prejudicing the prospects of Williams having been acquitted on the basis of self-defence, in a manner antithetical to the spirit of Victoria's 2005 law. Further, it is contended that this argument trivialised the inequalities which the standard had sought to address. In this instance, that the law of self-defence had been seen, insofar as victims of family violence were concerned, to have inadequately accommodated disproportionate responses to threats or pre-emptive responses on unarmed or otherwise defenceless partners, performed in the context of ongoing family violence.

On this basis, the Crown's tactic itself may be said to represent the twelfth manifestation of injustice to have arisen under Victoria's 2005 law: an act which unjustly contributed to Angela Williams not attaining the criterion of a just outcome as established by the standard.

While the legislative enshrinement of Victoria's 2005 law was presumed to uphold itself within a prosecutions setting, the prosecution of Angela Williams further reflected Rawls' conception of imperfect procedural justice in the sense that no assurances could ever be made that the prosecutions process would yield a just outcome for Williams.[595] Although the standard of justice had established an independent criterion for a just outcome, the proceedings may nevertheless be said to have reached an unfair outcome in that Angela Williams, an arguably innocent accused, was convicted of defensive homicide. Further, the 2005 law failed to inspire the Crown to lead its case in a manner which adequately reflected Williams' experiences of family violence and, as a result, failed to accommodate the experiences of Angela Williams.

4.3.8 DPP v Kerr [2014] VSC 374

[594] Ibid.
[595] Rawls (n 1) 85.

4.3.8.1 Material evidence

Tracey Kerr was born in October 1971 and was the youngest of 13 children of a Koori family.[596] A couple of years later, the family moved from Cummeragunga Aboriginal Reserve into a small housing commission house in Moama, NSW.[597] During Kerr's upbringing, violence and drunken behaviour by her father were commonplace, with welfare authorities expressing concerns regarding the family's standard of living, overcrowding at home and poor school attendance rates.[598]

Kerr had some happy memories from early childhood.[599] However, this changed when she was eight.[600] She was 'raped so violently by a male relative that [she] had to spend several months in hospital in Melbourne, recovering from serious injuries'.[601] The treatment was also painful and distressing and was made worse by none of her family visiting her.[602] Left with long-term physical and psychological damage, Kerr experienced ongoing medical problems and a diminished capacity to enjoy sex in her adult life.[603] As an adult, Kerr found herself in a number of destructive relationships with men who were physically and emotionally violent towards her.[604] The first of her six children (to five different fathers) was born when Kerr was 16 years old.[605] Unable to cope with caring for her children, they were all raised by Kerr's other family members.[606]

Kerr was eventually diagnosed with post-traumatic stress disorder on the basis of her childhood rape and ongoing violence she was subjected to.[607] Often hyper-vigilant, fearful, anxious and depressed, Kerr was prescribed Xanax[608] and eventually developed addictions to alcohol and cannabis.[609] She began to use intravenous amphetamines from

[596] *DPP v Kerr* [2014] VSC 374, [24] (Hollingworth J) ('*Kerr*').
[597] Ibid [25] (Hollingworth J).
[598] Ibid [26] (Hollingworth J).
[599] Ibid [27] (Hollingworth J).
[600] Ibid.
[601] Ibid.
[602] Ibid.
[603] Ibid [28] (Hollingworth J).
[604] Ibid [29] (Hollingworth J).
[605] Ibid [30] (Hollingworth J).
[606] Ibid.
[607] Ibid [33] (Hollingworth J).
[608] Ibid.
[609] Ibid [31] (Hollingworth J).

'time to time'[610] and relapsed into drug and alcohol abuse after an unsuccessful rehabilitation attempt undertaken in 2010.[611]

As a result of these factors, Kerr was known to be 'easily irritable … prone to angry outbursts … and … self-destructive behaviour.'[612] Kerr also suffered from an intellectual impairment with tests indicating that 95% of people her age 'would [have scored] higher than [her] on intelligence tests,'[613] which meant her cognitive skills were 'roughly equivalent to those of a seven year old child'.[614]

Aged 40, Kerr lived in Echuca with one of her sons, Daniel Kerr, his partner, Nikita Firebrace, and their young child.[615] There Kerr met Douglas Barrett, a 65 year old man who lived with his wife, Hazel Barrett, in a house nearby.[616] Barrett was 'friendly with, and generous to, many other Aboriginal people in the local community, often driving them around, inviting them over for drinks, or giving them cigarettes or money'.[617] After meeting and 'becoming friendly' with Barrett, Kerr began a sexual relationship with him some months prior to his death.[618]

On the day of Barrett's death, Kerr went to his place in the afternoon and the pair 'sat around drinking, amicably, in the bungalow at the back of his property'.[619] At approximately 9 pm, they were still seen in the bungalow, drinking and dancing close together.[620] Around this time, Daniel came by and wanted a lift to the bottle shop.[621] As Barrett was too drunk to drive, he let Daniel drive his car and both Barrett and Kerr joined as passengers.[622] At the bottle shop, Barrett purchased a bottle of Scotch and Kerr was

[610] Ibid.
[611] Ibid [32] (Hollingworth J).
[612] Ibid [34] (Hollingworth J).
[613] Ibid [35] (Hollingworth J).
[614] Ibid.
[615] Ibid [2] (Hollingworth J).
[616] Ibid.
[617] Ibid [3] (Hollingworth J).
[618] Ibid [2] (Hollingworth J).
[619] Ibid [4] (Hollingworth J).
[620] Ibid.
[621] Ibid [5] (Hollingworth J).
[622] Ibid.

seen staggering around, 'visibly intoxicated'.[623] Upon returning home, Daniel left whereas Barrett and Kerr continued to drink and socialise.[624]

At approximately 10:30 pm, neighbours heard voices from the back of Barrett's property (including Barrett) telling someone to leave.[625] By midnight, Kerr had caused multiple injuries to Barrett; specifically, 'a knife stab wound to the neck, multiple incised injuries around the eyes, and an injury to the forehead near the hairline'.[626] Shortly after, Kerr told a number of people that Barrett had tried to rape her, that he had been 'dancing too close and getting 'touchety' with her.[627] This lead to Kerr pushing him away and asking him to 'cut it out'.[628] At this time, Barrett was said to have pinned Kerr on the couch before kissing her and attempting to undo her jeans and lift her top, whilst being told to stop.[629] Kerr's account was that this had brought back memories from when she had been sexually abused as a child.[630] It also brought back memories of Barrett having previously attempting to rape her, and other instances of violence towards her.[631]

After managing to get Barrett off of her by kicking him, Kerr went to pour herself another drink.[632] At this moment, Barrett got up, grabbed Kerr by her hair and then hit her.[633] Barrett's assaults were accompanied by accusations that Kerr had hid his bottle.[634] In response, Kerr 'picked up something sharp from the table and stabbed him … in the eye'.[635] Initially, Kerr had said that Barrett had dropped to the ground as soon as she had stabbed him.[636] However, she later claimed that he had dropped to the ground 5 or 10 minutes after she had stabbed him, after he had told her not to call an ambulance for him.[637] Kerr became scared and ran away.[638]

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[623] Ibid.
[624] Ibid [6] (Hollingworth J).
[625] Ibid [7] (Hollingworth J).
[626] Ibid [8] (Hollingworth J).
[627] Ibid [10] (Hollingworth J).
[628] Ibid.
[629] Ibid.
[630] Ibid.
[631] Ibid.
[632] Ibid.
[633] Ibid.
[634] Ibid.
[635] Ibid.
[636] Ibid.
[637] Ibid.
[638] Ibid.

The Court concluded that the circumstances leading to Barrett's death were not entirely clear.[639] Firstly, there were no witnesses to what took place.[640] Secondly, Barrett and Kerr were both 'extremely intoxicated' when Barrett's injuries were sustained.[641] Thirdly, Kerr's 'various intellectual deficits', including problems with her memory, led to 'confused' and 'different accounts of what [had] happened in the bungalow'.[642] Pertinently, the Crown and the defence both accepted that Kerr's perception or recollection of events may have involved some confabulation, caused by her chronic alcoholism and/or post-traumatic stress disorder.[643] In the opinion of several expert witnesses, Kerr may have 'mixed up some of what had happened in the bungalow with a traumatic childhood event'.[644]

Certain aspects of the physical evidence supported Kerr's account, whereas some did not.[645] Relevantly, there were bloodstains across the bungalow which were consistent with Barrett having received a bleeding injury before moving around the room.[646] Further, overturned chairs were 'consistent with a struggle having taken place … or somebody having knocked things over as they stumbled about'. [647] Additionally, Barrett's' fly was undone, although the top button of his jeans was still done up.[648] Lastly, one of Kerr's earrings and a broken gold chain were located on the bungalow floor. Her top had damaged fabric and was missing a button, all of which was consistent with some sort of struggle.[649]

On realising what she had done, Kerr was upset and informed family and police as to what had occurred, to the extent that she was able to remember.[650] Kerr was subsequently charged with murder.[651] In January 2013, she offered to plead guilty to manslaughter, but

[639] Ibid [9] (Hollingworth J).
[640] Ibid.
[641] As stated by Hollingworth J, Mr Barrett's blood alcohol level was 0.24 whereas Kerr's had not been tested: ibid.
[642] Ibid.
[643] Ibid.
[644] Ibid.
[645] Ibid [11] (Hollingworth J).
[646] Ibid [13] (Hollingworth J).
[647] Ibid.
[648] Ibid.
[649] Ibid.
[650] The Crown did not dispute that Kerr was genuinely remorseful for what had happened: ibid [44] (Hollingworth J).
[651] Ibid [43] (Hollingworth J).

this was rejected by the Crown.[652] She was subsequently found guilty of manslaughter by an unlawful and dangerous act by way of trial[653] and sentenced to seven years imprisonment with a non-parole period of four and a half years.[654]

4.3.8.2 The law of self-defence

Tracey Kerr also possessed a viable claim to self-defence, which ought to have resulted in her acquittal of the charge of murder, defensive homicide or manslaughter.

In response to the Crown's charge of murder, Barrett's conduct in pinning Kerr, attempting to rape her, pulling her hair and hitting her would have been sufficient to discharge the evidential burden of self-defence at trial and would have led Kerr to subjectively believe[655] that her conduct was necessary to defend herself from the infliction of really serious injury,[656] pursuant to section 9AC of the Crimes Act 1958 (Vic).[657]

The jury would have been able to conclude that Kerr believed it to be necessary to defend herself and that it was necessary to respond in the way that she did given the threat as she perceived it.[658] With reference to Kerr's response, namely, to stab Barrett in the neck and inflict multiple injuries around his eyes, including an injury to the forehead near his hairline), it is submitted that the Crown would not have persuaded a jury beyond a reasonable doubt that Kerr had not believed that it was necessary to do so in order to prevent really serious injury.

Barrett's combination of pinning Kerr, attempting to rape her, pulling her hair and hitting her would have been able to have been put to a jury as a basis to argue that she had possessed objectively reasonable grounds for her belief in the necessity of self-defence, pursuant to section 9AD of the Crimes Act 1958 (Vic).[659] Deciding whether Kerr had held reasonable grounds for her belief in the necessity of self-defence would have required the jury to consider whether Kerr, as opposed to the hypothetical reasonable

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[652] Ibid.
[653] Ibid [1] (Hollingworth J).
[654] Ibid [47] (Hollingworth J).
[655] The test imposed under section 9AC was ruled to be purely subjective: *Babic* (n 70).
[656] Although the *Crimes Act 1958* (Vic) had not defined *really serious injury*, sexual abuse was recognised under section 9AH as a form of family violence, a recognition of the impact of sexual abuse as a serious psychological and potentially physical injury: Kirkwood, McKenzie and Tyson (n 128) 19.
[657] *Crimes Act* (n 71) s 9AC.
[658] *Zecevic* (n 73).
[659] *Crimes Act* (n 71) s 9AD.

person,[660] held no reasonable grounds for her belief in the circumstances as she perceived them to be:[661] a belief which she might reasonably have held in all the circumstances.[662]

In resolving these considerations and ultimately determining whether there were no reasonable grounds for Kerr's belief that it was necessary to do what she did,[663] as opposed to whether she had acted unreasonably in the circumstances,[664] the jury would have been required to consider the factors listed in Table 4–1.

In considering the surrounding circumstances and the facts within Kerr's knowledge, Barrett was argued to be a 'more capable man' who had been 'taking advantage' of Kerr—a demonstrably 'vulnerable, damaged, younger Aboriginal woman'.[665] Pertinently, evidence revealed that Barrett's attempted rape was 'not an isolated incident'.[666] With this experience, Kerr was aware of Barrett's disregard for her physical autonomy and wellbeing—matters giving rise to reasonable grounds for her belief to have acted in self-defence.

With regard to their relationship and Barrett's prior conduct, evidence adduced at trial indicated that Barrett had perpetrated family violence toward Kerr in the past.[667] Specifically, neighbours had heard Barrett call Kerr 'derogatory and racist terms'. [668] Further, a witness had observed Barrett pushing Kerr up against a wall with Kerr responding 'no, leave me alone'.[669] With these transactions in mind, Kerr may further be said to have held reasonable grounds for her belief that self-defence was required.

Having regard to the personal characteristics of Kerr alongside any false beliefs or distress she had experienced, it is submitted that Kerr, having experienced violent child-rape,

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[660] At common law, it was possible to take into account the accused's state of intoxication in determining whether the accused believed his or her actions were necessary, as well as in determining whether that belief was based on reasonable grounds. However, the *Crimes Act 1958* (Vic) provided that if any part of an element of a relevant offence, or of a defence to a relevant offence, [relied] on a person having reasonable grounds for a belief, in determining whether those reasonable grounds existed, regard [was] [to] be had to the standard of a reasonable person who [was] not intoxicated: *Conlon* (n 75); *Crimes Act* (n 71) s 9AJ(2).
[661] See *Portelli* (n 80); *Viro* (n 75).
[662] See *Zecevic* (n 73); *Wills* (n 85).
[663] *Hendy* (n 86).
[664] Ibid.
[665] McKenzie et al (n 336) 33.
[666] McKenzie et al (n 336) 33.
[667] Ibid.
[668] Ibid.
[669] Ibid 510.

having suffered from post-traumatic stress disorder, suffering from an intellectual impairment and having been reminded of her child-rape, would have experienced substantial distress when Barrett began to hit and pull her hair amidst an attempted rape.

In considering the proportionality of Kerr's response, it is submitted that Kerr's multiple attempts to incapacitate Barrett were proportionate to Barrett's attempted rape and subsequent hitting and pulling of her. In the event that a jury perceived Kerr's response to be disproportionate to the threat which Barrett posed to her, the existence of family violence within their relationship would have enabled her to rely upon section 9AH of the Crimes Act[670] to substantiate that she may have possessed reasonable grounds for her belief.[671]

Having regard to the material evidence and the considerations addressed above, it is significant that the Crown managed to persuade the jury beyond a reasonable doubt that Kerr, as opposed to the hypothetical reasonable person,[672] had not held reasonable grounds for her belief that it was necessary to defend herself. In other words, the jury, having been lawfully instructed, could have found Kerr not guilty of murder, defensive-homicide or manslaughter on the basis of self-defence after considering all of the circumstances of her case and each element of self-defence within its broader context.[673]

4.3.8.3 Manifestations of injustice and imperfect procedural justice

Although the jury chose not to convict Kerr of murder, it is necessary to examine whether the Crown's trial strategy unjustly tailored the circumstances of her matter to its own interests, while unjustly undermining her prospects of successfully arguing self-defence in a manner antithetical to the spirit of Victoria's 2005 law.

In a similar fashion to the prosecution of Eileen Creamer and Angela Williams, the Crown denied that any family violence had taken place within Kerr's relationship with Barrett.[674]

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[670] *1958* (Vic).
[671] Ibid ss 9AH (1)-(3).
[672] At common law, it was possible to take into account the accused's state of intoxication in determining whether the accused believed his or her actions were necessary, as well as in determining whether that belief was based on reasonable grounds. However, the *Crimes Act 1958* (Vic) provided that if any part of an element of a relevant offence, or of a defence to a relevant offence, [relied] on a person having reasonable grounds for a belief, in determining whether those reasonable grounds existed, regard [was] [to] be had to the standard of a reasonable person who [was] not intoxicated: *Conlon* (n 75); *Crimes Act* (n 71) s 9AJ(2).
[673] *Zecevic* (n 73); *Dziduch* (n 93); *Portelli* (n 80).
[674] Tyson et al (n 347) 87.

For instance, the Crown argued that the incident in which a witness had observed Barrett pushing Kerr up against a wall with Kerr saying 'no, leave me alone' did not amount to family violence.[675] Further, it was argued that the racist, derogatory slurs (referred to earlier) simply amounted to 'bad language'.[676]

As argued by commentators, the Crown's attitude toward the existence of family violence within Kerr's relationship with Barrett trivialised the relationship's palpably unequal dynamic:[677] a dynamic informed by Barrett having been an 'older, more capable man' who had been 'taking advantage' of Kerr, a demonstrably 'vulnerable, damaged, younger Aboriginal woman'.[678] Pertinently, Barrett's attempted rape of Kerr was not an 'an isolated incident'.[679] The Crown's overall attitude toward the existence of family violence within Kerr's relationship with Barrett was best captured by its statement that Kerr was merely a 'drunken woman who … got angry and … lashed out with a knife'.[680]

By seeking to deny the existence of family violence in Kerr's relationship with Barrett, it is argued that the Crown unjustly undermined Kerr's prospects of acquittal by minimising Barrett's violence whilst capitalising upon her infirmities. In essence, the argument directed the jury to afford greater weight to the proportionality of Kerr's response: a conceivable phenomenon in light of the Crown's comments that Kerr 'kept going back' to Barrett.[681] As a result, the Crown may reasonably be perceived to have unjustly tailored the circumstances of Kerr's matter to its own interests by discharging its legal burden through the unjust argument that there was no family violence in her relationship with Barrett.

It is conceivable that the Crown's case was sufficient to have cast doubt upon the application of self-defence without necessarily disproving its applicability beyond a reasonable doubt, whilst significantly prejudicing the prospects of Kerr having been acquitted on the basis of self-defence, in a manner antithetical to the spirit of Victoria's 2005 law.

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[675] McKenzie et al (n 336) 33.
[676] Ibid.
[677] Tyson et al (n 347) 87.
[678] McKenzie et al (n 336) 33.
[679] Ibid.
[680] Ibid.
[681] *Kerr* (n 591) [19] (Hollingworth J).

Put another way, it is conceivable that Kerr's conviction did not reflect that the Crown would have successfully disproven Kerr's claim to self-defence. Rather, the verdict reflected a compromise in that the jury, having heard all the evidence, could not determine whether Kerr was sexually assaulted by Barrett and whether she genuinely perceived what she claimed to have perceived. In essence, the Crown's strategy trivialised an inequality in a manner antithetical to the spirt of Victoria's 2005 law and an inequality which it had sought to address: that lethal responses to family violence were commonly perceived to be the product of personal pathologies as opposed to socio-cultural or socio-economic circumstances.

On this basis, the Crown's denial of family violence within the relationship of Barrett and Kerr may be said to represent the thirteenth manifestation of injustice to have arisen under Victoria's 2005 law: an act which unjustly contributed to Tracey Kerr not attaining the criterion of a just outcome established under the standard.

It is also necessary to examine whether the Court unjustly tailored the circumstances of Kerr's matter to the Crown's interests by legitimising the jury's verdict through unjust arguments. In sentencing Kerr, the Court stated to her that:

> In your extremely intoxicated state, and given your intellectual deficits and past history of sexual abuse and post-traumatic stress disorder, you overreacted to the situation and were limited in your ability to generate alternative solutions to the situation you believed you were facing.[682] Whatever the precise sequence and manner in which the injuries were inflicted, I accept that they all occurred spontaneously, within a matter of minutes, and at a time when you perceived yourself to be facing a threat of rape. I accept that you did believe that it was necessary for you to do what you did to defend yourself. However, there were no reasonable grounds for a sober person in your position to have believed that your acts were necessary to defend [themselves].[683]

While the Court acknowledged that Kerr genuinely believed that it was necessary for her to defend herself, the Court emphasised Kerr's limited ability to generate alternative solutions to Barrett's attempted rape and accompanying assaults. It gave little weight to

[682] Ibid (emphasis added).
[683] Ibid.

Kerr's predicament in not being afforded any opportunity for calm deliberation and detached reflection.[684] Although the common law of self-defence provided that an accused's failure to retreat was relevant to the assessment of self-defence,[685] it was not a decisive factor and the Court's legitimation may be said to have paid insufficient regard to Barrett's attempted rape, subsequent assaults and the increased impact this would have had upon an individual suffering from post-traumatic stress disorder and intellectual impairment.

Having regard to Kerr's infirmities, it was significant of the Court to have further legitimised the jury's verdict on the basis that a sober individual would not have believed that their acts were necessary to defend themselves in order to imply that a sober individual, after experiencing an attempted rape, subsequent assaults, prior family violence on part of the deceased and child-rape at 8 years of age would not have held reasonable grounds that their actions were necessary to defend themselves in the circumstances as they perceived them.

The Court's assessment that alcohol was the sole or predominant factor in the formulation of Kerr's belief appeared reductive and brought about by the assumption that Kerr had 'overreacted to the situation'.[686] By grounding this argument in the context of Kerr's 'intellectual deficits … past history of sexual abuse and post-traumatic stress disorder',[687] the Court's approach may be said to have unjustly pathologised a victim of family violence in a manner antithetical to the spirit of Victoria's 2005 law. That is, the Court's approach unjustly delegitimised the application of self-defence with the effect of significantly prejudicing Kerr's prospects of being perceived by the community as having acted in self-defence, by overlooking an inequality, which Victoria's 2005 law had sought to address—namely, that lethal responses to family violence were commonly perceived to be the product of personal pathologies, as opposed to socio-cultural or socio-economic circumstances.

On this basis, the Court's approach may be said to represent the fourteenth manifestation of injustice to have arisen under Victoria's 2005 law: such an approach unjustly prevented

[684] *Zecevic* (n 73).
[685] Ibid. See also *Howe* (n 413).
[686] *Kerr* (n 596) [19] (Hollingworth J).
[687] Ibid.

Kerr from being perceived as having been eligible to attain the criterion of Rawls' just outcome.

Although the legislative enshrinement of Victoria's 2005 law was presumed to uphold itself within a prosecutions setting, the prosecution of Tracey Kerr further reflected Rawls' conception of imperfect procedural justice in the sense that no assurances could ever be made that the prosecutions process would yield a just outcome for Kerr: that the process could be guaranteed to uphold Victoria's 2005 law without fail.[688] Although the standard of justice had established an independent criterion for a just outcome, the proceedings may nevertheless be said to have reached an unfair outcome in that Tracey Kerr, an arguably innocent accused, was convicted of manslaughter by an unlawful and dangerous act.

The extent to which the 2005 law failed to inspire the Crown to lead its case in a manner which acknowledged Kerr's experiences of family violence and failed to prevent the Court from unjustly pathologising her lethal response to Barrett's violence may be regarded as the extent to which it unjustly failed to accommodate the experiences of Tracey Kerr.

Table 4–2 provides a summary of the cases heard pursuant to the 2005 law.

Table 4–2: Summary of cases heard pursuant to the 2005 law

Cases	Charge	Plea	Conviction and sentence	Category of injustice
R v Kulla [2010] VSC 60	Murder	Guilty to manslaughter	Manslaughter 6 years minimum 3	1. Prosecution pathologised accused by dismissing substantial evidence of family violence. A systematic application of sections 9AC, 9AD and 9AH should have precluded a plea of guilty to manslaughter.
R v Black [2011] VSC 152	Murder	Guilty to defensive homicide	Defensive homicide 9 years minimum 6	2. A plea to defensive homicide in the circumstances paid little regard to the inequities that the family violence provision (s 9AH) sought to redress. 3. The prosecution inadequately accommodated the disproportionate response

[688] Rawls (n 1) 85.

				of accused as was required by the wording of s 9AD. 4. The sentencing judge accepted the prosecution argument and sentenced with little regard to s 9AH.
R v Creamer [2011] VSC 196	Murder	Not guilty	Defensive homicide 11 years with minimum of 7	5. Despite substantial evidence to the contrary, the prosecution argued that there was no evidence of domestic violence thus disregarding s 9AH. 6. Sentencing Court gave insufficient weight to evidence of family violence and thus pathologised accused.
R v Edwards [2012] VSC 138	Murder	Not guilty to murder but guilty of defensive homicide	Defensive homicide 7 years minimum of 4 years and nine months	7. Prosecution paid little regard to evidence of family violence as required by s 9AH. 8. Sentencing judge pathologised accused and gave little weight to evidence of family violence.

Table 4–2: Summary of cases heard pursuant to the 2005 law (cont'd)

Cases	**Charge**	**Plea**	**Conviction and sentence**	**Category of injustice**
R v Kells [2012] VSC 53	Murder	Not guilty	Defensive homicide 8 years with minimum of 5	9. The prosecution trivialised evidence of family violence. 10. Sentencing judge pathologised accused and thus disregarded the inequalities that s 9AH sought to redress.
R v Hudson [2013] VSC 184	Murder	Guilty to manslaughter	Manslaughter 6 years minimum of 3	11. A careful application of sections 9AD and 9AH should have precluded a plea of guilty to manslaughter.
DPP v Williams [2014] VSC 304	Murder	Not guilty	Defensive homicide 8 years minimum of 5	12. In the face of evidence to the contrary, the prosecution argued that there was little evidence of family violence.
DPP v Kerr [2014] VSC 374	Murder	Not guilty	Manslaughter 7 years minimum of 4.5 years	13. In the face of evidence to the contrary the prosecution argued that there was little evidence of family violence. 14. The sentencing judge pathologised accused despite evidence that killing was a concomitant of family violence.

4.4 Reflective Equilibrium

As no female victims of family violence who had killed their violent partners managed to successfully argue self-defence between 2005 and 2014, the Crimes (Homicide) Act 2005 (Vic) became the subject of increased scrutiny. In a Rawlsian vein, this debate may be said to have reflected a dispute over the initial agreement which led to the creation of Victoria's 2005 law. Rawls conceived that an agreement could be revised to resolve such a dispute.[689]

In other words, the principles could be amended to address disputed issues by a process of reflective equilibrium; the use of intelligent judgment to coherently move back and forth between moral judgments (inductive intuitions observed by those in positions conducive to informed reflective judgment) and moral principles (deductive applications of the these intuitions to cases determined under the agreement) to achieve the strongest mutual support between them.[690]

Accordingly, the analyses of the preceding prosecutions ground the isolation, extrapolation and synthesis of moral judgments [articulated under 4.4.1] so that they may be deductively applied to the manifestations of injustice which arose under [4.3]. In doing so, the 'deliberations' of the disputing parties [at 4.4.2] may be said to represent the unconscious deductive application of such principles to the preceding prosecutions; a representation of Rawls' process of reflective equilibrium which, at [4.4.3], is argued to have led to the creation of a revised set of principles.[691] That is, the enactment of the Crimes (Abolition of Defensive Homicide Act) 2014 (Vic) - Victoria's 2014 law.

4.4.1 Reviewing the eight cases to create moral principles: predicating deductive application of inductive intuitions to manifestations of injustice arising under Victoria's 2005 law

In the prosecution of Melissa Kulla, the doctrinal content of Victoria's 2005 law failed to inspire confidence in the accused to proceed to trial on the basis of self-defence, despite

[689] See generally Rawls (n 1). See also David Raphael, *Concepts of Justice*, (Oxford University Press, 2001), 2.
[690] Raphael (n 689).
[691] Noman Daniels, 'Wide Reflective Equilibrium and Theory of Acceptance in Ethics (1979) 76(5) *The Journal of Philosophy*, 258.

the existence of a viable claim to it. The same occurred in the prosecutions of Karen Black, Jemma Edwards and Veronica Hudson.

Further, in the prosecutions of Karen Black and Angela Williams, the 2005 law failed to prevent the Crown from trivialising the existence of family violence in their relationships with their violent partners, permitting the prosecution to emphasise the purported 'disproportionality' of their lethal responses. The same phenomenon occurred in the prosecution of Jade Kells except the Crown unjustly pathologised Jade Kells' lethal response to Dean Pye.

In a similar theme, in the prosecution of Karen Black, it was the Court that trivialised the existence of family violence within her relationship with Wayne Clarke, with the effect that it unjustly emphasised the purported 'disproportionality' of her response to Clarke.

In the prosecutions of Eileen Creamer, Jemma Edwards and Tracey Kerr the same phenomenon occurred except the Court unjustly pathologised their lethal responses to David Creamer, James Edwards and Douglas Barrett.

When it came to the prosecution of Eileen Creamer, the 2005 law failed to prevent the Crown from denying the existence of family violence in her relationship with David Creamer, with the effect of the Crown unjustly emphasising the purported 'disproportionality' of her lethal response to David.

Lastly, in the prosecution of Tracey Kerr, the 2005 law further failed to prevent the Crown from denying the existence of family violence in her relationship with Douglas Barrett with the effect of the Crown unjustly pathologising her lethal response to Douglas Barrett.

From this analysis, it can be seen that the strength of the traditional common law formulation of self-defence was that the accused would not have had to point to the existence of evidence which suggested a reasonable possibility that they believed they were on the receiving end of a threat of death or really serious injury. In other words, the Crown would have faced greater difficulty in disproving the existence of reasonable grounds in the belief of the necessity of their actions. This would have bolstered the confidence of the accused to proceed to trial on the basis of self-defence or strengthened the prospects of them being able to substantiate reasonable grounds for a belief in the necessity of self-defence.

The weakness of the traditional common law formulation of self-defence was that a jury was compelled to assess the existence of reasonable grounds for a belief in the necessity of self-defence despite the potential absence of any immediate threat or the use of a purportedly disproportionate response to any real or perceived threat. Such matters would have continued to inspire little confidence in victims of family violence to proceed to trial. This was particularly the case given that the formulation was conducive to conscious or unconscious efforts to deny or trivialise the existence of family violence which, in turn, encouraged fixation upon the purported disproportionality of responses to family violence or the existence of personal pathologies; matters which were said to have impacted upon the capacity of those accused to form reasonable grounds for their beliefs in the necessity of self-defence.

Here, the usefulness of the reasonable response formulation of self-defence would have directed juries to assess Kulla, Black, Edwards and Hudson's conduct in light of the circumstances as they perceived them. This should have increased their confidence to proceed to trial on the basis of self-defence. This would have increased the prospects of Creamer, Kells, Kerr and Williams having been acquitted on the basis of self-defence,[692] by discouraging the prosecution or the Court from trivialising or denying the existence of family violence in their relationships in order to emphasise the purported disproportionality of their responses or their personal qualities or pathologies having been an impediment to the formulation of reasonable grounds.

From this review of relevant prosecutions, the following moral principles were generated in relation to the process of reflective equilibrium.

- Victims of family violence ought to have their claims assessed under a statutory codification of the common law of self-defence or the 'reasonable response' formulation in order to achieve equality before the law.
- The chosen formulation of self-defence must be conducive to enabling victims of family violence to present their experiences holistically and for juries to assess these fairly, on a case-by-case basis.

[692] Granted, practitioners elected not to contest their matters on the basis of self-defence.

- The law should not impose a lower standard on victims of family violence who kill by not requiring that there be a perception of a threat of death or really serious injury on the part of the victim of family violence.

4.4.2 Framing moral judgments—inductive intuitions of disputing parties

In observance of the process of reflective equilibrium, it is apt to first draw attention to the then Attorney-General Robert Hulls' remarks that Victoria's 2005 law was 'not working as intended' and had led to results that 'seemed unjust and contrary to common sense'[693] Without needing to conduct a Rawlsian analysis of the eight prosecutions, the Attorney-General had reached an intuitive conclusion that the standard had produced incorrect results.

Toole pertinently concluded that the standard had 'activated pre-existing stereotypes in ways that resulted in convictions for defensive homicide where complete acquittals seemed to have been more appropriate'.[694] Similarly, the DVRCV concluded that there had been a 'systemic failure to recognise the nature and impact of family violence'.[695] Lastly, in the final year of defensive homicide's operation, the Supreme Court of Victoria confirmed that evidence or arguments linked to these perspectives had not been considered in the defensive homicide cases of female offenders and male victims, in a family violence context.[696]

The VDJ argued that there was 'no clear benefit to [retaining] defensive homicide as part of [a] legal framework for women who [killed] in response to family violence' as 'the price of retaining 'defensive homicide for the comparatively small number of women who [killed was] substantially outweighed by the cost of inappropriately excusing men who [killed]'.[697] In other words, it was undesirable to retain defensive homicide given that 25 of the then 28 convictions for defensive homicide concerned killings which had not arisen within circumstances of family violence.

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[693] Andrea Petrie, 'Killers Abusing Defence Law', *The Age* (online, 16 June 2013) 8 < https://www.theage.com.au/national/victoria/killers-abusing-defence-law-20130615-2ob87.html>.
[694] Kellie Toole, 'Self-Defence and the Reasonable Woman: Equality before the New Victorian Law' (2012) 36(1) *Melbourne University Law Review* 286.
[695] Kirkwood, McKenzie and Tyson (n 128) 3.
[696] *Williams* (n 518) [37] (Hollingworth J).
[697] *Defensive Homicide: Proposals for Legislative Reform* (n 166) ix.

The VDJ determined that the operation of defensive homicide had been 'inherently complex, making it difficult for judges and juries, and the community, to understand and apply'.[698] As a result, the VDJ concluded that defensive homicide had '[distorted] homicide laws and [had] [produced] unintended effects'.[699] Specifically, defensive homicide had '[shifted] the focus of debate from the adequacy of complete self-defence to defensive homicide' by implicitly suggesting 'that a woman who [had killed] in response to family violence [had] not [acted] reasonably, or [would] often not [have acted] reasonably.[700] Further, defensive homicide may have led victims of family violence to believe that it was 'better to plead guilty to defensive homicide than [to risk raising] self-defence at a trial'.[701]

That being said, the VDJ conceded that complexity was not the only relevant consideration in reforming the law[702] as defensive homicide had considerable support within the legal profession and law enforcement communities.

Pertinently, spokesman for the LIV, Rob Stary praised the operation of defensive homicide as both Black and Creamer had been 'subjected to physical and psychological domestic violence over many years'.[703] Additionally, Victoria Police, the former Director of Public Prosecutions and VLA recommended the retention of defensive homicide on the basis that it '[filled] a gap in the law'.[704] Specifically, VLA suggested that it was 'important and appropriate that the law recognise … cases of homicide which [involved] a lower degree of moral culpability than murder [despite] not satisfying all of the criteria for self-defence.[705] Accordingly, these interest groups recommended waiting longer to assess whether reform was advisable.[706] Concurring, Tyson, Capper and Kirkwood 'cautiously' recommended the retention of the offence on the basis that it had been too

[698] Ibid. See also *Babic* (n 70).
[699] *Defensive Homicide: Proposals for Legislative Reform* (n 166) viii.
[700] Ibid.
[701] Ibid.
[702] Ibid 22.
[703] Courtney Crane, 'Growing Calls for Defensive Homicide Review', *Herald Sun* (online, 13 February 2012) 10 <https://www.heraldsun.com.au/ipad/growing-calls-for-defensive-homicide-review/news-story/e604440afc2a39cf45722db4d5787f6c?sv=90dba743a0ab8aef3ef4ce0749515ee3>.
[704] *Defensive Homicide: Proposals for Legislative Reform* (n 166) 13.
[705] Ibid.
[706] Ibid.

early to know whether defensive homicide's operation as a 'safety-net [was] necessary'.[707]

In acknowledging the considerable support for defensive homicide's retention, the VDJ ultimately determined its utility was limited to its 'safety-net' role in the event that the law of self-defence had not operated to provide substantive equality to female victims of family violence.[708] With the benefit of considering over seven and a half years of the operation of defensive homicide and believing that there would have been no need for a 'safety-net' if the law of self-defence had been adequate,[709] the VDJ found it 'difficult to conclude that [defensive homicide had worked] to the benefit of women who [had killed] in response to family violence'.[710] Put another way, the VDJ concluded that defensive homicide had not achieved its intended objective and may have even worked to the detriment of women who had killed in response to family violence.[711] Accordingly, it proposed that the offence of defensive homicide be abolished[712] and that excessive self-defence not be reintroduced in Victoria.[713] Having done so, the VDJ was left to consider what ought to become of the law of self-defence in Victoria.

The VDJ accepted that it was essential within the operation of the laws of self-defence that a woman could be acquitted on the basis of self-defence despite having responded to a non-imminent threat or having responded in excess of a threatened harm.[714] It also considered that the law ought to enable juries to fairly and holistically determine whether convictions were warranted on a case-by-case basis.[715] It decided that imminence (encompassing threat perception and necessity) and proportionality[716] '[were] separable and [were to] be separated' despite being closely related.[717]

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[707] Ibid 12.
[708] Ibid 23.
[709] Ibid.
[710] Ibid ix.
[711] Further, that the operation of defensive homicide would continue to inhibit cultural change in the assessment of women who kill in response to family violence: ibid ix.
[712] Ibid.
[713] Ibid 34.
[714] Ibid 25.
[715] Ibid.
[716] Paul Fairall and Stanley Yeo, *Criminal Defences in Australia* (LexisNexis Butterworths, 4th ed, 2005) 174.
[717] Ibid.

On imminence, the VDJ saw that clear answers regarding law reform would be exceptionally difficult to achieve in the abstract as the issue would invariably depend upon the reason why a woman believed it was necessary to kill.[718] It acknowledged that narrowing the range of 'possible' threats that could sustain a self-defence argument would not improve the situation of female victims of family violence[719] as some threats were difficult to categorise.

For example, the VDJ drew attention to Black.[720] It noted how Black had said that Clarke had never been physically violent towards her (notwithstanding a report produced by a psychologist indicating that she had been the subject of physical abuse) yet would sometimes force himself upon her sexually.[721] It also noted that he had once left a knife and gold coin on her pillow after she had been out with friends (an event she could not elaborate upon).[722]

The VDJ questioned how such threats could be categorised. It maintained that the strength of the common law test of self-defence was that it focussed, firstly, on what the accused believed certain threats and actions to mean and then, secondly, on whether the accused believed it was necessary to defend themselves rather than whether they also specifically believed it was necessary to defend themselves from the infliction of death or really serious injury.[723]

Accordingly, the VDJ proposed that the first limb of the common law test of self-defence be retained in any reform of the law,[724] that is, whether the accused believed that it was necessary to do what he or she did to defend himself, herself or another.[725] It proposed that the test be set out in the Crimes Act 1958 (Vic) and apply to both fatal and non-fatal offences.[726] The common law test was to be expressly abolished wherever the new statutory test applied.[727]

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[718] *Defensive Homicide: Proposals for Legislative Reform* (n 166) 24.
[719] Ibid 37. See also Julia Toole, 'Self-Defence and the Reasonable Woman: Equity before the new Victorian Law', (2012) 36(1) *Melbourne University Law Review* 264.
[720] *Black* (n 95) [11] (Curtain J) cited in *Defensive Homicide: Proposals for Legislative Reform* (n 163) 23.
[721] *Black* (n 95) [13].
[722] Ibid [14] (Curtain J).
[723] *Defensive Homicide: Proposals for Legislative Reform* (n 166) 37.
[724] Ibid.
[725] Ibid.
[726] Ibid 42.
[727] Ibid.

In considering whether to retain the second limb of the common law test of self-defence, the VDJ first considered a purely objective test which, according to Yeo, would 'likely to be easier for juries to use'.[728] However, it acknowledged that a fully objective proportionality test may have struggled to properly recognise the dynamics of family violence.[729] Accordingly, it considered the test in New South Wales, whether the accused's response was a reasonable response in the circumstances as perceived by the accused, had merit.[730]

This 'reasonable response' test was derived from the recommendations of the Criminal Law Officers Committee.[731] The differences between the common law and reasonable response tests were considered by the New South Wales Court of Criminal Appeal in R v Trevenna.[732] The Court stated that the statutory '[c]odification of what [constituted] self-defence … [refined] and [elaborated] on the common law … without introducing any major change'.[733] However, a jury would instead consider whether a woman believed that it was necessary to act in self-defence, and based on the circumstances as she perceived them to be, whether her response in killing a partner was a reasonable response.[734]

The VDJ saw that the advantage of this formulation was that it changed the focus to assessing the reasonableness of the response in the circumstances as she perceived them to be from the grounds for her belief.[735] Lastly, the VDJ proposed that the new test would still need to be linked to a social context provision in the Crimes Act 1958 (Vic) concerning evidence of family violence to ensure improvements in the law's application to victims of family violence.[736]

From this commentary, it may be said that the operation of defensive homicide had been judged by some as having operated successfully in the matters of Eileen Creamer and Karen Black. Further, it had provided society with a constructive benefit by 'filling a gap' in the law. However, the majority of judgments appeared to frame defensive homicide as

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[728] Stanley Yeo, 'Revisiting Excessive Self-Defence' (2000) 12(1) *Current Issues in Criminal Justice* 49 cited in *Defensive Homicide: Proposals for Legislative Reform* (n 166) 49.
[729] *Defensive Homicide: Proposals for Legislative Reform* (n 166) 19.
[730] Ibid ix.
[731] Ibid 38.
[732] *R v Trevenna* (2004) 149 A Crim R 505 *('Trevenna').*
[733] Ibid [38] (Santow JA).
[734] *Defensive Homicide: Proposals for Legislative Reform* (n 166) 39.
[735] Ibid 40.
[736] Ibid.

having produced incorrect results and providing little, if any, benefit to victims of family violence. Further, that defensive homicide had complicated the administration of justice, distorted the experiences of victims of family violence to their detriment and had ultimately failed to achieve its intended policy objective.

