

# DEFENSIVE HOMICIDE ON TRIAL IN VICTORIA

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*Defensive homicide was introduced in Victoria in 2005. It was enacted to provide a safety net conviction for women who kill an abusive partner and cannot satisfy the test for self-defence, but who should not be considered a murderer. However, 21 of the 24 people so far convicted of defensive homicide are men, and all but one of the victims is another man. The academic attention on defensive homicide has focused on women as offenders and victims, leaving the bulk of the cases unexamined. Given that the offence is currently under review, it is important that the cases are analysed in the context of male violence. This article considers whether the cases resulting in convictions for defensive homicide are within the intended scope of the offence and are compatible with the elements of the offence.*

## I INTRODUCTION

In late 2005, the then Victorian Labor Government announced that it would accept recommendations from the Victorian Law Reform Commission (VLRC) and amend the *Crimes Act 1958* (Vic) to introduce ‘groundbreaking’ and ‘great’ reforms to defences to homicide<sup>1</sup> that would address ‘women’s experience of violence’.<sup>2</sup> Perhaps the most significant reform was the abolition of the partial defence of provocation.<sup>3</sup> This measure was to respect women who were killed by their abusive partners, by abolishing the possibility of the offender avoiding a conviction for murder on the grounds that the woman had provoked the partner to lethal violence.<sup>4</sup> A second significant reform was the recognition of excessive self-defence to murder through the enactment of the substantive offence/alternative verdict of defensive homicide.<sup>5</sup> This measure was intended to benefit women who kill, rather than are killed by, an abusive partner by providing them with an

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1 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1843 (Rob Hulls, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1836 (Bruce Mildenhall); Victorian Law Reform Commission, *Defences to Homicide*, Issues Paper (2002) (*‘Homicide Defences Issues Paper’*); Victorian Law Reform Commission, *Defences to Homicide*, Options Paper (2003); Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) (*‘Homicide Defences Final Report’*).

2 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1353 (Rob Hulls, Attorney-General).

3 *Crimes Act 1958* (Vic) s 3B.

4 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1836 (Bruce Mildenhall).

5 *Crimes Act 1958* (Vic) s 9AD.

offence that sits ‘half-way’ between conviction for murder and complete acquittal on the basis of self-defence.

Twenty-four convictions for defensive homicide have been recorded since the offence was introduced in 2005.<sup>6</sup> Three of the offenders are women who killed abusive male partners.<sup>7</sup> The remaining 21 offenders are men, and all but one of them killed another man. A number of the cases involving male offenders have attracted public and political criticism because defensive homicide convictions were recorded in cases where the perception was that murder convictions were appropriate. The former Liberal Opposition called defensive homicide a ‘huge legal loophole’ and ‘another soft-on-crime debacle’.<sup>8</sup> Victim advocates say it is a ‘farce’,<sup>9</sup> ‘a national outrage, a national scandal’ and a ‘disgrace [that] must go’.<sup>10</sup> In 2010, the Victorian Department of Justice, under the former Labor Government, conducted a review of defensive homicide.<sup>11</sup> The Liberal Attorney-General announced in June 2012 that the offence would be amended, but it currently remains as it was originally enacted and there is no indication of the direction of further reforms.<sup>12</sup>

Despite the predominance of male violence, the commentary on defensive homicide to date has centred on women as either victims or offenders. These works seek to determine, largely, whether defensive homicide has improved the legal position of women who kill abusive male partners, or whether defensive homicide provides men who kill female partners with an alternative to the abolished provocation defence.<sup>13</sup> This academic focus has left the majority of

- 6 See Appendix for details of the offences as at 27 March 2013. In addition, four murder cases went to trial unsuccessfully arguing defensive homicide: *R v Romero* [2009] VSC 376 (3 September 2009); *Romero v The Queen* (2011) 32 VR 486; *R v Tran* [2011] VSC 473 (23 September 2011); *R v Babic* [2008] VSC 218 (20 June 2008); *Babic v The Queen* (2010) 28 VR 297 (‘*Babic*’); *DPP v Dunne* [2010] VSC 220 (27 May 2010); *Dunne v The Queen* [2011] VSCA 387 (17 November 2011). Each of these convictions resulted from trials where the juries rejected defensive homicide on the facts, and issues regarding the substantive law of defensive homicide were not raised. In *Babic*, the interaction between common law self-defence and defensive homicide was raised. See below n 35.
- 7 *R v Creamer* [2011] VSC 196 (20 April 2011); *R v Black* [2011] VSC 152 (12 April 2011); *R v Edwards* [2012] VSC 138 (24 April 2012).
- 8 See the comments of the Hon Gordon Rich-Phillips in Public Accounts and Estimates Committee, Parliament of Victoria, *Report on the 2010–11 Budget Estimates* (Pt 2) (2010) app 1, F4.
- 9 Adrian Lowe, ‘New Calls for State to Overhaul Homicide Laws’, *The Age* (Melbourne), 20 May 2010, 6.
- 10 Pdraic Murphy, ‘When Luke Middendrop Killed Jade Bownds, He Was Twice Her Size and He Said it Was Self-Defence’, *Herald Sun* (Melbourne), 12 April 2010, 13.
- 11 Department of Justice (Vic), ‘Defensive Homicide: Review of the Offence of Defensive Homicide’ (Discussion Paper, August 2010).
- 12 Alex White, ‘Defensive Homicide Law to Be Changed in Victoria’, *Herald Sun* (online), 26 June 2012 <<http://www.heraldsun.com.au/news/true-crime-scene/defensive-homicide-law-to-be-changed-in-victoria/story-fnat7jnn-1226408477655>>.
- 13 See generally Kellie Toole, ‘Self-Defence and the Reasonable Woman: Equality before the New Victorian Law’ (2012) 36 *Melbourne University Law Review* 251; Danielle Tyson, ‘Victoria’s New Homicide Laws: Provocative Reforms or More Stories of Women “Asking For it”?’ (2011) 23 *Current Issues in Criminal Justice* 205; Kate Fitz-Gibbon and Sharon Pickering, ‘Homicide Law Reform in Victoria, Australia from Provocation to Defensive Homicide and Beyond’ (2012) 52 *British Journal of Criminology* 159; Anthony Hopkins and Patricia Easteal, ‘Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland’ (2010) 35 *Alternative Law Journal* 132.

cases unexamined,<sup>14</sup> and this article seeks to address this gap in the scholarship by analysing the defensive homicide cases involving male offenders. It considers whether the defensive homicide offending is within the intended scope of the offence and compatible with its elements, and whether there have been any unintended consequences of the extension of defensive homicide to this kind of offending. This is an important inquiry given that the offence is currently under review and the bulk of the convictions for the offence have received little attention.

The article proceeds in the following way. Part II details the abolition of provocation and the introduction of defensive homicide. The abolition of provocation has already been considered elsewhere,<sup>15</sup> and is covered here in only enough detail to provide the context for the introduction of defensive homicide. Defensive homicide addressed the situation of women who kill abusive partners, because the existing defences to homicide did not adequately accommodate the circumstances of their offending. The offence was framed to encompass vulnerable victims of family and other violence, and was intended to apply, sparingly, to a narrow class of disadvantaged offenders.

Part III analyses the 21 reported defensive homicide cases involving male offenders, and divides them into three categories: family situations (4 cases), mental health situations (2 cases), and fights between male friends or acquaintances (15 cases). It concludes that only one of the convictions of the 21 male offenders is firmly within the scope and compatible with the elements of defensive homicide.

Part IV concludes that the convictions of male offenders for defensive homicide actually undermine the purpose of the new offence. By routinely applying defensive homicide to occasions of commonplace violence, the offence is benefitting the offender group whose prominence among self-defence cases prompted the need for law reform.

## II BACKGROUND TO DEFENSIVE HOMICIDE

### A *Partial Defence of Provocation*

Provocation is a partial defence to murder. It is based on the proposition that someone who kills in response to provocative conduct by the victim is less culpable than someone who kills deliberately in cold blood, but still deserves to face a serious penalty.<sup>16</sup> A person charged with murder, who successfully raises the defence of provocation, will be convicted of manslaughter rather than murder.

14 The exception is Asher Flynn and Kate Fitz-Gibbon, 'Bargaining with Defensive Homicide: Examining Victoria's Secretive Plea Bargaining System Post-Law Reform' (2011) 35 *Melbourne University Law Review* 905, which considers the convictions of male offenders, but from the perspective of plea bargaining and sentencing discretion. Tyson, above n 13, 221 noted that men who kill other men represent the majority of convictions for defensive homicide, but these offenders were outside the scope of her inquiry.

15 See further above n 13.

16 *Parker v The Queen* (1963) 111 CLR 610, 651.

The defence originated in Anglo-Saxon times, when lethal violence resulting from drunken brawls and duelling between men was common. Over the following centuries the defence was also applied where men reacted with sudden lethal violence on discovering their wives being unfaithful or men making improper advances towards their wives or daughters.<sup>17</sup> The defence was framed according to one-off encounters between male strangers or acquaintances of equal strength. The rationale today is that it 'amounts to a concession to human frailty'.<sup>18</sup> South Australia is now the only state in which provocation exists at common law. It has been abolished in Victoria,<sup>19</sup> Western Australia,<sup>20</sup> and Tasmania,<sup>21</sup> and modified by statute in the other jurisdictions.<sup>22</sup> However, the elements of the defence remain relatively uniform.<sup>23</sup> The general test is that there must have been provocative conduct by the victim,<sup>24</sup> the defendant must have lost self-control as a result of the provocation,<sup>25</sup> and the provocation must have been capable of causing an 'ordinary person' to lose self-control and form an intention to inflict death or grievous bodily harm.<sup>26</sup>

McAuley states that the 'essence of provocation is that the defendant lost control in circumstances in which it was difficult but not impossible to retain it'.<sup>27</sup> The 'loss of self-control' is not literal because if a person literally lost self-control then their actions would not be voluntary and they would not have had the mental state required for the imposition of criminal liability.<sup>28</sup> Provocation is a much-criticised defence on the basis that it justifies male aggression, and the VLRC and the Victorian Parliament found that it reflected outdated notions of male behaviour that no longer have community acceptance.<sup>29</sup> Upon its abolition, the Attorney-General announced that the 'defence of provocation promotes a culture of blaming the victim and has no place in modern society'.<sup>30</sup>

17 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, 'Model Criminal Code Chapter 5 — Fatal Offences against the Person' (Discussion Paper, June 1998) 73.

18 Ibid 75.

19 *Crimes Act 1958* (Vic) s 3B, inserted by *Crimes (Homicide) Act 2005* (Vic) s 3.

20 *Criminal Code Act Compilation Act 1913* (WA) s 281, repealed by *Criminal Law Amendment (Homicide) Act 2008* (WA) s 11.

21 *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas) s 4.

22 *Crimes Act 1900* (ACT) s 13(2); *Crimes Act 1900* (NSW) s 23; *Criminal Code Act 1983* (NT) sch 1 s 158.

23 *Stingel v The Queen* (1990) 171 CLR 312, 320.

24 *R v Chhay* (1994) 72 A Crim R 1, 13.

25 *R v Perks* (1986) 41 SASR 335, 341, 347–8.

26 *Stingel v The Queen* (1990) 171 CLR 312, 328.

27 Finbarr McAuley, 'Provocation: Partial Justification, Not Partial Excuse' in Stanley Meng Heong Yeo (ed), *Partial Excuses to Murder* (Federation Press, 1991) 19, 19.

28 Stephen James Odgers, 'Contemporary Provocation Law — Is Substantially Impaired Self-Control Enough?' in Stanley Meng Heong Yeo (ed), *Partial Excuses to Murder* (Federation Press, 1991) 101, 102.

29 *Homicide Defences Final Report*, above n 1, 56 [2.95].

30 Office of the Attorney-General (Vic), 'Hulls Announces Major Reform to Homicide Laws' (Media Release, 4 October 2005).

## B Self-Defence to Murder

Self-defence is a complete defence, including to a charge of murder. Victoria retained the common law of self-defence until 2005,<sup>31</sup> which the High Court had articulated in *Zecevic v DPP (Vic)* (*'Zecevic'*) as requiring that

the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.<sup>32</sup>

This states a two limb test requiring, first, that the defendant subjectively believed their lethal action was necessary, and second, that their belief was objectively reasonable in the circumstances, as the defendant perceived those circumstances. *Zecevic* recognised that a threat would 'not ordinarily' call for a lethal response unless it 'causes a reasonable apprehension ... of death or serious bodily harm',<sup>33</sup> but the case did not require that the threat be of this nature. This formulation widened the scope of common law self-defence to murder because the previous authority, *Viro v The Queen* (*'Viro'*), did require that a defendant be facing death or serious bodily harm.<sup>34</sup>

The 2005 Victorian reforms enacted the statutory defence of self-defence to murder in s 9AC.<sup>35</sup> This section provides that:

A person is not guilty of murder if he or she carries out the conduct that would otherwise constitute murder while believing the conduct to be necessary to defend himself or herself or another person from the infliction of death or really serious injury.<sup>36</sup>

The section makes two significant changes to the common law of self-defence. First, it narrows the *Zecevic* test by requiring that the threat faced by the accused be of death or really serious injury. Secondly, and more importantly for the purposes of this paper, it removes the requirement of reasonable grounds for the belief in the need for lethal violence. It does not, however, entitle a defendant to

31 Victoria was the last Australian jurisdiction to codify the defence. See *Criminal Code Act 1995* (Cth) sch 1 s 10.4; *Criminal Code 2002* (ACT) s 42; *Crimes Act 1900* (NSW) s 418; *Criminal Code Act 1983* (NT) s 43BD; *Criminal Code Act 1989* (Qld) sch 1 s 271; *Criminal Law Consolidation Act 1935* (SA) s 15(1); *Criminal Code Act 1924* (Tas) s 46; *Criminal Code Act Compilation Act 1913* (WA) s 248.

32 (1987) 162 CLR 645, 661 (Wilson, Dawson and Toohey JJ).

33 Ibid 662.

34 (1978) 141 CLR 88, 146 (Mason J).

35 Self-defence to non-homicide offences is still covered by the common law. Self-defence to manslaughter was codified in *Crimes Act 1958* (Vic) s 9AE in 2005.

36 *Crimes Act 1958* (Vic) s 9AC. Before August 2010, there was dispute regarding whether s 9AC displaced the common law, or whether common law self-defence could still be applied if the defendant was facing threats other than of death or really serious injury. See *R v Gould* (2007) 17 VR 393; *R v Pepper* (2007) 16 VR 637; *R v Parr* (2009) 21 VR 590; *DPP v Samson-Rimoni [Ruling No 1]* [2010] VSC 26 (8 February 2010). The Court of Appeal resolved the issue in *Babic* (2010) 28 VR 297, finding that common law self-defence no longer applied. The decision of Parliament to specify the requirement that threats be of death or really serious injury was contrary to the recommendation of the VLRC. See s 322I of the VLRC's Draft Proposals for a Crimes (Defences to Homicide) Bill in *Homicide Defences Final Report*, above n 1, 318.

a complete acquittal where there are no such reasonable grounds, because in that situation, s 9AD qualifies s 9AC in the manner discussed below.<sup>37</sup>

### C Excessive Self-Defence

The partial defence of excessive self-defence recognises a difference between the moral culpability of someone who commits murder, and someone who kills for a defensive purpose, but misjudges the level of force necessary in the circumstances.<sup>38</sup> It applies when ‘an error of judgment on the part of the accused ... deprives him of the absolute shield of self-defence’<sup>39</sup> and generally results in a conviction for manslaughter.<sup>40</sup> The principle that defendants are entitled to a conviction indicating reduced moral culpability where they have ‘misjudged’ or ‘made an error’ in relation to danger is critical to the justification for excessive self-defence, and so it is critical to this article’s analysis of whether the defensive homicide convictions are compatible with the elements of the offence.

Excessive self-defence has two possible formulations. The first is that the defendant believed their actions were necessary in self-defence, but lethal force was disproportionate to the threat they believed they faced. The second is that the defendant believed their actions were necessary in self-defence, but the belief in the need for the lethal force was not reasonable.<sup>41</sup>

Excessive self-defence has also been described as ‘imperfect’,<sup>42</sup> ‘unreasonable’,<sup>43</sup> or ‘mistaken’ self-defence,<sup>44</sup> and has been in and out of favour in Australian law for over half of a century. It was first recognised in Australia in the Victorian Supreme Court in 1957.<sup>45</sup> It was adopted by the High Court the following year in

37 *Crimes Act 1958* (Vic) s 9AC note 1 refers to s 4, which refers in turn to s 9AD. For a discussion of the complexity that the codification of self-defence and the introduction of defensive homicide have introduced into, particularly, jury directions, see Justice Mark Weinberg, ‘The Criminal Law — A “Mildly Vituperative” Critique’ (2011) 35 *Melbourne University Law Review* 1177, 1180–4.

38 *Viro* (1978) 141 CLR 88, 139.

39 *Ibid.*

40 For a discussion of excessive self-defence, see Stanley Yeo, ‘Revisiting Excessive Self-Defence’ (2000) 12 *Current Issues in Criminal Justice* 39.

41 The two formulations are generally discussed interchangeably. Both formulations were contemplated by the VLRC in *Homicide Defences Final Report*, above n 1, 329, and by the High Court in *Viro* (1978) 141 CLR 88. Barwick CJ identifies the problems with determining excessive self-defence on the basis of proportionality of response without reference to the reasonableness of belief: at 98–9. It has been suggested that defensive homicide (focus on reasonableness of the belief) may have broader effect than excessive self-defence (focus on the proportionality of the response). See Carolyn B Ramsey, ‘Provoking Change: Comparative Insights on Feminist Homicide Law Reform’ (2010) 100 *Journal of Criminal Law & Criminology* 33, 76.

42 Ramsey, above n 41, 42; Alafair S Burke, ‘Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman’ (2002) 81 *North Carolina Law Review* 211, 240; Reid Griffith Fontaine, ‘A Symposium on Self-Defence: An Attack on Self-Defence’ (2010) 47 *American Criminal Law Review* 57, 81.

43 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1842 (Robert Clark).

44 Marianne Giles, ‘Self-Defence and Mistake: A Way Forward’ (1990) 53 *Modern Law Review* 187, 187.

45 *R v McKay* [1957] VR 560. However, it was arguably first accepted in *R v Griffin* (1872) 10 SCR (NSW) 91, 107 (Cheeke J).

1958,<sup>46</sup> abolished by the Privy Council in 1971,<sup>47</sup> recognised by the High Court again in 1978,<sup>48</sup> questioned by it in 1987,<sup>49</sup> and later reintroduced by statute in South Australia,<sup>50</sup> New South Wales,<sup>51</sup> and Western Australia.<sup>52</sup>

## D Introduction of Defensive Homicide

The VLRC recommended that excessive self-defence operate in the conventional way, as a partial defence, and result in a conviction for manslaughter.<sup>53</sup> However, the Parliament opted instead to introduce the new offence of defensive homicide. This parliamentary innovation was introduced so that the basis for reduced culpability would be clear where a jury returned a verdict to a lesser offence on a trial for murder. It was not intended to modify the interpretation of excessive self-defence.<sup>54</sup> Victoria enacted a formulation of excessive self-defence — that a defendant believed their actions were necessary in self-defence — but qualified it by requiring that the defendant's belief in the need for the lethal force be reasonable. Accordingly, s 9AD provides that

A person who, by his or her conduct, kills another person in circumstances that, but for section 9AC, would constitute murder, is guilty of an indictable offence (defensive homicide) and liable to level 3 imprisonment (20 years maximum) if he or she did not have reasonable grounds for the belief referred to in that section.<sup>55</sup>

## E Evidence of Family Violence

At the same time that Parliament abolished provocation and introduced defensive homicide, it also enacted s 9AH to provide for the admission of evidence of family violence where the defendant in a family homicide matter alleged previous violence by the person they killed. The section defines family violence broadly, to include actual physical, sexual and psychological abuse, and threats of any of those forms of abuse.<sup>56</sup> The scope of the evidence that can be admitted is equally broad, and may relate to the dynamics and effects of family violence generally, or details specific to the violent relationship in question, such as the history of

46 *R v Howe* (1958) 100 CLR 448.