Having balanced the perspectives of the disputing parties, it is submitted that the VDJ's decision to recommend the abolition of defensive homicide and the common law of self-defence and to create a reformed statutory framework to assess claims of self-defence arising within a family violence context accorded with the moral principles produced at [4.4.1].

4.4.3 Synthesis—coherently moving back and forth between moral judgments and moral principles to achieve the strongest mutual support between them

Having synthesised the strengths and weaknesses of the eight judgments, Rawls' process of reflective equilibrium may be said to have been unconsciously reflected (initially by the VDJ, policy makers and then by the Parliament of Victoria) in the enactment of the Crimes (Abolition of Defensive Homicide) Act 2014 (Vic).

As a result, the revised 'reasonable response' test of self-defence [section 322K], the removal of defensive homicide and the reiteration of a social-context evidence framework in sections 322M and 322J of the Crimes Act 1958 (Vic) as well as sections 58, 59 and 60 of the Jury Directions Act 2015 (Vic) may be said to have represented Victoria's 2014 law. That if:

- a disproportionate response to a threat of violence or a response to a non-imminent threat of violence did not, by default, preclude an acquittal (or discontinuance) on the basis of self-defence (in the context of a lethal response to family violence); and
- evidence suggested a reasonable possibility of the existence of facts which (or arguably would have) established that:
    - the accused had subjectively believed that it was necessary to act in self-defence of themselves or another from the infliction of death or really serious injury; and

- the conduct of the accused was an objectively reasonable response (in the circumstances, as the accused subjectively perceived them); and
- the Crown could not disprove (or arguably would not have disproved), beyond reasonable doubt, that the accused had subjectively believed that it was necessary to act in self-defence of themselves or another from the infliction of death or really serious injury or that the conduct of the accused was an objectively reasonable response (in the circumstances, as the accused subjectively perceived them);

the 'just outcome' was that the accused ought to have been acquitted of a homicide offence on the basis of self-defence or that they ought to have had their prosecution discontinued on the basis of self-defence (depending on whether the accused had been tried for a homicide offence or had pled guilty to a homicide offence, respectively).

Three relevant cases have since been resolved under Victoria's 2014 law and are examined for further manifestations of injustice.

4.5 Prosecutions under the 2014 law

4.5.1 DPP Reference No 1 of 2017 [2018] VSCA 69

4.5.1.1 Material evidence

Gayle Dunlop aged 60, killed her violent long-term partner, John Reed aged 63, with a stool on July 18, 2015.[737] At Dunlop's trial, there was a 'substantial body of evidence, led through the prosecution witnesses (including several police to whom complaints had been made) regarding the extraordinary violence regularly inflicted upon the [accused] by the deceased.[738]

Dunlop and Reed had been in an on-and-off relationship for 25 years which was characterised by a 'long history of violence'.[739] Shortly after Dunlop began dating Reed in the late 1980s, Reed began to 'beat her daily'.[740] Over time, a neighbour often heard them screaming and swearing and began to see bruises on Dunlop every couple of months.[741] Eventually, Reed threw Dunlop over the balcony of her Seaford unit.[742]

On the night of Dunlop's attack, the pair argued and when Dunlop thought Reed was asleep, headed to her front door to go to her sister's house.[743] Dunlop feared that if she had stayed, the argument would have escalated and Reed would have beaten her.[744] As Dunlop was leaving, Reed blocked her from accessing the door and said 'you're going fuckin nowhere you bitch' before pushing her.[745] After Dunlop tried to leave again, Reed grabbed her arm and threatened to kill her.[746]

At that moment, Dunlop saw a foot stool and remembered her mother having hit her father with a beer bottle when she was a child.[747] Dunlop then took the stool, turned and hit Reed over the head with it.[748] Reed fell onto a couch where Dunlop hit him again.[749] After the attack, Dunlop called an ambulance for Reed who subsequently died in hospital two

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[737] Jane Lee, 'I still love him: Freedom for woman who killed abusive partner with a stool', *The Age* (online, 25 November 2016) 2 <https://www.theage.com.au/national/victoria/gayle-dunlop-found-not-guilty-of-murder-or-manslaughter-of-her-longterm-partner-20161125-gsx9qy.html>.
[738] *DPP Reference No 1 of 2017* [2018] VSCA 69, [120] (Weinberg and Beach JJA) ('*DPP Reference No 1*').
[739] Sarah Farnsworth, 'Melbourne woman found not guilty of murdering abusive partner, judge praises verdict', *ABC News* (online, 25 November 2016) 2 <https://www.theage.com.au/national/victoria/gayle-dunlop-found-not-guilty-of-murder-or-manslaughter-of-her-longterm-partner-20161125-gsx9qy.html>.
[740] Ibid.
[741] Ibid.
[742] Ibid.
[743] Ibid.
[744] Ibid.
[745] Ibid.
[746] Ibid.
[747] Ibid.
[748] Ibid.
[749] Ibid.

days later.[750] In her call to triple-0, Dunlop informed the operator that Reed had merely fallen and that she had found him on the floor, bleeding.[751] During the triple-0 call, which was played to the jury, Dunlop was also heard saying 'I was in bed, I don't know where you fell. I hope you die.'[752]

When asked why she had lied to the operator, why she had repeated the false story to police and thrown the stool over a fence, Dunlop said she had panicked.[753] Although admitting to having killed Reed, Dunlop maintained that she had never intended to kill or seriously injure him.[754] She had 'just wanted to get away from him' and that she had simply repeated the 'things he [Reed] had always said to her after he attacked her'.[755]

Dunlop was charged with murder[756] and was subsequently acquitted by a jury of both murder and manslaughter[757] in just half an hour[758] without having heard any closing addresses from the Crown or the defence.[759]

4.5.1.2 The law of self-defence

Table 4-3 shows the factors which a jury is required to take into account when assessing self-defence under Victoria's 2014 law.

Table 4–3: Factors which a jury should take into account when assessing self-defence under the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic)

Factors—The subjective belief in the necessity of conduct in self-defence	Case or legislative authority
1. A subjective belief that the conduct was necessary to defend themselves from the infliction of death or really serious injury	Crimes Act 1958 (Vic) s 322K(3).

[750] Ibid.
[751] Ibid.
[752] Ibid.
[753] Ibid.
[754] Ibid.
[755] Ibid.
[756] *DPP Reference No 1* (n 738) [96] (Maxwell P).
[757] Ibid [132]-[133] (Weinberg and Beach JJA).
[758] Lee (n 737) 3.
[759] *DPP Reference No 1* (n 738).

2. A belief in the necessity of responding in the way in which they did given the threat(s) as they perceived them	Zecevic v DPP (1987) 162 CLR 645; See also Viro v R [1978] HCA 9 – 141 CLR 88; Conlon v R (1993) 69 Crim R 92.
3. What the accused believed, as opposed to the ordinary reasonable person	R v Hector [1953] VLR 543 ('Hector')
4. The proportionality of the response to the perceived threat being relevant to the determination of whether they believed that their actions were necessary	R v Portelli (2004) 10 VR 259 ('Portelli'); [2004] VSCA 178; R v Carrington [2007] VSC 422 ('Carrington'). Zecevic v DPP (1987) 162 CLR 645;
5. The personal characteristics of the accused, such as any deluded beliefs she held or any excitement, affront or distress she was experiencing	Grosser v R (1999) 73 SASR 584 ('Grosser'); R v Walsh (1991) 60 A Crim R 419 ('Walsh'). R v Wills [1983] 2 VR 201 ('Wills')
Factors—The reasonableness of the response in the circumstances as the person perceives them	**Case or legislative authority**
6. A reasonable possibility that the conduct was a reasonable response in the circumstances as the person perceived them she perceived them.	Presidential Security Services of Australia Pty Ltd v Brilley (2008) 73 NSWLR 241; R v Katarzynski [2002] NSWSC 613; R v Trevenna [2004] NSWCCA 43; Oblach v R (2005) 65 NSWLR 75; Crawford v R [2008] NSWCCA 166.

Table 4–3: Factors which a jury should take into account when assessing self-defence under the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) (cont'd)

Factors—The reasonableness of the response in the circumstances as the person perceives them	**Case or legislative authority**
7. The response of the accused (as opposed to the reasonable person) having regard to age, gender, state of health and the surrounding circumstances.	R v Katarzynski [2002] NSWSC 613. See also R v Forbes [2005] NSWCCA

	377; Ward v R [2006] NSWCCA 321.
8. The objective proportionality of the response (in relation to the perceived situation).	Flanagan v R [2013] NSWCCA 320; Oblach v R (2005) 65 NSWLR 75.
9. Whether the response was reasonable in the circumstances as the person perceived them even though the person responded to a harm that was not immediate (due to family violence)	Crimes Act 1958 (Vic) s 322M(1)(a)
10. Whether the response was reasonable in the circumstances as the person perceived them even though the person responded in excess of the force involved in the harm or threatened harm (due to family violence)	Crimes Act 1958 (Vic) s 322M(1)(b)
Family violence jury directions	**Legislative authority**
The trial judge may include any of the following matters [in giving a direction requested under section 58 of the Jury Directions Act 2014 (Vic)]: > [T]hat family violence is not limited to physical abuse and may include sexual abuse and psychological abuse; may involve intimidation, harassment and threats of abuse; may consist of a single act; may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial. Further, if relevant, the trial judge may also direct that 'experience shows that': > [P]eople may react differently to family violence and there is no typical, proper or normal response to family violence; it is not uncommon for a person who has been subjected to family violence—to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;	Jury Directions Act 2015 (Vic) s 60(a); s 60(a)(i); s 60(a)(ii); s 60(a)(iii); s 60(a)(iv); s 60(b)(i); s 60(b)(ii); s 60(b)(A); s 60(b)(B); s 60(b)(B)(iii); s 60(b)(B)(iii)(A); s 60(b)(B)(iii)(B) and s 60(c).

	not to report family violence to police or seek assistance to stop family violence; decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by family violence itself; cultural, social, economic and personal factors; and that, as a matter of law, evidence that the accused assaulted the victim on a previous occasion does not mean that the accused could not have been acting in self-defence or under duress (as the case requires) in relation to the offence charged.	

As section 322K(2)(a) of the Crimes Act 1958 (Vic) is based on the common law test for self-defence, as pronounced in Zecevic v Director of Public Prosecutions (1987) 162 CLR 645, the same authorities apply under Victoria's 2014 law as were applied under the 2005 law.

On the evidence, Dunlop had a viable claim to self-defence, which appropriately resulted in her acquittal of both murder and manslaughter. Reed's daily beatings and threat to kill Dunlop discharged the evidential burden of self-defence and led Dunlop to subjectively believe[760] that her conduct was necessary in order to defend herself from the infliction of death or really serious injury pursuant to section 322K(3) of the Crimes Act 1958 (Vic).[761] The determination of whether Dunlop believed her actions to be necessary was satisfied through two separate yet interrelated considerations.[762] The first of these was that Dunlop believed that it was necessary to defend herself, and the second, was that she believed it was necessary to respond in the way that she did given the threat as she perceived it.[763]

Having regard to the material evidence, the Crown was unable to persuade a jury beyond a reasonable doubt that Dunlop had not believed that it was necessary to defend herself. With regard to Dunlop's response, namely, her decision to strike Reed with a stool, the Crown was also unable to persuade a jury beyond a reasonable doubt that Dunlop had not believed that it was necessary to strike Reed with a stool twice.

[760] The test imposed under section 9AC was ruled to be purely subjective: *Babic* (n 70).
[761] *Crimes Act* (n 71) ss 322K(1)-(3).
[762] See *Zecevic* (n 73).
[763] Ibid.

These arguments would have been supported by the common law's requirement that a jury assess what Dunlop herself had believed as opposed to what the ordinary reasonable person would have believed in the circumstances.[764] Further, it was immaterial whether Dunlop's belief was mistaken[765] or created by intoxication:[766] it was only required that such a belief be genuinely held.[767] Lastly, as a person who had reacted instantly to imminent danger, Dunlop could not have been expected to have precisely weighed the exact measure of self-defensive action which was required.[768]

With these considerations in mind and the proportionality of Dunlop's response being just one factor for consideration in the determination of whether she believed that her actions were necessary,[769] it is clear why the Crown was unable to persuade a jury beyond a reasonable doubt that Dunlop had not genuinely held a necessary belief to act in self-defence.

Having regard to section 322K(2)(b), Reed's aggressive conduct and threats to kill (amidst a protracted history of severe violence) rendered Dunlop's response reasonable in the circumstances as she perceived them.[770] For the jury, the relevant determination was whether there was a reasonable possibility that Dunlop's conduct was a reasonable response in the circumstances as she perceived them.[771] Additionally, the jury was to assess the response of Dunlop herself as opposed to the reasonable person which meant that they were also required to consider Dunlop's age, gender, state of health and the surrounding physical circumstances.[772]

Having regard to Dunlop's frailty, sex and surrounding climate of severe violence, it was clear to the jury that Dunlop genuinely held the belief which she had and that, objectively,

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[764] Ibid. See also *Viro* (n 75) and *Conlon* (n 75).
[765] *McKay* (n 76).
[766] *Conlon* (n 75); *Katarzynski* (n 77).
[767] *McKay* (n 76).
[768] *Palmer* (n 488). See also *Zecevic* (n 73); *Conlon* (n 75).
[769] See *Zecevic* (n 73); *Portelli* (n 80); *Carrington* (n 80).
[770] *Crimes Act* (n 71) s 322K(2)(b). As mentioned in chapter 2, section 322K(2)(b) is based on the law of section 418(2) of the *Crimes Act 1900* (NSW) and is interpreted accordingly: see Chapter 2, *The revised doctrine of self-defence – Congruence with and divergence from the common law* at 2.5.2.1(a).
[771] *Presidential Security Services of Australia Pty Ltd v Brilley* (2008) 73 NSWLR 241 ('*Brilley*'); *R v Katarzynski* (n 77); *Trevenna* (n 732); *Oblach v R* (2005) 65 NSWLR 75 ('*Oblach*'); *Crawford v R* [2008] NSWCCA 166 ('*Crawford*').
[772] *Katarzynski* (n 77). See also *R v Forbes* [2005] NSWCCA 377 ('*Forbes*'); *Ward v R* [2006] NSWCCA 321 ('*Ward*').

her response to that belief was reasonable.[773] Although the reasonableness of Dunlop's response was to be assessed in terms of the objective proportionality of the conduct to the perceived situation,[774] it was open for the jury to find that Dunlop's response was reasonable in the circumstances as she perceived them in the event that she had responded to a harm that was not immediate,[775] or had responded in excess of the force involved in the harm or threatened harm due to evidence of family violence.[776]

Lastly, it is assumed that defence counsel would have requested the trial judge to direct the jury that family violence[777] was not limited to the physical abuse which Dunlop experienced[778] and that family violence encompassed Reed's intimidation, harassment and threats of abuse specifically, the threat to kill).[779] Additionally, it is also assumed that defence counsel requested the trial judge to direct the jury that:

- there is no typical, proper or normal response to family violence;[780]
- it is not uncommon for a person who has been subjected to family violence[781] to stay with an abusive partner after the onset of family violence;[782]
- it is not uncommon to not report family violence to police or seek assistance to stop family violence;[783] and
- decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by[784] family violence itself.[785]

4.5.1.3 Manifestations of injustice and imperfect procedural justice

[773] *Katarzynski* (n 77); *Oblach* (n 771).
[774] *Flanagan v R* [2013] NSWCCA 320 ('*Flanagan*'); *Oblach* (n 771).
[775] *Crimes Act* (n 71) s 322M(1)(a).
[776] Ibid s 322M(1)(b).
[777] *Jury Directions Act 2015* (Vic) s 60(a) ('*Jury Directions Act'*).
[778] Ibid s 60(a)(i).
[779] Ibid s 60(a)(ii).
[780] Ibid s 60(b)(i).
[781] Ibid s 60(b)(ii).
[782] Ibid s 60(b)(A).
[783] Ibid s 60(b)(B).
[784] Ibid ss 60(b)-(B)(iii).
[785] Ibid ss 60(b)-(B)(iii)-(A).

With the doctrinal content of the law having provided Gayle Dunlop with an avenue to acquittal, Dunlop chose to pursue this avenue and attained perfect procedural justice.

On 22 November 2016 after the conclusion of the Crown case, counsel for the accused requested the trial judge to give a Prasad direction to the jury.[786] Strikingly, after hearing submissions from the Crown, which opposed the giving of the direction, his Honour ruled that the case, in his opinion, was 'so tenuous' as to warrant informing the jury of their right to acquit without hearing further evidence.[787]

In effect, his Honour found that Dunlop 'met the profile of what some, in the past, would have described as a battered woman'.[788] With the family violence provisions of the Crimes Act 1958 (Vic) having become relevant and having been effectively

[786] On 23 November 2016, his Honour informed the jury that as they had, by that stage, heard the whole of the Crown case, they now had three choices - they could: (a) deliver verdicts of 'not guilty' to both murder and manslaughter, (b) deliver a verdict of 'not guilty' to murder and hear more evidence in respect of the charge of manslaughter, or (c) indicate that they wished to hear more evidence in respect of both charges: ibid [119] (Weinberg and Beach JJA). Relevantly, he directed the jury as follows: That you, as the jury, now having heard the whole of the Crown case, at this stage have the right, if you choose to exercise it, to bring in verdicts of not guilty in relation to the offence of murder and also the alternative charge of manslaughter. You can do that now, in effect now, after I've explained to you this process, or at any later stage in the trial. It is important that you understand that the choice that is open to you at present is this choice: you can deliver two verdicts; not guilty of murder, not guilty of manslaughter, or you can indicate, alternatively, that you wish to hear more. You cannot at this stage, of course, it would be obvious to you perhaps why, deliver a verdict of guilty on either charge until all the processes of the trial are complete: the rest of the evidence, whatever that is, counsel's addresses and my directions: ibid [124] (Weinberg and Beach JJA). The judge continued: …I also emphasise to you this: I am not explaining any view of mine about the evidence. The facts are a matter for you, as I said to you at the start of the trial, the facts are a matter for you to determine. In all criminal trials a jury has the right that I'm now explaining to you that you have: *DPP Reference No 1* (n 738) [125] (Weinberg and Beach JJA).

[787] The judge, who had a considerable amount of experience in conducting trials of this nature, characterised the Crown case as 'not a particularly strong one': ibid [121] (Weinberg and Beach JJA). In opposing the giving of a *Prasad* direction, the prosecutor complained that the defence had not yet given an account of the killing which directly raised the issue of self-defence. The judge rejected that contention. He determined that not only was self-defence a live issue, based on the evidence led to that stage, but also that there was no need for the jury to have repeated to them, by the respondent, what the evidence had already made abundantly clear: ibid [122] (Weinberg and Beach JJA).

[788] *DPP Reference No 1 of 2017* (n 738) [120] (Weinberg and Beach JJA).

communicated to the jury,[789] the Supreme Court of Appeal acknowledged that Dunlop's prospects of acquittal had been 'significantly enhanced'.[790]

Despite the jury having first elected to hear more evidence in respect of both charges,[791] by 24 November 2016, once counsel for the accused had closed the defence case, his Honour, prior to closing addresses, reminded the jury of the continuing operation of the Prasad direction and provided the jury with an opportunity to revisit their earlier decision.[792]

The jury subsequently accepted his Honour's invitation and after a short deliberation, without having heard any closing addresses, acquitted the accused of both murder and manslaughter.[793] Most significantly, his Honour told the jury that they had delivered 'the right verdict'.[794] In his Honour's words, 'I say this extremely rarely, in my opinion, your verdict was a most appropriate verdict and [brought an] awful saga … to a conclusion'.[795]

His Honour's use of the Prasad direction became the subject of an appeal filed by the Director of Public Prosecutions[796] which ultimately led to the High Court of Australia determining that the direction was 'contrary to law and should not be administered to a jury determining a criminal trial between the Crown and an accused person'.[797] However, the fact that a female victim of family violence was prosecuted for a lethal response which may have traditionally been seen as disproportionate, received the benefit of a compelling

[789] In relation to the issue of family violence, the judge said: So, members of the jury, the law says that where an accused has killed in circumstances where family violence is alleged, an accused may believe that her conduct was necessary to defend herself and the conduct may be a reasonable response in circumstances even if, first, she is responding to harm that is not immediate or, secondly, her response involves the use of force in excess of the force involved in the harm or threatened harm. Now it doesn't mean that a person who has suffered family violence may use any level of force in the circumstances. A person who has suffered family violence will still be guilty of the crime of murder if she did not believe it was necessary to act in the way that she did to avoid the infliction of death or really serious injury, or her conduct was not a reasonable response in the circumstances as she perceived them. However, the law recognises that in determining whether a person was defending herself from family violence, it is not a simple matter of determining whether an attack was in progress at the time the accused acted or the accused's response was proportionate to the threatened harm: ibid [127] (Weinberg and Beach JJA).
[790] Ibid [118] (Weinberg and Beach JJA).
[791] Ibid [131] (Weinberg and Beach JJA).
[792] Ibid [132] (Weinberg and Beach JJA).
[793] Ibid [133] (Weinberg and Beach JJA).
[794] Farnsworth (n 739) 7.
[795] Ibid 8.
[796] *DPP Reference No 1 of 2017* (n 738).
[797] *Director of Public Prosecutions Reference No 1 of 2017* [2019] HCA 9 [58] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJA).

direction under section 322M of the Crimes Act 1958 (Vic) and was acquitted suggests that, at least in this case, the judge, counsel and the jury, were receptive to claims of self-defence from a female victim of family violence under Victoria's 2014 law.

With Dunlop having successfully met the criterion of a just outcome under Victoria's 2014 law2014 law, the criteria upheld themselves despite no assurances that the prosecutions process would yield a just outcome for her without a risk of failure.[798] In essence, the acquittal of Gayle Dunlop conformed to the spirit of Victoria's 2014 law and effectively redressed the inequalities which Victoria's 2005 law unsuccessfully addressed. To this end, no perceived manifestations of injustice arose in her prosecution nor did the prosecution reflect Rawls' conception of imperfect procedural justice. Accordingly, the prosecution reached the fair outcome in that Dunlop, an innocent accused, was acquitted. That being said, it is questionable why Gayle Dunlop was prosecuted in the first instance. It can only be assumed that the public's interest in the prosecution of homicide was afforded greater weight than Dunlop's substantial claim to self-defence.

4.5.2 Joanne and Shannon Debono

4.5.2.1 Material evidence

Joanne Debono aged 55 and her daughter, Shannon Debono aged 20 were accused of spiking Stephen Debono's (Joanne's husband) dinner with sleeping tablets as part of an alleged plot to murder him, by first incapacitating him and then hitting him with a shovel.[799] When Stephen Debono fell asleep, Joanne Debono 'could not bring herself to do it' and instead injected a mixture of brake fluid and weedkiller into his arm.[800] When Stephen Debono awoke to find a syringe in his arm, he asked what Joanne Debono was doing and the pair fled.[801]

[798] Rawls (n 1) 85.
[799] Adam Cooper, 'Charges dropped for wife who allegedly tried to kill with poisoned meatballs', *The Age* (online, 12 September 2017) 3-4 <https://www.theage.com.au/national/victoria/charges-dropped-for-wife-who-allegedly-tried-to-kill-with-poisoned-meatballs-20170912-gyfndm.html>.
[800] Ibid 5.
[801] Ibid 6.

Joanne Debono had previously alleged that she had been subjected to constant threats and abuse during her 25-year marriage.[802] Although initially charged with attempted murder and intentionally causing injury, the Crown subsequently withdrew both charges and submitted that it would not challenge the Debono's testimony of family violence if the matter proceeded to trial.[803]

4.5.2.2 The law of self-defence

With regard to Table 4-3, the Debonos appeared to have held viable claims to self-defence which appropriately resulted in the discontinuance of their prosecution; a reflection of perfect procedural justice. Following 25 years of constant threats and abuse, the Debonos would have been able to discharge the evidential burden of self-defence in the sense that they subjectively believed[804] that their conduct was necessary to defend themselves from the infliction of death or really serious injury pursuant to section 322K(3) of the Crimes Act 1958 (Vic).[805]

The determination as to whether the Debonos believed that their actions were necessary would have entailed two separate yet interrelated considerations.[806] The first was they believed that it was necessary to defend themselves, and the second, was that they believed that it was necessary to have responded in the way that they did given the ongoing threats as they perceived them.[807]

Having regard to the material evidence, the Crown would have had difficulty in persuading a jury beyond a reasonable doubt that the Debonos had not believed that it was necessary to defend themselves. With regard to their response, namely, to poison Stephen Debono, the Crown would have also been unlikely to persuade a jury beyond a reasonable doubt that the Debonos had not believed that it was necessary incapacitate or kill Stephen Debono. This much may be said having regard to the perpetration of 25 years

[802] Ibid 8.
[803] That being said, the Office of Public Prosecutions did not comment on its decision to withdraw the charges: ibid 10-11.
[804] The test imposed under section 9AC was ruled to be purely subjective: *Babic* (n 70).
[805] *Crimes Act* (n 71) s 9AC.
[806] See *Zecevic* (n 73).
[807] Ibid.

of family violence and the Crown's belief that it ought to discontinue the prosecution itself.

This would have also been supported by the common law's requirement that a jury assess what the Debonos themselves had believed as opposed to what ordinary reasonable people would have believed in the circumstances.[808] With these considerations in mind and the proportionality of the Debonos response to the perceived threat being relevant to the determination of whether they believed that their actions were necessary,[809] the Crown may have determined that it would have been unlikely to persuade a jury beyond a reasonable doubt that the Debonos had not held genuinely necessary beliefs to act in self-defence.

Having regard to section 322K(2)(b), Stephen Debono's constant threats spanning 25 years would have arguably rendered the Debonos' response reasonable in the circumstances as they perceived them.[810] For the jury, the relevant determination would have been whether or not there had been a reasonable possibility that the Debonos' conduct was a reasonable response in the circumstances as they perceived them.[811] Additionally, the jury would have been required to assess the response of the Debonos' themselves, as opposed to ordinary reasonable persons, which meant that they would have had to consider their age, gender, state of health and surrounding physical circumstances.[812]

Having regard to the vulnerability of the Debonos and the surrounding climate of ongoing fear, a jury may very well have found that the Debonos genuinely held the beliefs which they did and that, objectively speaking, their response to those beliefs was reasonable.[813] Although the reasonableness of their response would have been assessed in terms of the objective proportionality of their conduct to the perceived situation,[814] it would have been open to the jury to find that their response was reasonable in the circumstances as they

[808] Ibid. See also *Viro* (n 75); *Conlon* (n 75).
[809] See *Zecevic* (n 73); *Portelli (n 80)*; *Carrington* (n 80).
[810] *Crimes Act* (n 71) s 322K(2)(b). As mentioned in chapter 2, section 322K(2)(b) is based on the law of section 418(2) of the *Crimes Act 1900* (NSW) and is interpreted accordingly: see Chapter 2, *The revised doctrine of self-defence – Congruence with and divergence from the common law* at 2.5.2.1(a).
[811] *Brilley* (n 766); *Katarzynski (n 77)*; *Trevenna* (n 732); *Oblach* (n 771); *Crawford* (n 771).
[812] *Katarzynski* (n 77). See also *Forbes* (n 772); *Ward* (n 772).
[813] *Katarzynski* (n 77); *Oblach* (n 771).
[814] *Flanagan* (n 774); *Oblach* (n 771).

perceived them even though they had responded to a harm that was not immediate due to evidence of family violence.[815] Alternatively, the same decision could have been reached even in the event that the jury believed that the Debonos had responded in excess of the force involved in the harm or threatened harm also due to evidence of family violence.[816]

Lastly, had the matter proceeded to trial, it is assumed that defence counsel would have requested the trial judge to direct the jury that family violence[817] was not limited to physical abuse and would have extended to Stephen Debono's psychological abuse,[818] intimidation, harassment and threats of abuse[819] and that it also consisted of separate acts which formed a pattern of behaviour which could amount to abuse, even if some or all of those acts, when viewed in isolation, appeared to be minor or trivial.[820]

It is also assumed that defence counsel would have requested the trial to direct the jury that:

- people may react differently to family violence and there is no typical, proper or normal response to family violence;[821]
- it is not uncommon for a person who has been subjected to family violence[822] to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;[823]
- it is not uncommon to not report family violence to police or to not seek assistance to stop family violence;[824] and
- decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by[825] family violence itself.[826]

[815] *Crimes Act* (n 71) s 322M(1)(a).
[816] Ibid s 322M(1)(b).
[817] *Jury Directions Act* (n 777) s 60(a).
[818] Ibid s 60(a)(i).
[819] Ibid s 60(a)(ii).
[820] Ibid s 60(a)(iv).
[821] Ibid s 60(b)(i).
[822] Ibid s 60(b)(ii).
[823] Ibid s 60(b)(A).
[824] Ibid s 60(b)(B).
[825] Ibid ss 60(b)-(B)(iii).
[826] Ibid ss 60(b)-(B)(iii)-(A).

4.5.2.3 Manifestations of injustice and imperfect procedural justice

In a similar case to the prosecution of Heather Osland, the discontinuance of the prosecution of Joanne and Shannon Debono would suggest that the Crown has shown greater receptivity to claims of self-defence from female victims of family violence under Victoria's 2014 law. That being said, the rationale of the Crown's decision is unknown and can only be deduced by speculation from the Crown's comment that it would not have challenged the evidence of the Debonos. The most plausible explanation is that the Crown formed the view that there was no reasonable prospect of conviction and that the prosecution was not in the public interest having regard to the admissible evidence and the availability of the defence of self-defence.[827]

It is evident that the Debonos achieved a just outcome under Victoria's 2014 law. However, had the matter gone to trial, there would have been no assurances that the prosecution process would have yielded a just outcome.[828] In essence, the discontinuance of the prosecution of the Debonos conformed to the spirit of Victoria's 2014 law and reflected an acknowledgement of the inequalities which Victoria's 2005 law unsuccessfully addressed. To this end, no perceived manifestation of injustice arose within their prosecution nor did the prosecution reflect Rawls' conception of imperfect procedural justice.

4.5.3 R v Donker [2018] VSC 210

4.5.3.1 Material evidence

In the matter of R v Donker,[829] Jessie Donker and Richard Powell began a relationship during 2006.[830] The pair had children together and Powell was described as a 'good man'

[827] Chapter 1 – Prosecutorial Discretion. See Judd (n 18) 2-5.
[828] Rawls (n 1) 85.
[829] [2018] VSC 210 ('*Donker'*).
[830] Ibid [4] (Croucher J).

'when off hard drugs'.[831] When fuelled by methamphetamines, Powell often resorted to violence.[832] Often controlling and suspicious, Powell threatened to kill Donker several times and during Donker's first pregnancy, grabbed her by the throat and 'pushed her about'.[833] Although the Court observed that Donker would 'have her say and a good deal more too' and this included her responding with her own violence, it also stated that 'she was no match for Mr Powell'.[834]

In November 2016, the couple lost their rental home and their children were taken into State care, eventually being relocated to Powell's parents' residence. During that time Donker was 'forced to live in her car'[835] but had unrestricted access to the children. She would sleep in her car near the Powell residence so that she could visit the children during the day.[836]

On 7 January 2017, Donker attended the residence of Powell's parents to visit their baby.[837] After she had placed their baby in her car, Powell punched her in the chest.[838] After Donker hit Powell in return, Powell began to choke her 'to the point where she could not breathe'.[839] Powell subsequently punched Donker in the face and 'just kept on punching'.[840] He then demanded that Donker 'drive away' but Donker 'could not see properly because blood was running into her eyes from [a] gash that had opened up on her eyebrow'.[841] At that moment, Donker returned their baby to Powell's parents and Powell left by foot.[842]

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[831] Ibid.
[832] Ibid [5] (Croucher J).
[833] As stated by Croucher J, 'the police were called on occasions. Usually, however, as many victims of domestic violence do, Ms Donker would devise a thin cover story for what had happened, or understate things, or decline to make a statement, or simply ask that her abuser not be charged. After all, she still loved him. He was the father of two of her children. And she believed he loved her': ibid.
[834] Ibid [6] (Croucher J).
[835] Ibid [9] (Croucher J).
[836] Ibid.
[837] Ibid [14] (Croucher J).
[838] Ibid.
[839] Ibid.
[840] Ibid.
[841] Ibid.
[842] Ibid.

When the police arrived, Donker told them that she and Powell had fought but refused to make a statement or seek medical assistance.[843] She then left the premises and drove her car to a kindergarten car park in Sunbury where she slept the night.[844]

On 8 January 2017, at approximately 6.00am, Powell arrived at the car park to find Donker asleep with her window wound down.[845] Powell then opened the rear passenger door, grabbed Donker by the hair, screamed abuse at her and then dragged her out of the car.[846] He then hit her in the face again, claiming that 'she had stolen his family', called her a 'slut' and said other things which, in Donker's view, Powell knew would hurt her.[847]

Donker was able to get back into her car and into the driver's seat where 'her rage, the provocation, the torment that she had been suffering, not only at that moment [and] the night before, but [also] over many years, surfaced in a most dramatic manner'.[848] Enraged, she drove her car at Powell four times but only intended to 'taunt and frighten him in the way she felt she had been treated for years'.[849] On the fourth occasion, Donker's car struck a pole which 'freakishly, in [his Honour's] view, bent so far, and at such an angle, that the edge of the sign struck Powell on the head, cleaving his skull as if hit by an axe'.[850] Powell was killed instantly.[851]

Screaming in horror, Donker immediately rang triple-zero and said 'please help me, help me, help me, help me, help me'.[852] Following her interview with police, Donker was charged with murder.[853] However, prior to her committal hearing, she offered to plead guilty to manslaughter by an unlawful and dangerous act which was accepted by the Crown.[854] Donker was subsequently sentenced to 5 years imprisonment with a non-parole period of two years.[855]

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[843] Ibid [15] (Croucher J).
[844] Ibid [16] (Croucher J).
[845] Ibid [21] (Croucher J).
[846] Ibid.
[847] Ibid.
[848] Pertinently, Donker admitted to forensic psychologist Pamela Matthews that 'It was all too much for [her]' and '[she'd] had enough': ibid [22] (Croucher J).
[849] Ibid [24] (Croucher J).
[850] Ibid [27] (Croucher J).
[851] Ibid.
[852] Ibid [28] (Croucher J).
[853] Ibid [40] (Croucher J).
[854] Ibid [41] (Croucher J).
[855] Ibid [156] (Croucher J).

4.5.3.2 The law of self-defence

With regard to Table 4-3, Donker possessed a viable claim to self-defence which ought to have resulted in either the discontinuance of her prosecution for murder or her acquittal. Powell's violent ambush of Donker would have discharged the evidential burden of self-defence and led Donker to subjectively believe[856] that her conduct was necessary to defend herself from the infliction of death or really serious injury pursuant to section 322K(3) of the Crimes Act 1958 (Vic).[857]

The determination of whether Donker believed her actions to be necessary would have consisted of two separate yet interrelated questions for the jury's determination.[858] The first of these was whether Donker believed that it was necessary to defend herself at all, and the second, whether she believed it was necessary to respond in the way that she did given the threat as she perceived it.[859]

Having regard to the material evidence and Powell's ambush, it is unlikely that the Crown would have persuaded a jury beyond a reasonable doubt that Donker had not believed that it was necessary to defend herself. With regard to Donker's response, namely, her impulse to drive at Powell, it is equally unlikely that the Crown would have persuaded a jury beyond a reasonable doubt that Donker had not believed that it was necessary to respond as she did.

These arguments are supported by the common law's requirement that a jury assess what Donker herself had believed as opposed to what the ordinary reasonable person would have believed in the circumstances.[860] Further, it was immaterial whether Donker's belief was mistaken[861] or created by intoxication:[862] it was only required that such a belief be genuinely held.[863] Lastly, as a person who had reacted instantly to imminent danger,

[856] The test imposed under section 9AC was ruled to be purely subjective: *Babic* (n 70).
[857] *Crimes Act* (n 71) s 9AC.
[858] See *Zecevic* (n 73).
[859] Ibid.
[860] Ibid. See also *Viro* (n 75); *Conlon* (n 75).
[861] *McKay* (n 76).
[862] *Conlon* (n 75); *Katarzynski* (n 77).
[863] *McKay* (n 76).

Donker could not have been expected to have precisely weighed the exact measure of self-defensive action which was required.[864]

With these considerations in mind and the proportionality of Donker's response being just one factor for consideration in the determination of whether she believed that her actions were necessary,[865] it is unlikely that the Crown would have persuaded a jury beyond a reasonable doubt that Donker had not genuinely held a necessary belief to act in self-defence.

Having regard to section 322K(2)(b), Powell's ambush and his history of violence, would have rendered Donker's response reasonable in the circumstances as she perceived them.[866] For the jury, the relevant determination would have been whether there was a reasonable possibility that Donker's conduct was a reasonable response in the circumstances as she perceived them.[867] The jury would have also been required to assess the response of Donker herself, as opposed to the reasonable person, which meant that they would have had to have considered Donker's age, gender, state of health and the surrounding physical circumstances.[868]

Having regard to these factors and Powell's history of violence, it would have been open to the jury to conclude that Donker genuinely believed in the need to defend herself and that, objectively, her response was reasonable in the circumstances as she perceived them to be.[869] The reasonableness of her response had to be assessed in terms of the objective proportionality of the conduct to the perceived situation.[870] Given that Donker did not anticipate her collision with a sign and its fatal trajectory, it is argued that a conscientious assessment of the objective proportionality of her conduct would have been limited to her actions of driving itself.

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[864] *Palmer* (n 493). See also *Zecevic* (n 73); *Conlon* (n 75).
[865] See *Zecevic* (n 73); *Portelli* (n 80); *Carrington* (n 80).
[866] *Crimes Act* (n 71) s 322K(2)(b). As mentioned in chapter 2, section 322K(2)(b) is based on the law of section 418(2) of the *Crimes Act 1900* (NSW) and is interpreted accordingly: see Chapter 2, *The revised doctrine of self-defence – Congruence with and divergence from the common law* at 2.5.2.1(a).
[867] *Brilley* (n 771); *Katarzynski* (n 77); *Trevenna* (n 732); *Oblach* (n 771); *Crawford* (n 771).
[868] *Katarzynski* (n 77). See also *Forbes* (n 772); *Ward* (n 772).
[869] *Katarzynski* (n 77); *Oblach* (n 772).
[870] *Flanagan* (n 774); *Oblach* (n 771).

Lastly, it is assumed that defence counsel would have requested the trial judge to direct the jury that family violence[871] was not limited to the physical abuse which Donker experienced[872] and that family violence encompassed Powell's prior intimidation, harassment and threats of abuse.[873] Additionally, it is also assumed that defence counsel would have requested the trial judge to direct the jury that:

- there is no typical, proper or normal response to family violence;[874]
- it is not uncommon for a person who has been subjected to family violence[875] to stay with an abusive partner after the onset of family violence;[876]
- it is not uncommon to not report family violence to police or seek assistance to stop family violence;[877] and
- decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by[878] family violence itself as well as socioeconomic factors having regard to Donker's disadvantages preceding the homicide.[879]

4.5.3.3 Manifestations of injustice and imperfect procedural justice

With the presumption of innocence in mind,[880] the doctrinal content of the law provided Jessie Donker with an avenue to acquittal yet she chose not to take this avenue. In light of the obligations of confidentiality which practitioners have to their clients, the reason(s) for this decision can only be speculated. Before considering these reasons, it is significant to note that in sentencing Donker, his Honour Justice Croucher showed a significant

[871] *Jury Directions Act 2015* (no 777) s 60(a).
[872] Ibid s 60(a)(i).
[873] Ibid s 60(a)(ii).
[874] Ibid s 60(b)(i).
[875] Ibid s 60(b)(ii).
[876] Ibid s 60(b)(A).
[877] Ibid s 60(b)(B).
[878] Ibid ss 60(b)-(B)(iii).
[879] Ibid ss 60(b)-(B)(iii)-(A).
[880] As the accused's prosecution was resolved by plea of guilty, the evidence sourced amounts to a synopsis of the evidence which was available to the prosecution at the time. As a result, none of the evidence was tested for credibility at trial (as it would have been had the accused pleaded not guilty). Additionally, the credibility of any witnesses (expert or otherwise) which may have been called by defence counsel was not tested at trial. In other words, the evidence which might have been available at trial is not necessarily the same as that which was presented at sentence. See 3.2.6.1.

degree of empathy to Donker and substantially acknowledged the impact which the dynamics of family violence had upon her. For example, his Honour stated:

> [A]fter years of Mr Powell's violence; after numerous unsuccessful attempts at defending herself; after losing her recently hard-won gains – including her home, her job and, most importantly, the care of her children; after being forced to live in a car; after being choked and having her eyebrow split by him again the night before; after being viciously dragged out of her car by the hair as she tried to sleep; after all of that, Ms Donker could take no more and finally snapped.[881]

Most strikingly, was the Court's acknowledgement that Donker possessed a viable claim to self-defence yet chose not to pursue such a claim. In his Honour's view:

> [G]iven the unforeseen and unforeseeable mechanism of death, the long history of domestic violence to which Ms Donker was subjected, the acts of violence against her the night before and the morning of the killing, and the provisions in the Crimes Act 1958 (Vic) concerning the admissibility of evidence of family violence and the directions which would be given to a jury on a trial of this nature about that evidence, had the matter gone to trial, Ms Donker would have had a sound basis to argue for an outright acquittal on one or more bases: namely, that the act causing death was not "dangerous" in the sense required by law, that she acted in self-defence or that her actions did not cause death. Further still, it strikes me that Ms Donker's plight might well have been seen very sympathetically by a jury, which, experience tells, tends to make any defence open in law all the more attractive. In those circumstances, her early plea of guilty is of all the more weight in mitigation.[882]

It follows that Donker may have pleaded guilty out of shame, remorse or a desire to account for the death Powell, for whom she cared. It is also questionable whether or not defence counsel informed Donker of the significance of the family violence provisions and jury directions pertaining to self-defence. Lastly, the Crown's starting point was to charge Donker with murder. It would not be surprising if this unduly induced Donker into pleading guilty to manslaughter. Having spent 489 days in pre-sentence detention at the

[881] *Donker* (n 829) [23] (Croucher J). As stated by Croucher J, Ms Donker was simply minding her own business, sleeping for goodness's sake, when Mr Powell invaded the sanctity of her private space and behaved in an appalling manner. Ms Donker did not go looking for trouble. Rather, the trouble came to her: ibid [66] (Croucher J).
[882] Ibid [99] (Croucher J).

date of sentencing,[883] Donker may not have wished to proceed to trial and risk a conviction of murder.