47 *Palmer v The Queen* [1971] AC 814.

48 *Viro* (1978) 141 CLR 88, 146. This case determined that the High Court of Australia was not bound by the decisions of the Privy Council and so it could overrule *Palmer v The Queen* [1971] AC 814.

49 *Zecevic* (1987) 162 CLR 645, 660.

50 *Criminal Law Consolidation Act 1935* (SA) ss 15(1)(b), (2).

51 *Crimes Act 1900* (NSW) s 421.

52 *Criminal Code Act Compilation Act 1913* (WA) sch 1 s 248.

53 See s 322J of the VLRC's Draft Proposals for a Crimes (Defences to Homicide) Bill in *Homicide Defences Final Report*, above n 1, 319.

54 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1844 (Rob Hulls, Attorney-General).

55 *Crimes Act 1958* (Vic) s 9AD.

56 *Ibid* s 9AH(4).

the violence and the particular effects on the members of the relationship or family.<sup>57</sup> The evidence is admitted to assist the court to understand the context of the offending, and so assess whether the circumstances justified lethal violence in a situation where the jury might otherwise decide that the lethal response constituted murder. Sub-section (1) makes clear that

where family violence is alleged a person may believe, and may have reasonable grounds for believing, that his or her conduct is necessary ...

even if —

- (c) he or she is responding to a harm that is not immediate; or
- (d) his or her response involves the use of force in excess of the force involved in the harm or threatened harm.<sup>58</sup>

The provision is framed in gender-neutral terms, but is of critical importance for abused women who kill abusive partners. The section directly and intentionally confronts the problem women have faced in having their belief in lethal conduct considered genuine and reasonable as it provides women with the opportunity to explain the fear, desperation and lack of options that can lead them to resort to lethal violence instead of simply leaving a violent relationship. In certain cases, this provision will provide a basis for such women to have the full protection of self-defence, and mean they do not require the intermediate offence of defensive homicide. In other cases, the provision will provide a context to their actions that will result in a conviction for defensive homicide where a conviction for murder would otherwise have resulted.

## **F Rationale for the Law Reform**

The poor fit between the law of self-defence and the experiences of women who kill abusive partners has been thoroughly documented elsewhere.<sup>59</sup> The VLRC summarised the difficulty as arising from '[t]he traditional association of self-defence with a one-off spontaneous encounter, such as a pub brawl scenario between two people (usually men) of relatively equal strength'.<sup>60</sup> Where men kill in self-defence, they generally respond to a threat immediately and in a proportionate manner. While neither immediacy nor proportionality is required for self-defence to be established, the association between these characteristics and the defence is very strong. When women kill to prevent further violence

<sup>57</sup> Ibid s 9AH(3).

<sup>58</sup> Ibid ss 9AH(1)(c)–(d).

<sup>59</sup> See, eg, Julia Tolmie, 'Battered Defendants and the Criminal Defences to Murder — Lessons from Overseas' (2002) 10 *Waikato Law Review* 91; Patricia Easteal, 'Battered Women Who Kill: A Plea of Self-Defence' in Patricia Weiser Easteal and Sandra McKillop (eds), *Women and the Law* (Australian Institute of Criminology, 1993) 37; Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Charges of Homicide: The Structural and Systemic versus the Personal and Particular' in Wendy Chan, Dorothy E Chunn and Robert Menzies (eds), *Women, Madness and the Law: A Feminist Reader* (GlassHouse Press, 2005) 191; Hopkins and Easteal, above n 13, 132.

<sup>60</sup> *Homicide Defences Final Report*, above n 1, 61 [3.8].



from their abusive intimate partners, they often need to use a weapon, have assistance from another person, or strike while the abuser is asleep.<sup>61</sup> The lack of immediacy and proportionality in these responses can cause juries to doubt that defendants believed their actions were necessary, or to find that their belief was unreasonable, and consequently deem their actions to be premeditated killings.<sup>62</sup> For this reason, the VLRC concluded that '[a]lthough self-defence is technically equally available to both men and women ... in practice the defence is usually only useful to men'.<sup>63</sup>

Against this backdrop, the VLRC identified early in its review of defences to homicide that its major focus would be the question of 'how the law should deal with women who kill in response to domestic violence'.<sup>64</sup> Part of its answer was the codification of self-defence in s 9AC, which made clear that neither immediacy nor proportionality were required for self-defence. The reintroduction of excessive self-defence was another significant part of its answer. The VLRC concluded that excessive self-defence would provide a necessary 'halfway house' or 'safety net' for women who kill abusive partners in circumstances where their actions are accepted as genuinely defensive, but not reasonable.<sup>65</sup> The Victorian Parliament also focused on women who kill in these circumstances. During the debates of the Crimes (Homicide) Bill 2005 (Vic), the Labor Member for Footscray described the new provisions as 'bold and committed legislation, the effect of which will be to protect and provide greater justice for women who are subjected to domestic violence'.<sup>66</sup>

While the VLRC and the Victorian Parliament were focused on abused women, the excessive self-defence/defensive homicide provision was never intended to be limited to them. The VLRC argued that '[f]amily violence ... can occur in the context of any close personal relationship'.<sup>67</sup> It was equally clear that excessive self-defence could have application beyond family violence situations, and the VLRC illustrated the broader application through the example of a young man killing a physically stronger person, where he genuinely defended himself but used an excessive level of force.<sup>68</sup>

The VLRC presented four New South Wales case studies in support of its recommendation to reintroduce excessive self-defence.<sup>69</sup> In each of the cases, the defendant's vulnerability contributed to the occurrence of the homicide. The first defendant, Leanne Trevenna, shot a man with whom she shared a house.<sup>70</sup> The

61 Ibid 62 [3.11].

62 *Homicide Defences Issues Paper*, above n 1, 54–5 [5.18]–[5.20].

63 *Homicide Defences Final Report*, above n 1, 63 [3.14].

64 *Homicide Defences Issues Paper*, above n 1, 120 [10.11].

65 *Homicide Defences Final Report*, above n 1, 102–3 [3.106]–[3.110].

66 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1836 (Bruce Mildenhall).

67 *Homicide Defences Final Report*, above n 1, 61 [3.9].

68 Ibid 84 [3.71].

69 The defence of 'Self-Defence — Excessive Force that Inflicts Death' in *Crimes Act 1900* (NSW) s 421 was introduced in December 2001 by the *Crimes Amendment (Self-Defence) Act 2001* (NSW).

70 See generally *R v Trevenna* (2004) 149 A Crim R 505 ('Trevenna'). See also *Homicide Defences Final Report*, above n 1, 96 [3.96].

deceased was ‘a large and intimidating man with ... convictions for assault [and] ... a history of inflicting violence upon women’.<sup>71</sup> Trevenna had a long history of heroin use and sexual abuse, little schooling, no work experience and nowhere to live but with the deceased.<sup>72</sup> The Crown accepted her account of the events preceding the shooting:

He said ‘You’re a fucking bitch, I’m going to kill you’. Terry grabbed me and threw me, I landed on the carpet near the bed. We struggled. I tried to hit him, but he grabbed me by the throat ... I knew he had a shot gun ... I reached in and got it. ... I saw him facing away from me with the cricket bat raised in his hand. ... I thought he’d bash me really badly or probably kill me. I moved a pace or so forward and shot him ...<sup>73</sup>

In the second case study, Cheryl Scott killed her de facto partner with five blows to the head with an iron.<sup>74</sup> The sentencing judge did not accept the evidence of two experts that she was suffering from ‘battered woman syndrome’,<sup>75</sup> but did accept that she suffered chronic alcoholism, post-natal depression from eight unsuccessful pregnancies, and trauma resulting from her children being removed from her care.<sup>76</sup> He also accepted that she experienced periodic violence from the deceased, who, just before the attack, was intoxicated, verbally abusive, chased her with a butcher’s knife, and choked her.<sup>77</sup>

The third case study involved a fight at a hotel that resulted in Gheorghe Cioban fatally shooting a man.<sup>78</sup> Before the shooting, Cioban was punched and kicked by a group of men, including the deceased, who were all younger and taller than himself, and were intoxicated and behaving aggressively. Cioban tried to retreat from the fight, but was pursued and cornered by the deceased. Cioban fired a ‘warning shot’ and gave verbal warnings, but the deceased continued punching him and so Cioban fired the fatal shot.<sup>79</sup> In the final case study, Minh Hau Nguyen, who had a violent, gang-related criminal history, was playing computer games at the house of a friend.<sup>80</sup> Eight men armed with weapons forced entry into the

71 *Trevenna* (2004) 149 A Crim R 505, 512 [25].

72 *Ibid* 514 [28]–[30]; *R v Trevenna* [2003] NSWSC 463 (29 May 2003) [28], [32].

73 *Trevenna* (2004) 149 A Crim R 505, 512 [22]. The defendant pleaded guilty to manslaughter despite the apparent availability of self-defence. The sentencing judge found that ‘a jury may not have been persuaded ... that the Crown had negated self-defence and that it may accordingly have acquitted the offender altogether’: *R v Trevenna* [2003] NSWSC 463 (29 May 2003) [40]. The Court of Criminal Appeal held that the circumstances which prompted the killing ‘involved a real and immediate threat to her life’: *Trevenna* (2004) 149 A Crim R 505, 521 [58].