Notwithstanding the possible explanations for Donker's decision to plead guilty to manslaughter, Victoria's 2014 law did not inspire confidence in her to proceed to trial despite the existence of a viable claim to self-defence.

Donker's decision may be said to have been antithetical to the spirit of Victoria's 2014 law in the sense that the decision gave insufficient weight to the inequalities which the standard had sought to address. On this basis, given the strength of her claim to self-defence, her decision to plead guilty to manslaughter by an unlawful and dangerous act itself represented the first manifestation of injustice to arise under Victoria's 2014 law: an act which unjustly prevented Donker from meeting the criterion of a just outcome established under Victoria's 2014 law and led to Rawls' conception of imperfect procedural justice arising within her prosecution.

While the legislative principles in Victoria's 2014 law could be presumed to uphold themselves, the prosecution of Jessie Donker reflected Rawls' imperfect procedural justice in the sense that no assurances could be made that the prosecutions process would yield a just outcome for her without a risk of failure.[884] Although the standard of justice had established an independent criterion for a just outcome, the proceedings nevertheless reached an unfair outcome in that Donker, an innocent accused, was convicted.

The extent to which the written, doctrinal content of Victoria's 2014 law failed to inspire confidence in Donker to proceed to trial on the basis of self-defence reflects the extent to which Victoria's 2014 law unjustly failed to accommodate her experiences.

The prosecution of Jessie Donker raises implications as to the extent to which the 2014 law has increased the confidence of victims of family violence to pursue claims of self-defence at trial. Although judicial remarks such as those quoted earlier would suggest that judges have shown greater receptivity to female victims of family violence, the decision of Jessie Donker to plead guilty to manslaughter would appear to reflect the perpetuation

[883] Ibid [159] (Croucher J).
[884] Rawls (n 1) 85.

of an issue experienced by female victims of family violence under the operation of the 2005 law. Table 4–4 provides a summary of cases heard pursuant to the 2014 law.

Table 4–4: Summary of cases heard pursuant to the 2014 law

Cases	Charge	Plea	Conviction and sentence	Category of injustice
DPP Reference No 1 of 2017 [2018] VSCA 69	Murder	Not guilty	Acquittal	Perfect procedural justice.
Joanne and Shannon Debono	Attempted Murder	Not applicable	Discontinuance	Perfect procedural justice.
R v Donker [2018] VSC 210	Murder	Guilty to manslaughter	Manslaughter 5 years minimum of 2	A systematic application of sections 322K, M, J of the Crimes Act alongside sections 58, 59 and 60 of the Jury Directions Act should have precluded a plea of guilty to manslaughter.

4.6 Exposition of Thesis

It is theorised that Victoria's previous law of self-defence and family violence evidence, as reflected in the enactment of the Crimes (Homicide) Act 2005 (Vic), embodied Rawls' conception of justice as fairness: a 2005 law which represented a set of criteria for a just outcome. When it came to the eight prosecutions under this standard, the criteria were applicable. However, fourteen manifestations of injustice arose in these prosecutions with the effect of unjustly preventing each accused from attaining a just outcome: processes reflecting Rawls' conception of imperfect procedural justice.

The extent to which the doctrinal content of the law failed to prevent these injustices arising in the first instance may be regarded as the extent to which Victoria's previous law of self-defence and family violence evidence unjustly failed to accommodate the experiences of victims of family violence in criminal prosecutions, who were alleged to have killed their violent partners.

Additionally, the enactment of the Crimes (Abolition of Defensive Homicide) Act 2014 (Vic) may be said to represent Rawls' conception of reflective equilibrium: a process leading to the creation of a 2014 law. With regard to the three prosecutions analysed under

this standard, the criteria were applicable. In contrast to Victoria's 2005 law, the prosecutions of Gayle Dunlop and Joanne and Shannon Debono appropriately resulted in acquittal and discontinuance (respectively). However, Donker's plea of guilty to manslaughter represents a manifestation of injustice which unjustly prevented her from attaining a just outcome: a process reflecting Rawls' conception of imperfect procedural justice.

It is hypothesised that the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) has increased justice in the accessibility of self-defence to victims of family violence who kill their violent partners in that the standard is more conducive to upholding its own criteria for a 'just outcome'. In other words, the standard is less likely to occasion Rawls' imperfect procedural justice in comparison to Victoria's 2005 law. Nevertheless, non-legal factors are theorised to continue to pose foreseeable risks of imperfect procedural justice arising under Victoria's 2014 law.

4.7 Conclusion

This chapter articulated Rawls' conception of justice as fairness and found that Victoria's enactment of the Crimes (Homicide) Act 2005 (Vic) may be said to have reflected that conception, which led to the creation of Victoria's 2005 law. The chapter then analysed the eight prosecutions heard under that standard. 14 manifestations of injustice were identified with each manifestation having been argued to have unjustly caused or contributed to Rawls' imperfect procedural justice arising within each respective prosecution: phenomena which unjustly prevented those accused from attaining the criterion of the standard's just outcome notwithstanding the applicability of the criterion.

The chapter articulated Rawls' conception of reflective equilibrium and inductively substantiated that Victoria's enactment of the Crimes (Abolition of Defensive Homicide) Act 2014 (Vic) reflected this conception as well as creating a 2014 law. It then analysed three prosecutions heard and resolved under this standard. Apart from Donker, the standard appeared to be more conducive to upholding its own criteria for a just outcome when compared with Victoria's 2005 law.

In the next chapter, data obtained from interviewing 12 stakeholders in the administration of criminal justice is used to provide a deeper understating as to why the 2005 law failed

to achieve just outcomes for women who killed their violent partners and why the 2014 law appears, with one exception, to have given such women improved access to self-defence.

CHAPTER 5
JUSTICE IN THE ACCESSIBILITY OF SELF-DEFENCE: QUALITATIVE DATA ANALYSIS

5.1 Introduction

The previous chapter applied John Rawls' theory of justice to the relevant eight cases heard pursuant to Victoria's 2005 law. It was found that the standard unjustly failed to accommodate victims of family violence who killed their violent partners. Concerns were identified, particularly:

- the accused pleading guilty to manslaughter or defensive homicide even where self-defence based on sections 9AC, 9AD and 9AH should have resulted in acquittal or discontinuance;
- prosecutors tactically minimising or dismissing evidence of family violence; and
- the Crown and the Court pathologising the accused despite evidence of family violence providing a rational explanation for their conduct.

John Rawls' theory of justice was then applied to the three cases heard pursuant to Victoria's 2014 law. It was found that in two of the three cases, appropriate outcomes resulted. In the third case,[1] however, the accused pleaded guilty to manslaughter despite a viable claim to self-defence based on the existence of family violence. It was hypothesised that the 2014 law provided victims of family violence who killed their violent partners with improved access to self-defence.

[1] *R v Donker* [2018] VSC 210 ('Donker').

This chapter details and analyses the responses of 12 interview participants concerning their experiences and insights pertaining to Victoria's 2005 law and then the 2014 law. Several areas are explored:

- plea decisions of victims of family violence;
- practitioner understandings of family violence;
- the pathologisation of victims of family violence;
- the consequences of the abolition of provocation and enactment of defensive homicide;
- the directions given to juries;
- the overall capacity of Victoria's 2005 law to accommodate the dynamics of family violence;
- the reformed defence of self-defence;
- the operation of Victoria's social context evidence and family violence jury directions framework and its capacity to accommodate the dynamics of family violence;
- the consequences of the abolition of defensive homicide; and
- the capacity of Victoria's 2014 law to accommodate the dynamics of family violence;

The analysis of the interviews in this chapters was designed to provide answers to subsidiary questions one and two posed in Chapter 1 at [1.2].

Table 5–1 outlines the professional experience and gender of the interviewees.

Table 5–1: Details of interview participants

Interviewee	**Occupation**	**Sex**
Judge A	Retired Supreme Court Justice	Female
Practitioner A	Murder Trial Barrister (Queen's Counsel)	Male
Practitioner B	Murder Trial Barrister (Queen's Counsel)	Male
Practitioner C	Experienced Murder Trial Barrister	Male
Practitioner D	Experienced Murder Trial Barrister	Female
Practitioner E	Experienced Murder Trial Barrister	Female

Practitioner F	Experienced Murder Trial Barrister	Male
Practitioner G	Murder Trial Barrister (Queen's Counsel)	Male
Practitioner H	Murder Trial Barrister (Queen's Counsel)	Male
Practitioner I	Experienced Murder Trial Solicitor	Male
Professor of Law A	Professor of Law–Criminal law and family violence specialist	Female
Psychologist A	Forensic Psychologist–expert murder trial witness	Male

5.2 Results and analysis

Here, the views of the twelve interviewees are presented concerning why the 2005 law unjustly failed to accommodate victims of family violence and whether the 2014 law is likely to increase the accessibility of self-defence.

5.2.1 Did Victoria's 2005 law unjustly fail to accommodate the experiences of women who killed their violent partners in self-defence?

5.2.1.1 The legal advice given to victims of family violence

Practitioner H argued that the culture among Victoria's criminal law practitioners had always been one of 'keen contest'[2] and that there had never been 'a tradition of pleading guilty [to] soft options'.[3] Nor did accused, from his experience, 'buckle at the knees'[4] and plead guilty to lesser homicide charges due to the advice given by counsel.

Practitioner B asserted that counsel who saw a reasonable prospect of a full acquittal would typically 'go for it'.[5] Similarly, Practitioner I, an experienced murder trial solicitor, asserted that if he thought a person had a viable claim to self-defence, even if it was possible that a jury might bring back a verdict of excessive self-defence or manslaughter, he would still raise self-defence during the trial.[6] However, when questioned as to whether section 9AH of the Crimes Act 1958 (Vic) had inspired greater confidence in the legal

[2] Interview with Practitioner H (Vincent Farrugia, Chambers, 19 March 2018).
[3] Ibid.
[4] Ibid.
[5] Interview with Practitioner B (Vincent Farrugia, Chambers, 13 December 2017).
[6] Interview with Practitioner I (Vincent Farrugia, Professional Office, 20 March 2018).

profession to advise victims of family violence to raise self-defence and proceed to trial, he said 'not really, to be candid'.[7] Speaking of two of the prosecutions he handled, he stated:

> In those two cases that I was personally involved, there was no imminent threat– there was more of that long-term systematic abuse … this [was] sort of [a] crude analysis but if it was approximate, if it was reasonable and it was proportionate. I know that was not the legal test necessarily but [those were] the sorts of things that we would look at before we … [took matters] to a jury.[8]

To Practitioner I, the ultimate concern was that:

> If jurors didn't think that there was an immediate threat or an imminent danger, the reality [was] that they [were] less likely to accept the defence.[9] They'd be looking at their own experiences and … there would inevitably be a number of jurors that would have experienced domestic violence directly or indirectly and, in a sense, there [had been] an acceptance of it to some degree.[10] It was too remote to rely on that provision.[11]

The analysis provided in the previous chapter established that Victoria's 2005 law was unable to inspire practitioners to provide legal advice which accounted for two fundamental Rawlsian inequalities which the standard had sought to address:

1. Due to disparities in strength and size and continuous threats of violence, victims of family violence often killed in ways appearing to be 'at odds' with how self-defence had traditionally been understood—as a defence for those who had used force to preserve life or limb in the context of an immediate altercation.
2. Self-defence had been seen, insofar as victims of family violence were concerned, to have inadequately accommodated disproportionate responses

[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] Ibid. As expressed by Practitioner F, it [wasn't] uncommon to say or think that a jury [was] never going to buy that or that a jury [would] accept that: See Interview with Practitioner F (Vincent Farrugia, Chambers, 9 February 2018).

> to threats or pre-emptive responses on unarmed or otherwise defenceless partners performed in the context of ongoing family violence.

In essence, Practitioner I's legal advice had been tailored to the traditional circumstances in which self-defence was available at common law despite the doctrinal content of Victoria's 2005 law having specifically catered to those matters which Practitioner I had carriage over. Although the law had changed, legal advice on the prospects of acquittal remained the same as such advice had been contingent upon whether Practitioner I believed juries to be receptive to non-traditional claims to self-defence.

In the reflection of Judge A, 'barristers (and solicitors) [were] pretty conservative in [these] areas – the Victorian Criminal Bar had a way of thinking about things and it was difficult to get practitioners to change their minds when they had it all worked out'.[12]

Relevantly, Practitioner C asserted:

> Practitioners were not going to be attracted to defence arguments that justified killings where it was not generally understood how or why individuals should escape punishment when there were other ways out.[13]

Conservative legal advice did not wholly account for the reluctance of victims of family violence who killed their violent partners to argue self-defence under Victoria's 2005 law. Practitioner H, for example, argued that in some instances, the psychological condition of a client led counsel to give advice to plead guilty to a lesser homicide charge if they did not 'believe that [the] client [was] up to it'.[14]

Although pleas were sometimes influenced by evidence in possession of the Crown, the contents of forensic reports and a lack of demonstrable evidence being able to be obtained,[15] it was not uncommon for Practitioner H's clients to express words to the effect of 'I feel bad, I think I did it, I should go to jail … I don't care, I don't want to run the defence, I'll plead guilty to something so that things will be done'.[16] Similarly, in Practitioner I's experience, 'few people … [were] … prepared to run a matter to verdict

[12] Interview with Judge A (Vincent Farrugia, Professional Office, 28 March 2018).
[13] Interview with Practitioner C (Vincent Farrugia, Chambers, 15 January 2018).
[14] Interview with Practitioner H (n 2).
[15] Ibid.
[16] Ibid.

[when] they were offered a manslaughter [plea]'[17] and the Crown '[seemed] to [make] no concessions about anything'[18] insofar as family violence was concerned.

Practitioner B, however, was sceptical of victims of family violence having unjustly pleaded guilty to lesser homicide charges. In his experience, if there was a real prospect of a complete acquittal, clients 'weren't going to go in for ten years instead of twenty'.[19] He continued that such decisions depended on the assessment of the quality of the evidence available to practitioners and that such assessments 'required fine judgment' and 'practitioners didn't decide that by themselves'.[20]

In the opinion of Practitioner G:

> There were always cases where you heard someone had pleaded and you only really knew the bare facts. You didn't know the intricacies but you thought, oh no, I wouldn't have pleaded like that.[21]

The accounts of Practitioners H and I indicated that Victoria's 2005 law inspired little confidence in victims of family violence to proceed to trial on the basis of self-defence. The standard was unable to compel the Crown to pay greater regard to the Rawlsian inequalities which the law sought to address. Additionally, it was unable to channel the understandable grief, remorse and anxiety of victims into a greater focus on those inequalities and an understanding that killing a violent partner in self-defence may be a rational (as opposed to pathological) response to danger. In this light, these accounts supplement the conclusion that Victoria's 2005 law unjustly failed to accommodate victims of family violence in criminal prosecutions.

5.2.1.2 The plea decisions of victims of family violence

In the experience of Practitioner D, 'when . . . murder [was] on the table, it [was] sometimes better to hedge your bets rather than to go all in'.[22] Similarly, Practitioner E

[17] Interview with Practitioner I (n 6).
[18] Ibid.
[19] Interview with Practitioner B (n 5).
[20] Ibid.
[21] Interview with Practitioner G (Vincent Farrugia, Chambers, 16 February 2018).
[22] Interview with Practitioner D (Vincent Farrugia, Chambers, 23 January 2018).

asserted that the decision whether to advise a client to plead guilty to a lesser homicide charge was always challenging because:

> There [were] so many factors playing on their mind. [Practitioners] just [had] to advise them of what the risks of going to a jury trial [were] and what they [could] argue.[23]

Practitioner F reported that clients:

> typically [looked] at what the most likely outcome would be and how little or any jail [was] going to be served.[24]

However, for Judge A, it was unclear whether such deliberations would have been negatively influenced by a prospective jury's understanding of family violence.[25] To Practitioner A, there was no prevailing view that juries 'got it wrong' or that defensive homicide pleas were something which practitioners were drawn to on account of a generalised fear of juries.[26]

That being said, Practitioner I's conservative legal advice had been shaped by his beliefs concerning the receptivity of jurors to claims of family violence. Further, Professor of Law A argued that such deliberations 'might have' been influenced by practitioner understandings of family violence as:

> Women had been seen from time to time to plead to manslaughter rather than [risking] trial and arguing for [a] full acquittal.[27]

Although Practitioners E and F perceived defensive homicide as having provided greater options to clients, Professor of Law A believed that defensive homicide 'may have operated strategically and in practice in ways that were not desirable'.[28] In essence, it had

[23] As put by Practitioner E, 'the more options you can give them [about] what they can run at trial, the better you're going to [be in] … [making] a strategic call about taking one course over another': Interview with Practitioner E (Vincent Farrugia, Telephone Call, 12 February 2018).
[24] Interview with Practitioner F (n 11).
[25] Interview with Judge A (n 12).
[26] Interview with Practitioner D (n 22).
[27] This was to be balanced with 'the reality that practitioners had to make sensible strategic judgments as to how they were going to run their cases': Interview with Professor of Law A (Vincent Farrugia, Academic Office, 13 March 2018).
[28] Ibid.

encouraged 'women … to plead … rather than risk running [their] full story' and it was unclear whether or not practitioners 'had a sense of that'.[29]

As a result, it is conceivable that practitioner understandings of sections 9AC, 9AD and 9AH (alongside the provision of conservative legal advice, the presence of an overzealous Crown and the remorse of those accused) contributed to those instances of imperfect procedural justice arising through the pleas of Melissa Kulla, Karen Black, Jemma Edwards and Veronica Hudson.

5.2.1.3 The prosecution of victims of family violence

(a) The pathologising of victims of family violence at trial

With regard to the pathologising of victims of family violence during trials, it was in Practitioner B's experience that counsel sought:

> to get around [defensive homicide] in whatever way they could because it was so complex and so difficult to work with.[30] . . . In essence, prosecutors commonly sought to fit 'square pegs' into round holes … [before] the 2014 legislation.[31]

On this testimony, the Crown had, at times, paid insufficient regard to the inequalities which the 2005 law sought to address.[32] That is, the Crown had traced lethal responses of victims of family violence to personal pathologies, as opposed to sociocultural and socioeconomic circumstances, in order to unjustly disprove the application of defensive homicide and self-defence. However, this view was not shared by other participants.

In the view of Practitioner C, social values provided a satisfactory explanation for the verdicts reached in the prosecutions of Eileen Creamer, Jade Kells, Angela Williams and Tracey Kerr as opposed to the 'technical and reverse engineered' concept of pathologising.[33] In essence, it was:

[29] Ibid.
[30] Interview with Practitioner B (n 5).
[31] Ibid.
[32] Ibid.
[33] Interview with Practitioner C (n 13).

> particularly perverse to suggest that jurors [had] formed the view that [women were] so damaged from [their] battered experiences that [they were] therefore [unable] to satisfy a technical legal defence – jurors didn't think like that.[34]

Similarly, Practitioner H stated that jurors were:

> smart enough to understand that if what [was] being presented to them [was] a history of someone who [had] suffered psychological or physical trauma for a significant period – they [were] more likely to act out in a way that [was] different from the norm – they [could] still … [be seen as] having acted reasonably.[35]

These positions were also mirrored by Professor of Law A who maintained that practitioners were simply:

> focussing on the concept of self-defence and [arguing] that [people didn't] always [kill] suddenly when faced with an immediate trigger.[36]

To Practitioner A, jurors saw 'victims of family violence as people'[37] and Practitioner I always 'treated [his] clients that way'.[38] Lastly, Practitioner G deemed the concept of victim pathology to be 'frog-shit'.[39]

Having regard to the preceding commentary, it cannot be said that the legal community believed that victims of family violence were unjustly pathologised at trial under Victoria's 2005 law. However, the responses of the majority of interviewees appeared to focus on the extent to which jurors would be decisively swayed by arguments which adopted victim pathology narratives as opposed to whether practitioners or judges had engaged in the practice at all.

Pertinently, Practitioner C suggested:

> if prosecution counsel had pathologised victims in order to defeat self-defence arguments…if there were transcripts where that had been done, it was a possibility that in those trials, that [the tactic had been] effective.[40]

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[34] Ibid.
[35] Interview with Practitioner H (n 2).
[36] Interview with Professor of Law A (n 27).
[37] Interview with Practitioner A (Vincent Farrugia, Chambers, 17 November 2017).
[38] Interview with Practitioner I (n 6).
[39] Interview with Practitioner G (n 21).
[40] Interview with Practitioner C (n 13).

Practitioner C did not believe that jurors would have been persuaded by such arguments. However, he conceded that it was 'certainly a possibility'.[41]

Although the impact of the pathologising of victims of family violence during trials cannot be quantified, it cannot be overlooked that the practice may have partially contributed to the manifestations of imperfect procedural justice arising in the prosecutions of Eileen Creamer, Jade Kells, Angela Williams and Tracey Kerr–a phenomenon which Victoria's 2005 law unjustly failed to guard against. For the majority of interviewees the abolition of provocation and enactment of defensive homicide created the greatest difficulties for victims of family violence at trial.

(b) The consequences of the abolition of provocation and enactment of defensive homicide in trials

In relation to the enactment of defensive homicide, Practitioner G:

> knew what was going to happen to defensive homicide – it was going to be the new provocation and get used by men in order to be found guilty of something less than murder.[42]

Although 'self-defence and [defensive homicide] really [came] into their own', Practitioner H reported that the trials were 'still basically run as provocation cases'.[43] Psychologist A expressed a similar view when he asserted that the law had simply been stated 'in another way … and still [operated] in exactly the same context.[44]

Practitioner H:

> never really understood the idea of [defensive homicide] in [a] family homicide situation– it was a ridiculous idea, no one understood it and it led to cases of injustice.[45]

Similarly, Practitioner B asserted that defensive homicide was

[41] Ibid.
[42] Interview with Practitioner G (n 21).
[43] Interview with Practitioner H (n 2).
[44] Interview with Psychologist A (Vincent Farrugia, Professional Office, 16 November 2017).
[45] Interview with Practitioner H (n 2).

> so full of qualifications, definitions and the rest of it that … juries [did not understand] them.[46] [It had achieved the] the same sort of result [that] would have been achieved without going down the route of a qualified self-defence [provided one] had expanded the notion of provocation to include [the dynamics of family violence] that would have applied [to] everyone.[47]

From the outset, the accounts of Practitioners G, H, B and Psychologist A indicate that the abolition of provocation and enactment of defensive homicide had placed victims of family violence within a confusing framework which, in itself, diverted jurors from the fundamental Rawlsian inequalities which Victoria's 2005 law had sought to address. This may have further contributed to the imperfect procedural justice seen in the prosecutions of Eileen Creamer, Jade Kells, Angela Williams and Tracey Kerr.

That being said, Practitioner A noted that provocation meant that victims still wouldn't have 'received complete acquittals', and that would have been 'unfair on its own'.[48] With regard to the unfairness of provocation generally, Professor of Law A maintained that the operation of provocation:

> had been unfair in the sense that it required a person to be acting whilst they lost self-control as a result of something understood as being provocative in the general community.[49] [This was so because] victims of family violence were often unsafe, unable to respond for a period of time and often killed their partners with excessive violence or at a time where their partners were otherwise incapacitated–provocation didn't really work in most cases and wasn't really available to them.[50]

For these reasons, Judge A maintained that provocation was not:

> salvageable in terms of reducing murder to manslaughter … [as it] was meant to [reflect] an unpremeditated killing and when women [killed] violent partners, [they were often] premeditated [killings] and [often had] to be so.[51]

In the salient reflection of Practitioner C:

[46] Interview with Practitioner B (n 5).
[47] Ibid.
[48] Interview with Practitioner A (n 37).
[49] Interview with Professor of Law A (n 27).
[50] Ibid.
[51] Interview with Judge A (n 12).

> the notion of battered wives was relatively new and the reasonable grounds aspect of provocation [was] not something that was easily applied to victims of family violence.[52]

Similarly, Practitioner E expressed that:

> [Parliament] got rid of provocation for that very reason; [Victoria had that] famous case where [the accused] sniper attacked [the deceased] and couldn't really rely on provocation. It was extended self-defence which was traditionally hard to get over the line for a complainant that was now the accused.[53]

Of relevance to these perspectives, Practitioner B conceded that the rules of provocation had been:

> unfair to victims of family violence in the sense that they limited the occasion and immediacy of the provocation to an explosion as opposed to a build-up.[54]

However, he had nevertheless run:

> provocation for women and [experienced] no trouble getting murder … reduced to manslaughter.[55]

For this reason, he had opposed the abolition of provocation and would have rather had the defence:

> redefined to include a course of conduct leading for someone to kind of lose it in a way [that] a juror would [have understood].[56] [Then provocation] would have been fair.[57]

However, Professor of Law A considered that:

any modification of provocation to make it more broadly available for women killing a violent partner would have made it more available to men killing in a situation of jealousy which was widely recognised as being unacceptable.[58]

[52] Interview with Practitioner C (n 13).
[53] Interview with Practitioner E (n 23).
[54] Interview with Practitioner B (n 5).
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] Interview with Professor of Law A (n 27).

Similarly, Practitioner E did not:

> know how to sterilise [provocation] so that it [couldn't] be used by people that had just lost their rag and cracked it with their spouses because [they'd had] an affair.[59]

As recounted by Practitioner F, provocation had been 'open to abuse'.[60] In Practitioner D's experience:

> [You would] have a situation where there [was] a person who [was] deceased and unable to defend themselves whose name [was] besmirched in a way that the prosecution simply [couldn't address] because their victim had [died]. The law [had] enabled that and defence barristers [were] going to use whatever tools were available to them to try and achieve a good result for their client.[61]

Despite the community having recognised that 'there was a need to modify and change the law in domestic cases', Practitioner I did not believe that the abolition of provocation was a 'good idea'.[62] Where provocation 'was and could be manipulated so as to produce what might have looked like an injustice', Practitioner G maintained that this was 'a problem with its application, not its nature'.[63] Elaborating, Practitioner G said that:

> [Provocation] was readily evoked in circumstances where it was perfectly proper and sensible to do so and was a sensible halfway house between murder and unlawful and dangerous act manslaughter. Its abolition unhappily [resulted] in people being found guilty of murder (or manslaughter by an unlawful and dangerous act) when in truth, they shouldn't [have been] and that [wasn't] just and that [wasn't] in the community's interest. The abolition of provocation as a partial defence was a mistake.[64]

Although Practitioner H believed that 'there were too many cases where provocation was raised', he '[did not] think [provocation] needed reform'.[65] In his view:

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[59] Interview with Practitioner E (n 23).
[60] Interview with Practitioner F (n 11).
[61] Interview with Practitioner D (n 22).
[62] Interview with Practitioner I (n 6).
[63] Interview with Practitioner G (n 21). Similarly, in his reflection, Practitioner C questioned whether this reflected 'a problem with the legal test or … an underlying absence of social acceptance that what women were experiencing [was] something [that fell] within [the] paradigm [of] provocation?': Interview with Practitioner C (n 13).
[64] Interview with Practitioner G (n 21).
[65] Interview with Practitioner H (n 2).

> Juries had no difficulty getting to the point. They knew bullshit when they saw it. Just the fact that [provocation was] raised [wasn't] a reason to believe that juries [would] accept it. Juries [had] common sense and knew when it was a fair dinkum situation. Where [provocation] wasn't fully open, juries rejected it.[66]

Paralleling the positions of Practitioners G and H, Practitioner B asserted that he really trusted:

> juries rather than judges [because] when a jury [said] manslaughter, it [was] 12 people who [were] saying [that an accused was] not a murderer and [that reflected] community values. Where self-defence did not apply, provocation was always about excusable, it was [never] about lawful, it was about excusable and twelve people [would determine whether conduct was] excusable.[67]

Although the VLRC maintained that community values no longer supported a place for provocation, Practitioner H said that, in appropriate circumstances, the profession agreed and 'so did [juries]'.[68] Accordingly, he questioned 'why people who [were] not in the criminal justice system [ascribed] a lack of common sense to juries?'[69]

> The people who seemed to have a problem with it were the academics and people who really had very little, if any, understanding of the criminal justice system. There was no reason to get rid of the law which had been fully understood for centuries simply on the basis of some sort of pop-culture; I thought it was pop-culture and I still believe it's pop-culture. I think its rubbish.[70]

Mirroring the positions of Practitioners G, H and B, Practitioner F believed that socially responsible reforms to provocation were possible on the condition that such reforms were 'tightened'. [71] Pertinently, he added that provocation:

> could have been salvaged by a statutory modification along the lines of taking into account a battered person's history which had led to a response which a jury might have accepted as being forgivable.[72]

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[66] Ibid.
[67] Interview with Practitioner B (n 5).
[68] Ibid.
[69] Interview with Practitioner H (n 2).
[70] Ibid.
[71] Interview with Practitioner F (n 11).
[72] Interview with Practitioner B (n 5).

Alternatively, in the view of Practitioner C, provocation could have been reinterpreted in a way that was 'more useful generally as opposed to specifically in relation to family violence: [it] was capable of [responding] to changing times'.[73] In his reflection, Practitioner C said that:

> There was a social construction around what provocation meant and that [did] not mean that provocation as a legal test could not have responded appropriately but it would have taken a paradigm shift and perhaps defensive homicide, I think, was an attempt to reintroduce or to introduce a paradigm shift but the legal test perhaps was where the problem lay with defensive homicide.[74]

Having regard to the preceding commentary, the abolition of provocation may have produced less justice for victims of family violence under Victoria's 2005 law. Although the defence of provocation had been criticised as inherently unfair and open to abuse, the enactment of defensive homicide decreased the likelihood of victims of family violence availing themselves of self-defence on account of the confusion which defensive homicide produced at trial. As put by Practitioner H, the introduction of defensive homicide had been:

> Difficult to understand, too remote a concept for juries to fully understand and led to a separate statutory language which made [matters] more confusing for juries as they more readily understood when an ordinary person [reached a] point where they [reacted] in [a] way in which they did.[75]

In essence, the existence of defensive homicide itself diverted juries from the Rawlsian inequalities which Victoria's 2005 law sought to address. The same may be said of its accompanying jury directions.

(c) Defensive homicide and the directions given to juries at trial

In relation to the directions given to juries at trial concerning defensive homicide, it was Practitioner A's experience as senior prosecuting counsel that they were 'quite

[73] Interview with Practitioner C (n 13).
[74] Ibid.
[75] Interview with Practitioner H (n 2).

complicated' and led to a 'real risk of juries [convicting] when they really should not [have been] and [acquitting] when they really should not [have been]'.[76] As he recounted:

> The law had become so complicated. [Juries were] just not able to comprehend it. Juries were glazing over evidence, counsel addresses and judge charges. The length and complexity of jury directions saw judges getting tangled up in their directions [as] directions were pages and pages and pages long. The sort of language which was used made [matters] more scientific and less comprehensible in terms of ordinary emotional reactions to situations and there might have been a number of cases that were adversely affected by [that].[77]

Similarly, in the experience of Practitioner B, 'the law [had] created enormous confusion; some lawyers couldn't quite understand it and juries [had] difficulty understanding it'.[78] Practitioner D even reported being 'bamboozled listening to [a] judge [delivering] a charge'.[79]

Although Practitioner I thought that 'judges [appeared] to be familiar with [the] [directions]',[80] Practitioner F experienced judges 'departing from the script and [getting] things wrong',[81] whereas Psychologist A did not believe that judges had consistently provided directions to juries with 'clarity'.[82] As Practitioner D recounted:

> [Society overestimated] the ability of juries to grasp concepts that [lawyers found] easily understandable. We [forgot] that the majority of jurors had no experience with legal concepts and that very many of them [were] not educated. They [may] not have [had the] concentration span of a person who [had] been through University and that [was] where [matters became] very concerning. Having three options with different tests and concepts of reasonableness–it [was] very confusing.[83]

Based on these accounts, Judge A believed that the complexity of the directions given to juries under Victoria's 2005 law may have led juries to 'rely on the middle ground'.[84]

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[76] Interview with Practitioner A (n 37).
[77] Interview with Practitioner H (n 2).
[78] Further, the *Babic* judgement had not been 'terribly helpful': Interview with Practitioner B (n 5).
[79] Interview with Practitioner D (n 22).
[80] Interview with Practitioner I (n 6).
[81] Interview with Practitioner F (n 11).
[82] Interview with Psychologist A (n 44).
[83] Interview with Practitioner D (n 22).
[84] As put by Judge A, 'once the law [got] too complicated, juries just [came] up with their [own] answers': Interview with Judge A (n 12).

Concurring, Practitioner B asserted that 'where juries [had] room to compromise, [they'd] grab it'.[85] That being said, if there was a reasonable possibility of self-defence, Practitioner B perceived that jurors 'tended to acquit'.[86] Similarly, Practitioner D believed that jurors were not always 'true to the charge' and did not 'always make their decisions based [on] the letter of what the judge [had] directed them'.[87] Continuing she said:

> At times, verdicts reflected moral judgements where jurors would listen to [the] charge, understand the charge [and] then apply their own moral judgment knowing full well that an acquittal [resulted] in [an] accused walking out the front door and a conviction for murder [resulting] in a very lengthy jail term. Jurors [would] take the middle ground (i.e., defensive homicide), apply their moral judgment and, in effect, see that as [an alternative] option. In trials where it was 'all or nothing', jurors were more likely to apply what the Judge [had] told them and [treat their task] as an intellectual exercise.[88]

Having regard to the accounts of Practitioners A, B, D, F, Psychologist A and Judge A, there is a substantial chance that the directions given to jurors under Victoria's 2005 law pertaining to defensive homicide further distracted jurors from the Rawlsian inequalities which the standard sought to address. It is conceivable that this phenomenon equally contributed to the manifestations of imperfect procedural justice which arose in the prosecutions of Eileen Creamer, Jade Kells, Angela Williams and Tracey Kerr: that their convictions represented compromises on the part of their respective juries as opposed to conscientious appreciations of the inequalities targeted by Victoria's 2005 law.

That being said, Practitioner C believed that any 'compromise verdict' could have been explained by a limited understanding of family violence.[89] However, Practitioner B believed that juries:

> understood family violence pretty well when they got to hear the facts of [the] history of [a] person; that when [they heard a] story, [they reacted] in a fairly predictable way.[90]

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[85]: Interview with Practitioner B (n 5).
[86] Ibid.
[87] Ibid.
[88] Interview with Practitioner D (n 22).
[89] Interview with Practitioner C (n 13).
[90] Interview with Practitioner B (n 5).

Pertinently, Practitioner G said that;

> you [could] hardly blame [a jury] or Parliament for a case where there [seemed] to be a legitimate claim to self-defence but [the accused seemed to have] gone a bit far.[91]

For example, when prompted on defence counsel's omission to raise the relevance of section 9AH in the prosecution of Jade Kells, he maintained that section 9AH ought to have:

> made its way into counsel's closing address and into counsel's response at the beginning of the trial as it [had] to be an issue for the jury.[92]

As put by Practitioner E, defence counsel's omission reflected:

> a misunderstanding about family violence on the part of practitioners and the provisions themselves which may have contributed to the verdicts reached.[93]

Whether complexities or limited practitioner understandings of family violence led to compromise verdicts or not, Practitioner C believed that the courts could instruct jurors in whichever way they wanted, but:

> they still [brought] their common sense and common experience to bear: if their common sense and common experience [said] I [heard] what the law [was], I [heard] the technical definition of the law but I [didn't] find that this [matter satisfied] that definition–the [matter would] not [have qualified] for what [was] properly described as self-defence.[94]

This, of course, assumed that the technical definition of the law and its accompanying directions had been expressed in language comprehensible to jurors and, further, that they were made aware of the significance of the Rawlsian inequalities which the 2005 law sought to address.

(d) The capacity of Victoria's 2005 law to accommodate the dynamics of family violence

[91] Interview with Practitioner G (n 21).
[92] Ibid.
[93] Interview with Practitioner E (n 23).
[94] Interview with Practitioner C (n 13).

On the overall capacity of the former law to accommodate the dynamics of family violence, Practitioner A believed that Victoria's 2005 law had been 'a start' but ultimately 'too restrictive' in the sense that its reasonable grounds formulation was 'harsh' to victims of family violence and inadequately accounted for 'all the circumstances' of family violence.[95] Similarly, Practitioner F suggested that the standard had not been 'broad enough [to] cater [to] the complexities of [what was] involved in family violence'.[96]

Although the intention of Parliament had been 'understandable', Practitioner B maintained that these weaknesses had been exacerbated by a system which was 'overly complex and not attuned to the public interest'.[97] It was:

> so technically defined as to not make good common sense [and] allowed prosecutors to have a halfway house that was satisfactory for them (in some senses) without the hard decisions about whether it [was] in the public interest to [prosecute a] person at all.[98]

These sentiments were paralleled by Judge A, who reported that the redrafting of self-defence had made matters more complex than they needed to be.[99] The fact that no claims of self-defence had succeeded for women who would have 'classically been described as battered women' led Practitioner C to conclude that the standard 'hadn't really helped at all'.[100] Similarly, Practitioner D suggested that defensive homicide 'hadn't applied to the cases it had been intended for' and ended up being 'used predominantly by men beyond circumstances of family violence'.[101]

Notwithstanding the complexity of the standard and its troubled application, Practitioner E was unable to secure appropriate expert witnesses for trial.[102] For this reason, Practitioner E believed that:

> a lot more was needed within the legal profession in terms of understanding family violence. [Counsel] needed expert evidence to explain [family violence] to juries

[95] Interview with Practitioner A (n 37).
[96] Interview with Practitioner F (n 11).
[97] Interview with Practitioner B (n 5).
[98] Ibid.
[99] Interview with Judge A (n 12).
[100] Interview with Practitioner C (n 13).
[101] Interview with Practitioner D (n 22).
[102] Interview with Practitioner E (n 23).

> because when practitioners were struggling to understand family violence, juries were even worse.[103]

Practitioner G argued that the standard '[was] all about informing a jury as best as a judge [could] about what [occurred] within [a] family violence dynamic'[104] and that the provisions had been 'good at doing that'.[105] Pertinently, Professor of Law A suggested that the reforms 'were a really significant move and, in many ways, [had provided] a satisfactory response'.[106] Lastly, in praise of the standard, Practitioner I maintained that a number of those accused had 'availed themselves of [a] defence which [may] not have [otherwise] been [available to] them'.[107]

With regard to the preceding commentary, the responses of the participants were mostly consistent with the conclusion provided in Chapter 4, namely, that Victoria's previous law of self-defence and family violence evidence unjustly failed to accommodate the experiences of family violence victims in criminal prosecutions who were alleged to have killed their violent partners.

Having theorised that the guilty pleas of Melissa Kulla, Karen Black, Jemma Edwards and Veronica Hudson were underpinned by a lack of confidence in Victoria's 2005 law, the responses of the participants verified that the standard was unable to inspire practitioners to provide legal advice which accounted for the inequalities it sought to address; nor was it able to encourage the Crown to pay greater regard to these inequalities. As a result, the remorse and grief that some women who killed their violent partners felt could not be put into a context which fostered insight and self-understanding. Rather some of these women felt that their behaviour was not a rational response to violence but was morally reprehensible behaviour deserving of punishment rather than understanding. It is not surprising then that a number of victims of family violence who killed their violent partners chose not to contest their matters on the basis of self-defence.

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[103] Ibid.
[104] Although Practitioner G's defence of a male who had laid 'in wait' (before killing) was ultimately unsuccessful, a 'bare-analysis' of self-defence would have precluded Practitioner G from contesting the charge in the first instance: Interview with Practitioner G (n 21).
[105] Ibid.
[106] Interview of Professor of Law A (n 27).
[107] Interview with Practitioner I (n 6).

Further, in having theorised that prosecution denials of family violence, trivialisations of family violence and the use of pathologising narratives contributed to the guilty verdicts,[108] and verdict legitimisations adopted by sentencing judges,[109] received by Eileen Creamer, Jade Kells, Angela Williams and Tracey Kerr, the responses of a number of participants indicated that the pathologising of victims of family violence may have contributed to their respective convictions. However, this proposition was implicitly challenged by the majority of participants notwithstanding the concessions of Practitioner C.

Separately, beyond the conclusions of Chapter 4, the responses of the interviewees indicated that the abolition of provocation and enactment of defensive homicide placed victims of family violence within a complex framework which, in itself, diverted jurors from the inequalities which Victoria's 2005 law sought to address. In other words, the majority of participants believed that the doctrinal content of the standard and its accompanying jury directions may have led to compromise verdicts in place of conscientious appreciations of the inequalities underlined by the standard.

Although a proportion of the participants viewed the operation of the standard in a favourable light, prosecution denials of family violence, trivialisations of family violence and the use of pathologising narratives often meant that the attention of jurors was diverted from a consideration of the inequalities which the 2005 law sought to address - to factors which were antithetical to the spirit of the standard.

To that extent, the responses of the participants are argued to have provided a supplementary account of the incidences of imperfect procedural justice which were said to have arisen within the prosecutions of Eileen Creamer, Jade Kells, Angela Williams and Tracey Kerr. In other words, the responses of the participants were nevertheless consistent with the proposition that Victoria's 2005 law unjustly failed to accommodate their experiences of family violence and the analyses of their respective verdicts in Chapter 4.

[108] To unjustly emphasise the lack of immediacy of a threat; the purported disproportionality of a lethal response to family violence or the pathology of the accused.
[109] It is acknowledged that the same phenomena occurred in the sentencing of both Karen Black and Jemma Edwards.

As Victoria's 2005 law may be said to have unjustly failed to accommodate the experiences of victims of family violence in criminal prosecutions who were alleged to have killed their violent partners, the remaining commentary considers whether Victoria's 2014 law has increased justice in the accessibility of self-defence. Specifically, it focuses on whether Victoria's 2014 law has been more conducive to upholding its own criterion of a 'just outcome' in being less likely to occasion Rawls' imperfect procedural justice (in comparison to Victoria's 2005 law and the inequalities which it unsuccessfully redressed).

5.2.2 Whether Victoria's 2014 law has increased justice in the accessibility of self-defence

Having regard to the prosecution of Gayle Dunlop, it is significant that a female victim of family violence was acquitted on the basis of self-defence for a lethal response which may have traditionally been seen as disproportionate. Further, Dunlop received the benefit of a compelling direction under section 322M of the Crimes Act 1958 (Vic), a Prasad direction, which resulted in a prompt acquittal and the supporting sentiment of a trial judge. This has not been an isolated experience under Victoria's 2014 law. As reported by Practitioner D:

> I was involved in a murder trial that resulted in complete acquittal where there was arguably a disproportionate response but in the context of a protracted history of emotional abuse and violence in a same-sex relationship so it was a little bit out of the ordinary. That resulted in a very quick acquittal, which was … the right result in the circumstances. From my perspective, [in] having dealt with the provisions, they worked in practice in that one case that I did.[110]

Similarly, Practitioner F (who led Practitioner D in this trial) suggested that the reforms have been:

> a great improvement … I vividly remember the judge [being] sceptical … at the outset of the trial because he didn't know what was involved. I [then] remember him in his charge being almost passionate in his description of how [the accused]

[110] Interview with Practitioner D (n 22).

> would have felt as [the deceased] was about to embark upon another drunken potentially violent episode and [the accused], in the judges' words, [thought] "here we go again, [the deceased's] got a [knife]". He showed an amazing insight and intellect and in fact, compassion, even though that [wasn't] relevant to the charge.[111]

In light of these two prosecutions, evidence of the efficacy of Victoria's family violence jury directions, two prompt acquittals of victims of family violence and the compassion of two trial judges, it is apparent that judges, practitioners and jurors have paid greater regard to the Rawlsian inequalities which Victoria's 2005 law unsuccessfully addressed. The same may ultimately be said of the Crown and its decision to discontinue its prosecution of Joanne and Shannon Debono. However, the following commentary must be weighed against the plea of Jessie Donker.

As acquittals and discontinuances in such circumstances were not forthcoming under Victoria's 2005 law, it is apparent that Victoria's 2014 law has been more conducive to upholding its own criterion for a 'just outcome' in being less likely to occasion Rawls' conception of imperfect procedural justice. The reasons for this are multifaceted and may readily be contrasted with the operation of Victoria's 2005 law.

5.2.2.1 The reformulated doctrine of self-defence

Practitioner F welcomed the reformulated doctrine of self-defence under section 322K of the Crimes Act 1958 (Vic) as a 'simplification'. However, he felt that it had not 'changed much as far as self-defence [was] concerned'.[112] To Practitioner G, section 322K merely contained subtleties which only lawyers cared about[113] and had been no more likely to result in acquittals than the Zecevic formulation, despite it being 'clearer than Zecevic'.[114] In fact, Practitioner A considered section 322K to be 'pretty limiting' in that it required a

[111] Interview with Practitioner F (n 11).
[112] Ibid.
[113] Interview with Practitioner G (n 21).
[114] As put by Practitioner G, 'it [was] nice for a jury to have [this] test in the family violence context [as] the jury [would] [be] compelled to ask themselves what were the circumstances as the accused perceived them to be. *That feeds beautifully into the family violence provisions* [*under section 322M of the Crimes Act 1958 (Vic)*] and that's a good thing. [It's] better than the reasonable grounds [formulation]. Even the reference of the perception of the accused is great and t*he next trial I do, if I have to use it, I'll go to town on that*': ibid.

perception of a threat of death or really serious injury,[115] and further, that its hybrid subjective and objective-subjective limbs would lead juries to become 'awfully tangled' in their deliberations.[116]

That being said, sections 9AC and 9AD of the Crimes Act 1958 (Vic) under Victoria's 2005 law contained the same qualifications: qualifications which did not appear to dissuade those jurors who chose to acquit Gayle Dunlop and the client of Practitioners D and F. It follows that the operation of Victoria's 2014 law must be assessed with reference to the combined effect of sections 322K, 322M and 322J of the Crimes Act 1958 (Vic) [self-defence and social context evidence of family violence framework] as well as sections 58, 59 and 60 of the Jury Directions Act 2015 (Vic) [family violence jury directions].

5.2.2.2 The operation of Victoria's social context provisions and family violence jury directions at trial

Having regard to the combined effect of these provisions, Practitioner F argued that the acquittal of Gayle Dunlop and the client of Practitioners D and F suggested that the law had now successfully 'countenanced how diverse violence [could] be without someone necessarily being hospitalised'.[117] Pertinently, Professor of Law A suggested that it was fundamentally significant that the social context provisions of the Crimes Act 1958 (Vic) combined with the family violence provisions of the Jury Directions Act 2015 (Vic) had emphasised that 'family violence [was] more than [just] physical violence' and could 'diversely accommodate a variety of relationships'.[118]

As an example, Practitioner A (who prosecuted the client of Practitioners D and F) explained that the accused's relationship was 'a little bit unusual'.[119] Specifically, the relationship was characterised as a master/slave sadomasochistic relationship where physical violence was welcomed between the deceased and the accused.[120] Although the accused's dynamic had not been contemplated by the law, 'it fell within the family

[115] Interview with Practitioner A (n 37).
[116] Ibid.
[117] Interview with Practitioner F (n 11).
[118] Interview with Professor of Law A (n 27).
[119] Interview with Practitioner A (n 37).
[120] Ibid.

violence provisions and the Jury Directions Act [took those] matters into account with positive practical implications by the force of them'.[121]

As a result, Practitioner A believed that the 'intended consequences' of Victoria's 2014 law 'had been realised'.[122] Although Practitioner D acknowledged that family violence could be reflected in an 'infinite number of scenarios',[123] Practitioner A maintained that Victoria's 2014 law had successfully reflected that Victoria is a:

> multifaceted community and [that] not everybody [lived] in a heterosexual relationship in the suburbs; the law [applied] to everybody.[124]

Pertinently, Practitioner H was confident that the standard had removed 'a lot of the stigma of what people would [ordinarily] be afraid to raise [regardless] of their cultural background' and that they were, as a result, 'more likely to get justice'.[125]

Professor of Law A believed that the standard had 'gone a long way towards minimising the risk' of victims of family violence being pathologised at trial.[126] Practitioner E suggested that the standard had:

> made it easier for juries to consider whether someone may have engaged in reasonable conduct.[127]

To Practitioner F, such perceptions were attributable to the standard having demonstrably provided greater 'insight and understanding that was not present' under Victoria's 2005 law.[128]

Notwithstanding these perspectives, Psychologist A believed that victims of family violence were still at risk of being depicted and perceived as not being capable of behaving reasonably. He suggested that the reforms had been 'a bit idealistic in terms of what [they were] set up to do'[129] and that although the draftspersons could be:

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[121] Ibid.
[122] Ibid.
[123] Interview with Practitioner D (n 22).
[124] Interview with Practitioner A (n 37).
[125] Interview with Practitioner H (n 2).
[126] Interview with Professor of Law A (n 27).
[127] Interview with Practitioner E (n 23).
[128] Interview with Practitioner F (n 11).
[129] Interview with Psychologist A (n 44).

> applauded for their logic and their supposed understanding of the system … in reality, when one [is] on his or her feet in a criminal trial … it [was] not an ideal situation [to be in].[130]

Practitioner A, however, had a different view. In his view, jurors would 'see through' any attempts at pathologising under Victoria's 2014 law and would be 'capable of deciding what amounted to acting reasonably'[131] and if juries were:

> instructed that they had to look at a case from a perspective of what was reasonable, from the subjective perspective of another, [they weren't] going to have trouble with that simple concept.[132]

Similarly, Practitioner C surmised that the notion that men or women who were subjected to domestic violence 'had some sort of damaged mindset' was not one of 'general favour'.[133] He continued that the community knew that there were:

> individuals in relationships who [were] so abusive, controlling and manipulative that many people would respond in a similar way.[134] As a result, the pathologising of victims of family violence was no longer such a risk.[135]

Pertinently, Psychologist A argued that if the law had:

> in fact [operated] that way; if issues of family violence or contextual issues … [had served] to [adequately] explain the mental state or the psychological context of the offender, then the reforms have been beneficial.[136]

This was the experience of Practitioners D and F in their successful defence of a victim of family violence. As Practitioner D reported:

> In the trial that I was involved in, [there was] a history of violence and it was that history that we used to get the jury to understand the accused's state of mind at the time and to get the jury to understand [the] response given: that [the response] would have otherwise been considered completely disproportionate and

[130] Ibid.
[131] Interview with Practitioner A (n 37).
[132] Ibid.
[133] Interview with Practitioner C (n 13).
[134] Ibid.
[135] Ibid.
[136] Interview with Psychologist A (n 44).

> completely unreasonable. I think that we were able to do that because the directions allowed us to.[137]

Paralleling this account, Practitioner C believed that the family violence jury directions had rendered trials 'fairer and more effective'[138] for victims of family violence by reducing:

> complicated and sophisticated questions of psychology and human responses to a series of one-line statements. [These statements] assisted jurors in assessing someone's guilt or innocence.[139]

However, Practitioner C was unsure of whether family violence jury directions had been effective in 'making a jury or an individual juror [more] aware of the nuanced nature of family violence',[140] while Practitioner E believed that the delivery of family violence directions by judges themselves gave greater weight to them.[141] In essence, the directions had been beneficial to the administration of justice as many members of the community had not appreciated the broad definition of family violence and its pervasiveness in society.[142]

Practitioner A recalled that under Victoria's 2005 law:

> practitioners had to argue that these matters needed to be taken into account and that [they] may not have had a receptive audience.[143]

As judges were now compelled to accept that these matters were to be taken into account and were to direct juries accordingly,[144] it was Practitioner A's experience, in his prosecution of a victim of family violence, that the Jury Directions Act 2015 (Vic) 'had taken these matters into account with positive practical implications by the force of them'.[145]

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[137] Interview with Practitioner D (n 22).
[138] Interview with Practitioner C (n 13).
[139] Ibid.
[140] In essence, the provisions '[could] only do so much as to provide a few guideposts but no roadmap for a jury to better understand how family violence really [impacted] upon the commission of [any] offences': ibid.
[141] Interview with Practitioner E (n 23).
[142] Ibid.
[143] Interview with Practitioner A (n 37).
[144] Ibid.
[145] Ibid.

In relation to this prosecution, Practitioner D reported that '[the] direction that should be given as early as practicable in the trial in relation to family violence ... was helpful because that framed the jury's perception of the whole case'.[146]

Continuing, Practitioner D reflected that:

> Often, you can read provisions and directions but it's not until you're actually in court having them delivered to a jury that you appreciate how good or bad they are and I have to say that in that case, the directions were, in my view, very clear: they were very clearly understood by the jury, we got a verdict very quickly … with no questions which suggested that the jury [understood] the directions.[147]

Significantly, judges, jurors and victims of family violence were not the only members of the community to have benefitted from the Jury Directions Act 2015 (Vic). In the experience of Practitioner G, the Jury Directions Act had made counsel more:

> acutely aware of their responsibilities in terms of assisting trial judges with appropriate requests for directions.[148]

Given Victoria's history of complex jury directions, Judge A welcomed the greater burden that had been placed on counsel to ask for directions and believed that this had been instrumental in reducing appeals. Practitioner B could not envision any 'unintended consequences' arising from the operation of Victoria's 2014 law.[149] On the contrary, he believed that the standard would continue to produce its intended consequences for those who 'really [should] not be convicted of murder'[150] and, further, that it would continue to rectify the shortcomings of the 'defensive homicide ethos [which had] not produced justice in a lot of cases'.[151] These sentiments were supported by Practitioners D,[152] F,[153] G[154] and H[155] as well as Professor of Law A.[156]

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[146] Interview with Practitioner D (n 22).
[147] Ibid.
[148] Interview with Practitioner G (n 21).
[149] Interview with Practitioner B (n 5).
[150] Ibid.
[151] Ibid.
[152] To Practitioner D, this was 'difficult to appreciate in theory until [you] [had] encountered it in practice': Interview with Practitioner D (n 22).
[153] Interview with Practitioner F (n 11).
[154] Interview with Practitioner G (n 21).
[155] Interview with Practitioner H (n 2).
[156] Interview with Professor of Law A (n 27).

Practitioner E, however, cautioned that the law risked placing 'too much emphasis on the family violence experienced by victims to the detriment of the [State]'.[157] This position was not supported by Practitioners G and F who believed that the balance was 'OK'[158] and that no unintended consequences were likely to arise unless 'a particular juror or jury was particularly cynical'.[159]

Pertinently, Practitioner C believed that the gender-neutrality of the reforms would have mitigated such risks[160] and that the reforms simply reflected that there are 'psychological truths' for people who found themselves in circumstances of family violence.[161] He felt that, as a result, more victims of family violence were likely to avail themselves of self-defence and for these reasons, he did not believe that the reforms had 'gone too far'.[162]

In light of the preceding accounts concerning the combined effect of sections 322K, 322M and 322J of the Crimes Act 1958 (Vic) alongside sections 58, 59 and 60 of the Jury Directions Act 2015 (Vic), it is evident that Victoria's 2014 law has been more successful in accommodating the Rawlsian inequalities which Victoria's 2005 law unsuccessfully redressed.

Although Victoria's 2005 law possessed an identical social-context evidence framework, the standard unsuccessfully communicated the significance of physical, emotional and sexual abuse due, in part, to its lack of supporting family violence jury directions. It is submitted that this may have contributed to lethal responses being perceived as 'disproportionate' or 'unreasonable' when they were carried out on unarmed or otherwise defenceless partners. Further, it may have contributed to accused being pathologised.

It follows that what was considered 'disproportionate' or 'unreasonable' under Victoria's 2005 law has, to a large extent, not been perceived as such under Victoria's 2014 law. Additionally, the stigma commonly attached to victims of family violence seems to have been addressed with the effect that victims of family violence are less likely to be pathologised at trial. Put another way, Victoria's 2014 law has demonstrated a greater

[157] Interview with Practitioner E (n 23).
[158] Interview with Practitioner G (n 21).
[159] Interview with Practitioner F (n 11).
[160] Interview with Practitioner C (n 13).
[161] Ibid.
[162] Ibid.

ability to explain the mental states and psychological contexts of victims of family violence. Accordingly, their lethal responses have been assessed with greater regard to the Rawlsian inequalities which Victoria's 2005 law unsuccessfully addressed. As a result, Victoria's 2014 law has, to date, been more conducive to upholding its own criterion for a 'just outcome' with the effect of being less likely to occasion Rawls' conception of imperfect procedural justice.

5.2.2.3 The consequences of the abolition of defensive homicide

On the abolition of defensive homicide, Practitioner C asserted that its abolition had led to a 'clearer', more 'simplified approach' to Victoria's defences to homicide.[163] He asserted:

> The directions given to juries has improved, in accordance with a more sophisticated understanding of family violence, with the effect of placing juries in a better position to take into account the realities of family violence, which has led to a more holistic justification for killing another person.[164]

He observed that Victoria's 2014 law and the abolition of defensive homicide had successfully:

> opened up self-defence to something which was broader than a narrow perception concerning the proportionate and the immediate.[165]

Paralleling this position, Practitioner B expressed the view that Victoria's 2014 law had overcome the limitations of defensive homicide and would continue to do so through the hands of those 'who could operate it properly'.[166] He noted that the standard had opened up the possibility of a complete acquittal where previously 'an acquittal would [have] otherwise [been seen] as a merciful outcome'.[167] It was his view that:

> Heather Osland would have never been convicted. Heather Osland would have been acquitted outright.[168]

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[163] Ibid.
[164] Ibid.
[165] Ibid.
[166] Interview with Practitioner B (n 5).
[167] Ibid.
[168] Ibid.

Pertinently, Practitioner G claimed that:

> If [Osland] ran the same case now, the jury would have been directed accordingly. It might not have made a difference to the trial but in that trial, the jury would have been directed on self-defence and immediacy. The best thing [Victoria] has done is that it has provided a solid foundation for expanding self-defence–rendering it more sophisticated in its application so that it occurs more broadly in the context of family violence. It creates a concrete foundation at law for what used to be 'nudge nudge, wink wink, he had it coming" and provides victims [with] an evidentiary basis at law to raise self-defence.[169]

In support of these positions, Practitioners D and F suggested that Victoria's 2014 law had overcome the 'confusing limitations' of defensive homicide and had 'greatly assisted their defence' of a victim of family violence at trial.[170] However, Practitioner A conversely voiced the opinion that 'the loss of defensive homicide [was] being felt' by the profession and the community at large.[171] In his view, the abolition of defensive homicide had placed those who were not defending themselves from a threat of death or really serious injury (outside of a history of family violence that enlivened the family violence provisions) in a precarious position.[172]

Similarly, Practitioner I believed that defensive homicide had been 'attractive to juries'[173] and that its abolition may have made matters 'more complicated and difficult for juries to understand,' with negative implications for the community.[174] As put by Practitioner G:

> The problem with getting rid of some kind of culpability that stands between manslaughter and murder is that we tend to push cases that fall within that lacuna either up or down and juries typically go down. Nobody likes the idea of finding someone guilty of murder, I'm a defence [barrister] but that's not a good outcome for the community: the community has an interest in people being found guilty of

[169] Interview with Practitioner G (n 21).
[170] Interview with Practitioner F (n 11). Practitioner H concurred with this sentiment: Interview with Practitioner H (n 2).
[171] As a supporter of defensive homicide, Practitioner A desired the reinstatement of defensive homicide: Interview with Practitioner A (n 37).
[172] Ibid.
[173] Interview with Practitioner I (n 6).
[174] Ibid. Similarly, Practitioner E expressed that 'the way [Parliament] worded things [had] made matters more and more complicated for juries': Interview with Practitioner E (n 23). Additionally, Practitioner A expressed that there was a real risk that the reforms '[had] not removed the confusion arising from defensive homicide' although this was not 'evidenced based': Interview with Practitioner A (n 37).

> what they did. If someone is found guilty of what should be provocation manslaughter or defensive homicide, he or she is instead being found guilty of unlawful and dangerous act manslaughter. That's not a good result for the community and that's the problem with not having something between the murder and manslaughter dichotomy … [Victoria's] reforms will result in less murder convictions.[175]

For the same reasons, Professor of Law A would have preferred the retention of a 'halfway house'.[176] Similarly, Practitioner G maintained that it was 'too soon to know' whether the implementation of Victoria's 2014 law was justified.[177] Also, Judge A maintained that Victoria's 2014 law was 'premature' and would have wanted 'a lot more data' before coming to a conclusion on whether the abolition of defensive homicide was necessary.[178] To Psychologist A, family violence homicides were different from bashings on the street and it was important to see what happened over time to cases that [used] the family violence directions and those which [did] not [use] the directions'[179] in order to determine whether the abolition of defensive homicide had best served the community.

In a more elaborate vein, Judge A expressed the view that:

> I don't think we'll know until we really see how [the reforms] play out. More time is required. I think the simplification of the law is good and maybe that's an advantage. It's very difficult for trial judges when the law is complex … to give an appropriate jury direction and not get it wrong in these cases. Once the law gets too complicated, juries just come up with their own answer. Assuming that it's now easier to direct the jury, that's probably an advantage. I'm not really persuaded though that you'll get a better set of outcomes. I don't think we'll know for a long time.[180]

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[175] Further, Practitioner G was 'a big fan of having something between murder and manslaughter but defensive homicide [was] not the answer … it [was] impossible for most lawyers to get their heads around the directions'. Practitioner G did not know 'what the middle ground [was]' but it was 'not defensive homicide'. It was something which concerned 'reasonable grounds'; it should have been 'provocation' but that was 'not coming back': Interview with Practitioner G (n 21).
[176] Interview with Professor of Law A (n 27).
[177] Interview with Practitioner G (n 21).
[178] Interview with Judge A (n 12).
[179] Interview with Psychologist A (n 44).
[180] Interview with Judge A (n 12).

Having regard to the views of the participants, the doctrinal content of the 2005 law and its accompanying jury directions were perceived to have led to compromise verdicts in place of conscientious appreciations of the inequalities underlined by the standard. Following the abolition of defensive homicide, Victoria's 2014 law has rendered the provision of jury directions pertaining to self-defence more communicable to juries when compared to Victoria's 2005 law. As a result, Victoria's 2014 law has been more conducive to upholding its own criterion for a 'just outcome' with the effect of being less likely to occasion Rawls' conception of imperfect procedural justice. That being said, the extent to which the removal of a tier of moral culpability, in the form of defensive homicide, has adversely affected the broader community remains a matter for further investigation.

5.2.2.4 The capacity of Victoria's 2014 law to accommodate the dynamics of family violence

Despite Judge A's uncertainty about the 2014 law's capacity to accommodate the dynamics of family violence,[181] Practitioner C maintained that the law had 'come along in leaps and bounds'.[182] Although Practitioner A questioned what 'adequacy' truly entailed, it was his view that the reforms were 'probably enough' and did not contain 'any glaring omission'.[183] In fact, Professor of Law A believed that the reforms had accommodated the dynamics of family violence 'maybe, as far as [could] be done'.[184] Practitioner D surmised that the acquittal of Gayle Dunlop (alongside Practitioner D and F's successful defence) showed that the reforms had been 'broad and adaptable enough' to do so.[185]

Overall, Practitioner B believed that self-defence had become 'more accessible to female victims of family violence'[186] but noted that there were questions left unresolved. Specifically, he wondered how broadly the provisions would be construed in the event of

[181] Ibid.
[182] Interview with Practitioner C (n 13).
[183] Interview with Practitioner A (n 37).
[184] Interview with Professor of Law A (n 27). Similarly, Practitioner G expressed that the law had adequately accommodated the dynamics of family violence 'with the obvious limitation that [it] could only do its best': Interview with Practitioner G (n 21).
[185] Interview with Practitioner D (n 22).
[186] Interview with Practitioner B (n 5).

an appeal against conviction.[187] Although Practitioner H desired to continue examining the operation of the law in order to determine whether it had '[lived] up to its promise', it was Practitioner H's view that the law had ultimately made matters more accessible and understandable.[188] It had put:

> judges in a position where they [were] required to explain things in a way which [a] jury [would] more readily understand.[189]

Paralleling these positions, Practitioner F recalled:

> being gladdened, enthused and relieved by what [he] had read about the provisions [which he] thought rendered [his client's] actions defensible and capable of being understood.[190]

Similarly, Psychologist A claimed that the law had successfully taken into consideration 'something that hadn't been taken into consideration previously,' with the effect of increasing the fairness of the law and its application to victims of family violence.[191] Lastly, it was Professor of Law A's view that the law had reflected that:

> there [could] be different genders involved in family violence and that, overall, the law of self-defence had become more accessible where it ought to [be] for victims of gendered violence.[192]

The responses of participants have demonstrated that judges, practitioners, jurors and the Crown, in the administration of the 2014 law, have paid greater regard to the Rawlsian inequalities which Victoria's 2005 law unsuccessfully addressed. This was partially attributable to the abolition of defensive homicide and the consequent simplification of the provision of jury directions pertaining to family violence and self-defence. That being said, a number of participants indicated that the abolition of defensive homicide could

[187] Practitioner B expressed that if the law of self-defence and its accompanying family violence provisions were construed humanely, that would be 'a good thing'. On the absence of appellate guidance, in the right case where somebody should be acquitted, Practitioner B believed that 'they [would] be acquitted and there [would] be no appeal'. However, if someone was convicted, in order to uphold the conviction, Practitioner B expressed that the Court could become 'quite restrictive in its interpretation given that … twelve people thought the [accused] [was] a murderer': ibid.
[188] Interview with Practitioner H (n 2).
[189] Ibid.
[190] Interview with Practitioner F (n 11).
[191] Interview with Psychologist A (n 44).
[192] Interview with Professor of Law A (n 27).

have adversely affected the broader community in the sense that a tier of moral culpability had been removed. Overall, the responses of the participants reflected that Victoria's 2014 law had been more conducive to upholding its own criterion for a 'just outcome' with the effect of being less likely to occasion Rawls' conception of imperfect procedural justice. However, the plea of Jessie Donker demonstrates that those accused may still nevertheless plead guilty to homicide offences despite the existence of viable claims to self-defence.[193]

5.3 Conclusion

This chapter has detailed and analysed the responses of the interview participants concerning their experiences and insights pertaining to Victoria's 2005 and 2014 laws.

The responses indicated that the 2005 law was unable to inspire practitioners to provide legal advice which accounted for the Rawlsian inequalities it sought to address. The participants indicated that the pathologising of victims of family violence at trial may have contributed to the convictions. However, this proposition was challenged by the majority of participants. Nevertheless, the responses demonstrated that the abolition of provocation and enactment of defensive homicide placed victims of family violence within a complex legal framework which, in itself, diverted jurors from the Rawlsian inequalities which Victoria's 2005 law sought to address. In short, the doctrinal content of the standard and its accompanying jury directions may have led to compromise verdicts in place of conscientious appreciations of the inequalities underlined by the standard.

The responses also indicated that prosecutors, judges, and jurors have paid greater regard to the Rawlsian inequalities which Victoria's 2005 law unsuccessfully addressed. This was reflected in the prompt acquittal of Gayle Dunlop, the prompt acquittal of Practitioner D and F's client, the supporting sentiments of two trial judges and the discontinuance of the prosecution of Joanne and Shannon Debono. However, the guilty plea of Jessie Donker demonstrates that accused may continue to plead guilty to homicide offences despite the existence of viable claims to self-defence[194]–her guilty plea reflected the perpetuation of imperfect procedural justice under the 2014 law.

[193] As stated by Croucher J, '*Ms Donker would have had a sound basis to argue for an outright acquittal'*: *Donker* [99] (n 1).
[194] Ibid.

Nevertheless, the responses of the interview participants concerning their experiences and insights pertaining to Victoria's 2014 law affirmed that the standard has been more conducive to upholding its own criterion for a 'just outcome'. In essence, what was considered 'disproportionate' or 'unreasonable' under Victoria's 2005 law has not, to date, been perceived as such under Victoria's 2014 law. Further, the stigmas commonly attached to victims of family violence have, to some extent, been addressed with the effect of victims being less likely to be pathologised at trial. In addition, the abolition of defensive homicide, the operation of sections 322K, M and J and the operation of family violence jury directions was shown to have simplified the provision of jury directions. However, a number of participants suggested that the abolition of defensive homicide had adversely affected the broader community in the sense that a tier of moral culpability had been removed.

The next chapter discusses and analyses the insights of participants concerning non-legal factors which may pose a foreseeable risk of imperfect procedural justice arising under Victoria's 2014 law.

CHAPTER 6
NON-LEGAL FACTORS INFLUENCING JURY AND PRACTITIONER DECISIONS IN PROSECUTIONS

6.1 Introduction

The previous chapter analysed the responses of the interviewees pertaining to the first and second subsidiary research questions. This chapter analyses the responses of the interviewees pertaining to the third and fourth subsidiary research questions. The chapter focusses on social interests and whether non-legal factors pose foreseeable risks of imperfect procedural justice arising under Victoria's 2014 law. Interviewees were also asked if the 2014 law required reform.

6.2 Results and analysis

6.2.1 Have lawyers changed their attitudes to family violence and where does it rank in the hierarchy of criminal offences?

The interviewees indicated that lethal responses to family violence commanded varying levels of importance among members of the legal profession. For Practitioner A, it was 'hard to say' where family violence ranked as a significant issue which the criminal justice system had to deal with as this 'depended on [one's] perspective'. [1] In the view of Practitioner B, there 'were not that many homicides' which meant that lethal responses to family violence were not a top priority for the criminal justice system.[2]

Practitioner C opined that victims of family violence had not been a 'tiny group of people'[3] and many had 'reached out for assistance' and had found that 'none of it [was] effective'.[4] Practitioner D felt that this was due to family violence having been

[1] Interview with Practitioner A (Vincent Farrugia, Chambers, 17 November 2017).
[2] Interview with Practitioner B (Vincent Farrugia, Chambers, 13 December 2017).
[3] Interview with Practitioner C (Vincent Farrugia, Chambers, 15 January 2018).
[4] Ibid.

inadequately discussed, despite its prevalence in society.[5] Accordingly, it was 'important for the law to [respond] appropriately so that others would speak up before a homicide occurred'.[6] In doing so, there would be a:

> cascading effect in the sense of addressing family violence at a lower level … rather than dealing with [a] response, [whether] it [was] homicidal or violent.[7]

Practitioner E suggested that 'many more [were] coming forward to complain'.[8] To Practitioner I, this was due to a new understanding of what was 'colloquially expressed as battered person's syndrome' in comparison to how it was understood 'five, ten or twenty years ago'.[9] Practitioner G believed that the law had done 'its best' to accommodate 'the real world':[10] to accommodate those greater insights which had been produced by research in order to produce 'just results'.[11]

Practitioner E believed that there were 'other significant issues facing the criminal justice system [which] took precedence'.[12] Specifically, there had been a 'huge change in terms of how people [were] sentenced and how cases [came] to court': matters which were at the 'forefront of [the] minds of [lawyers]'.[13]

Practitioner D, on the other hand, believed that lethal responses to family violence were:

> some of the most important issues [which] the justice system [had] to deal with because of their prevalence, challenging and varied nature.[14]

Professor of Law A asserted that it was:

> really important for the criminal justice system to be better [in] dealing with gendered violence in general.[15]

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[5] Interview with Practitioner D (Vincent Farrugia, Chambers, 23 January 2018).
[6] Ibid.
[7] Ibid.
[8] Interview with Practitioner E (Vincent Farrugia, Telephone Call, 12 February 2018).
[9] 'For example, what we used to talk about was the physical abuse suffered by a person rather than long term psychological abuse which might have included threats, intimidation and other forms of non-physical violence': Interview with Practitioner I (Vincent Farrugia, Professional Office, 20 March 2018).
[10] Interview with Practitioner G (Vincent Farrugia, Chambers, 16 February 2018).
[11] Ibid.
[12] Interview with Practitioner E (n 8).
[13] Ibid.
[14] Interview with Practitioner D (n 5).
[15] Interview with Professor of Law A (Vincent Farrugia, Academic Office, 13 March 2018).

As a result, she placed the issue 'very high up on the list'.[16] Practitioner H believed that the issue was 'pretty significant' and 'always had been'.[17]

To Judge A, family violence was:

> a very important issue ... The law tended to analyse circumstances in the context in which men found themselves rather than the sorts of circumstances that women who were victims of family violence found themselves. When [society looked] at the high rate of violence, when [it took] into account that it [was] the highest cause of morbidity and mortality for women under the age of 40, it [became] a very important issue … yet, only relatively recently … very visible.[18]

Practitioner A maintained that when Parliament created new statutory authority, 'that was always a matter of significance and great importance' to the criminal justice system.[19]

Professor of Law A believed that 'the gendered nature of violence' was relevant to the entire criminal justice system and that 'all members … would see the issue as significant'.[20]

Psychologist A, however, suggested that just responses to family violence would never be held with an equal degree of importance among prosecutors, defence lawyers and judges as they each 'operated in a different manner'.[21] Practitioner F similarly expressed that 'some would have a greater interest in certain areas of the law [compared to] others'.[22] For example, Judge A believed that those who regularly appeared for victims of family violence in the Magistrates Court would say that it was the most important criminal justice issue today as the vast majority of criminal cases in that court concerned family violence.[23]

Practitioner I opined that family violence was the 'talking point amongst all defence practitioners'[24] and as 'the most significant issue' it required 'better resourcing' as it

[16] Interview with Practitioner A (n 1).
[17] Interview with Practitioner H (Vincent Farrugia, Chambers, 19 March 2018).
[18] Interview with Judge A (Vincent Farrugia, Professional Office, 28 March 2018).
[19] Interview with Practitioner A (n 1).
[20] Ibid.
[21] Ibid.
[22] Interview with Practitioner F (Vincent Farrugia, Chambers, 9 February 2018).
[23] Interview with Judge A (n 18).
[24] Interview with Practitioner I (n 9).

occupied a significant portion of the Magistrates Court's work.[25] Pertinently, Practitioner H maintained that one simply needed to 'look at the list for the IVOs' to see that it was 'right up there'. [26]

Practitioner C suggested that the strength of one's political views commonly determined the importance which a member of the criminal justice system ascribed to family violence.[27] For example, if one had been a 'strong believer in the misogyny of men' and an 'unfairly patriarchal system' which victimised women, one would have been more likely to ascribe a greater degree of importance to just responses to family violence.[28] Alternatively, lawyers who perceived responses to family violence as 'female laws' were less likely to view the area as 'important'.[29]

Practitioner G conceived of the law as:

> a social construct made up of people who [sat] on a spectrum. There were people that were acutely aware of the nature and the dynamics of family violence and judges of generations past that simply did not understand it.[30]

Accordingly, Practitioner G believed that younger judges and younger practitioners demonstrated a 'greater understanding' of family violence.[31]

Although Practitioner E believed that people generally took family violence 'seriously', Practitioner B maintained that there was now a tendency to encourage victims to [place] a greater reliance on their 'victimhood' [and that society] ought [not] to be encouraging victims to look at themselves as victims as this was counterproductive.[32]

Continuing, Practitioner B expressed the view that:

> The law [had] added to [this] by making all the kinds concessions that [perpetuated this.]… [Victimhood had] crept into the language of the courts and the language of the press: they [talked] about victims, they [talked] about survivors … in [most]

[25] Ibid.
[26] Interview with Practitioner H (n 17).
[27] Interview with Practitioner C (n 3).
[28] Ibid.
[29] Interview with Practitioner C (n 3).
[30] Interview with Practitioner G (n 10).
[31] Ibid.
[32] Interview with Practitioner B (n 2).

> cases, the victimhood of the person at the hands of the deceased [was] precisely what [was] in issue.[33]

As observed by Practitioner F:

> those who [had] been subjected to [family violence] were almost always victims of ongoing abuse.[34]

To Judge A, the law had, until recently, inadequately recognised this.[35]

Practitioner E believed that there was 'a tendency for people to talk down what people [had] gone through in a society where everything [was] about headlines'.[36] Perhaps, as put by Practitioner B, there was 'no consensus about these things other than to say [that] [they were] all serious problems'.[37]

Judge A recommended the continuation of legal and community education programs concerning family violence and gender because there had been:

> a lot of focus on the judiciary being biased in all sorts of ways which it no doubt was.[38]

Practitioner I reported that the Magistrates Court was 'overwhelmed' by family violence applications and did not 'have a positive view of where things [were] at'.[39] As expressed by Psychologist A:

> What [had] gone wrong [was] the system of intervention orders, restraining orders and family court orders. Something [had] gone wrong with that system … There [was] a hell of a lot more of it now: a greater frequency of criminal matters coming up. The context of relationships [was] the basis behind [family violence] … or the significant psychological factors behind it. Not everyone [agreed] with that and it [was] very hard to convince a lot of judges of that but nevertheless, it [happened] to be true.[40]

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[33] Ibid.
[34] Interview with Practitioner F (n 22).
[35] Interview with Judge A (n 18).
[36] Interview with Practitioner E (n 8).
[37] Interview with Practitioner B (n 2).
[38] Interview with Practitioner E (n 8).
[39] Interview with Practitioner I (n 9).
[40] Interview with Psychologist A (Vincent Farrugia, Professional Office, 16 November 2017).

For these reasons, Practitioner I desired the 'proper resourcing of crimes of family violence more generally' and further resourcing to 'fund respondents' and 'decrease tension' among those involved with IVO matters.[41] Most interviewees indicated that although family violence commanded varying levels of importance among members of the legal profession today, it had become a significant issue for the criminal justice system in Victoria. Their responses may be said to reflect the canvassing of social interests; interests relevant to factors which have traditionally posed risks of imperfect procedural justice to victims of family violence with arguable claims to self-defence.

6.2.2Do relevant non-legal factors impact the decisions of juries and practitioners in the context of family violence and consequently reduce justice in the accessibility of the present law of self-defence?

6.2.2.1 Gender

Having dealt 'with a multitude of cultural and ethnic groups' in the belief that such matters impacted on 'verdicts and [remained] important issues', Practitioner I was unsure as to whether social values pertaining to matters of gender had been sufficiently recognised by the legal profession.[42] In his view, 'both the profession and the judiciary were drawn pretty narrowly'.[43]

On the question of inappropriate convictions, Practitioner E maintained that jurors would always bring their prejudices with them regardless of the jury directions they received.[44] Practitioner F expressed the view that:

> no framework could legislate against a portion of a jury being prejudiced: it may not be discovered in the course of trial but may nevertheless be present - even psychosomatic.[45]

Psychologist A believed that there were:

> so many gaps in jury directions that a plane could fly through them.[46]

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[41] Interview with Practitioner I (n 9).
[42] Ibid.
[43] Ibid.
[44] Interview with Practitioner E (n 8).
[45] Ibid.
[46] Interview with Psychologist A (n 40).

That being said, he was confident that Judges were 'aware' of this.[47]

Professor of Law A suggested that jurors came to their task:

> with all their pre-existing knowledge and it [was] not enough in one statement, that is, a jury direction, to completely re-educate people.[48]

Similarly, Judge A did not believe that judges could:

> tell juries factual information … to eradicate inaccuracies from their mind.[49] This was a matter for expert evidence.[50]

Nevertheless, Professor of Law A expressed the view that, overall, the directions had 'done a good job'.[51] Practitioner C similarly maintained that:

> the statements contained within section 60 [were] about as universally accurate as you could expect to see in an Act designed to change preconceptions about what is or isn't self-defence and what is or isn't family violence.[52]

That being said, Practitioner D was cautious of the directions in the sense that:

> where there [were] prescriptive directions about how people may or may not react in certain circumstances … [such] directions [needed] to be very carefully worded because … they [could] undermine legitimate [defences].[53]

Practitioner C maintained that the gender-neutral nature of the directions mitigated the risks of stereotyping or undermining defences.[54]

In the view of Practitioner A, the intended consequences of the Jury Directions Act 2015 (Vic) 'had been realised' in practice.[55] Although the prosecution of a male within a homosexual master/slave relationship had not been contemplated by Victoria's 2014 law,

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[47] Ibid.
[48] Interview with Professor of Law A (n 11).
[49] Interview with Judge A (n 18).
[50] Ibid.
[51] Interview with Professor of Law A (n 11). Similarly, Judge A expressed that the stereotype that 'sneaky women use poison' had been addressed. Specifically, that the provisions were 'good' and 'do try to get rid of those old principles that were very prejudicial to women': Interview with Judge A (n 18).
[52] Interview with Practitioner C (n 3).
[53] Interview with Practitioner D (n 5).
[54] Interview with Practitioner C (n 3).
[55] Interview with Practitioner A (n 1).

the matter 'fell within the family violence provisions and [they] [successfully] applied',[56] although the prosecution concerned '[one] law, it (evidently) [applied to] everybody'.[57]

Practitioner B believed that the law had become 'broad enough' to deal with gendered stereotyping:[58] that it had demonstrably eliminated the stereotype of a battered woman with the effect of constructing a model of the 'battered person'.[59] Similarly, Practitioner G expressed the view that the law could do nothing more and that:

> in the arms of competent counsel and a conscientious judge, the message [would] [continue to] be sent and would [continue to] get through.[60]

Having regard to the preceding commentary, the responses of the participants were inconsistent with the hypothesis given in Chapter 4 that gender may continue to pose foreseeable risks of imperfect procedural justice arising under Victoria's 2014 law. Although a minority of participants expressed concerns about the extent to which the law had acknowledged the prevalence of social prejudices pertaining to gender, the majority of participants indicated that Victoria's 2014 law had sufficiently done so and that no further legislative reform was appropriate.