74 See generally *R v Scott* [2003] NSWSC 627 (10 July 2003). See also *Homicide Defences Final Report*, above n 1, 97 [3.96].

75 *R v Scott* [2003] NSWSC 627 (10 July 2003) [58], [61], [73], [74].

76 *Ibid* [69]–[70].

77 *Ibid* [38], [53], [58], [71]–[78]. Scott also appears to have had a viable defence of self-defence yet she pleaded guilty to manslaughter.

78 *Homicide Defences Final Report*, above n 1, 97 [3.96]; *Cioban v The Queen* (2003) 139 A Crim R 265.

79 *Cioban v The Queen* (2003) 139 A Crim R 265, 267–9.

80 *Homicide Defences Final Report*, above n 1, 98 [3.96]; *R v Nguyen* [2002] NSWSC 536 (14 June 2002).

house to steal drugs and money they believed were inside. Nguyen fired two shots from his handgun, killing one man instantly.<sup>81</sup>

The cases chosen by the VLRC in support of the reintroduction of excessive self-defence are instructive. In the first two case studies, the women were vulnerable through personal circumstances, and the earlier violence inflicted by their victims. The two male victims were far from vulnerable figures generally, but in the circumstances preceding the homicides, were confronted by groups of angry, abusive men while they were unprepared for a violent encounter. The choice of cases that involve such vulnerability underlines the priorities of the VLRC in promoting the reintroduction of excessive self-defence. These characteristics are critical. They clearly define the scope of defensive homicide, and distinguish it from the dynamic of fights between people of equal strength and mutual willingness to participate in violence that influenced the defence of self-defence.

The intention that an excessive self-defence provision would have a narrow scope was evident in the comments of the VLRC on the limited application of the proposed defence. The VLRC argued that the reintroduction of excessive self-defence was an important innovation, '[n]o matter how remote the possibility'<sup>82</sup> that it would ever actually apply in practice. Even though the Parliament introduced a provision that was not limited to either family violence situations or female offenders, and was an offence in itself as well as a partial defence, the Attorney-General supported the position of the VLRC that defensive homicide would have limited application. He stated that 'in practice most cases are likely to continue to result in either a conviction for murder or a complete acquittal. Relatively few cases are likely to fall into the new defensive homicide category'.<sup>83</sup>

The Victorian law reforms thus recognised that abused women are subject to a power imbalance in their relationships. In extreme circumstances, a lethal response to a threat from an abusive partner can be reasonable, and a woman will be protected by self-defence, and completely acquitted.<sup>84</sup> In other circumstances, a violent relationship can skew a woman's assessment of a violent situation. She might genuinely believe she needs to use lethal force to prevent death or really serious injury, but her belief is not reasonable, even in the context of the violent relationship. In such a situation, she is convicted of defensive homicide rather than murder. Less frequently, other family relationships, or even non-family relationships, entail power dynamics extreme enough to impair a person's assessment of danger. Defendants who kill in the context of these relationships are also within the scope of s 9AD, because a power imbalance leads to an error of judgment that reduces their culpability from that required for a conviction for murder, but not to the level that justifies a complete acquittal.

81 *R v Nguyen* [2002] NSWSC 536 (14 June 2002) [4]–[9].

82 *Homicide Defences Final Report*, above n 1, 94 [3.91].

83 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1351 (Rob Hulls, Attorney-General).

84 The provision was supported by the introduction of s 9AH, which recognises that previous family violence might affect a defendant's apprehension of whether a lethal response is required.

### III THE CASES

The 21 cases involving male offenders can be categorised as family violence or non-family violence, and the non-family violence cases can be further broken down into mental health cases and fights. The relatively small body of case material affords the opportunity to be comprehensive in discussing the cases. The detailed discussion is necessary to show the type of offending that is resulting in defensive homicide convictions, which is necessary to underpin the argument that the cases are routine examples of mundane violence, outside the intended scope of the offence, and incompatible with its express provisions. The detailed discussion is particularly important because of the lack of appellate cases considering defensive homicide and articulating relevant guiding principles.<sup>85</sup>

#### A Family Relationships

There was a family relationship between the offender and the victim in four of the 21 defensive homicide cases involving male offenders. In each family violence case, the offender admitted causing the death of the victim, but successfully denied culpability for murder. Only one of these cases aligns neatly with the intentions of the Victorian Parliament or with the actual defensive homicide provisions.

#### 1 Monks

The case of *R v Monks* ('*Monks*')<sup>86</sup> is the sole illustration of the defensive homicide provisions applying as they were intended. It vindicates the VLRC position that the offence could appropriately apply in family situations other than where a woman killed an abusive male partner. Milner Monks pleaded guilty to the defensive homicide of his uncle, Ian Monks. Milner had burglary and theft charges pending, and had been granted bail on the condition that he reside with his uncle, Graeme Monks. Graeme lived with his brother, Ian.<sup>87</sup> The relationship between Ian and Milner Monks had been violent since Milner was three years old.<sup>88</sup> The violence peaked when Milner was a teenager, when Ian twice faced criminal charges for intentionally causing injury and threatening to kill him.

On 14 July 2009, the three men were drinking together amicably at home when the police arrived to speak to Ian about an unrelated road rage incident. Having earlier observed his careless driving, the police breathalysed him and found that he had just driven to buy more alcohol while already intoxicated.<sup>89</sup> Ian became angry, and blamed his nephew for the resulting drink driving charge, as Milner had requested that more alcohol be obtained. Ian ordered Milner to leave the

85 The exception is *Babic* (2010) 28 VR 297 in relation to common law self-defence. See above n 36.

86 [2011] VSC 626 (2 December 2011).

87 *Ibid* [1], [20], [28].

88 *Ibid* [1]–[4], [13], [19], [28].

89 *Ibid* [5].

house, and repeatedly punched him. Milner swung a hammer at Ian, then left the room, returned with a tomahawk, and twice hit him over the head with it, causing fatal injuries.<sup>90</sup>

Monks' mother was frequently imprisoned during Monks' childhood, and so he lived with his grandmother. He was the subject of repeat child protection notifications and 'constant family violence'.<sup>91</sup> After his arrest, Monks reported to a psychologist 'a deep sense of distress and abiding powerlessness in the face of the abuse and ... mounting fear that [Ian] would cause ... serious harm or perhaps kill [him]'.<sup>92</sup> These feelings were 'rekindled' by the bail agreement requiring him to live with his uncle.<sup>93</sup> The psychologist found that at the time of the offending, Monks was affected by severe psychological problems 'characterised by elevated generalised anxiety in the context of residual traumatic symptoms'.<sup>94</sup> He further found that Monks' conduct conformed

to a well recognised pattern, that of passive acceptance of brutality directed at the subject, a failure to escape the situation for enduring periods and ultimately the eruption of explosive violence in response to yet another episode of the person being attacked.<sup>95</sup>

Monks' behaviour conformed to the pattern identified as 'battered woman syndrome'.<sup>96</sup> The judge remarked to Monks in sentencing that 'when faced with your uncle in a rage and punching you, the violence you suffered over the years and its sequelae *affected your ability to exercise appropriate judgment or to make calm and rational choices*'.<sup>97</sup> The clear connection between Monks' offending and the previous family violence places him firmly within the category of offender that the VLRC and the Victorian Parliament intended to benefit from defensive homicide. In addition to being within the intended scope of the offence, his conduct is also compatible with the provisions enacted, as the earlier family violence explains why he misjudged the danger presented by the punching and verbal abuse from his uncle to the extent that he genuinely, but not reasonably, concluded that lethal violence was necessary.

The three remaining family violence cases stand in contrast to *Monks*. They represent significantly differing factual situations, but none of them approximate the circumstances contemplated by the VLRC in proposing the reintroduction of excessive self-defence, or of the Parliament in introducing the new provisions. They are discussed below in the order in which they were sentenced.

90 Ibid [7], [10].

91 Ibid [18].

92 Ibid [19].

93 Ibid [20].

94 Ibid [21].

95 Ibid [25].

96 Lenore E Walker, *The Battered Woman* (Harper & Row, 1979); Lenore E Walker, *The Battered Woman Syndrome* (Springer Publishing, 1984).

97 *Monks* [2011] VSC 626 (2 December 2011) [33] (emphasis added).

## 2 Middendorp

Luke Middendorp and Jade Bownds had recently ended a short de facto relationship, but they still lived together in a house in Brunswick. Just before midnight on 1 September 2008, Bownds and a male friend arrived at the Brunswick house. Middendorp was drunk and told Bownds he would stab her if she went inside the house. While Middendorp chased the man away with a knife, Bownds entered the house. Middendorp returned home and stabbed her four times in the back with a fishing knife. She ran out of the house and, as she lay dying in the street, witnesses heard him shout ‘words to the effect that she got what she deserved and that she was a filthy slut’.<sup>98</sup> He defended a charge of murder by arguing self-defence at trial.

Neighbours and family members agreed that Bownds and Middendorp had a tempestuous relationship, marked by alcohol and drug abuse and violence between them. Middendorp testified that he did not ever initiate the violence in the relationship.<sup>99</sup> Bownds’ mother, however, told the court that in the months before her death, Middendorp had cut Bownds’ throat with a box-cutter, hit her with a frying pan and a vacuum cleaner pole, twice strangled and threatened to kill her, and kicked her with a steel-capped boot.<sup>100</sup> The mother’s credibility was impugned at trial, and the judge remarked that the jury might have rejected her testimony,<sup>101</sup> even though Middendorp was subject to a Family Violence Intervention Order and a bail agreement for alleged offences against Bownds at the time he stabbed her.<sup>102</sup>

Middendorp testified that before her death, Bownds raised a knife at him in a threatening manner, and because of her previous violence, he believed that he had to stab her to prevent himself from being stabbed.<sup>103</sup> The jury found that he believed his actions were necessary, but that there were no reasonable grounds for that belief.<sup>104</sup> Whether defensive homicide saved Middendorp from a conviction for murder or denied him a complete acquittal is impossible to tell. However, an acquittal at common law would have required a jury to accept that it was reasonable for a six foot tall, 90kg man armed with a knife to believe he had to use lethal violence against a woman weighing 50kg.<sup>105</sup> Middendorp’s conviction for defensive homicide is controversial because of the reversal of the expected gender roles, the superior size of the offender, the evidence of previous violence by him, and his verbal abuse of the dying Bownds. This case accounts for much of

98 *R v Middendorp* [2010] VSC 202 (19 May 2010) [9] (Byrne J) (*‘Middendorp’*).

99 *Ibid* [6].

100 *Middendorp v The Queen* (2012) 218 A Crim 286, 288–9 [7]. See also *Middendorp* [2010] VSC 147 (1 March 2010) [7]. This ruling is additionally interesting on the application of the *Evidence Act 2008* (Vic) to the admissibility of hearsay and tendency evidence.

101 *Middendorp* [2010] VSC 202 (19 May 2010) [7] (Byrne J).

102 *Ibid* [20].

103 See *Crimes Act 1958* (Vic) s 9AC. His defence was assisted by s 9AH.

104 Middendorp was convicted upon retrial as a previous jury had been unable to reach a decision.

105 ‘Appeal over Ex-Lover Killing’, *The Age* (online), 26 September 2011 <<http://www.theage.com.au/victoria/appeal-over-ex-lover-killing-20110926-1kt10.html>>.

the public criticism of defensive homicide.<sup>106</sup> However, his claim of self-defence within a violent intimate relationship places his case firmly within the intended scope of the defensive homicide provisions, and the jury clearly accepted that he had a genuine belief in the need for lethal violence.

### 3 Spark

Spark's is not the kind of family violence situation contemplated by the VLRC or the Parliament, either.<sup>107</sup> In fact, the former Liberal Opposition cited this conviction as evidence that defensive homicide was 'soft on crime'.<sup>108</sup> Gordon Spark pleaded guilty to defensive homicide for bashing to death his 60 year-old uncle, George Spark. The Crown initially rejected his offer to plead guilty to manslaughter, but accepted the plea to defensive homicide during his murder trial. In November 2007, Gordon and his two sons moved in with George.<sup>109</sup> George was 'far from happy about the arrangement',<sup>110</sup> and the two men frequently fought over routine domestic issues.<sup>111</sup> During such an argument on 22 December 2007, George told Gordon that he would 'treat [Gordon's] children in the same way as [Gordon] had treated [George] in the past'.<sup>112</sup> He was referring to having sexually abused Gordon over a period of years in his nephew's childhood.<sup>113</sup> As a result of the comment Gordon 'became enraged and [he] punched George, who fell onto the sofa, where he continued to make derogatory comments'.<sup>114</sup> Gordon then left the room, returned with a baseball bat, and repeatedly hit his uncle over the head with it until he died. That night Gordon drove George's body to a campsite, and dismembered and buried it.<sup>115</sup>

Spark's lethal violence was clearly not reasonable in the circumstances, and so the issue for the court was whether George's statement, in the context of the prior abuse, made Spark genuinely, but unreasonably, believe that he had to kill George to protect his children. The Crown ultimately accepted that the belief was genuine, but its initial reluctance is understandable. Given the manifest improbability of George alerting Spark to any intention to sexually abuse the children, his comment was more in the nature of a taunt than a threat. These

106 Paul Anderson, 'Hulking Luke Middendorp Stabbed Tiny Jade Bownds — and Gets Off with Defensive Homicide', *Herald Sun* (online), 20 May 2010 <<http://www.news.com.au/national-news/hulking-luke-middendorp-stabbed-tiny-jade-bownds-and-gets-off-with-defensive-homicide/story-e6frfkvr-1225868906818>>; Victoria, *Parliamentary Debates*, Legislative Assembly, 9 June 2010, 2173 (Robert Clark).

107 See generally *R v Spark* [2009] VSC 374 (11 September 2009) ('*Spark*').

108 Public Accounts and Estimates Committee, above n 8, app 1, F4.

109 *Spark* [2009] VSC 374 (11 September 2009) [8]. Spark was raised by his grandparents and was told his mother was his sister. Some of the abuse occurred before Spark knew George was his uncle not his brother.

110 *Ibid* [7].

111 *Ibid* [8].

112 *Ibid* [10].

113 *Ibid*. Testimony from George Spark's sister was capable of substantiating the allegations of child sexual abuse, and prompted the Crown to accept the plea to defensive homicide: at [15].

114 *Ibid* [10] (emphasis added).

115 *Ibid* [11].

factors might, arguably, only go to the reasonableness of Spark's belief, rather than its genuineness, and so be compatible with a defensive homicide conviction. However, his admitted 'rage' at the time of the beating, his post-offence conduct, and the fact that the children were 200 km away with their grandmother at the time of the precipitating comment, all call into question the genuineness of his belief. The Crown likely concluded that Spark's circumstances were sympathetic enough that a jury would return a conviction to a lesser homicide offence irrespective of the strict requirements of either defensive homicide or manslaughter.

Spark himself seemed similarly concerned only with a generic lesser homicide offence. Manslaughter, rather than defensive homicide, was his first plea offer. If the killing had occurred two years earlier, a provocation defence would have been available to him. A jury or the Crown would likely have been favourably disposed to the argument that George's comments, given his previous abuse of Spark, were provocative.<sup>116</sup> They could have understood that Spark lost self-control as a result of the provocation, and in that state formed the intent to kill or cause grievous bodily harm.<sup>117</sup> The provocation would likely have been considered sufficiently grave to be capable of causing an ordinary person to lose self-control and form an intention to inflict death or grievous bodily harm.<sup>118</sup> However, that partial defence had been abolished by the time that Spark killed his uncle,<sup>119</sup> and an alternative basis for a lesser homicide offence had to be found. Defensive homicide certainly filled that practical role, but not in a manner consistent with the purpose of excessive self-defence articulated by the VLRC, or with the rationale for defensive homicide provided by Parliament, or with the actual elements enacted in the offence.

#### 4 Svetina

The factual situation of the final family violence case, *R v Svetina* ('Svetina'),<sup>120</sup> was different again to the other family violence cases. A jury found Zlatko Svetina guilty of the defensive homicide of his elderly father, Tomislav, after the Crown had rejected Svetina's overtures regarding a plea to the same offence.<sup>121</sup> Prior to the stabbing death of Tomislav, Svetina and his parents had complex financial dealings that fuelled tensions within their personal relationships to the point that, in 2009, Tomislav stabbed his wife. He served several months in prison for that offence, during which time his marriage ended.<sup>122</sup> According to the remarks that the sentencing judge addressed to Svetina:

your father detested you. He blamed you for the breakdown of his marriage and for having been sent to gaol. ... [H]e intended to ensure you received

116 *Chhay v The Queen* (1994) 72 A Crim R 1, 8.

117 *R v Perks* (1986) 41 SASR 335, 341, 347–8.

118 *Stingel v The Queen* (1990) 171 CLR 312, 328.

119 *Crimes Act 1958* (Vic) s 3B.

120 [2011] VSC 392 (22 August 2011).

121 *Ibid* [45].

122 *Ibid* [8]–[11].



nothing. ... [H]e was scared of you, and believed that you still had a key to the house, and he ... [kept] a tomahawk ... beside his bed for protection ...<sup>123</sup>

Svetina tried, unsuccessfully, a number of times, to re-establish communication with his father. His evidence was that on 8 July 2010, he 'sought to resolve the impasse'<sup>124</sup> by surreptitiously entering Tomislav's house and turning off the power to 'flush him out'.<sup>125</sup> Tomislav was in bed at the time, but went downstairs with his tomahawk to investigate the power blackout.<sup>126</sup> Svetina's accounts differ as to what happened next, and all the judge could conclude was that

whoever surprised whom, you managed to prize the tomahawk away from your father, thereby inflicting injuries to his fingers; and, having so prized it away from him, struck him with it at least 10 times to the head and face ...<sup>127</sup>

The Crown's argument that familial and financial tensions motivated Svetina to murder his father was compatible with Svetina's post-offence conduct of leaving his father injured, but alive, and spending the subsequent days drinking and playing online poker rather than checking on his welfare.<sup>128</sup> However, the jury found that while Svetina intentionally killed his father, he did so believing genuinely, although not reasonably, that his actions were necessary to protect himself from death or really serious injury.<sup>129</sup> The judge's sentencing remarks suggest sympathy with the Crown case. He said:

you created circumstances propitious for the commission of the offence by unlawfully invading your aged father's home at night in the dark after turning off the electric power ... Secondly, although it is possible that your father came at you with the tomahawk ... any injury as you may have sustained was certainly minor and did not prevent you from taking the tomahawk away from him. Thirdly, once you had got the tomahawk from him, there was nothing to prevent you from taking it and going home. ... Fourthly ... you struck him at least 10 times, three of which when he was crouching or lying on the floor ... [even though he was] 74 years of age, of limited strength and restricted physical capacity ...<sup>130</sup>

According to a forensic psychologist, Svetina's judgment was likely compromised at the time of the killing, on account of severe depression.<sup>131</sup> This depression, combined with Tomislav's previous violence and immediate possession of a tomahawk, could have provided a basis for a defensive homicide conviction.

123 Ibid [15].

124 Ibid [17].

125 Ibid [19].

126 Ibid [20].

127 Ibid [22].

128 Ibid [23].

129 *Crimes Act 1958* (Vic) ss 4, 9AC, 9AD.

130 *Svetina* [2011] VSC 392 (22 August 2011) [27]–[30].