In essence, Victoria's gender-neutral family violence jury directions had been broad enough to deal with gender-based stereotyping with the effect of eliminating the stereotype of a 'battered woman': a claim corroborated by the acquittals of Gayle Dunlop and the client of Practitioners D and F. Put another way, there was insufficient evidence to suggest that the gender of the parties involved (the juror, the deceased and the accused) would unjustly influence jury decisions concerning acceptance of an accused person's belief in the necessity of self-defence.[61] Accordingly, as a result of the passage of the legislation creating the 2014 law, gender does not appear to pose a foreseeable risk of imperfect procedural justice arising under Victoria's 2014 law.

6.2.2.2 Race

[56] Ibid.
[57] Ibid.
[58] Interview with Practitioner B (n 2).
[59] Ibid.
[60] Interview with Practitioner G (n 10).
[61] T'Meika Knapp, 'Murder, Self Defence, Defensive Homicide? Impacts of Gender and Relationships': (PhD Thesis, Deakin University, 2010 viii.

In the view of Professor of Law A, racial politics, like gender politics, inevitably played a role in the deliberations of jurors.[62] However, it was unclear whether or not the Jury Directions Act 2015 (Vic) had adequately addressed this phenomenon.[63] Practitioner F expressed the view that no legislation could try to do so, as this would:

> have the opposite effect and would be insulting to non-bigots and ultimately ignored by racists or bigots.[64]

Similarly, Practitioner B suggested that:

> Legislation [could not] dispel these sorts of things. The law [required] juries to look at [a] person in their context and while certain things [were] taboo in terms of context and [could not] impact on [their] judgement, juries [understood] when they [were] told that they were to put [themselves] in [another] person's shoes.[65]

Practitioner G maintained that the jury system itself served as an adequate safeguard against racial politics. He stated:

> At the commencement of a trial, juries are directed against emotive thinking and emotive responses. They are told to put aside their prejudices and biases. I'm sure that most jurors do their best to do that. The system also relies upon twelve individuals bringing forward twelve different paths of experience and twelve different lives. I don't know whether the Jury Directions Act [goes] far enough in doing away with prejudice and bias but I will say that I can't think of what else might be done. There might be a couple of bigots on a jury but I think they'll more or less be subsumed by the collective voice of the other ten. Again, that is the beauty of the jury system. [66]

Paralleling Practitioner G's position, Practitioner A expressed the view that:

> We have so many different communities which have different ways of living and different morals. A fundamental proposition is that family violence is just simply unacceptable. That's something that's contained within the Act. You have all the various things set out which amount to family violence but in terms of having

[62] Interview with Professor of Law A (n 11).
[63] Ibid.
[64] Interview with Practitioner F (n 22).
[65] Interview with Practitioner B (n 2).
[66] Interview with Practitioner G (n 10).

> people understand, jurors who may be completely unfamiliar with what is normal, then it's probably the Jury Directions Act that doesn't contemplate that. That being said, I can't really envisage how you could have a detailed instruction which would cover all situations. It would be so complicated and it would be very cumbersome.

Judge A similarly cautioned against the law potentially overcomplicating matters for juries. From her experience:

> [Judges] always [weighed] up and [tried] to balance the advantages of [giving] juries directions which [would try] to rectify attitudes and [ended up making matters more] complicated which lead juries to make bad decisions anyway. It's really hard to get rid of those attitudes in people. We all have them, even if [we] think [we're] pretty pure.[67]

Practitioner C maintained that the Jury Directions Act 2015 (Vic) had dispelled:

> The myths around family violence and as a part of that, gender and racial politics which [had been] brought into the jury room [had] at least [been] diminished in their impact on self-defence.[68]

Similarly, in Practitioner D and F's experience, the family violence directions had:

> reminded juries [from] the start that there were lots of different responses to family violence and to keep their minds open[69] [and further], that their fixed ideas, based on their own personal experiences, [could] be very easily cast aside and their minds opened.[70]

In her compelling interview, Practitioner D reported that they:

> had some very conservative people on [their] jury who would have never experienced a same sex relationship let alone a master/slave relationship. Some of the material … some of the descriptions of the relationship and the dynamics [of] [the] relationship … the everyday stuff, would have been shocking to some of [the jury and yet] … I was really impressed by their ability to put that to one side. Their moral judgment didn't seem to come into it. [Practitioner F] and I secured an acquittal for a bloke who … wasn't a particularly endearing chap … we might

[67] Interview with Judge A (n 18).
[68] Interview with Practitioner C (n 3).
[69] Interview with Practitioner D (n 5).
[70] Ibid.

> underestimate the ability of [juries] to open their minds to circumstances that might be completely unfamiliar and I had examples of that in other cases as well.[71]

Elaborating upon the receptivity of the trial judge to the dynamics of the relationship, Practitioner D also reported that:

> It was quite an unconventional relationship … whilst [they] initially got some resistance from the judge about the applicability of the family violence provisions, (because the judge had the frame of mind of man versus woman because that's probably the only scenario he'd ever dealt with) … once the judge considered the directions and once he realised what it was all about and got a sense of the history of the relationship he was very much … I don't know what he personally thought, but I think he was convinced that it applied and he directed the jury accordingly.[72]

Practitioner H believed that the directions had sufficiently dealt with the risk of any gender or racial politics unjustly influencing the assessment of self-defence.[73] That being said, Practitioner H wanted to review the operation of the directions:

> in a few years to make sure that they adequately reflected what [he believed] that they [were] doing.[74]

Having regard to the preceding commentary, the responses of the participants were inconsistent with the hypothesis presented in Chapter 4 that racial factors continued to pose foreseeable risks of imperfect procedural justice arising under Victoria's 2014 law. Although a minority of interviewees expressed concerns about the extent to which the law had acknowledged the prevalence of social prejudices pertaining to race, the majority of participants indicated that Victoria's 2014 law had sufficiently done so and that no further legislative reform was needed.

6.2.2.3 Professional understandings of family violence and plea decisions

In relation to charging practices, Professor of Law A expressed the view that it was 'possible' that the abolition of defensive homicide had left victims of family violence more susceptible to unjust pleas as there was a risk that trials were presently perceived as

[71] Interview with Practitioner D (n 5).
[72] Ibid.
[73] Interview with Practitioner H (n 17).
[74] Ibid.

a matter of 'all or nothing'. [75] Although this meant that victims of family violence could continue to 'plead … rather than risk running [their] full story', Professor of Law A noted that this was the same argument used against the retention of defensive homicide.[76]

To Judge A, however, this was a moot point. Juries already possessed a 'half-way house' in the form of a manslaughter verdict and for this reason, did not require 'a special one'.[77] Similarly, Practitioner F was not sure whether matters had 'changed much'[78] on account of jurors retaining the alternative verdict of manslaughter.[79] That being said, in cases of self-defence, there was often a 'clear intention to kill' on the part of the accused which created implications for the applicability of manslaughter.[80]

For the same reasons, Practitioner E expressed the view that it 'remained to be seen' whether or not the reformulated test for self-defence and its accompanying family violence jury directions overcame the pressures which victims of family violence experienced in their decision-making.[81] Although Professor of Law A was similarly unsure, she was confident that practitioners 'would talk [this] through with [their] [clients]'.[82] As a result, it was critical to determine what was '[playing] out in practice' concerning the pleas of victims of family violence.[83]

In the experience of Practitioner G, the abolition of defensive homicide had placed greater pressure on victims of family violence to plead guilty to manslaughter or, at the very least, 'a greater readiness on the part of the Crown to accept manslaughter pleas'.[84] On the contrary, Practitioner A maintained that victims of family violence were under no greater pressure to plead guilty to manslaughter because prosecutors were now 'more aware of family violence'.[85] If an accused claimed to be 'in a situation of domestic violence' but

[75] Interview with Professor of Law A (n 11).
[76] Ibid.
[77] Interview with Judge A (n 18).
[78] Interview with Practitioner F (n 22).
[79] Ibid.
[80] Interview with Judge A (n 18).
[81] Interview with Practitioner E (n 8).
[82] Interview with Professor of Law A (n 11).
[83] Interview with Judge A (n 18).
[84] However, Practitioner G did not believe that the abolition of defensive homicide had 'resulted in greater convictions for murder or a greater reluctance on the part of the Crown to resolve matters' prior to trial: Interview with Practitioner G (n 10).
[85] Interview with Practitioner A (n 1).

that could not be canvassed with absolute clarity, 'that would be taken into account much more readily these days'.[86]

Practitioner C suggested that the reformed law of self-defence and its accompanying family violence jury directions had made the Crown:

> more acutely aware that there was a greater risk of self-defence being successful, which may not have been appreciated with the same degree of equity previously.[87]

Accordingly, the Crown had become:

> more amenable to accepting manslaughter pleas as opposed to [insisting] on [murder] a process [which balanced] out the fact that [defensive homicide] was gone.[88]

Practitioner I, however, was sceptical of any greater readiness on the part of the Crown to acknowledge the dynamics of family violence. In his experience, the Crown:

> never … conceded [to family violence] very easily and [would] always say [that they did not] have the deceased's version of events.[89]

Pertinently, Practitioners D and F initially felt pressured to plead to manslaughter in their ultimately successful defence of a victim of family violence because they:

> were really concerned about [their] client going down [for] murder even though [they] felt very strongly about the application of self-defence.[90]

Although their plea was 'artificial' and required 'a serious [contortion] of the facts to justify it', [91] the offer was nevertheless made in response to the Crown's approach to their client's prosecution. Accordingly, Practitioner D desired the availability of defensive homicide. Nevertheless, she believed that it would be safer for victims of family violence to proceed to trial under the reformed law of self-defence.[92]

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[86] Ibid.
[87] Interview with Practitioner C (n 3).
[88] Interview with Practitioner D (n 5).
[89] Interview with Practitioner I (n 9).
[90] Interview with Practitioner D (n 5).
[91] Ibid.
[92] Ibid.

As suggested by Practitioner C, the removal of defensive homicide had limited the 'choices [available] for plea bargains' which meant that 'they were more likely to happen'.[93] Accordingly, Practitioner E believed that there was now less 'capacity to negotiate' with the Crown as the abolition of defensive homicide had created 'more pressure to plead'.[94] This was exacerbated by:

> the general pressure to plead across the board because there [were] so many matters [going] through court.[95]

For this reason, 'there [would] always be … plea negotiations going on'.[96] Pertinently, Practitioner H maintained that this was the 'nature of litigation' despite the reforms having not been 'designed to put greater pressure on people than existed formerly'.[97]

In contrast to the positions advanced by Practitioners I, D, F and E, Practitioner A maintained that any pressure to plead guilty could not be linked to the Crown, but to the prospect of a discount in sentence.[98] As he put it:

> the danger [was] that if you [were] going to be convicted of murder, you [would] want to get a discount … a deal [for] manslaughter and have [your background] taken into account. If you [could not] bring yourself within sections 322K and M, you [could] bring yourself to [enter] a plea [of guilty to] manslaughter [and have such] matters taken into account.[99]

However, Practitioner B believed that those accused 'were not going to go in for ten years instead of twenty' when there was 'a real prospect of acquittal'.[100] To that end, there was no greater pressure on victims of family violence to plead guilty to manslaughter than was previously the case under Victoria's 2005 law.[101] The core issue was the capacity of practitioners to 'present an accused person's perspective': a process contingent upon

[93] Interview with Practitioner C (n 3).
[94] Interview with Practitioner E (n 8).
[95] Ibid.
[96] Ibid.
[97] Interview with Practitioner H (n 17).
[98] Interview with Judge A (n 18).
[99] Ibid.
[100] Interview with Practitioner B (n 2).
[101] Ibid.

'what was admissible and what was inadmissible'.[102] In Practitioner D's successful defence of a victim of family violence, she:

> had historical police reports which were hearsay documents … absolute gold . . . because they demonstrated a history of violence being reported . . . They were never tested and the perpetrator was [never] cross-examined … some Judges [were] less inclined to admit such evidence so, to a significant extent, it really [depended] on how much [judicial] latitude there [was] in [practitioners] being able to present [the] history of an accused … if it [was] unnaturally limited, [they would] not [be] presenting the full picture.[103]

Even so, Practitioners D and F in their successful defence of a victim of family violence still offered to plead guilty to manslaughter before proceeding to trial on the basis of self-defence. Notwithstanding their initial reluctance to proceed to trial on the basis of self-defence, Practitioner F reflected that:

> if somebody [had said] that they [had] killed somebody in the regime that [Victoria has] at the moment … the likelihood [was] that [they] [were] going to run the trial.[104]

This suggestion may be attributable to tangible increases in the legal profession's understanding of the dynamics of family violence. However, the experiences of Practitioners D and F (and possibly the plea of Jessie Donker) indicate that professional fears continue to create obstacles to the use of the law of self-defence.

In relation to the question of whether Victoria's 2014 law has increased judicial and professional understandings of the dynamics of family violence and their relevance to self-defence, Practitioner C reported that:

> This [was] as much a social awareness problem as it [was] a legal … problem. [However], there [had] been cultural change. There [had] been acknowledgement of the reality of battered people: the reforms [had] focussed attention on something that, under the general provisions, [had not] been focussed upon. [The law] now

[102] Interview with Practitioner D (n 5).
[103] Ibid.
[104] Interview with Practitioner F (n 22).

> provided guidance [to practitioners] where previously, there [had been] no guidance provided.[105]

Practitioner A expressed the view that the significance of family violence had been made more apparent as it was:

> now stated [in] the Jury Directions Act that a judge [had to] make [such] directions. It [was] not a matter of persuasion, if the evidence [was] there … it [had] to be done.[106]

As a result, 'judges [were] no longer the dinosaurs they [were often] made out to be'.[107] In short, the law had 'absolutely' increased professional understandings of family violence.[108]

Practitioner G similarly reported that the reforms had increased professional understandings of family violence 'to a material extent'.[109] In his experience:

> I've seen greater readiness in at least two trials that I've done, a greater readiness on the part of judges to relay the directions, even sometimes over the objection of the Crown. We've increasingly come to know more about [family violence] and we'll learn more as time progresses. The law can't be that naïve to ignore reality. It has to accommodate it and it might take a little longer for it to reach the courtroom than it does to reach the street but that's ok … the law has to weigh up a variety of interests. So far, I think it [has] dealt with it well.[110]

Practitioner F also reported that the reforms had 'massively' increased professional understandings of family violence.[111] For example, in his past experience:

> A judge ignorantly said of the complainant that he had [not] been violent towards the female accused with whom he had previously been in a de-facto relationship (notwithstanding evidence of emotional abuse). That bespoke of values of archaic days that weren't, sadly too long ago and it showed a complete lack of appreciation

[105] Interview with Practitioner C (n 3).
[106] Interview with Practitioner A (n 1).
[107] Ibid.
[108] Interview with Practitioner C (n 3).
[109] Interview with Practitioner G (n 10).
[110] Ibid.
[111] Interview with Practitioner F (n 22).

> of what family violence is. The longer it's in, the more judges and lawyers will know.[112]

In a separate trial recently conducted by Practitioner F, a trial judge found his defence of a victim of family violence 'compelling' and was 'almost passionate in his description of how the accused would have felt'. [113] In essence, the trial judge:

> showed an amazing insight and intellect and, in fact, compassion, despite compassion having not been relevant to the charge.[114]

This phenomenon was also observed in the trial of Gayle Dunlop.[115]

Having regard to the preceding commentary, Practitioners A, B, C, E, F and G believed that defence lawyers were now more likely to make use of the law of self-defence whereas other interviewees were unsure.[116]

To Judge A, it was 'naïve' to believe that the substantive content of the law compelled practitioners to take particular courses of action.[117] Although there had been a discernible change in social attitudes toward family violence, it was unclear how the law could do 'any better' concerning professional understandings of family violence.[118] To this end, the reforms, standing alone, had not increased professional understandings of family violence.[119] They had simply 'rectified [an] imbalance'.[120]

Similarly, Practitioner B expressed the view that people either understood 'or [did] not understand family violence': that legislation would not 'help them understand' it.[121] Practitioner D indicated that it was public dialogue which had led to any increase of professional understanding within the legal profession.[122] To Practitioner E, the bigger issue facing the judiciary and the defence was the ongoing education of the community

[112] Ibid.
[113] Ibid.
[114] Ibid.
[115] *DPP Reference No 1 of 2017* [2018] VSCA 69 ('*DPP Reference No 1 of 2017*').
[116] Interview with Practitioner C (n 3).
[117] Interview with Judge A (n 18).
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Interview with Practitioner B (n 2).
[122] Interview with Practitioner D (n 5).

(encompassing potential jurors) concerning less understood forms of family violence.[123] For example:

> many members of the community [did not understand] how violent psychological abuse [could be]. Some older members of the community [thought] that unless someone [had] been beaten black and blue and ended up in hospital … it [was] not family violence. Overlaid with this [was] the notion that the victim of family violence somehow brought it upon themselves when they [did not] complain, returned home or only [reported the] abuse years later when the perpetrator [had] left them.[124]

Practitioner H believed that the reforms had been instrumental in the 'destruction of the culture of silence' and that juries unfamiliar with family violence would be pleased to have informative family violence directions.[125]

Professor of Law A hoped that the enactment of the family violence jury directions would be supported by a greater use of expert evidence.[126] She considered that there had been insufficient use of expert evidence pertaining to family violence before 2014. She continued saying:

> People at the DVRCV were contacted to locate experts. [Practitioners] asked "where do we actually find people who can give this type of evidence?" It [was] very specialised and that would suggest that it [was not] something that the profession was on top of … a specialised and complicated area … You'd expect these things to take a bit of time you know … how to run these sorts of defences … "what's the evidence that we can use and how does the evidence work in terms of all the rules and the basis on which you're presenting that evidence?".[127]

Encouragingly, as a result of the reforms, Practitioner E maintained that 'the use of expert evidence [would] become more and more apparent in a wide spread of cases'.[128] Similarly, Judge A believed that it was now 'well established' how 'people [reacted] in [circumstances] of family violence' and that practitioners should now be 'calling [more]

[123] Interview with Practitioner E (n 8).
[124] Ibid.
[125] Interview with Practitioner H (n 17).
[126] Interview with Professor of Law A (n 11).
[127] Ibid.
[128] Interview with Practitioner E (n 8).

experts'.[129] Further, that the OPP had been 'nervous' about family violence expert evidence and that practices had hopefully changed'.[130]

Having regard to the preceding commentary, the responses of the participants were consistent with the hypothesis suggested in Chapter 4 that professional factors continued to pose foreseeable risks of imperfect procedural justice arising under Victoria's 2014 law. Specifically, the responses indicated that the abolition of defensive homicide had placed greater pressure on victims of family violence to plead guilty to manslaughter. This claim is arguably supported by the plea of Jessie Donker.[131]

Notwithstanding greater professional understandings across the profession, Practitioners D and F (as previously indicated) felt pressured to[132] plead guilty to manslaughter. This posed implications for the extent to which the Crown had been more receptive to the dynamics of family violence in their prosecutions of victims of family violence. Practitioner A maintained that the Crown had become more amenable to accepting manslaughter pleas on the basis that it had become more aware of the dynamics of family violence. Practitioner C, on the other hand, believed that the Crown had simply become aware of the increased possibility of self-defence being successful at trial and was therefore willing to accept manslaughter pleas so that a 'win' could be recorded. Perhaps, as suggested by Practitioners D and F, the Crown had experienced greater pressure to secure manslaughter pleas.

Such claims must be weighed in context of the discontinuation of the prosecution of Joanne and Shannon Debono. However, the decision of the Crown to prosecute Gayle Dunlop[133] for murder and the guilty plea of Jessie Donker (who was initially charged with murder)[134] indicate that the Crown has not consistently shown a greater degree of receptivity to the dynamics of family violence and viable claims to self-defence following the enactment of the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic).

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[129] Interview with Judge A (n 18).
[130] Ibid.
[131] *R v Donker* [2018] VSC 210 ('*Donker*').
[132] Ibid.
[133] *DPP Reference No 1 of 2017* (n 115).
[134] *Donker* (n 131).

The nature of the responses do, however, indicate that the reforms have nevertheless produced evidence of cultural change within the legal profession insofar as professional understandings of family violence are concerned. Judges, in particular, have shown a greater awareness of the dynamics of family violence and their relevance to self-defence. The remarks of His Honour Justice Lasry[136] following the acquittal of Gayle Dunlop and the remarks of His Honour Justice Croucher in the sentencing of Jessie Donker[137] are testimony to this change.

Based on the preceding commentary, the removal of defensive homicide and the overzealous approach of the Crown to a number of viable claims to self-defence constitutes professional phenomena which perpetuates the risk of imperfect procedural justice under Victoria's 2014 law.

In applying Ewald's objectivity within the norm,[138] these non-legal considerations reflect interests shared among members of the community which arguably advance the self-interest of certain members over others: specifically the Crown's interest in securing convictions over the meritorious claims to self-defence possessed by those accused. Accordingly, these norms possess conceivable influence over juries and their decision-making as they represent interests which self-interest, at the expense of the community, beyond Rawls' veil of ignorance, would unfairly seek to protect.

As a result, the phenomenon is capable of being ascribed a single meaning in order to establish a terminological point of reference:[139] specifically, that of overzealous prosecutions. Given the repetition of this phenomenon, the norm is imbued with weight and meaning and may be linked to the formulation of the law.[140] Under Victoria's 2014 law, the Crown's policies and procedures have given insufficient weight to 'the circumstances as the [accused] perceives them' (as framed by section 322K). In effect, in the absence of defensive homicide and a supplementary family violence prosecution policy, the Crown has perpetuated a risk of imperfect procedural justice which Victoria's 2014 law has not accounted for.

[136] *DPP Reference No 1 of 2017* (n 115).
[137] *Donker* (n 131).
[138] Francois Ewald, 'Norms, Discipline, and the Law' (1990) 30(1) *Law and the Order of Culture* 154.
[139] Ibid.
[140] Ibid.

6.2.2.4 Juror interpretation and personal application of law

In relation to the question of whether the reformed law of self-defence had made it less likely for judges, prosecutors and juries to pathologise victims of family violence, Practitioner C maintained that its emphasis upon a reasonable response was more accessible[141] in that it focused on what a person actually did whereas the reasonable grounds formulation concerned the accused's reasons.[142]

Practitioner H believed that once juries got the context in which the history of a relationship between a victim and a perpetrator was fully exposed, the concept of a reasonable response was much more readily understood.[143] For these reasons, Practitioner H concluded that the law was:

> more comprehensible to a twelve-person jury who [were] not necessarily of the same cultural or economic group as the [person] on trial.[144]

That being said, Practitioner I questioned the capacity of the law of self-defence to adequately accommodate the cultural and ethnic backgrounds of those 'from African communities [or those of] Islamic faith'.[145] To Practitioner E, it did not:

> matter what a judge said (about the law of self-defence) as there are deep-seated cultural [and] community problems with stereotypes that warranted a 'big educational shift.[146]

On the other hand, Practitioner B expressed the view that the reformed law of self-defence was 'no worse because the subjective/objective mix was still there and would influence the decisions which juries made concerning what was, and was not, acceptable regardless of the background of the accused or the accused's course of conduct'.[147] Similarly, Practitioner G believed that the law's immediate qualification concerning 'the context in which the accused's perception occurred' served as an adequate safeguard against any

[141] Interview with Practitioner C (n 3).
[142] Interview with Practitioner A (n 1).
[143] Interview with Practitioner H (n 17).
[144] Ibid.
[145] Interview with Practitioner I (n 9).
[146] Interview with Practitioner E (n 8).
[147] Interview with Practitioner B (n 2).

risk of stereotyping or pathologising.[148] This view was supported by Practitioner F[149] and Professor of Law A who maintained that:

> the reasonable response test … had made it more difficult to pathologise … and [would] make a difference.[150]

However, Judge A significantly noted that the preceding accounts assumed that juries would go 'into such a fine-grained analysis'. [151] In her view:

> A woman once killed her husband with an axe … everyone in the country town knew that he had been beating her relentlessly for 20 years and she was acquitted. That had nothing to do with the substantive law. If you take an axe to someone (I think he was asleep at the time) and [you] get acquitted, that indicates that it's not just about what the formal law is.[152]

Practitioner A believed that the reformed law's emphasis upon the 'the circumstances' as perceived by the accused, ensured that the subjective reality of a victim of family violence was part of a jury's deliberations. [153] However, Practitioner A cautioned that the extent to which it adequately did so would 'depend on the case'.[154] Practitioner B expressed the view that 'the circumstances' would adequately extend to:

> the historical background of the accused to the extent that it [is appropriate] and to the extent that it [would] be understood by a juror to be of relevance whilst precluding things like honour killing type considerations.[155]

Practitioner B continued that the reformed self-defence accommodated 'the circumstances' to the extent that they were:

> subject to the kind of controls of reasonability in relation to those subjective factors [which] a jury might accept as reasonably acceptable subjective factors.[156]

[148] Interview with Practitioner G (n 10).
[149] Interview with Practitioner F (n 22).
[150] Interview with Professor of Law A (n 11).
[151] Interview with Judge A (n 18).
[152] Ibid.
[153] Interview with Practitioner A (n 1).
[154] Ibid.
[155] Interview with Practitioner B (n 2).
[156] Ibid.

For all intents and purposes, this meant that the circumstances would 'extend as far as counsel was able to extend them' and, according to Practitioner G, the community 'would be amazed at how far they [could] extend in the right hands'.[157] In fact, Judge A conceived that:

> the circumstances could be completely bizarre … homophobic panic for example. You think somebody's coming on to you – they're not, but you happen to think they are.[158]

Practitioner C opined that counsel could:

> start with the words of the legislation and that [would] be viewed through the eyes of the victim of domestic violence and how they reacted in light of their perception.[159]

Practitioner C continued that it is:

> a very fair test because it [invited] consideration from their standpoint and 'the circumstances' [reflected] a very broad set of considerations.[160]

As a result, Practitioner F could not conceive of a test that was 'more helpful'.[161] Similarly, Practitioner H expressed the view that when:

> the whole history of [a] relationship [was] exposed adequately and properly … the new test [would] prove to be satisfactory.[162]

For these reasons, Professor of Law A believed that the law had adequately accommodated 'the subjective reality of [a] victim of family violence'.[163]

Psychologist A expressed the view that it was unfortunate that:

> there [was] no objectivity in the accused's perception of the circumstances.[164]

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[157] Referencing Jimmy Montgomery, who acted for a teacher who had lured her husband out into a bush dressed in camouflage. 'I told the jury it was a built up thing': Interview with Practitioner G (n 10).
[158] Interview with Judge A (n 18).
[159] Interview with Practitioner C (n 3). Practitioner D answered in agreement, Practitioner E was 'not sure' and Practitioner I 'did not feel equipped to answer': Interview with Practitioner D (n 5); Interview with Practitioner E (n 8) and Interview with Practitioner I (n 9).
[160] Ibid.
[161] Interview with Practitioner F (n 22).
[162] Interview with Practitioner H (n 17).
[163] Interview with Professor of Law A (n 11).
[164] Interview with Psychologist A (n 40).

However, Practitioner A noted that a jury could find that they were:

> not accepting of the circumstances because of the objective [component] (of section 322K) which established a balance in [the test][165] and had the test been completely subjective, this would have [posed] a greater danger.[166]

Having regard to the preceding commentary, Practitioner B believed that the law's measured accommodation of the subjective reality of a victim of family violence would not invite attempts by practitioners to pathologise the accused as:

> juries are not stupid. [They bring] to bear the kind of moral judgement which is lacking for instance, in sentencing, where hands are constrained by authority.[167]

This view was mirrored by Judge A,[168] Practitioner F[169] and Psychologist A.[170] As put by Professor of Law A:

> [The law] is inviting jurors to put themselves in [a] victim's shoes: if this was the way [their] world was, if this [was] how [their] relationship was functioning, was [their response] a reasonable response? It was not suggesting that jurors put the person aside as an 'other' as a sort of pathologised person who [was] irrational … I would like to think that [the] [law] certainly reduces the risk of pathologising.[171]

Similarly, Practitioner H maintained that:

> [Juries] would understand that the response of a victim of family violence likely involved a depression and … a greater concept of paranoia or anticipation of harm because [they] had years of being battered so … a relatively minor event might trigger off [a] more significant event. If a jury [understood] that in terms of [a] history of violence … they [were] not going to have a problem with [that].[172]

Despite the reduced risk of victim pathologising, each interviewee believed that jurors may nevertheless apply their own personal standards (based on their personal values) in the adjudication of claims to self-defence arising in circumstances of family violence. For

[165] Interview with Practitioner A (n 1).
[166] Ibid.
[167] Interview with Practitioner B (n 2).
[168] Interview with Judge A (n 18).
[169] Interview with Practitioner F (n 22).
[170] Interview with Psychologist A (n 40).
[171] Interview with Professor of Law A (n 11).
[172] Interview with Practitioner H (n 17).

example, Practitioner A believed that there would 'always [be] a risk' of juries employing impermissible lines of reasoning in their assessment of the application of self-defence to victims of family violence.[173] In such scenarios:

> jurors [could] take their own view of the justice of [a] situation; they [could] take their own view of where fault lay and [could] be resistant to the prosecution case or the defence case.[174]

Similarly, Practitioner H opined that:

> Juries have an innate sense of justice that may not be what we, as practitioners, academics or people who are not of the same cultural milieu, would regard as perhaps an appropriate standard or reaction— but they do react to a factual matrix and it's possible that they will do that beyond the directions [given] or in spite of the directions [given].[175]

To Practitioner I, this 'happens all the time … across the board'.[176] For example, in the experience of Judge A:

> There [was] always a risk of juries using impermissible information where juries [did not] want a person to be released or convicted. [For example], a jury may [reason that a] woman had behaved in an unwomanly fashion; she [was a] violent woman and [they didn't] like violent women. On the one hand, she's a violent woman and she deserves everything she gets. On the other hand, she [could be] a poor vulnerable woman who has had a horrible life and we need to look after her. How a jury interprets that, a lot of that [turns] on how the [accused] is presented.[177]

Practitioner E believed that jurors could be 'swayed by … whatever the flavour of the media [was]'.[178] Alternatively, Practitioner D believed that the presumption that jurors always followed directions was, at times, displaced by jurors 'applying moral judgments' as opposed to treating their task as 'an intellectual exercise'.[179] Although this could be

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[173] Interview with Practitioner A (n 1).
[174] Ibid.
[175] Interview with Practitioner H (n 17).
[176] Interview with Practitioner I (n 9).
[177] Interview with Judge A (n 18).
[178] Practitioner E asserted '*it's getting out there that family violence is common and the effect it can have on people is dramatic. That's a good thing*': Interview with Practitioner E (n 8).

[179] As put by Practitioner D, 'in presenting to the jury from the defence point of view, the accused perspective (how they perceive the circumstances), you very often have to present the history of the

traced to a juror's personal values, Practitioner C acknowledged that jurors were ultimately invited 'into the courtroom to … apply their own experience'.[180] As suggested by Practitioner C:

> When a human being [had] killed another human being and a juror [was] asked to consider whether the killer should be acquitted on the basis of self-defence, they [were] likely [being asked to] consider an experience which they themselves [had] never had.[181]

For the same reasons, Professor of Law A, like Practitioner A, believed that the risk of impermissible reasoning was 'unavoidable'[182] and that the law could only 'guide [jurors] on what to take into account' so that they were 'aware of all relevant matters'.[183] That being said, Practitioner B maintained that the presence of 12 jurors 'militated' against any such risk.[184]

As observed by Practitioner G:

> I've probably done 250 appeals now, probably 100 conviction appeals and I am in awe at the extent to which juries are able to remain faithful to the directions that they are given. They ask questions that betray a level of understanding that would blow your mind. They bring back verdicts that are explicable only in terms that suggest that the jury has fully understood the directions that they have been given and how the direction might attach to one charge and not the other. Of course, there are trials where you say 'look, the jury here just got it wrong' and of course you are bound to have bad juries but in general, my experience is juries are just incredible. They really are. They are as good as we can make the system and god help us if we get rid of them.[185]

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relationship and so it becomes more, I guess … the jury becomes, the jury almost enters that person's world and of course the prosecution then tries to show them a different point of view but they enter that world and they're only human so of course they're going to consider the dynamics of the relationship and not just apply the intellectual but also very potentially apply moral judgement to it … that's the reality of juries I think': Interview with Practitioner D (n 5).

[180] Interview with Practitioner C (n 3).

[181] Ibid.

[182] Interview with Professor of Law A (n 11).

[183] Ibid.

[184] Interview with Practitioner B (n 2).

[185] Interview with Practitioner G (n 10).

Practitioner A did not believe that jurors would perceive the law as they were directed on it as a license to kill.[186] However, Psychologist A expressed the view that the subjective phenomenon of the victim and their perception amounting to such a license was dangerous and not workable.[187] Practitioner A expressed a contrary view, maintaining that that was 'really overstating it' as jurors had to apply the various tests. [188] Similarly, in the view of Practitioner B, the law would not be perceived as a license to kill but 'forgiveness for [a] killing'.[189] If an accused thought that they had a license to kill, a jury would 'see right through it'.[190] Further, Practitioner I expressed the view that 'very few [jurors] would turn their minds to that possibility' and if they did 'they would have to be pretty calculating'.[191] Pragmatically, Practitioner C maintained that as far as family violence directions are concerned, jurors would ultimately 'set the bar'.[192]

However, Practitioners C and D believed that members of the community may see the law differently.[193] As suggested by Practitioner D, members of the community could perceive the law as such 'through ill-informed judgment'. [194] Similarly, Professor of Law A said that:

> There was always a risk that [the] tabloids [would] present it that way with their simplistic analysis … Any defence is saying we excuse or allow … it's not a justification but we at least excuse this as a killing because we recognise that it's not culpable in the way that our society defines what's culpable. You would hope that that wasn't seen as a license to kill and I think within the way in which this is framed … it is very clear that it's about responding to something that you had to.[195]

However, when members of the community became jurors and were given the family violence directions, Practitioner D reported that they saw:

> as they were listening to the directions that they [made] sense and that they [were] not necessarily a license to kill [as] they [were]. We had a situation in our trial

[186] Interview with Practitioner A (n 1).
[187] Ibid
[188] Ibid.
[189] Interview with Practitioner B (n 2).
[190] Ibid.
[191] Interview with Practitioner I (n 9).
[192] Interview with Practitioner D (n 5).
[193] Interview with Practitioner C (n 3).
[194] Interview with Practitioner D (n 5).
[195] Interview with Professor of Law A (n 11).

> where I think the jurors were very sceptical about the notion that a man could stab another man in the back in self-defence. [However], once they appreciated the circumstances and the history which went for a couple of decades, they could see the sense in the directions that they were given about responses to family violence and they could see that it was not always going to be an immediate threat which had to respond to or felt the need to respond to.[196]

Furthermore, Practitioner E maintained that any case concerning family violence would be 'looked at with a fine-toothed comb'.[197] Pertinently, Practitioner F believed that juries would be 'pretty intellectually honest' and would take the family violence directions 'very seriously' and that the law needed to make sure that it did not send the message that 'if [one was] in a bad domestic relationship, [one could] just knock off [their] partner',[198] Practitioner G believed that there was no risk of 'the directions sending that message'.[199] As suggested by Practitioner H:

> [The directions] regard the sanctity of human life as fairly significant. They don't treat murder trials as a walk in the park. If [juries] are given the appropriate factual history of the family violence, they will understand the circumstances because … the legislation … still reflects the basic human conditions of protecting oneself, protecting one's loved ones, reacting to a history of abuse and violence – [juries] understand that.[200]

Having regard to the preceding commentary, the responses of the participants were consistent with the hypothesis presented in Chapter 4 that juror interpretation and personal application of law continued to pose foreseeable risks of imperfect procedural justice arising under Victoria's 2014 law. That being said, the balance of opinion indicated that victims of family violence were unlikely to be pathologised by judges, counsel or jurors under Victoria's 2014 law because the reformulated doctrine of self-defence had satisfactorily accommodated the realities of victims of family violence. Specifically, the reasonable response formulation had increased justice in the accessibility of self-defence in the sense that judges, practitioners and jurors were now compelled to

[196] Interview with Practitioner D (n 5).
[197] Interview with Practitioner E (n 8).
[198] Ibid.
[199] Interview with Practitioner G (n 10).
[200] Interview with Practitioner F (n 22).

examine what a victim of family violence did in their circumstances as opposed to the objective reasonableness of their belief to act. In addition, the 2014 law has reduced the complexity of jury directions and made them more comprehensible.

It is noteworthy that a number of interviewees highlighted that 'common-sense justice' rather than the strict application of jury instructions sometimes guided jury verdicts. Indeed, a majority of interviewees believed that 'common-sense justice' posed a foreseeable risk of imperfect procedural justice arising under Victoria's 2014 law. Consistent with Ehrlich, it could not be assumed that juries would reason to the letter of the law..[201] In separating these non-legal considerations from the law's positivist interpretation and practical mobilisation in practice, their capacity to conceivably influence verdicts could be demonstrated with reference to Ewald's objectivity within the norm. Again, Ewald's norm invited:

> each one of us to imagine ourselves as different from … others, forcing [us] to turn [our backs] upon [our] own particular [case alongside our] individuality and irreducible particularity. The [identified] norm [would then illustrate] the equality of individuals just as surely as it [would make] apparent the [inequalities] among them.[202] [Here], the norm [could be seen as] … producing social law: a law constituted with reference to the particular society it [purported] to regulate as opposed to a set of [universal truths].[203]

Additionally, their repetition and reiteration in society imbued such norms with weight and meaning.[204] As perceptions of 'unwomanly' women and men that 'needed killing' could reasonably be construed as reflecting interests shared among members of the community that arguably advance the self-interest of certain members over others (with reference to Rawls' veil of ignorance), such norms may be argued to reflect a sense of inequality within the community.

Accordingly, the norms could conceivably influence juries and their decision-making as the norms represent interests which self-interest, beyond Rawls' veil of ignorance, would

[201] Eugene Ehrlich, *Fundamental Principles of the Sociology of Law* (Taylor & Francis, 1st ed. 2001) 10.
[202] Ewald (n 138)
[203] Ibid 155.
[204] Ibid.

unfairly seek to protect at the expense of the community.[205] As a result, they are capable of being ascribed a single meaning in order to establish a terminological point of reference:[206] specifically, gendered expectations of behaviour as well as misogynistic and misandrist sentiments.[207]

Despite the preceding commentary, the interview participants were of the view that the jury system was sufficient to militate against any impermissible reasoning employed by jurors in their deliberations on the innocence or guilt of victims of family violence. Further, that matters consisting of a single act of family violence were unlikely to attract unjust value judgements nor were perceptions concerning 'licenses to kill' deemed to be well-founded or likely to manifest within deliberations.

Accordingly, the responses of the participants indicated that the law did not, in itself, invoke or perpetuate misogynistic or misandrist sentiment. In effect, Victoria's 2014 law had satisfactorily accommodated for the risk of imperfect procedural justice in this context.

6.2.3 Whether suggestions for law reform to render self-defence more just are necessary

Although the analysis in this chapter indicated that the thesis in Chapter 4 was 'partially accurate', the responses of the participants indicated that no law reform was required.

However, with regard to the balance of the interests of victims of family violence who genuinely kill in self-defence, alongside the interests of the Crown and the community in the prosecution of homicide, it is submitted that such interests could be better reflected in a family violence self-defence specific prosecution policy from the Office of Public Prosecutions. Such a claim is made with reference to the guilty plea case analyses conducted in chapter 4. The contents of this proposal are discussed within Chapter 7.[208]

[205] This was consistent with Ehrlich's belief that the interests of a dominant group must coincide with the interests of the whole society or, at the very least, the majority of the members of the association so that other members would obey the norms established by the dominant group: Ehrlich (n 201) 60.
[206] Ewald (n 136) 150.
[207] Ibid.
[208] See Chapter 7, *Prosecution counsel – Proposed reform* at 7.6.2.1(b).