131 Ibid [36].

However, the judge noted that '[t]he most that can be said in your favour, as your counsel put it on the plea, is that, as a result of all the pressures to which you were subjected in the months leading up to the killing, *you snapped and lost control*'.<sup>132</sup> This reference was accepted without comment by the judge, but it was an extraordinary submission in a defensive homicide matter. A defendant 'snapping' or 'losing control' was compatible with the abolished provocation defence, but should preclude a defensive homicide argument, because it conflicts with the process of reasoning inherent in the requirements of the offence.

## 5 Conclusion on the Family Violence Cases

*Monks* is an uncontroversial application of the principle that family violence and a resulting power imbalance can exist across a variety of family relationships, and the vulnerability of the victim of such violence can create a genuine, but not reasonable, belief in the need for lethal violence against an abuser.<sup>133</sup> The facts of the case justify the proposition that the effects of such relationships can be sufficiently disempowering to the victim to justify a conviction for an offence less than murder. However, in the remaining three family violence cases, the power dynamic contemplated by the VLRC and the Parliament, and evidenced in *Monks*, was not simply absent, but inverted. In each case the person convicted of defensive homicide had the superior position in the power dynamic within the pre-existing relationship. The *victim* of the lethal violence was vulnerable in relation to the homicide offender through age and ill health in *Svetina* and *Spark*, and size, sex and previous violence in *Middendorp*, and yet the *offender* received the benefit of the legislation intended to protect vulnerable defendants.

However, the cases are of the type contemplated by the defensive homicide provision, which does not, after all, circumscribe the circumstances or relationships in which violence must occur for the offence to be made out. Looking beyond the wording of the statute, to the intentions of the VLRC and the rationale for defensive homicide presented by the Attorney-General, the cases are still within the scope of the provision because they involve family relationships where the homicide victim was alleged to have perpetrated violence, either earlier in the relationship or just preceding the homicide incident. It is significant that the two cases that most appear to be compatible with murder convictions, *Middendorp* and *Svetina*, were both decided at trial by a jury. In these cases, the factual issues were fully explored against the legal provisions, rather than just resulting from a practical negotiation between the defence and the prosecution. A real challenge in evaluating the effect of the introduction of defensive homicide is that in two of the four cases, the reasoning underpinning the abolished provocation defence was raised, even though the actual defence was abolished. The re-emergence of the 'victim-blaming' arguments associated with provocation is the subject of a different inquiry.<sup>134</sup> However, it is relevant to note here that where the 'loss of

132 Ibid [42] (emphasis added).

133 *Monks*' plea, conviction and sentence did not attract any public comment.

134 See, eg, Tyson, above n 13, 203, 205.

control' essential to provocation reasoning re-emerges in defensive homicide cases, it is not only importing a characteristic that was intended to be abolished from the law, but also negates the existence of the exercise of an error of judgment that should be the key characteristic of defensive homicide offences.

## **B Non-Family Violence Cases**

Deviation from the intended scope of the defensive homicide provisions becomes more pronounced when moving out of the sphere of family violence and into violence between male friends and acquaintances. The non-family violence cases can be divided into the categories of 'mental health' and 'fighting'. By definition, they are outside the main intended scope of the legislation, and it is clear that nothing on the facts brings them into the intended narrow band of non-family violence cases that were contemplated as sharing the type of power dynamic that characterises family violence relationships. The issue that remains, therefore, is the compatibility of the convictions with the elements of the defensive homicide offence. This does require the specific inquiry that follows to determine that the cases in both of these categories are more difficult than the family violence cases to conceptualise as within even the widest interpretation of the actual provisions.

### **1 Mental Impairment**

Given that defensive homicide was framed as a concession to the making of an error of judgment, not to the failure to exercise judgment or the inability to exercise judgment, it was intended to apply where a defendant employed a rational decision-making process. In some cases, mental health conditions are relevant to offending and sentencing, but insufficient to undermine the application of defensive homicide.<sup>135</sup> However, in *Callum Smith*<sup>136</sup> and *Ghazlan*,<sup>137</sup> while the defendants pleaded guilty to defensive homicide, their mental states were incompatible with the elements of the offence.

#### **(a) Smith**

On 14 June 2006, Callum Smith visited his friend, Christopher Leone. That night police responded to a 000 call and found Leone dying from 62 stab wounds distributed over his head and body.<sup>138</sup> Smith gave various accounts to police and psychiatrists about the stabbing, all of which described a fight breaking out, Leone making threats, and Smith stabbing him in self-defence.

135 See *R v Martin* [2011] VSC 217 (20 May 2011); *R v Trezise* [2009] VSC 520 (31 August 2009); Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1351 (Rob Hulls, Attorney-General).

136 *R v Smith* [2008] VSC 617 (15 October 2008) ('*Callum Smith*').

137 *R v Ghazlan* [2011] VSC 178 (3 May 2011) ('*Ghazlan*').

138 *Callum Smith* [2008] VSC 617 (15 October 2008) [3], [6].

Smith had previously displayed ‘unpredictable and at times aggressive behaviour’.<sup>139</sup> He had spent time as an involuntary patient in psychiatric wards, including after threatening his brother with a knife. He was under a community treatment order,<sup>140</sup> which was extended just the day before he stabbed Leone.<sup>141</sup> He had self-inflicted injuries on occasion, and exhibited ‘irrational and fantastic behaviour such as claiming that [he] had been raped by a fictional television character, Tony Soprano’.<sup>142</sup> A psychiatrist who saw him after his arrest diagnosed Smith’s condition as schizophrenia aggravated by drug abuse. In his opinion, Smith was ‘mentally ill at the time of the offence’ and his psychotic condition contributed to the violent behaviour.<sup>143</sup> The sentencing judge accepted the psychiatric opinion and made frequent references to the nexus between the offending and the mental health issues. Her Honour found that aside from his mental illness, the offence was ‘totally inexplicable’.<sup>144</sup>

### (b) Ghazlan

Joseph Ghazlan also had a history of mental illness. On 22 December 2009, John Wyatt attempted to trip Ghazlan as he exited an elevator in the seniors’ public housing estate where they both lived. Ghazlan stumbled and produced a knife with which he fatally stabbed Wyatt in the head and abdomen.<sup>145</sup> Ghazlan perceived that Wyatt had been ‘hassling’ him for months, and on the evening of the stabbing he thought he heard Wyatt, four floors above, whistle at him as though he ‘were a woman’.<sup>146</sup>

Over ‘many years’, Ghazlan had been diagnosed with paranoid schizophrenia, endogenous depression, cannabis-induced psychotic disorder, and chronic delusional disorder.<sup>147</sup> He had experienced ‘unequivocal deluded thinking’ and auditory hallucinations, been prescribed anti-psychotic medication, and admitted to psychiatric hospitals.<sup>148</sup> His illness had frequently manifested itself in persecutory beliefs that caused him to use or threaten violence.<sup>149</sup> He had served prison sentences for serious acts of violence, including another repeat stabbing and a beating with a steel bar,<sup>150</sup> and was under a community treatment order, imposed for violence offences, when he killed Wyatt.<sup>151</sup> The judge found it was ‘abundantly clear that [Ghazlan’s] predisposition to persecutory thoughts carried

139 Ibid [18].

140 A community treatment order under the *Mental Health Act 1986* (Vic) s 14 requires a person to obtain treatment for a mental illness.

141 *Callum Smith* [2008] VSC 617 (15 October 2008) [18].

142 Ibid [19].

143 Ibid [24].

144 Ibid [29].

145 *Ghazlan* [2011] VSC 178 (3 May 2011) (T Forrest J) [2].

146 Ibid [10].

147 Ibid [12].

148 Ibid [2], [4]–[5], [8]–[10].

149 Ibid [2], [11].

150 Ibid [5]–[6].

151 Ibid [8]–[9].

through until December 2009',<sup>152</sup> and that his 'psychiatric illness provides the most cogent explanation for [his] conduct'.<sup>153</sup>

## 2 Conclusion on Mental Impairment Cases

The physical element of defensive homicide was clearly satisfied in *Callum Smith*, leaving Curtain J to remark in sentencing that '[t]he only issue to be tried was either ... mental capacity or the issue of self-defence'.<sup>154</sup> Her comment regarding capacity is equally applicable to *Ghazlan*, where the physical element was not in doubt and self-defence was not raised. However, in both cases, guilty pleas were accepted in substitution for the trial of the mental health issues. The acceptance of pleas was a practical compromise that had benefits for both the defendants and the Crown. However, it resulted in convictions that stretched the definition of defensive homicide. The mental health issues and substance abuse of the defendants interacted to destroy their impulse control and cause them to react violently to real or imagined insults. The convictions thus applied to situations that went beyond where a rational decision-making process resulted in an error of judgment, into cases where the defendants were unable to engage in rational decision-making.

Neither Ghazlan nor Callum Smith needed a new offence to deal with their offending. Their circumstances were covered by the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), which significantly predated the enactment of defensive homicide. The acceptance of pleas to defensive homicide significantly disadvantaged the defendants by denying them the opportunity to seek to avoid criminal liability under the mental impairment legislation. It also disadvantaged the community by not ensuring that penalties appropriate to their serious mental health issues were imposed to minimise future offending and optimise the chances of rehabilitation.

## 3 Fighting

The final category of defensive homicide cases involving male offenders includes over half of all convictions for the offence. It is comprised of 15 cases of men fighting with other men, where the violence escalated and resulted in the unexpected death of one of the participants. It is necessary to establish the type of fighting situations that have resulted in defensive homicide convictions, given the high proportion of all offences they represent and that the argument of this paper is that mundane violence is being inappropriately subsumed under the defensive homicide label. To this end, each of the fighting cases is grouped according to the circumstances leading to the homicide incident and discussed in some detail below. The discussion describes the relationship between the offender and the victim, the role of alcohol and illicit drugs, and any incidents that precipitated the

152 Ibid [10].

153 Ibid [4].

154 *Callum Smith* [2008] VSC 617 (15 October 2008) [30].

lethal encounter, and compares those characteristics to the profile of general male homicide offending in Australia.