As put by Pound, the law had to not only be conscientiously, adequately and fairly designed to secure, protect and promote the interests of society,[209] it had to be able to realistically do so as well.[210] In accordance with Ehrlich, the interests of the dominant group (the broader community) would coincide with the interests of the whole society (encompassing victims of family violence) if such a policy were to be clearly defined and the matters defined within it consistently acted upon. In accordance with Pound, it is submitted that such a policy would promote the fair prosecution of victims of family violence and a legal order which could be realised in social life (lest the law fail in its purpose).[211]

6.3 Conclusion

This chapter has analysed the responses of the interviewees pertaining to the third and fourth subsidiary research questions using the socio-legal methodology presented in Chapter 3. In doing so, the chapter revealed that gender and racial factors do not pose a risk of imperfect procedural justice under Victoria's 2014 law. This is because the reformed law of self-defence and family violence provisions supplemented by the mandated jury directions contained in the Jury Directions Act 2015 (Vic) are sufficient to ensure that juries comply with those instructions and to not take such matters into account.

However, the analysis revealed that juries may nevertheless apply 'common-sense justice' based on their personal values although it was believed that the jury system itself would guard against unjust verdicts within the context of the 2014 law. Finally, the analysis indicated that professional factors, including overzealous prosecutorial decision-making and professional pressures continued to pose foreseeable risks of imperfect procedural justice as had occurred under Victoria's 2005 law. This was deemed to be a matter requiring reform in the form of a revised prosecutions policy which is explored in greater detail in the following chapter.

The next chapter consolidates the findings of this research in order to discuss the implications which flow from the data and how they supplement the literature.

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[209] A. Javier Trevino, 'Sociological Jurisprudence' in Reza Banakar and Max Travers (eds), *Law and Social Theory* (Hart Publishing, 2nd ed, 2013) 46.
[210] Ibid.
[211] Current Sociology, 'The Sociology of Law' (1972) 20(3) *Current Sociology* 15.

CHAPTER 7
DISCUSSION AND IMPLICATIONS

7.1 Introduction

The previous chapter revealed that gender and race factors are unlikely to pose a foreseeable risk of imperfect procedural justice under Victoria's 2014 law. However, the analysis revealed that juries may continue to apply 'common-sense justice' based on their personal values even if the jury instructions make it clear that this is inappropriate. Finally, the analysis indicated that professional factors, including overzealous prosecutorial decision-making and professional pressures continued to pose foreseeable risks of imperfect procedural justice in the realm of pleas.

This chapter discusses the significance of the results presented in the preceding chapters and how the results make a contribution to knowledge. The chapter is divided into five parts. In section 7.2, the results of the doctrinal research design are discussed. Section 7.3 deals with the results arising from the qualitative research design, and section 7.4 with the results obtained from the socio-legal research design. The question of law reform is addressed in section 7.5. In section 7.6, the academic and practical significance of the research is discussed as well as the implications of the research and suggestions for law reform.

7.2 An unjust failure to accommodate victims of family violence

Based on the Rawlsian analysis undertaken in Chapter 4, it can be concluded that Victoria's previous law of self-defence and the evidence used to raise the defence in the context of family violence unjustly failed to accommodate the experiences of family violence victims in criminal prosecutions who were alleged to have killed their violent partners in self-defence.

Prior to the research, it was not clear how the law itself had failed to accord justice to those prosecuted under it. The systematic application of the former law of self-defence to

those accused blended with Rawls' theory of justice has explained how the law unjustly failed to accommodate those who were prosecuted under it.

Although the VLRC's intention had been to ensure that the law of self-defence adequately accommodated experiences of family violence rather than be a special defence for those who killed in response to it,[1] the Rawlsian analysis established that Victoria's 2005 law did not inspire confidence in those accused to proceed to trial despite the existence of viable claims to self-defence. The analysis also revealed that denials and trivialisations of family violence on part of the Crown, the court and defence counsel alongside the pathologisation of victims, undermined otherwise viable claims to self-defence. This reflected insufficient regard of the inequalities which Victoria's 2005 law sought to address.

The findings of Chapter 4 ultimately reinforce and supplement Kirkwood, McKenzie and Tyson's research which concluded that there had been a 'systemic failure to recognise the nature and impact of family violence'[2] under Victoria's 2005 law.

7.3 The effectiveness of self-defence for women who killed their violent partners under both frameworks

Based on the findings of the qualitative analysis undertaken in Chapter 5, the thesis affirmed that Victoria's 2005 law unjustly failed to accommodate victims of family violence and that Victoria's 2014 law had increased justice in the accessibility of self-defence to victims of family violence to a significant degree.

7.3.1 Practitioner decision-making and why victims of family violence pleaded guilty despite the existence of viable claims to self-defence

[1] Victorian Law Reform Commission, *Defences to Homicide – Final Report* (Report No 94, October 2004) 68.

[2] Debbie Kirkwood, Mandy McKenzie and Danielle Tyson, 'Justice or Judgement? The impact of Victorian homicide law reforms on responses to women who kill intimate partners' Domestic Violence Resource Centre Victoria (Discussion Paper, November 2013) 3 <http://www.dvrcv.org.au/sites/thelookout.sites.go1.com.au/files/DVRCV-DiscussionPaper-9-2013web_0.pdf>. Significantly, practitioner understandings of the *Crimes (Homicide) Act 2005* (Vic) appeared to reflect traditional understandings of the battered person's syndrome as opposed to coercive control or social-context models: see also Chapter 2, *Recognition of the impact of family violence* at 2.4.1.1 and *Understandings of family violence* at 2.6.4.1.

When the research started, it was unclear why certain victims of family violence pleaded guilty to defensive homicide (or manslaughter) under Victoria's 2005 law. Byrne noted that the reasons would have shed light on the operation of Victoria's homicide laws[3] as there was no public transparency or external scrutiny of plea bargaining decision-making in Victoria.[4]

Although Byrne indicated that 'reasonable people [and practitioners] may have different views about what constitutes a threat of violence and the degree of violence necessary to excuse a killing on the basis of self-defence',[5] Fitz-Gibbon identified that the community remained 'largely in the dark as to why persons who [killed] in response to prolonged family violence, who may have [held] genuine [beliefs] that they [were] defending themselves, favoured entering … guilty [pleas] to defensive homicide [or manslaughter] as opposed to testing their [claims] of self-defence at trial'.[6]

The information obtained through this research has produced an original contribution to knowledge by providing insight into why victims of family violence chose to plead guilty under Victoria's 2005 law despite their viable claims to self-defence. Firstly, participants revealed that the standard did not inspire practitioners to provide legal advice which accounted for the Rawlsian inequalities which the standard had sought to address.[7] Legal advice had been tailored to the traditional circumstances in which self-defence was available at common law. This was in spite of the doctrinal content of Victoria's 2005 law having specifically catered to those victims of family violence who, as illustrated in

[3] Greg Byrne, 'Simplifying Homicide Laws for Complex Situations' in Kate Fitz-Gibbon and Arie Freiberg (ed), *Homicide Law Reform in Victoria: Retrospects and Prospects* (The Federation Press, 2015) 153. See Chapter 2, *Plea decisions* at 2.6.4.2. The perceived overzealousness of the OPP in pursuing criminal charges points to continuing education and training: See also *Are further reforms to the defence of self-defence required?* at 7.5.

[4] Asher Flynn and Kate Fitz-Gibbon, 'Bargaining with Defensive Homicide: Examining Victoria's Secretive Plea Bargaining System Post-Law Reform' (2011) 35(3) *Melbourne University Law Review* 905.

[5] Byrne (n 3).

[6] Kate Fitz-Gibbon, 'The Offence of Defensive Homicide: Lessons Learned From Failed Law Reform' in Kate Fitz-Gibbon and Arie Freiberg (ed), *Homicide Law Reform in Victoria: Retrospects and Prospects* (The Federation Press, 2015) 132.

[7] Specifically, that due to disparities in strength and size and continuous threats of violence, victims of family violence often killed in ways appearing to be 'at odds' with what self-defence had traditionally been understood as; a defence for those who had used force to preserve life or limb in the context of an immediate altercation. Secondly, that the law of self-defence had been seen, insofar as victims of family violence were concerned, to have inadequately accommodated disproportionate responses to threats or pre-emptive attacks on defenceless partners (performed in the context of ongoing family violence): *Defences to Homicide – Final Report* (n 1) 194.

Chapter 4, possessed viable claims to self-defence.[8] Although the law had changed, legal advice on the prospects of acquittal remained the same as practitioners did not believe that juries would be receptive to non-traditional claims to self-defence.[9]

Secondly, the Crown was identified as having been overzealous in its prosecutions of victims of family violence and that that, alongside the remorse and anxiety of victims, was believed to have contributed to the decisions of those accused to plead guilty under Victoria's 2005 law.[10] When considering the totality of analysis undertaken in Chapters 4, 5 and 6 and the significant evidence of Practitioner I, the analysis reflects an account of why victims of family violence pleaded guilty. Although a single reason cannot be isolated (given the nature of the research), it is open to submit that the aggregate effect of the factors explains why victims with claims ultimately plead guilty.

7.3.1.1 Original insights concerning trials of victims of family violence

(a) Pathologising victims of family violence

As noted by Schuller, reliance on the use of the battered person's syndrome had been perceived as denying the rationality of a victim's response to prolonged abuse: as depicting a victim's conduct as irrational and emotional[11] within a framework of dysfunction.[12] Pertinently, Sheehy, Stubbs and Tolmie, expressed the view that defences which allowed recognition of the trauma arising from long-term abuse often reinforced the idea that an accused's behaviour was due to a psychological condition as opposed to

[8] See Chapter 4, *Relevant prosecutions* at 4.3.
[9] See Chapter 5, *The legal advice given to victims of family violence* at 5.2.1.1.
[10] See Chapter 5, *The plea decisions of victims of family violence* at 5.2.1.2.
[11] See, eg, Stanley Yeo, 'Resolving Gender Bias in Criminal Defences' (1993) 19(1) *Monash University Law Review* 111; Isabel Grant, 'The Syndromization of Women's Experience' (1991) 25(1) *UBC Law Review* 51 cited in Donna Martinson et al, 'A Forum on Lavallee v R: Women and Self Defence' (1991) 23(1) *University of British Columbia Law Review* 53-54; Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90(1) *Michigan Law Review* 42; Martha Shaffer, 'R v Lavallee: A Review Essay' (1990) 22(3) *Ottawa Law Review* 607.
[12] See, eg, Regina Schuller and Sara Rzepa, 'Expert Testimony Pertaining to Battered Woman Syndrome: Its Impact on Jurors' Decisions' (2002) 26(6) *Law and Human Behaviour* 657 and Fiona Raitt and Suzanne Zeedyk, *The Implicit Relation of Psychology and Law: Women and Syndrome Evidence* (Routledge, 2000). See also Chapter 2, *The current status of battered person's syndrome* at 2.3.5.3.

a rational, reasonable or ordinary response to the circumstances they found themselves in.[13]

Although Parliament intended that victims of family violence no longer needed to exhibit a syndrome or show an immediate link between the family violence and the actions which they had taken in response to it,[14] the preceding analysis verified that the phenomenon was perpetuated under Victoria's 2005 law. The data yielded from the participants evidenced that the Crown had traced lethal responses of victims of family violence to personal pathologies as opposed to sociocultural and socioeconomic circumstances in order to unjustly disprove the application of defensive homicide and self-defence under Victoria's 2005 law.[15] The data also evidenced that this may have had a prejudicial impact on those accused under the standard.[16]

Although this view was not shared by the majority of participants, the insight was significant when read with the analysis undertaken in Chapter 4, specifically, the analysis concerning Jemma Edwards and the commentary of defence counsel and the court concerning battered woman syndrome.[17] The same may be said of the Crown's depictions of Jade Kells and Tracey Kerr.[18] This was because the insight served as a comparative standpoint in which to determine whether the practice had continued or ceased under Victoria's 2014 law.

As expressed by Hopkins and Easteal, reasonableness is context dependent; it requires consideration of the rationality of a choice to use lethal force from the perspective of the

[13] Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'When Self-Defence Fails' in Kate Fitz-Gibbon and Arie Freiberg (ed), *Homicide Law Reform in Victoria: Retrospect and Prospects* (The Federation Press, 2015) 111. See also Chapter 2, *Perceptions of reasonableness* at 2.6.3.2.
[14] Rob Hulls, 'Foreword: Complexity and Violence, the Political Need for Reform' in Kate Fitz-Gibbon and Arie Freiberg, *Homicide Law Reform in Victoria*: *Retrospect and Prospects* (The Federation Press, 2015) vii. See also Chapter 3, *John Rawls' Theory of Justice* at 3.2.4.1.
[15] See Chapter 4, *Reviewing the eight cases to create moral principles: deductive application of inductive intuitions to manifestations of injustice arising under Victoria's 2005 law* at 4.4. See also Chapter 5, *The pathologising of victims of family violence at trial* at 5.2.1.3(a).
[16] Ibid. See also Chapter 3, *John Rawls' Theory of Justice – Justice as Fairness* at 3.2.4.1(a).
[17] Ibid. See also Chapter 4, *R v Edwards [2012] VSC 138 – Manifestations of injustice and imperfect procedural justice* at 4.3.4.3.
[18] See Chapter 4, *R v Kells [2012] VSC 53 – Manifestations of injustice and imperfect procedural justice* at 4.3.5.3 and *DPP v Kerr [2014] VSC 374 – Manifestations of injustice and imperfect procedural justice* at 4.3.8.3.

killer.[19] This 'does not mean that a woman who killed her [abuser] was necessarily acting reasonably … what it does mean is that to assess the reasonableness of a choice to kill requires engagement with the experience of the killer'.[20] The information obtained by this research has produced an original contribution to knowledge by indicating that the practice of pathologising victims is now less likely due to the family violence specific jury directions in operation today.

(b) The consequences of the abolition of provocation, the enactment of defensive homicide and the complexity of the law (including its accompanying directions)

The abolition of provocation was believed to have produced less justice for victims of family violence under Victoria's 2005 law. Although the defence of provocation had been criticised as inherently unfair and open to abuse, the enactment of defensive homicide was believed to have decreased the likelihood of victims of family violence availing themselves of self-defence on account of the confusion which defensive homicide produced at trial, specifically, in relation to its formulation and accompanying directions.[21]

These findings were consistent with the VLRC's apprehensions that any form of 'excessive self-defence' had the potential to represent a 'middle ground' which hindered women from being acquitted of murder and other offences.[22] They were also consistent with Fitz-Gibbon and Pickering's conclusions concerning the former framework's 'mind-boggling' directions[23] and Justice Weinberg's statement that a significant proportion of the criminal law in Victoria could only be described as 'incomprehensible'. [24]

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[19] Anthony Hopkins and Patricia Easteal, 'Walking in her shoes: Battered women who kill in Victoria, Western Australia and Queensland' (2012) 35(3) *Alternative Law Journal* 136. See Chapter 2, *The application of self-defence to female victims of family violence* at 2.3.3.1.
[20] Ibid.
[21] See Chapter 5, *The consequences of the abolition of provocation and enactment of defensive homicide in trials* at 5.2.1.3(b). See also Chapter 3, *John Rawls' Theory of Justice* at 3.2.4.1.
[22] Marcia Neave, 'The More Things Change - The More They Stay The Same' in Kate Fitz-Gibbon and Arie Freiberg (ed), *Homicide Law Reform in Victoria: Retrospects and Prospects* (The Federation Press, 2015) 18. See Chapter 2, *The enactment of defensive homicide* at 2.3.6.2.
[23] Kate Fitz-Gibbon and Sharon Pickering, 'Homicide Law Reform in Victoria, Australia - From Provocation to Defensive Homicide and Beyond' (2012) 52(1) *British Journal of Criminology* 167.
[24] Mark Weinberg, 'The Criminal Law: A Mildly Vituperative Critique' (2011) 35(3) *Melbourne University Law Review* 1177.

This research has produced an original contribution to knowledge by obtaining professional opinion that the complexity of Victoria's 2005 law, specifically, the abolition of provocation and enactment of defensive homicide, decreased the likelihood of victims of family violence availing themselves of a claim to self-defence at trial. The standard produced complexities in trials which diverted juries from the Rawlsian inequalities which Victoria's 2005 law had sought to address and contributed to the manifestations of imperfect procedural justice detailed in Chapter 4.

This research has also produced an original contribution to knowledge by verifying that Victoria's 2014 law, in its abolition of defensive homicide, has made jury directions on self-defence far simpler in comparison to Victoria's 2005 law. As previously expressed, juries had been less drawn to compromise verdicts to the overall benefit of victims of family violence.[25]

(c) The capacity of the law to accommodate the dynamics of family violence

This thesis has effectively heeded Fitz-Gibbon's imperative to engage with stakeholders on what had been learnt from prior attempts at reform and what had occurred under Victoria's latest package of reform.[26] In doing so, information yielded by this research contributed to and went beyond existing knowledge by demonstrating that the Victorian law of homicide had mostly ridded itself of the 'ghosts of [its] past'[27] insofar as the doctrine of self-defence and victims of family violence were concerned.

King et al. expressed doubt as to whether the statutory language of the doctrine concerning a reasonable response[28] would result in 'significant change' in practice.[29] The two acquittals of self-defence[30] alongside the testimonies of practitioners who had dealt with Victoria's 2014 law[31] reflected that the standard had been able to provide acquittals and discontinuances for adult victims of family violence who had killed their violent

[25] See Chapter 5, *The consequences of the abolition of defensive homicide* at 5.2.2.3(a).
[26] Fitz-Gibbon (n 6) 139.
[27] Ibid 141.
[28] As opposed to the possession of *reasonable grounds* for a belief in the necessity of self-defence.
[29] Charlotte King et al, 'Did Defensive Homicide in Victoria Provide a Safety-Net for Battered Women Who Kill?' A case study analysis' (2016) 42(1) *Monash University Law Review* 171.
[30] See Chapter 5, *Whether Victoria's 2014 law has increased justice in the accessibility of self-defence* at 5.2.2.
[31] See Chapter 5, *The operation of Victoria's social context provisions and family violence jury directions at trial* at 5.2.2.2.

partners even though their responses appeared to be in response to non-imminent threats of violence or disproportionate responses to active threats of violence.

As acquittals and discontinuances in such circumstances did not occur under Victoria's 2005 law, the professional opinions obtained in this research further contributed to existing knowledge by indicating that Victoria's 2014 law had increased justice in the accessibility of self-defence to a significant degree. That is, the standard was more conducive to upholding its own criterion for a 'just outcome' by possessing a greater capacity to ameliorate the fundamental Rawlsian inequalities which the 2005 law inadequately addressed.[32]

A striking example concerned the prosecution of Gayle Dunlop where a female victim of family violence was prosecuted for a lethal response[33] which may have traditionally been seen as disproportionate. Dunlop received the benefit of a compelling direction under section 322M of the Crimes Act 1958 (Vic), a Prasad direction, a prompt acquittal and the supporting opinion of a trial judge.[34] This is compelling evidence that judges, practitioners and jurors have paid regard to the fundamental Rawlsian inequalities which Victoria's 2005 law inadequately addressed. Although one case does not prove a trend, such sentiment should be read alongside the testimony of Practitioners A, D and F concerning the prosecution which they handled[35] alongside the discontinuance of the prosecution of Joanne and Shannon Debono.

Accordingly, the 2014 law is satisfactorily reducing the risk of those manifestations of injustice and incidences of imperfect procedural justice under Victoria's 2005 law rematerialising. However, this must be read with the prosecution of Jessie Donker[36] who unjustly pleaded guilty to manslaughter.

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[32] Again, that due to disparities in strength and size and continuous threats of violence, victims of family violence often killed in ways appearing to be 'at odds' with what self-defence had traditionally been understood as; a defence for those who had used force to preserve life or limb in the context of an immediate altercation. Secondly, that the law of self-defence had been seen, insofar as victims of family violence were concerned, to have inadequately accommodated disproportionate responses to threats or pre-emptive attacks on defenceless partners (performed in the context of ongoing family violence) and that lastly, lethal responses to family violence were commonly assessed to be the product of a pathology as opposed to sociocultural or socioeconomic phenomena.

[33] See Chapter 5, *Whether Victoria's 2014 law has increased justice in the accessibility of self-defence* at 5.2.2.

[34] Ibid.

[35] Ibid.

[36] *R v Donker* [2018] VSC 210 *('Donker').*

In addition to the preceding insights, the information yielded by this research extended existing knowledge by identifying that, in conformity with the intention of Parliament, the family violence directions contained within the Jury Directions Act 2015 (Vic) had '[helped jurors] … better assess self-defence in a family violence context so [that] where the actions of family violence [victims were] genuine and reasonable in the circumstances as the [victims perceived] them, they [were] … acquitted altogether'.[37]

Although members of the community often believed that family violence was limited to physical violence and that other forms of abuse were less serious,[38] this research also extended existing knowledge by confirming Fitz-Gibbon's position that the Jury Directions Act 2015 (Vic) would be able to 'dispel commonly held myths … [and] ongoing concerns regarding victim-blaming in homicide cases.[39]

Victoria's 2005 law possessed an identical social-context framework. Its lack of supporting family violence jury directions limited the effective communication to jurors that family violence extended to emotional and sexual abuse. Through the force of relevant directions being delivered from a trial judge, what was considered 'disproportionate' or 'unreasonable' under Victoria's 2005 law appears less likely to be perceived as such under Victoria's 2014 law.

It follows that Victoria's 2014 law has served to better explain the mental state and psychological context of a victim of family violence to reduce the risk of unjust pathologisation of those accused. This is attributable to the combined operation of the social context framework of evidence of family violence and the family violence jury directions which supplement it; legislative developments which have better accommodated the experiences of victims of family violence.

This has led to acquittals which, in similar cases, did not materialise under Victoria's 2005 law.

[37] Robert Clark, 'Defensive Homicide Abolition to Stop Killers Getting Away With Murder' (Media Release, 22 June 2014).
[38] Byrne (n 3) 151.
[39] Fitz-Gibbon (n 6) 137.

In demonstrating that family violence extended to sexual and psychological abuse including intimidation, harassment and threats of abuse,[40] the research also vindicated Byrne's contention that family violence jury directions would 'provide greater context for assessing claims of self-defence by victims of family violence'.[41]

The findings also added to the considerable body of research conducted on victims of family violence who remained in abusive relationships and the extent to which they were perceived as irrational or unreasonable–matters which had undermined the accessibility of self-defence to victims of family violence (and which have since been addressed by Victoria's 2014 law).[42] Lastly, the experience of participants concerning family violence directions being delivered at the commencement of trials affirmed Cossins' position that jury directions supplied early in a trial (combined with jury directions supplied in summation) addressed juror misconceptions more effectively than expert witnesses.[43]

The research supported Naylor and Tyson's position that the reforms enacted by the Crimes (Abolition of Defensive Homicide) Act 2014 (Vic) were 'symbolically important in [having given] explicit attention to family violence, the conventional legal formulations of murder and the defences around masculine relationships and responses'[44] but by confirming that the reforms were able to provide tangible and beneficial outcomes for victims of family violence.

7.4 The impact of non-legal factors on the decisions of juries and practitioners in prosecutions

Based on the findings of the socio-legal analysis undertaken in Chapter 6, gender and race did not pose foreseeable risks of imperfect procedural justice arising under Victoria's 2014 law. However, professional understandings of family violence and plea decisions continued to pose foreseeable risks of imperfect procedural justice arising. Regarding

[40] *Jury Directions Act 2015* (Vic) s 60(a)(i).
[41] Byrne (n 3) 151.
[42] Ibid.
[43] Byrne (n 3) 150. See also Annie Cossins and Jane Goodman-Delahunty, 'Misconceptions or Expert Evidence in Child Sexual Assault Trials: Enhancing Justice and Jurors Common Sense' (2013) 22(1) *Journal of Judicial Administration* 91.
[44] Bronwyn Naylor and Daniel Tyson, 'Reforming defences to homicide in Victoria: another attempt to address the gender question' (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 73.

juror interpretation and personal application of law, foreseeable risks remained but were nevertheless managed by the standard and its accompanying jury directions.

7.4.1 Gender

Although a minority of interview participants expressed concerns about the extent to which the law had acknowledged the prevalence of social prejudices pertaining to gender, the majority of participants indicated that Victoria's 2014 law had sufficiently done so and that no further legislative reform was required.[45]

These findings are an original contribution to the literature on the influence of juror gender on decision-making.[46] They are also of significance to T'Meika Knapp's study of Victoria's previous framework of self-defence, evidence of family violence and schemas (which confirmed that non-legal considerations, such as the gender of all parties involved—juror, deceased, accused—and the relationship between the accused and the deceased impacted on juror decisions regarding the application of self-defence).[47] Although Knapp's study indicated that 'the accused's gender in particular and the gender combination of the accused person and deceased person and the relationship between them all … [influenced a] participant's decisions regarding verdict, acceptance of the accused person's belief (in the necessity of self-defence), and assessment of the reasonableness of this belief',[48] the findings of this research indicate that this has, to a large extent, been addressed under Victoria's 2014 law.

The findings and the cases decided under Victoria's 2014 law were contrary to the research of Mossiere et al. which found that men commonly embrace a number of schemas regarding female victims of family violence: particularly, that they are 'passive and dependent, provoke their own beatings, enjoy the violence and can easily leave an

[45] See Chapter 6, *Gender factors* at 6.2.2.1.
[46] Annik Mossiere, Evelyn Maeder and Emily Pica, 'Racial Composition of Couples in Battered Spouse Syndrome Cases: A Look at Juror Perceptions and Decisions (2016) 33(18) *Journal of Interpersonal Violence* 4. See also Chapter 2, *The interpretation of 'reasonableness' – Knapp's Study* at 2.6.3.1.
[47] T'Meika Knapp, 'Murder, Self Defence, Defensive Homicide? Impacts of Gender and Relationship' (PhD Thesis, Deakin University, 2010) viii.
[48] Ibid ix.

abusive relationship'.[49] Such beliefs may have influenced juror perceptions concerning the reasonableness of a victim's actions, especially, if the victim remained in an abusive relationship.[50] The effectiveness of Victoria's family violence jury directions and prompt acquittal of Gayle Dunlop indicate that this issue has been, to a significant extent, addressed under Victoria's 2014 law.

7.4.2 Racial factors

Similarly, a minority of interviewees[51] expressed concerns about the extent to which the law had acknowledged the prevalence of social prejudices about race. However, the majority indicated that Victoria's 2014 law had sufficiently done so and that no further legislative reform was needed. There was insufficient evidence to suggest that the race of the deceased, accused and jurors would unjustly influence jury decisions on an accused person's belief in the necessity of self-defence or the reasonableness of their response as a result of the family violence jury directions. Victoria's family violence jury directions were, for them, sufficient to deal with racial and cultural based stereotyping.

These findings amount to an original contribution to the literature on the influence of race on juror decision-making.[52] Although Stubbs and Tolmie suggested that evidence often

[49] Mossier, Maeder and Pica (n 46). See also Brenda Russel and Linda Melillo, 'Attitudes toward battered women who kill: Defendant typicality and judgments of culpability' (2006) 33(1) *Criminal Justice and Behaviour* 219-241; Regina Schuller and Neil Vidmar, 'Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature' (1992) 16(3) *Law and Human Behavior* 273-291; M Dodge and E Greene, 'Jurors and expert conceptions of battered women. Victims and Violence' (1991) 6(4) *Violence and Victims* 271-282 and Lenore Walker, Roberta Thyfault and Angela Browne, 'Beyond the Juror's Ken: Battered Women' (1982) 7(1) *Vermont Law Review* 1-14.

[50] Mossiere, Maeder and Pica (n 46) 4. See also Diane Follingstad et al, 'Decisions to Prosecute Battered Women's Homicide Cases: An Exploratory Study' (2015) 30(1) *Journal of Family Violence* 859-874; Megan Haselschwerdt et al, Divorcing mothers' use of protective strategies: Differences over time and by violence experience' (2015) 6(1) *Psychology of Violence* 182-192; Thelma Riddell, Marilyn Ford-Gilboe and Bevery Leipert, 'Strategies Used by Rural Women to Stop, Avoid or Escape From Intimate Partner Violence' (2008) 30(1) *Health Care for Women International* 134-159. Mary Ann Dutton et al, 'Ecological Model of Battered Women's Experience over Time' *National Criminal Justice Reference Service* (Final Report, 2005) <www. ncjrs.gov/pdffiles1/nij/grants/213713.pdf>; Jessica Goodkind, Cris Sullivan and Deborah Bybee, 'A Contextual Analysis of Battered Women's Safety Planning' (2004) 10(1) *Violence Against Women* 514-533; Lisa Goodman et al, 'The Intimate Partner Violence Strategies Index: Development and Application' (2003) 9(2) *Violence Against Women* 163-186.

[51] See Chapter 6, *Political factors* at 6.2.2.2.

[52] Mossiere, Maeder and Pica (n 46) 6. See Brian Bornstein and Michelle Rajki, 'Extra-legal factors and product liability: The influence of mock jurors' demographic characteristics and intuitions about the cause of an injury' (1994) 12(2) *Behavioural Sciences & the Law* 127-147. See also Chapter 2, *Political factors – Does the race of the accused and jury decision making matter?* at 2.6.2.

misrepresented experiences of family violence,[53] Kirby J having drawn attention to battered person's syndrome developing through the experiences of Caucasian women of particular social backgrounds),[54] the findings indicated that the law possessed the capacity to respond to this. Pertinently, the testimony of Practitioners A and D[55] challenged what Douglas found prior to the reforms that those who were typically acquitted of self-defence tended to be 'benchmark' battered victims.[56]

7.4.3 Professional understandings of family violence and practice related pressures

The responses of the participants, as indicated above, were consistent with the hypothesis suggested in Chapter 4 that professional understandings of family violence and plea decisions continued to pose foreseeable risks of* imperfect procedural justice *arising under Victoria's 2014 law. Although a degree of cultural change had occurred within the legal profession surrounding professional understandings of family violence, the abolition of defensive homicide had placed pressure on victims of family violence to plead guilty to manslaughter as reflected in the testimony of Practitioners D and F (and possibly, the plea of Jessie Donker).[57]

7.4.3.1 Cultural change

In relation to cultural change, judges in particular, have shown a greater awareness of the dynamics of family violence and their relevance to self-defence. The remarks of Lasry J[58] following the acquittal of Gayle Dunlop and the remarks of Croucher J in the sentencing of Jessie Donker[59] evidence these changes. For legal practitioners, the reforms were found

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[53] Julie Stubbs and Julia Tolmie, 'Race, Gender and the Battered Woman Syndrome: An Australian Case Study' (1995) 8(1) *Canadian Journal of Women and the Law* 122. See also David Faigman and Amy Wright, 'The Battered Woman Syndrome in the Age of Science' (1997) 67(1) *Arizona Law Review* 111; Martha Shaffer, 'The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After R v Lavallee' (1997) 47(1) *University of Toronto Law Journal* 13 and *Osland v The Queen* [1998] HCA 75 [161] (Kirby J) ('*Osland*').

[54] *Osland* (n 53).

[55] See Chapter 5, *Whether Victoria's 2014 law has increased justice in the accessibility of self-defence* at 5.2.2.

[56] Heather Douglas, 'A consideration of the merits of specialised homicide offences and defences for battered women' (2012) 45(3) *Australian & New Zealand Journal of Criminology* 377.

[57] *Donker* (n 36). See Chapter 2, *Professional factors – understandings of family violence and plea decisions* at 2.6.4.

[58] *DPP Reference No 1 of 2017* [2018] VSCA 69 ('*DPP Reference No 1*').

[59] *Donker* (n 36).

to have provided greater guidance to them with a proportion of participants indicating that defence counsel were more likely to use the law of self-defence and prosecuting counsel were more likely to demonstrate a greater comprehension of the dynamics of family violence.

In the prosecutions of female victims of family violence between 2005 and 2014, the DVRCV observed that practitioners focused on physical forms of family violence and gave little significance to psychological impacts concerning coercion, intimidation and sexual violence.[60] These limited understandings of family violence extended to the cumulative impact of the various forms of family violence and how this contributed to perceptions of danger.[61] Additionally, practitioners had struggled to understand why women had not left their violent partners.[62] None of the women were perceived as rational actors who had 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.[63]

Accordingly, the findings of this research concerning legal practice after 2014 amount to an original contribution to the literature on professional understandings of family violence demonstrated by legal counsel. Practitioners are now more likely to introduce a broader range of evidence on family violence and have increased the likelihood of practitioners acknowledging and acting upon the cumulative effects of the various forms of family violence and their effects on victims.[64]

As a result, these findings ultimately clarify Naylor and Tyson's uncertainty over whether the reforms would promote a consistently greater understanding of family violence among the profession and change the daily practices of judges and lawyers.[65] That being said, responses indicated that it was 'naïve' to assume that the substantive content of the law would consistently compel particular courses of action.

[60] Kirkwood, McKenzie and Tyson (n 2) 39. See Chapter 2, *Recognition of the impact of family violence* at 2.4.1.1.
[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] See Chapter 6, *Professional understandings of family violence and plea decisions* 6.2.2.3.
[65] Naylor and Tyson (n 44) 73. See Chapter 2, *Recognition of the impact of family violence* at 2.4.1.1. See also Chapter 2, *Plea decisions* at 2.4.6.2 and Chapter 8, *Future research directions* at 8.5.

This sentiment was supported by the plea of Jessie Donker [66] and the testimony of Practitioners D and F.[67] It also reaffirmed the significance of the VRCFV's conclusions that: the nature and dynamics of family violence must be properly understood by judicial officers and legal representatives;[68] that understandings of family violence were to be regarded as 'core business' of courts and legal practitioners, including those involved in homicide trials[69] and that improving practices, through education, training and embedding best practice and family violence specialisation in the courts, was likely to be more effective than law reform.[70]

7.4.3.2 Professional understandings of family violence and plea decisions

As previously explored, Practitioners D and F initially felt pressured for clients to plead guilty to manslaughter. This raised implications for the extent to which the Crown had better understood the dynamics of family violence. Practitioner A maintained that the Crown remained willing to accept manslaughter pleas as it had become more aware of the dynamics of family violence.[71] Practitioner C, on the other hand, believed that the Crown had simply become aware of the increased possibility of self-defence being successful at trial and were therefore willing to accept manslaughter pleas so that a 'win' could be recorded.[72] Perhaps, as suggested by Practitioners D and F, the Crown felt increasingly pressured to secure manslaughter pleas.[73]

Although such claims must be weighed in context of the discontinuation of the prosecution of Joanne and Shannon Debono,[74] concerns remain under Victoria's 2014 law. Firstly, the Crown elected to prosecute Gayle Dunlop[75] for murder (which was met with the provision of a Prasad direction) and a prompt acquittal. Secondly, Jessie Donker

[66] *Donker* (n 36).
[67] See Chapter 6, *Professional understandings of family violence and plea decisions* at 6.2.2.3.
[68] *Royal Commission into Family Violence* (Final Report, March 2016) vol 3, 225. See also Chapter 2, *Victorian Royal Commission into Family Violence* at 2.2.4.
[69] Ibid. See also Chapter 2, *Victorian Royal Commission into Family Violence* at 2.2.4.
[70] Ibid 189.
[71] Ibid.
[72] See Chapter 6, *Professional understandings of family violence and plea decisions* .
[73] Ibid..
[74] See Chapter 4, *Joanne and Shannon Debono* at 4.6.2.
[75] *DPP Reference No 1 of 2017* (n 58).

pleaded guilty to manslaughter (which led a sentencing judge to comment on the viability of self-defence).[76]

It cannot be said that the Crown has shown a consistently greater degree of receptivity to the dynamics of family violence and viable claims to self-defence during the operation of the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic). Additionally, the plea of Jessie Donker represents evidence of defence counsel not mobilising the law to its potential though such a finding must be weighed with an accused's legal right to plead guilty.

Although the VDJ maintained that the abolition of defensive homicide would encourage more women to pursue self-defence at trial,[79] the DVRCV cautioned that the absence of a partial defence to murder, and the prospect of an 'all or nothing' approach to trial could lead more women to plead guilty to murder or manslaughter as opposed to proceeding to trial and being found guilty of murder.[80] This research has confirmed that such pressure has been apparent under Victoria's 2014 law.[81] That being said, it cannot be overlooked that Gayle Dunlop was not dissuaded or deterred from proceeding to trial on the basis of self-defence leading to an acquittal.

The DVRCV sought greater clarity on the extent to which the reformed law had increased the accessibility of self-defence in plea decisions.[82] This research has also shed light on the DVRCV's concern that victims of family violence could be making a 'safe' decision in not proceeding to trial under the new law.[83] Its concern was partially validated.

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[76] *Donker* (n 50).
[79] Department of Justice, 'Defensive Homicide: Proposals for Legislative Reform', *Victoria State Government* (Consultation Paper, September 2013) vii <https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2018/07/23/3f7c88ccc/defensivehomicideconsultationpaper2013.pdf> ix.
[80] Kirkwood, McKenzie and Tyson (n 2) 50. See Chapter 2, *The abolition of defensive homicide and enactment of the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic)* at 2.5 where the DVRCV cautioned that the absence of defensive homicide may place greater pressures on victims of family violence to plead guilty to homicide offences.
[81] See Chapter 6, *Professional understandings of family violence and plea decisions*at 6.2.2.3. See also Chapter 8, *Future research directions* at 8.5.
[82] Ibid 43.
[83] Ibid.

In essence, these findings confirm and extend Kirkwood, McKenzie and Tyson's previous conclusion that the abolition of defensive homicide would be an 'experiment'[84] that left female accused in a precarious situation[85] until evidence suggested that its abolition had better accommodated responses to family violence in the realm of plea negotiations. The research has provided evidence that female accused are still not entirely protected.[86] In its analysis of the plea of Jessie Donker, the research has also validated Sheehy, Stubbs and Tolmie's concerns that women may plead guilty to lesser offences under the reformed law and be deprived of potentially valid claims to self-defence because of the risks of conviction of murder at trial.[87]

As the research has demonstrated that the risk of imperfect procedural justice has persisted under the reformed law (given the plea of Jessie Donker), the findings of the research also validate the significance of the RFCV's reference to the DVRCV's submission that enhancing prosecutorial guidelines in Victoria may help prosecutors determine appropriate charges.[88] Pertinently, the research has considered prosecutorial guidelines and has offered original contributions in the form of proposed reforms at 7.6.2.1(b).

7.4.4 Juror interpretation and personal application of law

In contrast to the preceding commentary in [7.4.1] and [7.4.2], the responses of the participants were consistent with the hypothesis presented in Chapter 4 that juror interpretation and personal application of law continued to pose foreseeable risks of imperfect procedural justice under Victoria's 2014 law. However, practically speaking, they were likely to be managed by the standard and no reforms were warranted.

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[84] Ibid 50. See Chapter 2, *Plea decisions* 2.6.4.2. See also Chapter 8, *Are further reforms to the defence of self-defence needed in order to facilitate greater access to this defence for victims of family violence who kill their violent partners?* at 8.3.4.
[85] Ibid.
[86] See Chapter 6, *Professional understandings of family violence and plea decisions*at 6.2.2.3.
[87] Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Battered women charged with homicide in Australia, Canada and New Zealand: How do they fare?' (2012) 45(3) *Australian & New Zealand Journal of Criminology* 383-399.
[88] The VRCFV noted that the DVRCV suggested the establishment of a specialist domestic homicide list for courts and a specialist 'domestic homicide' unit within the Office of Public Prosecutions. However, the Commission believed that the entire profession needed to be familiar with the nature of family violence. *Royal Commission into Family Violence* (n 68), 201. See also Chapter 2, *Victorian Royal Commission into Family Violence* at 2.2.4.

As stated by Justice Weinberg during the operation of the Crimes Homicide Act 2005 (Vic), the criminal law had:

> [B]ecome so complex that it is almost the exception rather than the rule that a case runs smoothly, and without significant error. Of all the branches of the law, it is surely the criminal law that should be most readily accessible and easily understood. The reality is quite different … many aspects of the criminal law … can only be described as incomprehensible.[89]

In contradistinction to Justice Weinberg's comments, the responses of the participants revealed that Victoria's 2014 law had made the law more comprehensible to jurors by removing defensive homicide and utilising family violence jury directions. They believed that the law's emphasis on an objectively reasonable response was more accessible by focussing on what a person actually did unlike the reasonable grounds formulation which concerned the accused's reasons. The reformulation of the law was also believed to have sufficiently accommodated the subjective realities of victims of family violence.

This is significant to the findings of Knapp's pre-reform research.[90] Of 259 study participants who concluded that an accused person's belief in the necessity of their actions was based on reasonable grounds, only 6.9% correctly concluded that the verdict should be a full acquittal whereas 93.1% of participants incorrectly concluded that the verdict should be manslaughter.[91] In effect, the findings of this research support Byrne's contention that Victoria's new test for self-defence and its accompanying family violence provisions and directions '[are] … more intuitive for jurors and therefore easier to apply'.[92] Accordingly, just verdicts are more likely to be delivered.

As a corollary, the risk of compromise verdicts undermining justice in the accessibility of self-defence has decreased. In compromise verdicts of guilt for lesser offences in self-defence cases involving long-term abuse, an accused's behaviour may have been affected

[89] Weinberg (n 24) 1177.
[90] T'Meika Knapp, 'Murder, Self Defence, Defensive Homicide? Impacts of Gender and Relationships': (PhD Thesis, Deakin University, 2010. See also Chapter 2, *Gender* at 2.6.1.
[91] Knapp (n 90) 67.
[92] This is because the test avoids an 'excessive focus' on the quality of the 'belief' and an examination of the quality of the reasons for a person's belief that it was necessary to act in self-defence. This is useful where jurors do not understand the dynamics of family violence in that the test highlights that the relevant circumstances are what the accused perceives them to be: Byrne (n 3) 149.

by abuse while also being a rational response to the circumstances of abuse.[93] As recounted by Sheehy, Stubbs and Tolmie, these two issues were sometimes difficult to reconcile.[94] That is, defences which allowed the recognition of trauma arising from abuse may have reinforced the idea that a victim's behaviour was due to a psychological condition and not the product of a rational, reasonable or ordinary response to the circumstances they found themselves in.[95]

The findings of this research have indicated that victims of family violence are less likely to be pathologised by judges, counsel or jurors under Victoria's 2014 law. They have made an original and substantial contribution to knowledge by revealing that Victoria's 2014 law has placed greater emphasis on the rationality of their responses to the circumstances of abuse. These findings are not only reflected in the insights of the participants, but in the remarks made by Lasry and Croucher JJ in the prosecutions of Gayle Dunlop[96] and Jessie Donker[97] (respectively). In relation to these findings and remarks, a subsidiary contribution to the literature is the conclusion that the courts are extending their roles by ensuring that 'the narratives and messages that [arose] from criminal proceedings and judgments [are] aligned with those identified in Australia's shared framework for the primary prevention of violence against women and children'.[98]

The findings above also vindicate Byrne's call for jury directions to be comprehensible to ordinary members of the public on a jury with no particular knowledge of the law as there is little value in jury directions being correct in law if juries do not understand them.[99] Under Victoria's 2005 law, the rationale of defensive homicide was never explained to juries despite it having been intended to overcome misunderstandings

[93] Sheehy, Stubbs and Tolmie (n 13) 111. See also Chapter 2, *Perceptions of reasonableness* at 2.6.3.2.
[94] Ibid.
[95] Ibid.
[96] See Chapter 4, *Manifestations of injustice and imperfect procedural justice* at 4.6.3.3: *Donker* (n 36).
[97] See Chapter 4, *Manifestations of injustice and imperfect procedural justice* at 4.6.1.3 and *DPP Reference No 1* (n 58).
[98] Mandy McKenzie et al, 'Out of Character - Legal Responses to intimate partner homicides by men in Victoria 2005-2014', Domestic Violence Resource Centre Victoria (Discussion Paper, 2016) 7 <http://www.dvrcv.org.au/sites/default/files/out_of_character_dvrcv.pdf>.
[99] In Byrne's reflection, the trial judge's task was to explain the law but this did not require the trial judge to explain the rationale for the law. How would a jury have interpreted its existence? Would the jury have thought that it was an option for them because a woman who [killed] in response to family violence is not acting reasonably or would often not be acting reasonably? This interpretation would be understandable in the context of common misconceptions [concerning] family violence: Byrne (n 3) 146.

concerning family violence.[100] As put by Fitz-Gibbon, 'if those within the law [were] unable to assess the actions of persons who [killed] in response to prolonged family violence meaningfully, then the law of homicide [was] likely to lead to injustice regardless of the formation of legal categories'.[101]

The findings of this research ultimately supplement Fitz-Gibbon's position by indicating that Victoria's 2014 law has promoted the meaningful and holistic analysis of claims to self-defence arising in circumstances of family violence. The standard's abolition of defensive homicide, reformulation of the doctrine of self-defence and stipulation of family violence jury directions has reduced the complexity of the law and has communicated the rationale of the law more effectively to juries as seen in the prosecution of Gayle Dunlop.[102]

Nevertheless, it is noteworthy that a number of interviewees highlighted that 'common-sense justice' rather than the strict application of jury instructions sometimes guided jury verdicts. Indeed, a majority of interviewees believed that 'common-sense justice' posed a foreseeable risk of imperfect procedural justice arising under Victoria's 2014 law. However, it was believed that juries under the 2014 law would sufficiently militate against any impermissible reasoning employed by jurors in their deliberations on the innocence or guilt of victims of family violence.[103] Specifically, that prosecutions which involved a single act of family violence perpetrated by the deceased were unlikely to be judged unfavourably due to perceptions that a killing stemmed from a 'license to kill'. .[104]

Overall, these findings amount to an original and substantial contribution to the literature[105] concerning the complexity of the Victorian law of homicide and self-defence.

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[100] Ibid 147.
[101] Fitz-Gibbon (n 6) 141. See Chapter 2, *Perceptions of reasonableness* at 2.6.3.2.
[102] See Chapter 5, *Whether Victoria's 2014 law has increased justice in the accessibility of self-defence* at 5.5.2.
[103] See Chapter 6, *Juror interpretation and personal application of law* 6.2.2.4.
[104] Ibid.
[105] See eg, *Babic v The Queen* (2010) 28 VR 297. See also Fitz-Gibbon and Pickering (n 23) 167 and Elizabeth Najdovski-Terziovski, Jonathan Clough and James Ogloff, 'In your own words: A survey of judicial attitudes to jury communication' (2008) 18(2) *Journal of Judicial Administration* 80.

7.5 Are further reforms to the defence of self-defence needed?

Based on the findings of this research and the insights collected from the interviewing process, it may tentatively be said that no further doctrinal reform to the law of self-defence is required. However, more prosecutions should be reviewed by the VLRC and VDJ in future given the limited amount which have transpired to date.[106] Separately, the prosecutions of Gayle Dunlop, Jessie Donker and the professional pressures explored under heading 7.4.3.2 indicate that the OPP should consider policy reforms and education of its officers including crown prosecutors in relation to family violence and its intersection with the law of self-defence. The matter of reform is discussed at 7.6.2.1(b).

7.6 Significance and implications

7.6.1 Academic and practical significance

Overall, this research has identified and filled gaps in the scholarly literature on the law of self-defence and its intersections with victims of family violence focussed on the jurisdiction of Victoria. It was a comprehensive study of relevant cases under Victoria's previous law of self-defence. It was systematic, conscientious and oriented towards theories of justice. It establishes that the previous law unjustly failed to accommodate victims of family violence who killed their violent partners. It also substantiates that Victoria's reformed law of self-defence has increased the accessibility of self-defence to victims of family violence. Additionally, it has established that there are still professional pressures which pose risks of imperfect procedural justice.

Its contribution to practice in the area goes beyond that addition to the literature. The professional insights of those working in the area, a judge, nine lawyers, one legal academic and a forensic psychologist, have provided information on the previous and present law of self-defence and whether further law reform is required.

[106] In the form of a periodic review of the legislation. Stephen thought that codes should be revised every ten years. He said: The process of codification consists in summing up, from time to time, the results of thoughts and experience. One of its principal merits is that in this way it continually supplies, or ought to supply, new points of departure; and this, instead of hampering or fettering the progress of the law towards the condition of a science, would contribute to it enormously: John D Heydon, 'Reflections on James Fitzjames Stephen' (2010) 29(1) *University of Queensland Law Journal* 43, at 63 quoting James Fitzjames Stephen, 'Codification in India and England' (1872) 18 *Fortnightly Review* 644, at 672.

For the legal profession and those involved in such trials, the research has yielded insights on the professional challenges which legal practitioners may encounter with the current law in representing a victim of family violence. Additionally, the research has identified flaws in the approaches adopted by the Crown[107] in its prosecution of victims of family violence and the need for them to be addressed. In turn, the community is the beneficiary of a fair and just legal system and the protection such systems give to us all. It has benefited as this research has assessed the quality of representation[108] afforded to those who seek to rely on self-defence in response to killing their violent partners.

Lastly, the research has affirmed the ongoing relevance of the use of Rawls' theory of justice. The strength of this thesis stems from its relevant focus on justice and hence, the legitimacy of the criminal law and its process. Despite the criticisms of Rawls,[109] such considerations did not, in the submission of the researcher, prevent the research from demonstrating that questions of justice had been contemplated by lawmakers and that their enacted intentions were not and would not always be realised within legal processes.

The research has also affirmed the relevance of socio-legal methodology as a means to explore the intersection of law, professional pressures and social realities in the view of facilitating justice for all.

7.6.2 Implications

The unjust failure of Victoria's 2005 law to accommodate victims of family violence warrants ongoing observation of the 2014 law's intersection with victims of family violence and their claims to self-defence.

Although Victoria's 2014 law has increased justice in the accessibility of self-defence to a significant degree, the results indicate that both prosecution and defence counsel must

[107] If a victim of family violence has a cogent claim to self-defence, is prosecuted for murder despite that claim and then receives the benefit of a *Prasad* direction and a prompt acquittal from a jury (having waived the direction), it may reasonably be inferred that there has been a flaw in the prosecutorial decision-making process. Similarly, if a victim of family violence has a cogent claim to self-defence, is committed to trial for manslaughter and is then committed for murder (through a DPP's decision to issue an ex-officio indictment) only for the trial to collapse with a concession that the Crown cannot prove manslaughter or murder, a perception of flawed prosecutorial decision-making concerning victims of family violence tentatively emerges.

[108] By asking the participants about the prosecutions of victims of family violence and analysing the insights which were gleaned from the interviewing process.

[109] See Chapter 3, *Critique and defence of Rawls* at 3.2.6.4.

be regularly updated on family violence and exercise greater diligence and conscientiousness in their prosecutions and defences of victims of family violence.

7.6.2.1 Prosecution counsel

Regarding prosecution counsel, the prosecutions of Gayle Dunlop and Jessie Donker alongside the testimony of Practitioners D and F reflect the need for a comprehensive policy guiding the prosecutions of victims of family violence who kill their violent partners.

(a) OPP Prosecution policy

Presently, a prosecution in Victoria may only proceed if:[110]

- There is a reasonable prospect of a conviction; and
- a prosecution is in the public interest.

In determining whether there is a reasonable prospect of conviction, regard must be had to:[111]

- All admissible evidence;
- the reliability and credibility of the evidence;
- the possibility of evidence being excluded;
- any possible defence;
- whether the prosecution witnesses are available, competent and compellable;
- any conflict between eye-witnesses;
- whether there is any reason to suspect that evidence may have been concocted;
- how the witnesses are likely to present in court;
- any possible contamination of evidence; and
- any other matter relevant to whether a jury or magistrate would find the person guilty.

If there is a reasonable prospect of a conviction, consideration must then be given to whether the prosecution is in the public interest. The prosecution must proceed unless

[110] Kerri Judd QC, 'Policy of the Director of Public Prosecutions for Victoria' *Office of Public Prosecutions Victoria* (Policy Document, 17 December 2019) 2-4.
[111] Ibid.

there are public interest factors tending against prosecution which outweigh those tending in favour.[112]

(b) Proposed reform

The prosecutions of Gayle Dunlop and Jessie Donker give rise to a perception[113] that the OPP's policies and procedures give insufficient weight to 'the circumstances as the accused perceives them' [pursuant to section 322K], the family violence provisions [sections 322M and 322J] and: 'the existence of any possible defence(s)' to victims of family violence who kill their violent partners; the culpability of victims of family violence; the prevalence (lack thereof) of the offence; the consequences of convictions being unduly harsh; the mental health of witnesses and mitigating circumstances.[114]

In the absence of a clear family violence policy, the Crown's prosecutions of victims of family violence who kill their violent partners and hold viable claims to self-defence perpetuates the risk of further imperfect procedural justice (such as that observed in the plea of Jessie Donker). Although there is a substantial public interest in the prosecution of homicides, the Victorian OPP's prosecution policy should afford greater weight to the factors outlined above in order to decrease the likelihood of further instances of imperfect procedural justice such as that observed within the plea of Jessie Donker.

The prosecutions policy presently provides that particular attention be given to whether a prosecution is in the public interest if the prosecution concerns child offenders, a young

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[112] Offence related factors include: the seriousness of the offence and the age of the offence. Offender related factors include: the offender's culpability; the offender's antecedents and background; the age, physical health, mental health or disability of the offender; whether the offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the offender has done so. Other factors include: community protection; the likely sentence; the prevalence of the offence and the need for specific and general deterrence; the need to maintain public confidence in constitutional institutions such as the courts and Parliament; whether the consequences of a conviction would be unduly harsh or oppressive; any circumstances that would prevent a fair trial; the age, physical health, mental health or disability of any witnesses; the obsolescence or obscurity of the law; whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute; the availability and efficacy of any alternatives to prosecution; the likely length of a trial; whether a sentence has already been imposed on the offender which adequately reflects the criminality and any mitigating or aggravating circumstances: ibid.

[113] Again, if a victim of family violence has a cogent claim to self-defence, is prosecuted for murder despite that claim and then receives the benefit of a *Prasad* direction and a prompt acquittal from a jury (having waived the direction), something has gone awry in the prosecutorial decision-making process. Similarly, if a victim of family violence has a cogent claim to self-defence, is charged with murder, pleads guilty to manslaughter and a sentencing judge advises that the accused had a sound basis to argue for outright acquittal, a pattern of flawed prosecutorial decision-making emerges. See also Chapter 2, *Victorian institutional responses* at 2.2.3 where consciousness raising is concerned.

[114] Judd (n 110). See also Chapter 2, *Plea decisions* at 2.6.4.2.

person who has committed an offence in the context of a consenting sexual relationship with another young person, offenders with cognitive impairments and persons who commit offences while detained involuntarily in psychiatric hospitals.[115]

It is submitted that the policy be amended to include that particular attention must also be given to 'victims of family violence'. Under such a section, weight should be given to:

- The defence of self-defence [s 322K of the Crimes Act 1958 (Vic)];
- The operation of the family violence provisions pertaining to self-defence [s 322M and s 322J of the Crimes Act 1958 (Vic)]; and
- The evidential burden of self-defence [s 322I of the Crimes Act 1958 (Vic)].

Where evidence of prior family violence suggests a reasonable possibility of the existence of facts that, if they existed, would establish self-defence, the DPP, its delegates or the OPP would be obliged to investigate that history and proactively liaise with defence counsel on the matter of discontinuation.

If a prosecution were to proceed in spite of this policy, the DPP should be satisfied that the accused has accessed family violence and trauma-informed counselling in relation to the circumstances of the offending. All prosecution counsel handling such matters should be appropriately trained in family violence and its intersection with the law of self-defence.

7.6.2.2 Defence counsel

The plea of Jessie Donker[116] reflects that defence counsel may still not be using the law to its full potential. While an accused has a right to plead guilty to a homicide offence out of fear, remorse or fear of harsher punishment, defence counsel should use the law of self-defence to its full potential. Ignorance of the law and its purpose is unsatisfactory. Both

[115] Ibid 2-4.
[116] See Chapter 6, *Professional understandings of family violence and plea decisions*at 6.2.2.3.

judges and juries are receptive to the claims of victims of family violence under Victoria's 2014 law and have adjudicated them fairly.

Practitioners must know the law and the dynamics of family violence and not be intimidated by dogmatic prosecutorial approaches. They can increasingly rely on judicial understandings of family violence alongside the attention which media and interest groups have given to prosecutorial unfairness. Ideally, fairer prosecutorial appraisals will ensure that those with viable claims to self-defence are not put in this position in the first place.

Where a trial ensues, practitioners must request judges to direct on family violence as a matter of best practice and must call expert evidence even when it is difficult to obtain.[117] Both practitioners and judges must ensure that the directions are clear, precise and as comprehensible as possible to members of the jury. Practitioners must also be aware of their client's mental health and ensure that their clients have had access to family violence, trauma-informed counsellors before any decision is made as to whether to proceed to trial or plead guilty.[118]

7.7 Conclusion

This chapter has provided a discussion of the significance of the results detailed in the preceding chapters and the implications which arose from those results. It emerged from the Rawlsian analysis of the cases undertaken in Chapter 4, and the interview data in Chapter 5, that the 2005 law failed to inspire confidence in victims of family violence to proceed to trial despite the existence of viable claims to self-defence. This was due to the provision of dated legal advice, overzealous prosecution and the remorse of victims of family violence.

At trial, the enactment of defensive homicide and the codification of the common law defence of self-defence produced complexities and perplexing jury directions. These issues were exacerbated by the Crown's pathologisation of victims of family violence

[117] Ibid.

[118] This would safeguard against clients pleading guilty in the event that they believe they are responsible for the violence inflicted upon them and their defensive responses to such violence. Such a process would arguably manage the substantial grief and remorse that one would realistically experience following the commission of a homicide in such circumstances. See also Chapter 2, *Professional understandings of family violence and plea decisions* at 2.6.4.

which was ostensibly undertaken to unjustly disprove the application of defensive homicide and self-defence. The analysis also revealed that where the Crown pathologised the victim during trial, the sentencing judge invariably used that characterisation during the sentencing process. While the majority of interview participants did not agree with the analysis pertaining to pathologisation, the totality of the Rawlsian analysis nevertheless contributed to a deeper understanding of why victims of family violence were unable to successfully raise self-defence when viewed alongside the work of the DVRCV.

Although the 2005 law possessed an identical social-context framework to the 2014 law, the abolition of defensive homicide, the reformulation of self-defence and enactment of the Jury Directions Act 2015 (Vic) had provided victims of family violence who killed their violent partners with better access to self-defence. The majority of interview participants were of the view that the 2014 law and the provisions of the Jury Directions Act 2015 (Vic) had reduced the risk of pathologisation by the Crown and had fostered a better understanding of the concomitants of family violence by judges and lawyers alike. It is to be noted, however, that a minority of interviewees expressed contrary views.

That being said, the majority of participants were of the view that the 2014 law had been less complex to navigate and that it had encouraged defence counsel to make better use of expert testimony and jury directions provided at the beginning of trial. Lastly, because of the simplification of the law, the participants believed that the jury directions were more likely to be understood by juries and that overall, the standard had been more conducive to upholding its criterion of a just outcome in comparison to Victoria's 2005 law.

With regard to the socio-legal analysis undertaken in Chapter 6, gender and racial factors were found to not pose risks of imperfect procedural justice under the 2014 law. Although 'common sense' justice was highlighted as a foreseeable risk, participants believed that the revised standard and the jury system were sufficient. That being said, the collective analysis of Chapter 4, 5 and 6 demonstrated that the 2014 law had not necessarily accommodated responses to family violence where plea negotiations were concerned. This proved to be the case for Jessie Donker[125] who was charged with murder but pleaded

[125] *Donker* (n 36).

guilty to manslaughter in spite of evidence reflecting a compelling claim to self-defence.[126]

Finally, the prosecutions of Gayle Dunlop[127] and Jessie Donker[128] suggest that the discretion of the OPP to prosecute cases concerning victims of family violence requires reform, so that where evidence of family violence suggests a reasonable possibility of the existence of facts that, if they existed, would establish self-defence, the DPP, its delegates or the OPP, must investigate the history of violence and, if there is cogent evidence of it, liaise with defence counsel as to a discontinuance of the prosecution.

The next chapter provides an answer to the overarching research question and its subsidiary questions, the limitations of the research, and suggestions for further research.

[126] The precise reason for Jessie Donker entering a plea of guilty is not known, but it suggests a number of possibilities. Firstly, that the advice she was given by defence counsel may have reflected a lack of understanding of the reformed law, or, if such an understanding existed, arose from the inexperience of defence counsel, or simply, their lack of courage to run such a trial, preferring rather to recommend a plea of guilty to manslaughter. Secondly, the Crown's default to a charge of murder and the risk of trial may have unduly influenced her decision when viewed in light of pre-sentence detention and the length of sentence which a remorseful plea to manslaughter would attract. Lastly, Donker may have felt guilty for the death of Powell in spite of having no other way to protect herself from death or serious injury. If that was the case, it suggests that the community, as a whole, requires further education on family violence and the right of victims to defend themselves.

[127] *DPP Reference No 1 of 2017* (n 58).
[128] *Donker* (n 36).

CHAPTER 8
CONCLUSION

8.1 Introduction

In the previous chapter, the findings of this research were discussed, implications drawn from those findings and contributions to knowledge presented. This chapter provides answers to the overarching research question and its subsidiary questions, and outlines the limitations of the research and suggestions for future research.

8.2 The focus of the research

This research theorised that Victoria's previous law of self-defence and family violence evidence, as reflected in the enactment of the Crimes (Homicide) Act 2005 (Vic), embodied Rawls' conception of justice as fairness: a 2005 law which represented a set of criteria for a just outcome. When it came to eight prosecutions under this standard, the criteria were applicable. However, 14 manifestations of injustice arose in these prosecutions with the effect of unjustly preventing each accused from attaining a just outcome: processes reflecting Rawls' conception of imperfect procedural justice.

The extent to which the doctrinal content of the law failed to prevent these injustices arising in the first instance may be regarded as the extent to which Victoria's previous law of self-defence and family violence evidence unjustly failed to accommodate the experiences of victims of family violence in criminal prosecutions, who were alleged to have killed their violent partners.

Additionally, the enactment of the Crimes (Abolition of Defensive Homicide) Act 2014 (Vic) was said to represent Rawls' conception of reflective equilibrium: a process leading to the creation of a 2014 law. With regard to the three prosecutions analysed under this standard, the criteria were also applicable. However, in contrast to Victoria's 2005 law, two prosecutions appropriately resulted in acquittal and discontinuance (respectively).

However, one manifestation of injustice arose within the third prosecution with the effect of unjustly preventing the accused from attaining a just outcome: a process further reflecting Rawls' conception of imperfect procedural justice.

Having regard to these conclusions and the literature, the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) was hypothesised to have increased justice in the accessibility of self-defence to victims of family violence who kill their violent partners in that the standard was more conducive to upholding its own criteria for a 'just outcome'. In other words, the standard was less likely to occasion Rawls' imperfect procedural justice (in comparison to Victoria's 2005 law). Nevertheless, non-legal factors were also theorised to continue to pose foreseeable risks of imperfect procedural justice arising under Victoria's 2014 law.

8.3 Answers to the research questions

8.3.1 Did the previous law of self-defence and the evidence used to raise the defence in the context of family violence, unjustly fail to accommodate the experiences of family violence victims in criminal prosecutions who were alleged to have killed their violent partners?

On the first subsidiary research question[1] of whether the previous law of self-defence (and the evidence used to raise the defence in the context of family violence) unjustly failed to accommodate the experiences of family violence victims in criminal prosecutions who were alleged to have killed their violent partners, the doctrinal and philosophical inquiry undertaken in Chapter 4 revealed that the law had unjustly failed.

8.3.2 Did the 2014 reforms to the law of self-defence result in increased justice in that the defence became more available to victims who killed their violent partners?

[1] See Chapter 1, *Research questions* at 1.2. See also Chapter 2, *The operation of the Crimes (Homicide) Act 2005 (Vic) and its application to female victims of family violence* at 2.4 and Chapter 4, *Relevant prosecutions* at 4.3.

Regarding the second subsidiary research question[2] of whether the 2014 reforms to the law of self-defence resulted in increased justice (in that the defence became more available to victims who killed their violent partners), the interviews with 12 participants and the qualitative analysis employed in Chapter 5 indicated that justice in the accessibility of self-defence had increased to a significant degree.

8.3.3 Did relevant non-legal factors impact the decisions of juries and practitioners in the context of family violence and consequently reduce justice in the accessibility of the present law of self-defence?

On the third subsidiary question[3] concerning whether relevant non-legal factors impacted on the decisions of juries and practitioners in the context of family violence and consequently reduced justice in the accessibility of the present law of self-defence,, the socio-legal analysis used in Chapter 6 found that professional understandings of family violence, plea decisions and personal juror interpretations of the law[4] continued to pose foreseeable risks of imperfect procedural justice.

8.3.4 Are further reforms to the defence of self-defence needed in order to facilitate greater access to this defence for victims of family violence who kill their violent partners?

Regarding the fourth subsidiary question[5] of whether further reforms to the defence of self-defence were needed in order to facilitate greater access to this defence for victims of family violence who kill their violent partners, the analysis revealed that, tentatively speaking, no further doctrinal reform of the law of self-defence was required.[6] However,

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[2] See Chapter 1, *Research questions* at 1.2 See also Chapter 2, *The abolition of defensive homicide and enactment of the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic)* at 2.5 and Chapter 5, *Whether Victoria's 2014 law has increased justice in the accessibility of self-defence* at 5.2.2.

[3] See Chapter 1, Research questions at 1.2. See also Chapter 2, Jury decision-making at 2.6 and Chapter 6, *Do relevant non-legal factors impact the decisions of juries and practitioners in the context of family violence and consequently reduce justice in the accessibility of the present law of self-defence?* at 6.2.2.

[4] Albeit, managed by the *2014 law*

[5] See Chapter 1, *Research questions* at 1.2. See also Chapter 6, *Whether suggestions for law reform to render self-defence more just are necessary* at 6.3.2.

[6] Additionally, in Chapter 7, *Are further reforms to the defence of self-defence?* at 7.5, it was advised that the VLRC and VDJ undertake a periodic review of the legislation.

reform of the Policy of the Director of Public Prosecutions for Victoria[7] concerning its discretion to prosecute victims of family violence was found to be necessary.

8.3.5 To what extent does the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) provide a more just solution to victims of family violence who kill their partners in self-defence in comparison to the previous law?

Lastly, in response to the overarching research question,[8] to what extent has the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) provided a more just solution to victims of family violence who kill their partners in self-defence in comparison to the previous law, the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) has done so to a significant degree subject to the perpetuation of unjust guilty pleas.[9]

8.4 Limitations

With reference to the scope of the research outlined in Chapter 1[10] and the research design limitations canvassed in Chapter 3,[11] it was beyond the scope of this research, particularly given space constraints, to conduct detailed comparisons with jurisdictions other than Victoria. Additionally, this research was unable to account for any matters which transpired and were resolved before 2005. Pertinently, only a limited number of relevant cases have transpired following the enactment of the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic). The research did not investigate any matters which may have arisen following the conclusion of the research phase in January 2019.

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[7] It may also be advisable that the OPP provide greater transparency concerning their acceptance of pleas. See Kerri Judd QC, 'Policy of the Director of Public Prosecutions for Victoria' *Office of Public Prosecutions Victoria* (Policy Document, 17 December 2019) <http://www.opp.vic.gov.au/getattachment/6beb7d86-d539-4443-871f-cc4165557ea4/DPP-Policy.aspx>. See also Chapter 7, *Are further reforms to the defence of self-defence needed?* at 7.5 and Chapter 2, *Plea decisions* at 2.6.4.2.

[8] See Chapter 1, *Research questions* at 1.2.

[9] Additionally, it is possible that poorly informed, educated or trained police, lawyers, judges and jurors may still pose risks at trial.

[10] See Chapter 1, *Scope of the thesis* at 1.4. See also Chapter 5, *The capacity of Victoria's 2014 law to accommodate the dynamics of family violence* at 5.2.2.4.

[11] See Chapter 3, *Doctrinal method and research design - Limitations* at 3.2.6; *Qualitative method and research design - Limitations* at 3.3.6 and *Socio-legal method and research design - Limitations* at 3.4.4.

Although the research scope involved interviews with 12 stakeholders in the criminal justice system, it is important to note the difficulty in generating definitive conclusions from a small sample even though saturation was reached.[12]

The researcher wished to interview Supreme Court and Court of Appeal Justices experienced in criminal trials and appeals. The reason provided for the refusal of active judges to be interviewed is provided in Chapter 3.[13] There is little doubt, given the interview with Judge A, that being able to conduct interviews with sitting Justices would have provided additional depth to this research, and the inability to interview them represents a significant limitation to this research.

The researcher further wished to interview several clinical forensic psychologists. It is not surprising, given that Practitioner E found it difficult to obtain forensic clinical psychologists to appear as expert witnesses,[14] that the researcher was only able to interview one representative of the profession. Their additional insights would have been a useful contribution to this research and the inability to access them is a limitation itself. Similarly, it would have been useful to interview additional solicitors practising in the criminal jurisdiction to ascertain their views. Apart from one solicitor, Practitioner I, who was happy to be interviewed, the inability to access this cohort represents a further limitation to this research.

Given that jury members may continue to apply their own common sense of justice to facts even where there are jury directions to the contrary, it would have also been useful to have had access to former jurors to gain insight into whether they applied their own sense of justice contrary to jury directions (if at all) and under what circumstances they did so where family violence was concerned.

It would have also been invaluable to have interviewed women who pleaded guilty to killing their violent partners under both frameworks. The difficulty in accessing these women and the thought that such interviews might re-traumatise them, let alone the

[12] Professionals, like others, have different values and experiences so that even with larger sample sizes and survey by questionnaire of a very wide group of professionals, the conclusions drawn can only be specific for that group.
[13] See Chapter 3, *Sample size – access to judges, legal practitioners, forensic psychologists and academics* at 3.3.6.1.
[14] See Chapter 5, *The capacity of Victoria's 2005 law to accommodate the dynamics of family violence* at 5.2.1.3(d).

appropriate difficulty in obtaining ethics approval, precluded the researcher from exploring this viable source of knowledge. Nevertheless, the failure to interview them represents a further limitation.

In relation to the sociological component of this research, any non-legal factors beyond those canvassed and explored in Chapter 6 which could conceivably prevent individuals from obtaining justice were beyond the scope of this research. As Hopkins, Carline and Easteal note, Victoria's reforms have 'gone further in promoting the realisation of equality of consideration'.[15] However, this research did not consider the matter of 'targeted consciousness raising'[16] concerning 'the experience of others (including the intersectionality of victims and perpetrators) with whom [others] [may] not share a common social category'.[17] The cognitive filters of members of the criminal justice system may be so different to victims of family violence that their reality, as 'other', is all but obscured.[18] In this context, the task of raising the consciousness of jurors falls to legal practitioners, judges and the police.[19] The inability of this research to explore this matter represents a further limitation to its conclusions.

8.5 Future research directions

Given the preceding limitations, future research ought to keep abreast of further prosecutions of victims of family violence under the current Victorian law of self-defence and the law in other Australian jurisdictions at least. The methodologies used in this research may assist in identifying, evaluating and responding to further injustices should they arise. Other research methods could also be used to assess whether the conclusions drawn in this thesis are accurate or in need of further elaboration or refinement. A review of law and practice across Australian jurisdictions may reveal that the Victorian reforms are less effective or unnecessary. Jurisdictions which maintain the common law may see

[15] Anthony Hopkins, Anna Carline and Patricia Easteal, 'Equal Consideration and Informed Imagining: Recognising and Responding to the Lived Experiences of Abused Women Who Kill' (2018) 41(3) *Melbourne University Law Review* 26.
[16] Ibid 34. See Chapter 3, *Subjectivity, morality and representation in norms* at 3.4.4.2.
[17] Ibid 29.
[18] While this obfuscation may work both ways, in the context of 'according' equal justice, it is the view of the criminal justice decision-maker that defines the legal terrain and determines the outcome: ibid 31.
[19] Ibid 34. See also Chapter 2, *Victorian institutional responses* at 2.2.3 and Chapter 3, *Pragmatism in law reform* at 3.4.4.3.

the law develop in a way that is identical to or more just than the law of Victoria as the common law can change to reflect social values with less effort.

Additionally, a review of the extra formal law processes in other jurisdictions such as consciousness raising or training and education of police, lawyers and judges may reveal that this is more effective in facilitating justice in other jurisdictions.[20] Such an exercise could be linked to the sociology of law and legal sociology propounded by Ehrlich, Pound, Llewellyn and Cotterell.[21]

Beyond these matters, further research should be conducted on public attitudes towards defensive responses to family violence to gauge how prospective jurors perceive and respond to claims of self-defence. This would be a useful means to compare public attitudes under Victoria's former law and Victoria's current law.

Additionally, if it were possible to interview former jurors[22] of family violence homicides on their perceptions, schemas and sense of justice concerning victims of family violence, this would serve as a useful means to conclude how common it is for jurors to apply their own sense of justice to victims of family violence. Such research would also be useful in considering how defence practitioners decide to use the law in future and whether there are any other factors which may serve as obstacles to obtaining justice. It would also indicate the effectiveness of Victoria's family violence jury directions and whether changes should be made to them. With the reforms to the Jury Directions Act 2015 (Vic) having directed 'attention to the reality of the experience of abused women',[23] the

[20] See Chapter 2, *Victorian institutional responses* at 2.2.3. Feminist, author and human rights advocate, Charlotte Bunch, argued that violence against women is 'so deeply embedded in cultures around the world that it is almost invisible. Yet this brutality is not inevitable. Once recognised for what it is–a construct of power and a means of maintaining the status quo–it can be dismantled: Charlotte Bunch, 'The intolerable status quo: Violence against women and girls' in UNICEF (ed), *The Progress of Nations* (UNICEF, 1997) 41. Although this statement was made in 1997, it resonates today. Bunch recommended that a systematic effort must be made to raise the profile of violence against women in every sector of society–'the judicial system, the media, educators, health care authorities, governmental and non-governmental authorities, politicians, religious leaders and, of course, individual men and women: Charlotte Bunch, 'Women's Right as Human Rights: Towards a Re-Vision of Human Rights' (1990) 12(4) *Human Rights Quarterly* 486–498.
[21] See Chapter 3, *Socio-legal method and research design* at 3.4.
[22] It is acknowledged that jury matters are secret: *Juries Act 2000* (Vic) s 65. They are also confidential: *Juries Act 2000* (Vic) s 78. However, applications can be made to the Attorney General to conduct research into matters relating to jury service: *Juries Act 2000* (Vic) s 78(9).
[23] Hopkins, Carline and Easteal (n 15) 28.

consciousness raising potential of the family violence directions as a soft law supplement to the doctrinal law may benefit from further examination.

It would have been invaluable to have interviewed those who had pleaded guilty to killing their violent partners. Their thoughts, feelings and insights concerning their decisions and whether they believed they had been sufficiently informed of their options would be useful in the construction of professional practice models for victims of family violence if necessary. It could also inform future research on the need for funding of and appropriate structures for trauma-informed family violence counselling and the provision of expert evidence where a victim of family violence is charged with a homicide offence.

Lastly, the OPP's lack of public transparency concerning its decisions to prosecute victims of family violence with viable claims to self-defence warrants further research into its procedures and practices surrounding the prosecution of victims of family violence charged with homicide offences. Such research should compare the practice of the Victorian OPP with the bodies of other Australian States.

8.6 Concluding comments

The reformed Victorian law of self-defence has made significant improvements in providing justice to victims of family violence. Claims to self-defence have been prosecuted and adjudicated more fairly and with an improved understanding of the dynamics of family violence in trials. Decisions to prosecute and pleas of guilty in the context of such cases may not reflect these changes. Professional responses are warranted, particularly, from the Office of Public Prosecutions. Victoria's judges, prosecutors, defence practitioners, law enforcement, psychologists, academics and members of the community now have clearer legislative standards for doing justice to victims of family violence with viable claims to self-defence. Ideally, justice would occur before an accused is asked to make an unjust plea in the first instance.

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ANNEXURE A: OSLAND V THE QUEEN [1998] HCA 75–MATERIAL FACTS

In Osland v The Queen,[1] Mrs Heather Osland and her son, Mr David Albion, killed Mr Frank Osland (Heather Osland's husband) and relied upon the defences of self-defence and provocation.[2] Their defences were raised against an evidentiary background of tyrannical and violent behaviour on the part of Mr Osland that had occurred for years but had escalated in the days prior to his death.[3] The prosecution accepted that Mr Osland had been violent and abusive towards Mrs Osland in the past but contended that that behaviour had ceased well before his murder.[4] In summary, the prosecution case was that:

> Heather Osland and David Albion together planned to murder Frank Osland. It was put that, in furtherance of their plan, they dug a grave for their intended victim during the day of 30 July 1991. Later, on the evening of the same day and in furtherance of the plan alleged, Heather Osland mixed sedatives in with Frank Osland's dinner in sufficient quantity to induce sleep within an hour. According to the prosecution case, David Albion carried the plan to finality after Frank Osland went to bed by fatally hitting him over the head with an iron pipe in the presence of Heather Osland. Later, he and Heather Osland buried Frank Osland in the grave they had earlier prepared.[5]

Heather Osland and David Albion both supplied evidence at the trial.[6] They did not deny digging a grave, mixing sedatives into Frank Osland's dinner, striking the blow(s), burying him or pretending as if he had disappeared.[7]

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[1] [1998] HCA 75.
[2] Ibid [5] (Gaudron and Gummow JJ).
[3] Ibid.
[4] Ibid.
[5] Ibid [3] (Gaudron and Gummow JJ).
[6] Ibid.
[7] Ibid.

ANNEXURE B: RELEVANT STATUTORY RULES, COMMON LAW RULES, INTERPRETATIVE NORMS AND PROCEDURAL VALUES

A Statutory Rules

1 Crimes Act 1958 (Vic) section 9AC Murder – Self-defence

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.

2 Crimes Act 1958 (Vic) section 9AD - Defensive homicide

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.

3 Crimes Act 1958 (Vic) section 9AE Manslaughter- Self-defence

A person is not guilty of manslaughter if he or she carries out the conduct that would otherwise constitute manslaughter while believing the conduct to be 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 - and he or she had reasonable grounds for that belief.

4 Crimes Act 1958 (Vic) section 9AH - Family Violence

(1) 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.

(2) Without limiting the evidence that may be adduced, in circumstances where family violence is alleged evidence of a kind referred to in subsection (3) may be relevant in determining whether—

(a) a person has carried out conduct while believing it to be necessary for a purpose referred to in subsection (1)(a) or (b); or

(b) a person had reasonable grounds for a belief held by him or her that conduct is necessary for a purpose referred to in subsection (1)(a) or (b); or

(c) a person has carried out conduct under duress.

(3) 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 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.

(4) In this section— child means a person who is under the age of 18 years; family member, in relation to a person, includes—

(a) a person who is or has been married to the person; or

(b) a person who has or has had an intimate personal relationship with the person; or

(c) a person who is or has been the father, mother, step-father or step-mother of the person; or

(d) a child who normally or regularly resides with the person; or

(e) a guardian of the person; or

(f) another person who is or has been ordinarily a member of the household of the person; family violence, in relation to a person, means violence against that person by a family member; violence means—

(a) physical abuse;

(b) sexual abuse;

(c) psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to—

(i) intimidation;

(ii) harassment;

(iii) damage to property;

(iv) threats of physical abuse, sexual abuse or psychological abuse;

(v) in relation to a child—

(A) causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or

(B) putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.

(5) Without limiting the definition of violence in subsection (4)—

(a) a single act may amount to abuse for the purposes of that definition;

(b) a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

5 Crimes Act 1958 (Vic) section 9AJ - Intoxication

(1) If any part of an element of a relevant offence, or of a defence to a relevant offence, relies on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.

(2) If any part of an element of a relevant offence, or of a defence to a relevant offence, relies on a person having reasonable grounds for a belief, in determining whether those reasonable grounds existed, regard must be had to the standard of a reasonable person who is not intoxicated.

(3) If any part of an element of a relevant offence, or of a defence to a relevant offence, relies on reasonable response, in determining whether that response was reasonable, regard must be had to the standard of a reasonable person who is not intoxicated.

(4) If a person's intoxication is not self-induced, in determining whether any part of an element of a relevant offence, or of a defence to a relevant offence, relying on reasonable belief, having reasonable grounds for a belief or reasonable response exists, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

(5) For the purposes of this section, intoxication is self-induced unless it came about—

(a) involuntarily; or

(b) because of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force; or

(c) from the use of a drug for which a prescription is required and that was used in accordance with the directions of the person who prescribed it; or

(d) from the use of a drug for which no prescription is required and that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer.

(6) Despite subsection (5), intoxication is self-induced in the circumstances referred to in subsection (5)(c) or (d) if the person using the drug knew, or had reason to believe, when the person took the drug that the drug would significantly impair the person's judgment or control.

6 Crimes Act 1958 (Vic) section 322K – Self-defence

(1) A person is not guilty of an offence if the person carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if—

(a) the person believes that the conduct is necessary in self-defence; and

(b) the conduct is a reasonable response in the circumstances as the person perceives them.

(3) This section only applies in the case of murder if the person believes that the conduct is necessary to defend the person or another person from the infliction of death or really serious injury.

7 Crimes Act 1958 (Vic) section 322M – Family violence and self-defence

(1) Without limiting section 322K, for the purposes of an offence in circumstances where self-defence in the context of family violence is in issue, a person may believe that the person's conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if—

(a) the person is responding to a harm that is not immediate; or

(b) the response involves the use of force in excess of the force involved in the harm or threatened harm.

(2) Without limiting the evidence that may be adduced, in circumstances where self-defence in the context of family violence is in issue, evidence of family violence may be relevant in determining whether—

(a) a person has carried out conduct while believing it to be necessary in self-defence; or

(b) the conduct is a reasonable response in the circumstances as a person perceives them.

8 Crimes Act 1958 (Vic) section 322J – Evidence of family violence

(1) Evidence of family violence, in relation to a person, includes evidence of any of the following—

(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 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.