(a) *Recent Acquaintances*

The defensive homicides in the cases of *R v Smith* ('*Michael Smith*'),<sup>155</sup> *R v Wilson* ('*Wilson*'),<sup>156</sup> *R v Croxford* ('*Doubleday*'),<sup>157</sup> *R v Jewell* ('*Jewell*'),<sup>158</sup> and *DPP v McEwan* ('*Dambitis*'),<sup>159</sup> were committed by men who met their victims just before the fatal altercation. The offenders met their victims in social situations, except *Dambitis*, who intervened to defend a group of teenagers from assault by a group of older men. On 25 May 2006, Arthur Karatasios and Michael Smith met at a boarding house in St Kilda.<sup>160</sup> They had both been drinking alcohol,<sup>161</sup> and Smith had also been smoking cannabis, using heroin and taking benzodiazepines. An argument broke out during which both men were stabbed with the same knife. Karatasios received five stab wounds, including one to the chest that proved fatal.<sup>162</sup> Smith had experienced 'significant problems with alcohol and drugs over many years',<sup>163</sup> and had prior convictions for violent offences.<sup>164</sup>

On 22 July 2007, Benjamin Wilson visited a different boarding house in St Kilda. He became 'aggressive', 'drunk and argumentative', and accused another resident, Setla Hang, of being a thief.<sup>165</sup> Hang retaliated with a punch, and Wilson left the premises but returned several hours later, heavily intoxicated, and confronted Hang, who produced a pocket knife, which Wilson used to fatally stab him in the head and lungs.<sup>166</sup> Wilson had several convictions for firearm and violence offences, and his family reported similar uncharged acts.<sup>167</sup>

Ricky Doubleday and his friend, Ronald Croxford, went to a tavern in West Wodonga on 26 July 2008. An altercation broke out, and another patron, William Winter, produced a knife, which led to physical fighting. While Winter backed off at some point, Croxford and Doubleday followed him with garden stakes with which they struck and killed him.<sup>168</sup> Doubleday went to trial arguing self-defence. He had no prior convictions for violence offences.<sup>169</sup>

155 [2008] VSC 87 (1 April 2008).

156 [2009] VSC 431 (21 September 2009).

157 [2009] VSC 516 (16 October 2009).

158 [2011] VSC 483 (27 September 2011).

159 [2012] VSC 417 (13 September 2012).

160 *Michael Smith* [2008] VSC 87 (1 April 2008) [7].

161 *Ibid* [7], [24].

162 *Ibid* [11]–[15].

163 *Ibid* [23].

164 *Ibid* [27].

165 *Wilson* [2009] VSC 431 (21 September 2009) [2]–[3].

166 *Ibid* [4]–[11].

167 *Ibid* [31], [38]–[40].

168 *Doubleday* [2009] VSC 516 (16 October 2009) [7].

169 *Ibid* [19].

On 24 January 2010, Scott Jewell fought with Dylan Casey over damage to Jewell's parents' fence after a birthday party.<sup>170</sup> Jewell had consumed 'at least 10 beers' and admitted he was 'probably drunk'.<sup>171</sup> He mistakenly thought that Casey had hit his father, and responded by stabbing Casey in the chest and abdomen, causing his death.<sup>172</sup> There is some possibility that Jewell forgot that he was holding the knife and only intended to punch Casey.<sup>173</sup> Jewell had no criminal history.<sup>174</sup>

On the night of 12 September 2009, Normunds Dambitis was driving from a party to a hotel with two friends when they saw three male teenagers being accosted by two older men, including Scott Shaw, who was affected by alcohol and marijuana and brandishing a machete. Dambitis and his friends intervened to protect the teenagers, resulting in a fight between the five men. Shaw and his friend departed the scene, but Dambitis and his friends pursued them, and beat Shaw with fists, feet, a tree branch, and a fishing rod, leaving him unconscious and with fatal brain injuries.<sup>175</sup>

### (b) *Criminal Associations*

In the cases of *R v Giammona* ('*Giammona*'),<sup>176</sup> *R v Taiba* ('*Taiba*')<sup>177</sup> and *R v Evans* ('*Evans*'),<sup>178</sup> the offender and the victim were associated through criminal activity. They each pleaded guilty to defensive homicide. Rosario Giammona stabbed Darren Parkes in the Port Phillip Prison on 23 March 2006. Parkes was on remand for multiple offences, including attempted murder, and had a reputation in prison for being violent.<sup>179</sup> Giammona testified that Parkes lunged at him with a knife, which he took and used in self-defence.<sup>180</sup> Parkes sustained 16 wounds to most of his body. Giammona 'sustained no injuries of any significance', which tended 'to count against [him] being the victim of a surprise attack'.<sup>181</sup> Giammona had 113 convictions at the time of this offending, mostly for dishonesty offences relating to drug use, and only one involved violence.<sup>182</sup>

On 6 February 2007, Mahmoud Taiba stabbed Haysan Zayat three times in the chest while Zayat was lying in bed.<sup>183</sup> Taiba regularly bought crystal methamphetamine from Zayat.<sup>184</sup> Taiba attempted to steal drugs from a sleeping Zayat, and when

170 *R v Jewell* [2011] VSC 483 (27 September 2011) [4], [7], [9]–[13].

171 *Ibid* [6].

172 *Ibid* [13]–[15].

173 *Ibid* [19].

174 *Ibid* [34].

175 Stephen McEwan was convicted of murder and James Robb was convicted of manslaughter: *Dambitis* [2012] VSC 417 (13 September 2012). The three men went to trial and were convicted by a jury.

176 [2008] VSC 376 (26 September 2008).

177 [2008] VSC 589 (23 December 2008).

178 [2009] VSC 593 (16 December 2009).

179 *Giammona* [2008] VSC 376 (26 September 2008) [1], [3]–[4], [15].

180 *Ibid* [11].

181 *Ibid* [7].

182 *Ibid* [35].

183 *Taiba* [2008] VSC 589 (23 December 2008) [5].

184 *Ibid* [8]–[9].

Zayat woke, Taiba thought he was reaching for a gun, and so stabbed him with a knife he had taken to the property.<sup>185</sup> Taiba had 91 prior convictions at the time of this offending, including for serious violence offences.<sup>186</sup>

On 12 July 2007, John Patton provided stolen T-shirts to a fellow boarding house resident, James Evans, to sell.<sup>187</sup> A week later, the T-shirts were missing, which provoked a fight during which Evans fatally stabbed Patton.<sup>188</sup> The judge sentenced Evans on the basis that while Patton was the initial aggressor, Evans ‘brought the weapon to the room ... [and] produced the weapon, in response to a blow, with no other weapon being produced at that time’.<sup>189</sup> Evans had over a dozen prior convictions for violent offences at the time of this offending.<sup>190</sup>

### (c) *Accommodation*

The violence in *R v Parr* (*‘Parr’*)<sup>191</sup> and *R v Baxter* (*‘Baxter’*)<sup>192</sup> was precipitated by tension over accommodation. Vevil Aruma and Robert Parr shared a flat in Frankston.<sup>193</sup> Aruma had a ‘violent disposition’ and ‘had served a prison sentence for an armed robbery’.<sup>194</sup> On 3 September 2007, the men fought, and struggled on the balcony where Parr stabbed Aruma 17 times.<sup>195</sup> A toxicology report disclosed Aruma’s ‘regular use of methamphetamine, recent use of heroin, and use of methadone’.<sup>196</sup> Parr used cannabis, heroin and was on a methadone program.<sup>197</sup> He had multiple prior convictions for violence offences, including a stabbing in the course of a robbery, and was on parole at the time of this offending.<sup>198</sup> He argued self-defence at trial, after the Crown rejected offers to plead guilty to defensive homicide.<sup>199</sup>

Jason Baxter was staying at a friend’s house in Bendigo on 18 December 2007, when a previous resident, Graeme Falzon, arrived to collect some personal belongings.<sup>200</sup> A fight involving fists and knives broke out over the right to be on the premises, and Falzon sustained 11 stab wounds to his body.<sup>201</sup> Baxter pleaded guilty to defensive homicide. The judge found that although Falzon was the aggressor, he was unarmed, and Baxter’s reaction was ‘grossly disproportionate’

185 Ibid [23].

186 Ibid [18].

187 *Evans* [2009] VSC 593 (16 December 2009) [11].

188 Ibid [4]–[6].

189 Ibid [44].

190 Ibid [14]–[19].

191 [2009] VSC 468 (16 October 2009).

192 [2009] VSC 178 (12 May 2009).

193 *Parr* [2009] VSC 468 (16 October 2009) [1], [6].

194 Ibid [7].

195 Ibid [8]–[12].

196 Ibid [12].

197 Ibid [18].

198 Ibid [21].

199 Ibid [30].

200 *Baxter* [2009] VSC 178 (12 May 2009) [2].

201 Ibid [3], [6].



due to illicit drug use.<sup>202</sup> He had prior convictions for violence offences, including intentionally causing injury and threatening to kill.<sup>203</sup>

(d) *Friends*

In the cases of *R v Trezise* ('Trezise'),<sup>204</sup> *R v Talatonu* ('Talatonu')<sup>205</sup> and *R v Martin* ('Martin'),<sup>206</sup> socialising between friends turned homicidal. All three defendants pleaded guilty to defensive homicide. Daniel Trezise killed Alexander Dacre on 1 March 2008, by inflicting 36 stab wounds across almost all parts of his body.<sup>207</sup> When police arrived at Trezise's house, they found blood and knives strewn inside and outside.<sup>208</sup> Dacre's blood alcohol content was 0.190 per cent and Trezise claimed to have consumed three bottles of Jack Daniels whiskey.<sup>209</sup> Trezise had an underlying intellectual disability.<sup>210</sup> He presented various self-defence scenarios to explain the stabbing, all of which, according to the Crown, were 'patently false. As well as inconsistencies between different versions, no single version proffered ... [could have accounted] for the extent or seriousness of Alexander Dacre's injuries'.<sup>211</sup> Despite these reservations, the Crown accepted Trezise's plea to defensive homicide. The sentencing remarks did not refer to any prior convictions.