(2) In this section—

"child "means a person who is under the age of 18 years;

"family member", in relation to a person, includes—

(a) a person who is or has been married to the person; or

(b) a person who has or has had an intimate personal relationship with the person; or

(c) a person who is or has been the father, mother, step-father or step-mother of the person; or

(d) a child who normally or regularly resides with the person; or

(e) a guardian of the person; or

(f) another person who is or has been ordinarily a member of the household of the person;

"family violence", in relation to a person, means violence against that person by a family member;

"violence" means—

(a) physical abuse; or

(b) sexual abuse; or

(c) psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to the following—

(i) intimidation;

(ii) harassment;

(iii) damage to property;

(iv) threats of physical abuse, sexual abuse or psychological abuse;

(v) in relation to a child—

(A) causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or

(B) putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.

(3) Without limiting the definition of **violence** in subsection (2)—

(a) a single act may amount to abuse for the purposes of that definition; and

(b) a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

8 Jury Directions Act 2015 (Vic) section 58 – Request for direction on family violence

(1) Defence counsel (or, if the accused is unrepresented, the accused) may request at any time that the trial judge direct the jury on family violence in accordance with section 59 and all or specified parts of section 60.

(2) The trial judge must give the jury a requested direction on family violence, including all or specified parts of section 60 if so requested, unless there are good reasons for not doing so.

(3) If the accused is unrepresented and does not request a direction on family violence, the trial judge may give the direction in accordance with this Part if the trial judge considers that it is in the interests of justice to do so.

(4) The trial judge—

(a) must give the direction as soon as practicable after the request is made; and

(b) may give the direction before any evidence is adduced in the trial.

(5) The trial judge may repeat a direction under this Part at any time in the trial.

(6) This Part does not limit what the trial judge may include in any other direction to the jury in relation to evidence given by an expert witness.

9 Jury Directions Act 2015 (Vic) section 59 – Content of direction on family violence

In giving a direction under section 58, the trial judge must inform the jury that—

(a) self-defence or duress (as the case requires) is, or is likely to be, in issue in the trial; and

(b) as a matter of law, evidence of family violence may be relevant to determining whether the accused acted in self-defence or under duress (as the case requires); and

(c) in the case of self-defence, evidence in the trial is likely to include evidence of family violence committed by the victim against the accused or another person whom the accused was defending; and

(d) in the case of duress, evidence in the trial is likely to include evidence of family violence committed by another person against the accused or a third person.

10 Jury Directions Act 2015 (Vic) section 60 – Additional matters for direction on family violence

In giving a direction requested under section 58, the trial judge may include any of the following matters in the direction—

(a) that family violence—

(i) is not limited to physical abuse and may include sexual abuse and psychological abuse;

(ii) may involve intimidation, harassment and threats of abuse;

(iii) may consist of a single act;

(iv) may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial;

(b) if relevant, that experience shows that—

(i) people may react differently to family violence and there is no typical, proper or normal response to family violence;

(ii) it is not uncommon for a person who has been subjected to family violence—

(A) to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;

(B) not to report family violence to police or seek assistance to stop family violence;

(iii) decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by—

(A) family violence itself;

(B) cultural, social, economic and personal factors;

(c) that, as a matter of law, evidence that the accused assaulted the victim on a previous occasion does not mean that the accused could not have been acting in self-defence or under duress (as the case requires) in relation to the offence charged.

B Statutory Interpretation

1 Interpretation of Legislation Act 1984 (Vic) section 35 - Statutory Rule

In the interpretation of a provision of an Act or subordinate instrument—

(a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object; and

(b) consideration may be given to any matter or document that is relevant including but not limited to—

(i) all indications provided by the Act or subordinate instrument as printed by authority, including punctuation;

(ii) reports of proceedings in any House of the Parliament;

(iii) explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament; and

(iv) reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry, Formal Reviews or other similar bodies.[1]

2 Relevant Common Law Rules

(a) Bropho v State of Western Australia (1990) 171 CLR 18 - abolition of common law rights

Legislation should not be interpreted as abolishing common law rights unless parliament had stated a clear intention to do so.

[1] *Interpretation of Legislation Act 1984* (Vic) s 35.

(b) Beckwith v The Queen (1976) 135 CLR 569 - statutory ambiguity to be resolved in favour of the accused

If there is ambiguity in the statute itself, or if there is a genuine choice between two competing interpretations, the ambiguity must always be resolved, and the choice must always be made, in favour of the accused.

(c) Grey v Pearson (1857) 10 ER 1216; DPP v Ali [2009] VSCA 162 - absurdity

A departure from a literal interpretation of a legislative provision is justified where the literal reading produces absurd results. However, absurdity is not required for a Court to adopt the purposive approach to statutory interpretation as set out in section 35(a) of the Interpretation of Legislation Act 1984.

3 The codification of self-defence

(a) The Queen v Pepper [2007] VSC 234 – abolition of the common law

Although the Crimes (Homicide) Act 2005 (Vic) did not expressly abolish the common law of self-defence in relation to murder, the Supreme Court of Victoria initially held that Parliament had intended to codify the law of self-defence in relation to homicide and that Parliament had done so through sections 9AC, 9AD and 9AE.

(b) The Queen v Gould [2007] VSC 420 – retention of the common law

However, the Supreme Court subsequently determined that an accused could still rely upon common law self-defence where the accused had not defended him or herself against the infliction of death or really serious injury. In the view of the Court, it had not been the intention of Parliament or the Victorian Law Reform Commission that an accused be disadvantaged by the new provisions; the intention was the preservation of the common law but the extension of self-defence to cover certain pre-emptive responses and to restore the notion of excessive self-defence with the new crime of defensive homicide. Accordingly, the question of self-defence was to be considered both in its statutory and common law forms.

(c) The Queen v Parr [2009] VSC 166 – the codification of self-defence

While all Trial Division judges had been following R v Gould to ensure that there was no injustice to any accused and no possibility of a re-trial, the Supreme Court subsequently reconsidered the issue of whether Parliament had expressed an intention to abrogate the common law of self-defence by its enactment of the Crimes (Homicide) Act 2005 (Vic). The Supreme Court ultimately determined that there had been no ambiguity in the legislation that would require the court to decide in favour of the accused; the law of self-defence had been codified in cases of homicide.

(d) Babic v R [2010] VSCA 198 – affirming the codification of self-defence

In 2010, the Supreme Court of Appeal in Babic v The Queen [2010] VSCA 198 confirmed that in enacting sections 9AC, 9AD and 9AE relating to the offences of murder, defensive homicide and manslaughter, it was the intention of Parliament to displace the common law rules of self-defence. With regard to all other offences, the common law was to remain in effect.

C Common Law Rules

1 Crimes Act 1958 (Vic) section 9AC Murder - Self-Defence and section 322K(2)(a) – Self-Defence

(a) Babic v R (2010) 28 VR 297 - subjective test

Unlike the common law of self-defence as established in Zecevic, section 9AC did not require the accused's belief to have been based on reasonable grounds. Section 9AC simply established a purely subjective test which focused on the belief of the accused.

(b) Zecevic v Director of Public Prosecutions (1987) 162 CLR 645 – the common law of self-defence

The determination of whether the accused believed that his or her actions were necessary incorporated two questions. First, whether the accused believed it was necessary to defend himself or herself at all and, secondly, whether the accused believed it was necessary to respond as he or she did given the threat as he or she perceived it.

(c) Zecevic v Director of Public Prosecutions (1987) 162 CLR 645 - the subjective test of self-defence did not require consideration of what a reasonable person would have believed

In answering these questions, a jury was not to consider what a reasonable or ordinary person would have believed in the circumstances, but what the accused believed.

(d) R v McKay [1957] VR 560 - mistaken beliefs

In answering these questions, It did not matter what the accused's belief was mistaken, the accused's belief must have such a belief in all the circumstances could be said to have been simply been genuinely held.

(e) Zecevic v Director of Public Prosecutions (1987) 162 CLR 645 - accused's assessment of threat and proportionality

In determining the second question, whether the accused believed that the force used was necessary, consideration was to be given to the fact that a person who had reacted instantly to imminent danger could not be expected to weigh precisely the exact measure of self-defensive action which was required. In fact, the proportionality of the accused's response to the harm threatened was just one factor to take into account in determining whether the accused believed that his or her actions were necessary.

(f) R v Howe (1958) 100 CLR 448 - no general duty to retreat

There was no rule requiring the accused to retreat from an attack rather than defend himself or herself.

(g) Zecevic v Director of Public Prosecutions (1987) 162 CLR 645 - failure to retreat as a relevant factor

However, a failure to retreat was to be a factor to be taken into account in determining the accused believed that what was done was necessary.

(g) Zecevic v Director of Public Prosecutions (1987) 162 CLR 645 - pretences

If the accused acted under the pretence of defending himself or herself to attack another or retaliate for a past attack, then the test for self-defence will not be met. Factors such as a failure to retreat when possible or a highly disproportionate response might indicate an intention to use the circumstances for aggression or retaliation rather than for self-defence.

(h) Babic v R (2010) 28 VR 297 - a threat of death or really serious injury

The statutory defence would fail if the accused had not believed that his or her actions were necessary to defend him or herself or another person from the infliction of death or really serious injury. This differed from the common law in that the common law did not specify the type of harm that was to be threatened before a person could raise self-defence.

At common law, even if people had defended themselves against less serious harm, or act to protect property or prevent crime, they could successfully raise self-defence if the jury found that they believed upon reasonable grounds that their actions were necessary. Pertinently, the Crimes Act did not define 'really serious injury 'for the purposes of section 9AC. It was 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'.

(i) R v Conlon (1993) 69 A Crim R 92 and R v Katarzynski [2002] NSWSC 613 - intoxication

If the accused was intoxicated at the time he or she committed the relevant acts, this could be taken into account when determining whether the accused believed his or her actions were necessary.

2 Crimes Act 1958 (Vic) section 9AD - Defensive Homicide

(a) Zecevic v Director of Public Prosecutions (1987) 162 CLR 645 - reasonable person test inapplicable

The reasonable grounds test was not concerned with what a 'reasonable person' might have believed in the circumstances, but about whether the accused had no reasonable grounds for his or her belief, in the circumstances as he or she perceived them to be. In

other words, the test was concerned with a belief which the accused might reasonably have held in all the circumstances.

(b) R v Hendy [2008] VSCA 231 - reasonable grounds as opposed to reasonable conduct

This element did not require the jury to determine whether the accused acted unreasonably in the circumstances. It required the jury to determine whether there were no reasonable grounds for the accused's belief that it was necessary to do what he or she did.

(c) R v Wills [1983] 2 VR 201; R v Hector [1953] VLR 543; R v Besim [2004] VSC 169; Grosser v R (1999) 73 SASR 584; R v Walsh (1991) 60 A Crim R 419; Zecevic v Director of Public Prosecutions (1987) 162 CLR 645; R v Portelli (2004) 10 VR 259; [2004] VSCA 178 and R v Howe (1958) 100 CLR 448) – factors which a jury could consider

In determining whether the accused's belief was based on reasonable grounds, juries were permitted to take into account the following matters:

- The surrounding circumstances;
- All of the facts which were within the accused's knowledge;
- The relationship between the parties involved;
- The prior conduct of the victim;
- Circumstances of family violence;
- The personal characteristics of the accused, such as any deluded beliefs he or she held or any excitement, affront or distress he or she was experiencing;
- The proportionality of the accused's response; and
- The accused's failure to retreat.

(d) R v Conlon (1993) 69 A Crim R 92 and R v Katarzynski [2002] NSWSC 613 - intoxication

At common law, it was possible to take into account the accused's state of intoxication in determining whether the accused believed his or her actions were necessary, as well as in

determining whether that belief was based on reasonable grounds.[2] However, section 9AJ(2) of the Crimes Act 1958 provided that:

> If any part of an element of a relevant offence, or of a defence to a relevant offence, [relied] on a person having reasonable grounds for a belief, in determining whether those reasonable grounds existed, regard [was] [to] be had to the standard of a reasonable person who [was] not intoxicated.

(e) Osland v R (1998) 197 CLR 316 – the use of pre-emptive force

People were not only entitled to rely on self-defence if they had acted whilst an attack had been in progress or had been immediately threatened. They were entitled to take steps to forestall a threatened attack before it had begun. The key issue was whether an attack was imminent or immediately threatened, but whether the accused's perception of danger led him or her to believe that the use of defensive force was necessary, and (in the case of manslaughter or defensive homicide) whether there were reasonable grounds for such a belief.

However, what was believed to be necessary in the circumstances, and whether there were reasonable grounds for such a belief, could be affected by the lack of immediacy of the threat, although this would not necessarily be the case. Where a person responded pre-emptively to what he or she perceived to be a threat from a violent partner, expert evidence of 'battered woman syndrome' could be admitted to assist the jury to understand that an act committed where no attack had been underway could be a self-defensive response to a genuinely apprehended threat of imminent danger; an apprehension which was sufficient to warrant a pre-emptive strike.

In cases of pre-emptive force, disproportionate force could be used as long as the accused believed it was necessary and (in the case of defensive homicide or manslaughter) there were reasonable grounds for such a belief.

3 Crimes Act 1958 (Vic) section 322K(b) – Self-Defence

[2] *R v Conlon* (1993) 69 A Crim R 92 (NSWSC); *R v Katarzynski* [2002] NSWSC 613.

(a) Presidential Security Services of Australia Pty Ltd v Brilley (2008) 73 NSWLR 241; R v Katarzynski [2002] NSWSC 613; R v Trevenna [2004] NSWCCA 43; Oblach v R (2005) 65 NSWLR 75; Crawford v R [2008] NSWCCA 166 – Reasonable response

There must be a reasonable possibility that the conduct was a reasonable response in the circumstances as the person perceived them.

(b) R v Katarzynski [2002] NSWSC 613. See also R v Forbes [2005] NSWCCA 377; Ward v R [2006] NSWCCA 321 – Characteristics of the accused

The response of the accused (as opposed to the reasonable person) is to be considered having regard to the accused's age, gender, state of health and surrounding circumstances.

(c) Flanagan v R [2013] NSWCCA 320; Oblach v R (2005) 65 NSWLR 75 – Objective proportionality

The objective proportionality of the accused's response must be considered in relation to the perceived situation.

D Procedural Values

1 Woolmington v Director of Public Prosecutions [1935] AC 462 – the English onus of proof

Where evidence disclosed a possibility that a fatal act was performed in self-defence, a burden fell upon the Crown to prove beyond reasonable doubt that the fatal act was not performed in self-defence.

2 Babic v R (2010) 28 VR 297 – the Victorian onus of proof

Under the statutory framework of self-defence, once the question of self-defence had been put in issue, the onus was on the prosecution to prove that the accused did not act in self-defence.

3 R v Kear [1997] 2 VR 555 – juror assessment of evidence

The issue of self-defence could be held to arise if there was any evidence from which a jury might infer that the accused had acted in self-defence.

4 Zecevic v Director of Public Prosecutions (1987) 162 CLR 645 – directing juries on self-defence

A trial judge was required to instruct a jury about self-defence if there was evidence on which a reasonable jury could have used to decide the issue favourably to the accused.

5 R v Imadonmwonyi [2004] VSC 361 – direct and circumstantial evidence

In deciding whether there was evidence on which a reasonable jury could use to decide the issue of self-defence favourably to the accused, a trial judge was permitted to consider the direct evidence of the matter and the question of whether a circumstantial case could fairly be made out to support the defence.

6 Zecevic v Director of Public Prosecutions (1987) 162 CLR 645 – trial judge obligation to direct juries

If there had been sufficient evidence to raise the possibility of self-defence, a trial judge was required, at common law, to instruct the jury about self-defence (regardless of whether the accused had raised self-defence).

7 R v Kell & Dey (Ruling No. 1) [2008] VSC 518 – trial judge assessment of evidence

With regard to the preceding requirement, a trial judge was required to instruct the jury about self-defence even where he or she considered the defence to be ‘weak or tenuous’. The same requirement applied even if the factual basis for the defence had been inconsistent with the accused’s version of events at trial.

8 R v Portelli (2004) 10 VR 259 – content of directions

No set formula was required to be used when directing a jury about self-defence. That being said, the burden of proof had to be made very clear to a jury; the jury were to be told that the accused should only be convicted of murder if the prosecution proved that the accused had not acted in self-defence. Further, the issue of self-defence was to be

listed with all of the other issues which the prosecution must establish, rather than being dealt with separately.

9 R v Babic (2010) 28 VR 297 – benchmark direction

To satisfy the preceding requirement, a trial judge could explain to a jury that they were to acquit the accused of murder (and go on to consider whether he or she was guilty of defensive homicide), if they had found that either:

1. The accused believed it was necessary to do what he or she did to defend him or herself or another person from death or really serious injury; or
2. The prosecution had not proven beyond reasonable doubt that the accused did not have such a belief.

The trial judge could explain to the jury that even if they were not sure whether the accused held the requisite belief, they could still convict the accused of defensive homicide. In such a case, the jury were to assume that the accused held the belief that he or she said that he or she had held. They could only convict the accused of defensive homicide if they were satisfied that the accused held no reasonable grounds for that asserted belief.

10 R v Hendy [2008] VSCA 231 – unreasonable conduct

When addressing defensive homicide, trial judges were not to direct the jury that the accused's conduct must have been unreasonable. The focus of the charge concerned the grounds for the accused's belief.

11 Zecevic v Director of Public Prosecutions (1987) 162 CLR 645 – holistic appraisals of self-defence

The question of self-defence was to be placed in its factual setting, and considerations which could assist the jury to reach its conclusion were to be identified. The jury were to be told to consider all of the circumstances of the case, and that any one factor should be considered within that broader context.

The purpose of this requirement was to ensure that matters of evidence, such as the proportionality of the force, were not elevated to rules of law. A trial judge was required to offer such assistance by way of comment as was appropriate to a particular case. It was often desirable to tell the jury to approach its task in a practical manner, giving proper weight to the predicament of the accused, which may have afforded little, if any, opportunity for calm deliberation or detached reflection.

ANNEXURE C: INTERVIEW QUESTIONS

Preliminary questions

1. Why in your view is a just response to battered person's syndrome important?

2. Of the five most significant issues that the criminal justice system has to deal with, where would you rank it?

3. Would other participants in the criminal justice system see it as being as important as you do? Prompts: defence lawyers, prosecutors, judges?

Aim 1: To investigate whether the previous law of self-defence and family violence evidence unjustly failed to accommodate the experiences of family violence victims in criminal prosecutions who were alleged to have killed their violent partners

4. Were common law rules on provocation fair to victims of family violence who killed their violent partners?

5. Was common law provocation unsalvageable or beyond reform when defensive homicide was introduced to address its perceived deficiencies?

6. Did the 2005 framework of self-defence, defensive homicide and evidence of family violence provide a satisfactory framework to accommodate the dynamics of family violence?

7. Did the 2005 framework limit the possibility of complete acquittals (for victims of family violence) on the basis of self-defence where evidence pointed to a reasonable possibility of its existence that could not be negated by the Crown beyond reasonable doubt?

8. Was there a concern by defence lawyers and prosecutors about jurors not understanding these forms of family violence which led to pleas of guilty where a viable claim of self-defence existed?

9. Did practitioners, judges and jurors misunderstand or misapply the law? [Prompt: If so, what caused this to occur? If not, can they provide an example of the law being correctly understood and applied]?

10. Some writers suggest that the concept of battered person syndrome leads to lawyers and psychiatrists, judges and jurors pathologising victims. They suggest that this pathologising … leads to them being seen as incapable of forming the reasonable grounds for a subjective belief in the necessity of self-defence. Is this true from your experience?

[Prompt: If they agree: And did the concept of defensive homicide contribute to this? And if they disagree: So defensive homicide didn't contribute to this?]

Aim 2: To consider whether the reformed law of self-defence has increased justice in the accessibility of self-defence in this context

11. Are the 2014 reforms which replaced defensive homicide with the revised form of self-defence in section 322K justified?

12. Does section 322K and its associated provisions overcome the limits of defensive homicide? [Prompt: If they have previously indicated that defensive homicide was misunderstood: Has s 322K (and associated provisions) removed the misunderstandings and problems surrounding defensive homicide?]

13. In the context of s 322K, does the social context provisions on family violence make its use more just? [Prompt: Do the provisions in the Jury Directions Act 2015 (Vic) contribute to this?]

14. Does the new framework for self-defence in the context of family violence sufficiently guard against lawyers and psychiatrists, judges and jurors pathologising victims? Does it assist in them being seen as people capable of engaging in reasonable conduct in the circumstances as they, a victim of family violence, perceives them?

[Prompt depending on answer: So victims of family violence are still at risk/are not at risk of being perceived as not being capable of behaving reasonably under the new provisions?]

15. Based on your experience, are there any beneficial or harmful unintended consequences from the new framework including the Jury Directions Act 2015 (Vic)]?

16. Have these provisions created a framework for self-defence which adequately accommodates the dynamics of family violence?

17. Does the new framework increase the likelihood of victims of family violence being completely acquitted on the basis of self-defence?

18. Overall, do you think the new framework is fairer? [Prompt: Will it or does it make self-defence more accessible to female victims of family violence?]

Aim 3: To identify any non-legal factors which may influence juror and practitioner assessments of self-defence and consequently reduce a just accessibility to self-defence in this context

Social factors

19. Are there any stereotypes of women, family violence or gaps in jurors' knowledge about family violence that the Jury Directions Act fails to deal with adequately?

Political factors

20. Commentators caution that gender and racial politics may play a part in a juror's assessment of self-defence in the context of family violence. If you agree, does the Jury Directions Act adequately deal with this?

Other factors

21. The reformed test used is whether the conduct of the accused is an objective test of a reasonable response. Does this make it more difficult to stereotype or pathologise family violence victims than the previous requirement of reasonable grounds?

22. How far does ‘the circumstances’ as the accused perceives them extend? Do ‘the circumstances’ consist of the subjective reality of the victim of family violence?

23. If it is understood as including the subjective reality for the victim of family violence would this invite further victim pathology and perpetuation of stereotypes by practitioners, judges and jurors? [Prompt: Would the circumstances be perceived as potentially irrational because of the perceived pathological state of the victim?]

24. Judges will give directions to juries about family violence and its use but is there a risk of jurors employing impermissible reasoning in considering the application of section 322K?

25. Is it conceivable the jurors may apply their own standards based on their personal values?

26. Is it possible that jurors may perceive the law as they are directed on it as providing a ‘license to kill’?

Professional factors

27. Does the removal of defensive homicide leave victims of family violence more susceptible to plea-bargains which do not adequately acknowledge the dynamics of family violence?

28. If so, what facets of the new test for self-defence or jury directions overcome this pressure to plead guilty and to what degree?

29. To what extent do the reforms increase the judicial and professional understanding of what family violence is and its relevance in the context of self-defence?

[Prompt: Have you seen changes in the way in which family violence is understood? Are defence lawyers more likely to use self-defence?]

Aim 4: To generate suggestions for law reform to render self-defence more just in this context (if necessary)

30. Do you have any suggestions to better address family violence where self-defence is in issue?

ANNEXURE D: ETHICS CONSIDERATIONS

Research proposal and ethics approval

This research consulted the relevant ethical codes[1] to establish a research design which would promote honesty, integrity and respect for human participants.[2] Such values were contended to be upheld and promoted through the following approaches to data sampling and data management.

Sampling, recruitment, informed consent and beneficence

This research first consulted the National Statement of Ethical Conduct in Human Research (NSECHR) because this research involved human participants and could not be ethically justified unless the research was meritorious.[3] In other words, this research had to be justifiable by its potential benefits and contributions to knowledge.[4] It also had to be designed with an appropriate methodological framework which would provide an answer to the overarching research question.[5] Accordingly, the researcher contends that the mixed-methods framework used in this thesis would inform policy makers and the legal profession of the law's operation in practice and would identify any non-legal factors which could affect the successful operation of the 2014 law.

Sampling

The researcher acknowledged that the principle of procedural justice must be upheld when recruiting interview participants[6] so that all prospective interviewees could be regarded as having been fairly included or excluded from participating in this research project. To promote procedural justice in sampling, the researcher acknowledged that the

[1] The Australian Code for the Responsible Conduct of Research ('ACFTRCOR'), the National Statement of Ethical Conduct in Human Research ('NSECHR') and the Victoria University Research Integrity Policy ('VURIP').
[2] National Health and Medical Research Council, *National Statement on Ethical Conduct in Human Research* (2007) Australian Government National Health and Medical Research Council <https://www.nhmrc.gov.au/_files_nhmrc/publications/attachments/e72_national_statement_may_2015_150514_a.pdf> 9.
[3] Ibid 10.
[4] Ibid.
[5] Ibid.
[6] Ibid.

criteria for inclusion and exclusion of participants in qualitative research is potentially complex[7] and that, in conformity with clause 1.4 of the NSECHR, a fair framework of eligibility and exclusion depended upon the aims of the research.[8] With the four subsidiary research questions in mind, this research adopted purposive sampling, which entailed the selection of information-rich sources[9] who were deemed eligible and qualified to provide relevant data for each of these questions.

Recruitment

Information-rich sources were deemed to be current or former criminal trial and appellate judges of the Supreme Court of Victoria, experienced criminal law practitioners (barristers or solicitors), expert forensic psychologists and professors of law. For judges, their appointment to the criminal trials or appeals division of the Supreme Court of Victoria was deemed sufficient in itself as that court holds jurisdiction over matters involving homicides, and judges are highly knowledgeable of criminal law and procedure. With regard to legal practitioners, practitioners who had been briefed to appear in murder/self-defence trials in Victoria were deemed eligible for participation as they too were highly knowledgeable of criminal law and procedure. As far as forensic psychologists are concerned it was sufficient that they had given evidence, as expert witnesses, in Victorian homicide prosecutions where the accused had killed her violent partner. Lastly, eligible professors of law were those academics who possessed a demonstrable research interest in the criminal law of homicide, self-defence and evidence of family violence. As these participants were deemed best qualified to provide expert-opinion pertaining to the aims of this research, the above parameters of inclusion and exclusion were contended to be sufficient to promote justice in sampling.

Informed consent

The researcher ensured the implementation of NSECHR's requirement that a participant's decision to participate be made on a voluntary basis and that their decision be based on sufficient background information concerning the research–information which would provide an adequate understanding of the research and the implications of participation.[10]

[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Ibid 16.

To ensure informed consent, the researcher supplied interested participants with an informed consent form (in advance of the interview), which clearly stated the purpose, aims and nature of the research project.[11] This form included information concerning the methods, demands, risks and potential benefits of the research[12], and information on how data would be collected, stored, used and protected:[13] information to the effect that the responses of participants would be anonymously recorded and reported[14] and that participants would have the opportunity to discuss the information and their decision with other parties[15]. Also there was a statement that participants could withdraw from the research at any time without pressure or consequence[16] and that they would be asked again, immediately prior to the commencement of the interview, whether they understood their involvement with the research and consented to be interviewed.[17] This approach to informed consent was considered ethically sound.

Risks and benefits of the research

The NSECHR required this research to maximise its potential benefits whilst minimising any risk of physical or psychological harm to participants.[18] It was determined that only a negligible risk of psychological harm existed. While discussions about family violence were seen as having the potential to cause distress, the research placed greater emphasis on the law's response to lethal uses of force (in the context of family violence) as opposed to family violence in general.

With this in mind, the researcher concluded that the status and specialist education of trial judges, appellate judges, legal practitioners, expert psychologist witnesses and professors of law did not warrant a vulnerable persons' classification by the Ethics Committee and that the research be characterised as 'low risk' as care was taken to ensure that participants would not be identified by the information they provided.[19] This was achieved by giving

[11] Ibid 17.
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Paul Oliver, *Student's Guide to Research Ethics* (Open University Press, 2nd ed, 2010) 46.
[18] *National Statement on Ethical Conduct in Human Research* (n 2) 10.
[19] Ibid 13.

interviewees pseudonyms both in their audio-files and the written transcripts[20] and by ensuring that that their responses would be safely secured within University facilities.

Even so, a foreseeable risk concerning the inadvertent collection of stigmatising and dangerous information pertaining to victims of family violence existed. Although participants would not to be asked about specific victims of family violence, harmful information was capable of being collected without a third party's informed consent and participation. As this risk challenged the research's commitment to beneficence,[21] it was considered whether the inadvertent disclosure and consequent publication of such information would assist vulnerable parties and ameliorate the circumstances causing them harm.[22] This was considered to be unlikely. In the event that such information was collected, such information would be subjected to a process of de-identification (if that information had not been publicly available). If it were not possible to de-identify the individual from such information, the information would not be published. The above procedures were considered to accord with the principle of beneficence by maximising the possible benefits of the research whilst minimising the potential harms of the research.[23]

Data acquisition, management, storage, retention and destruction policy

In conformity with the Australian Code for the Responsible Conduct of Research (ACFTRCOR), this research adopted appropriate data collection, storage, management and destruction procedures.

Acquisition

With regard to data acquisition, the researcher recorded the responses of participants through an audio-recording device and then transcribed the recordings. This approach to

[20] Although the author took care to store data securely within Victoria University's R: Drive, participants were informed that they could potentially still be identified by responses even if personal identifiers such as their name were removed.
[21] Marian Pitts and Anthony Smith, 'Setting the scene' in Marian Pitts and Anthony Smith (eds), *Researching the margins: Strategies for ethical and rigorous research with marginalised communities* (Palgrave Macmillan, 1st ed, 2007) 37.
[22] Deborah Zion, 'On secrets and lies: Dangerous information, stigma and asylum seeker research' in Karen Block, Elisha Riggs and Nick Haslam (eds), *Values and Vulnerabilities the Ethics of Research with Refugees and Asylum Seekers* (Australian Academic Press, 1st ed, 2013) 203.
[23] *National Statement on Ethical Conduct in Human Research* (n 2) 13.

data collection conformed with the NSECHR, which characterises interviewing, audio-recording and transcription as legitimate forms of data-collection[24] in qualitative research.

Management and storage

This research protected the privacy and confidences of research participants through safe storage, protection, retention and disposal practices in conformity with the ACFTRCOR and the VURIP.[25] On the use of storage facilities, the VURIP required the researcher to maintain comprehensive records together with any research data and materials necessary to verify the integrity of the research and that these materials be stored in a safe and secure storage facility provided by the University. As a result, before ethics approval had been granted, the researcher established a Research Data and Materials Plan, which enabled access to Victoria University's R: Drive facilities. A re-identifiable records management system was established so that the personal identifiers of participants would be removed and replaced by a code.

Retention of data

With regard to data retention, the researcher has retained all data and primary materials and proposes to keep them for five years. Since the research does not involve children or a clinical trial, and is not of heritage value, there is no need for a longer time frame for the retention of data. Within this period, the data will be available for use by other researchers unless prohibited by matters of ethics, privacy or confidentiality. In the event that the research is challenged, it was agreed that all relevant data and materials would be made available until resolution.

Destruction

On data destruction, the ACFTRCOR mandated University policy is designed to ensure that the safe and secure disposal of all research data would occur at the end of a five year data retention period. Under the Victoria University Records Management Policy, such material must be destroyed by secure and irreversible means. This requirement has been

[24] Ibid.

[25] See National Health and Medical Research Council, *Australian Code for the Responsible Conduct of Research* (2007) National Health and Medical Research Council <https://nhmrc.gov.au/about-us/publications/australian-code-responsible-conduct-research-2007>; Victoria University, *Research Integrity Policy and Procedures* (2018) Victoria University <https://policy.vu.edu.au/view.current.php?id=00075>.

observed by ensuring that the researcher's R: Drive has been formatted so that the files will be deleted at the end of the mandatory data retention period.

Ethics approval

The proposed sampling and data management frameworks described above were provided to the Victoria University Human Research Ethics Committee during October 2017 and ethics approval was granted on 24 October 2017.

ANNEXURE E: INVITATION TO PARTICIPANTS AND CONSENT FORM

INFORMATION TO PARTICIPANTS INVOLVED IN RESEARCH

Invitation to participate in a PhD study

You are invited to participate in a research project entitled Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic), Battered Person's Syndrome and Justice.

This project is being conducted by a student researcher Mr Vincent Farrugia as part of a PhD in Law at Victoria University under the supervision of Dr Edwin Tanner and Professor Neil Andrews from the College of Law and Justice.

Project explanation

In March 2016, the Royal Commission into Family Violence concluded that the State of Victoria was inadequately responding to the social harm caused by family violence. In this study, you are invited to provide your expert-opinion on whether recent reforms to the law of self-defence provide a more just solution to victims of family violence who kill their violent partners.

While these reforms sought to address long-standing criticisms that the law failed to accommodate victims of family violence, it remains unclear whether these reforms have increased the accessibility of self-defence in practice. Using a mixed-methodological approach, expert-opinion on these matters will also be sought from other criminal trial and appellate judges, criminal lawyers and expert psychiatrist and psychologist witnesses.

As no doctoral study has examined the reformed law, the unique insight provided from you will inform policy makers and the legal profession of the extent to which the accessibility of self-defence has increased; the social, cultural, political and legal factors which may continue to reduce the accessibility of self-defence under the reformed law and suggestions for law reform if necessary.

What will I be asked to do?

- In this study, you will be asked to anonymously participate in an interview that should not exceed 60 minutes (1 hour) in duration.
- Your responses will be anonymously recorded by an audio-recording device so that your responses may be transcribed, incorporated and analysed within the Thesis (anonymously).
- Upon transcription, you will be contacted to verify the accuracy of your interview.

What will I gain from participating?

While participation is voluntary, your participation and analysis of your expert-opinion will produce beneficial insight concerning the law's operation in practice, factors which reduce the accessibility of self-defence to victims of family violence under the law's present formulation and suggestions for law reform if necessary.

As the 2014 reforms to the law of self-defence within the Crimes Act 1958 (Vic) have not been the subject of any extended research and analysis, this study is significant and may be of practical importance to policy and law makers, the legal profession and non-government organisations concerned with reducing family violence.

Here, policy and law makers stand to receive credible, expert-opinion feedback on whether the law could be reformed to increase the accessibility of self-defence to victims of family violence who kill their violent partners. This study will also inform legal practitioners of the social, cultural, political and legal difficulties they are likely to encounter under the reforms should they represent a victim of family violence who has killed their violent partner.

In turn, this may benefit the community by increasing the quality of representation afforded to those who seek to rely on self-defence in response to family violence.

How will the information you give be managed?

The data for this research will be collected through interviewing and the use of an audio-recording device to capture responses provided by participants. The responses will then be accurately transcribed to be used in the thesis. Accordingly, the research data shall exist in audio and written form (including any records which are compiled). You will not be identified within the Thesis, your responses will be reported anonymously. To ensure confidentiality, this study will employ a re-identifiable records management system. Under a re-identifiable records management system, personal identifiers of participants are removed and replaced by a code.

In conformity with the Victoria University Research Integrity Policy ("VURIP") and Australian Code For The Responsible Conduct of Research ("ACFTRCOR"), this study will store all research information and records safe and secure (protected) storage provided by the University. Hard copy material will be locked at the Graduate Research Centre at Level 1, 256 Queen Street, Melbourne, Victoria 3000. Soft copy material will be stored in the University's secure R: Drive facility under password protection.

In accordance with the ACFTRCOR, this project shall retain all research data for a period of 5 years from the date of publication. During this period, the data can be made available for use by other researchers (in a durable, indexed form) unless this is prevented by ethical, privacy or confidentiality matters.

On disposal, the ACFTRCOR mandates a University policy for the safe and secure disposal of research data following the mandatory retention period. According to the Victoria University Records Management Policy, the records must be destroyed by secure and irreversible means. This will entail the physical destruction of the hard copy material and the formatting of the project's allocated R: Drive for soft copy material.

What are the potential risks of participating in this project?

The physical and psychological risks to you in this study are anticipated to be negligible. All that is required is your anonymous expert-opinion on matters of law and legal practice. This study will take care to store data securely within the Graduate Research Centre and Victoria University's R: Drive whilst adopting pseudonyms to ensure that you are not identifiable by the information you provide.

While every effort will be taken to protect your anonymity, there is always the potential risk to be identified in the results of the research even if personal identifiers are removed. For example, other members of your profession may recall that you expressed a specific opinion on a specific matter with specific wording at a public event. If at any time you wish to discontinue your involvement with the study, you will not be jeopardised in anyway and your information will not be included in the study.

How will this project be conducted?

This study will use a semi-structured interview that is informed by the aims and literature review of the PhD.

It will record the interview responses with an audio recording device.

The audio recordings will be transcribed and then analysed within the PhD Thesis.

With reference to the aims of the study and the study's literature review, this study will consider what is learned from the interviews, what connective threads emerge from the responses and how such connections can be explained.

It will then consider how the interview responses have been consistent or inconsistent with the literature and how they go beyond the literature. Specifically, the data will be used to consider whether the reforms are likely to increase the accessibility of self-defence to victims of family violence who kill their violent partners. The data will also be used to identify any social, cultural, political or legal factors which may impact a juror's assessment of self-defence consequently reducing the accessibility of self-defence in this context.

It will then be used to evaluate the adequacy of the law and to recommend changes to any rules that are found to be inadequate. Ultimately, this analysis will enable the study to contextualise and articulate knowledge that was not known or understood prior to the interviewing process.

Who is conducting the study?

Victoria University - College of Law & Justice

Dr Edwin Tanner (Chief Investigator) - ejtanner@bigpond.com - 0417 291 245

Mr Vincent Farrugia (Student Researcher) - Vincent.Farrugia@vu.edu.au - 0400 045 359

Any queries about your participation in this project may be directed to the Chief Investigator listed above.

If you have any queries or complaints about the way you have been treated, you may contact the Ethics Secretary, Victoria University Human Research Ethics Committee, Office for Research, Victoria University, PO Box 14428, Melbourne, VIC, 8001, email researchethics@vu.edu.au or phone (03) 9919 4781 or 4461.

CONSENT FORM FOR PARTICIPANTS INVOLVED IN RESEARCH

INFORMATION TO PARTICIPANTS:

We would like to invite you to be a part of a PhD study into the extent to which recent reforms to the law of self-defence provide a more just solution to victims of family violence who kill their violent partners.

The study aims to:

1. Investigate whether the previous law of self-defence and family violence evidence unjustly failed to accommodate the experiences of family violence victims in criminal trials who were alleged to have killed their violent partners;
2. Consider whether the reforms are likely to increase justice in the accessibility of self-defence in this context;
3. With reference to the second aim, to identify any social, cultural, political or legal factors which may impact on a jury's assessment of self-defence and consequently reduce a just accessibility to self-defence in this context;
4. Provide suggestions for law reform to make self-defence more just in this context if necessary.

Your participation in the study would entail one anonymous interview for your expert-opinion on former and current law and legal practice. Your answers will be used to analyse the extent to which the reforms increase the accessibility of self-defence to victims of family violence and to provide suggestions for law reform if necessary. It is anticipated that the physical and psychological risk of participation is negligible. However, experience shows that it is still possible (although unlikely) for interview participants to be identified through views and professional opinions expressed (despite anonymity and the confidentiality of your involvement).

CERTIFICATION BY PARTICIPANT

I, _____

of _____

certify that I am at least 18 years old and that I am voluntarily giving my consent to participate in the study: Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic), Battered Person's Syndrome and Justice being conducted at Victoria University by **Mr Vincent Farrugia (Student Researcher), Dr Edwin Tanner (Chief Investigator) and Professor Neil Andrews (Associate Investigator).**

I certify that the objectives of the study, together with any risks and safeguards associated with the procedures listed hereunder to be carried out in the research, have been fully explained to me by:

Mr Vincent Farrugia (Student Researcher)

and that I freely consent to participation involving the below mentioned procedures:

- One interview with answers recorded (anonymously) by an audio-recording device (stored securely).
- Anonymous answers transcribed (stored securely) for analysis within the PhD Thesis.
- Answers published anonymously within the PhD Thesis.

I certify that I have had the opportunity to have any questions answered and that I understand that I can withdraw from this study at any time and that this withdrawal will not jeopardise me in any way.

I have been informed that the information I provide will be kept confidential.

Signed:

Date:

Any queries about your participation in this project may be directed to the Chief Investigator:

Dr Edwin Tanner

0417 291 245

If you have any queries or complaints about the way you have been treated, you may contact the Ethics Secretary, Victoria University Human Research Ethics Committee, Office for Research, Victoria University, PO Box 14428, Melbourne, VIC, 8001, email Researchethics@vu.edu.au or phone (03) 9919 4781 or 4461.

ANNEXURE F: PARTICIPANT DEMOGRAPHICS

Interviewee	**Occupation**	Sex
Judge A	Retired Supreme Court Justice	Female
Practitioner A	Experienced Murder Trial Barrister (Queen's Counsel)	Male
Practitioner B	Experienced Murder Trial Barrister (Queen's Counsel)	Male
Practitioner C	Experienced Murder Trial Barrister	Male
Practitioner D	Experienced Murder Trial Barrister	Female
Practitioner E	Experienced Murder Trial Barrister	Female
Practitioner F	Experienced Murder Trial Barrister	Male
Practitioner G	Experienced Murder Trial Barrister (Queen's Counsel)	Male
Practitioner H	Experienced Murder Trial Barrister (Queen's Counsel)	Male
Practitioner I	Experienced Murder Trial Solicitor	Male
Professor of Law A	Professor of Law and Academic- Criminal Law / Self-Defence / Family Violence	Female
Psychologist A	Forensic Psychologist - Family Violence Expert Witness	Male