On 28 January 2011, Iafeta Talatonu and Amuia Taoai drank at the Shepparton Club and then at Talatonu's home.<sup>212</sup> Taoai taunted Talatonu about being illegally in Australia, having overstayed a visitor's visa from Samoa in 2006.<sup>213</sup> Taoai then smashed beer bottles on Talatonu's car, and punched and threatened him with a broken bottle.<sup>214</sup> Some minutes later, Talatonu stabbed Taoai in the chest, shoulder and face. A witness described Talatonu as 'angry' and repeatedly yelling 'what did you say to me?'<sup>215</sup> Talatonu's angry comments, and the delay between Taoai's attack and his retaliation, raise questions about his belief in the need for defensive action. He also pleaded guilty to defensive homicide.

Justin Martin's case is quite different to the other fighting cases. Martin was 29 years old and socially marginalised.<sup>216</sup> He became friends with Alan Baker, who was 79. Martin told police that, on 27 January 2010, Baker

was flashing himself, rubbing himself against me. ... [H]e followed me and ... [touched me] between the legs and I said not to and he kept on doing

202 Ibid [10]–[11].

203 Ibid [20].

204 [2009] VSC 520 (31 August 2009).

205 [2012] VSC 270 (22 June 2012).

206 [2011] VSC 217 (20 May 2011).

207 *Trezise* [2009] VSC 520 (31 August 2009) [5]–[7], [9].

208 Ibid [13].

209 Ibid [15].

210 Ibid [23], [25].

211 Ibid [16].

212 *Talatonu* [2012] VSC 270 (22 June 2012) [1].

213 Ibid [2], [9].

214 Ibid [1]–[3].

215 Ibid [3]–[4].

216 *Martin* [2011] VSC 217 (20 May 2011) [2], [3], [16]–[17].

it and I didn't want it. He sat on top of me and I got sick of it and I told him not to and the more he done it *the angrier I got*. ... Then I was on the bed and he tried and *that's when I lost it*.<sup>217</sup>

Martin repeatedly pushed and kicked Baker, then stabbed him seven times.<sup>218</sup> When the police asked if Baker raped him, Martin replied, 'he would've if I didn't do what I done'.<sup>219</sup> Forensic evidence supported Martin's account, and an independent witness came forward reporting that Baker had sexually abused him in the past.<sup>220</sup> Martin had 'extremely low range' intellectual functioning that was further impaired by alcohol abuse.<sup>221</sup> He had a number of previous convictions for violence offences.<sup>222</sup> An offer to plead guilty to manslaughter was rejected by the Crown before it accepted a plea to defensive homicide.

It is uncertain whether Martin's credible allegation of attempted rape provides a basis for a defensive homicide plea. *Babic* determined nine months before Martin's sentencing hearing that common law self-defence did not survive the enactment of s 9AC.<sup>223</sup> This decision means that only threats of death or really serious injury now justify a claim of self-defence to murder, and, therefore, a finding of defensive homicide. The courts have not yet considered whether the threat of rape will satisfy ss 9AC and 9AD. In any event, Martin's claim to defensive homicide is critically undermined by his admission of being angry and having 'lost it'. Like Spark and Svetina, this provided a basis for an obsolete provocation defence, but is at odds with defensive homicide.

#### (e) *Pre-Existing Tensions*

In the cases of *R v Edwards* ('*Edwards*')<sup>224</sup> and *R v Vasquez* ('*Vasquez*'),<sup>225</sup> ongoing tensions between the victim and the offender erupted into lethal violence. Barry O'Neill formed a relationship with Kevin Edwards' partner while Edwards was in prison, resulting in animosity between them.<sup>226</sup> On 4 June 2006, Edwards and O'Neill had been drinking together for two full days, when O'Neill threatened Edwards with the leg of a coffee table.<sup>227</sup> Edwards retaliated with the table leg and three bottles, and by kicking him in the face and genitals until he fell unconscious.<sup>228</sup> Edwards had a 'shocking criminal record'.<sup>229</sup> He had spent 23 of his 28 adult years in custody,<sup>230</sup> and was on parole for armed robbery when he

217 *Ibid* [5]–[6] (emphasis added).

218 *Ibid* [6], [8].

219 *Ibid* [6].

220 *Ibid* [7].

221 *Ibid* [9], [11], [12]–[17].

222 *Ibid* [30].

223 *Babic* (2010) 28 VR 297. See above n 36.

224 [2008] VSC 297 (13 August 2008).

225 [2012] VSC 593 (14 August 2012).

226 *Edwards* [2008] VSC 297 (13 August 2008) [4]–[9].

227 *Ibid* [10]–[13].

228 *Ibid* [13].

229 *Ibid* [21].

230 *Ibid* [24].

killed O'Neill.<sup>231</sup> The Crown rejected an offer of a plea to manslaughter before accepting the plea to defensive homicide.<sup>232</sup>

Richard Vazquez and Steven Tosevski were involved in an ongoing dispute regarding a drug debt, and damage that was inflicted on Tosevski's car consequent to that debt.<sup>233</sup> On 13 September 2010, Tosevski attended Vazquez's father's office to discuss compensation for the damage to the car. Vazquez hid in the storeroom with a sawn-off, double-barrel shotgun. When a verbal argument broke out between Tosevski and Vazquez Snr, Vazquez shot Tosevski in the head at close range, killing him instantly.<sup>234</sup> The father or son planted unfired shotgun cartridges in Tosevski's clothing and claimed that the gun had accidentally discharged as Vazquez acted in defence of his father.<sup>235</sup> The case was reported as resulting from rivalry between Lebanese clans,<sup>236</sup> and parents of the victim and the offender gave evidence at Vazquez's committal hearing of prior violence between them.<sup>237</sup> Vazquez's actions were influenced by post-traumatic shock disorder from being 'kidnapped and tortured by a group of young men' who stabbed him and beat him with hammers the previous year.<sup>238</sup>

#### 4 Conclusion on Fighting Cases

Even more than the mental health cases, the fighting cases are between men of similar age and circumstances with an equal tendency toward engaging in violence. The power dynamic and vulnerability that were intended to characterise the offence of defensive homicide were not present. The defensive homicide fighting cases arise from spontaneous encounters between male acquaintances. The cases are archetypal examples of the male 'confrontational homicides' that have been the dominant scenario in homicidal violence across jurisdictions for centuries,<sup>239</sup> and continue to dominate offending in contemporary Australia. The most recent Australian statistics report that male acquaintance/friendship is the most common relationship between offender and victim in homicide encounters,<sup>240</sup> and accounts for 86 per cent of male victims of homicide.<sup>241</sup> All of the key characteristics of male confrontational homicides were evident in

231 *DPP (Vic) v Edwards* [2009] VSCA 232 (9 October 2009) [30].

232 *Edwards* [2008] VSC 297 (13 August 2008) [33].

233 *Vazquez* [2012] VSC 593 (14 August 2012) [1]–[2].

234 *Ibid* [6]–[10].

235 *Ibid* [8]–[10].

236 'Shooting Victim Steve Tosevski Remembered', *Herald Sun* (online), 21 September 2010 <<http://www.heraldsun.com.au/news/victoria/shooting-victim-steve-tosevski-remembered/story-e6frf7kx-1225927498506>>.

237 Mark Dunn, 'Murder Accused Richard James Vazquez Was Tortured, Father Tells Court', *Herald Sun* (online), 22 November 2011 <<http://www.heraldsun.com.au/news/victoria/murder-accused-richard-james-vazquez-was-tortured-father-tells-court/story-fn7x8me2-1226202095081>>.

238 *Vazquez* [2012] VSC 593 (14 August 2012) [19]; Dunn, above n 237.

239 Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (Cambridge University Press, 1994) 58–9.

240 Andy Chan and Jason Payne, Australian Institute of Criminology, *Homicide in Australia: 2008–09 to 2009–10 National Homicide Monitoring Program — Annual Report* (2013) 6.

241 *Ibid* 18.

the defensive homicide fighting cases. The median age of the offenders was 30, compared with 29 for all male homicide offenders,<sup>242</sup> and the average age of the defensive homicide victims was 35.4,<sup>243</sup> compared to the average age for all male homicide victims of 38.2.<sup>244</sup> Knives were the lethal weapon in 73 per cent of the defensive homicides, and while they accounted for only 38 per cent of deaths by homicides overall, they were the highest single cause of such deaths.<sup>245</sup>

The only fighting scenario where intoxication or drug use was not a direct issue for either the defendant or victim was in *Giammona*, when both men were in prison. In *Evans, Taiba* and *Vazquez*, the fights were over possession and debts for illicit drugs. In *Wilson* and *Baxter*, the defendant was intoxicated, but it is unclear whether the victim was also intoxicated. In *Dambitis*, the victim had consumed alcohol and cannabis. Although the offender was an alcoholic, it is not stated that he was intoxicated at the time the incident occurred between his attendance at a party and at a hotel. He had a history of violent offending after excessive alcohol consumption. In the remaining cases of *Trezise, Parr, Edwards, Michael Smith, Jewell, Martin, Talatonu* and *Doubleday*, both defendant and victim were heavily intoxicated on various combinations of alcohol and illicit drugs at the time of the offending.<sup>246</sup> This profile of intoxication is indicative of general homicide offences, as currently in Australia, '[i]n the majority of incidents, both the victim and the offender were known to have been drinking', and illicit drug use is known to have preceded one in five homicides.<sup>247</sup>

With the exception of women who kill abusive partners, there is limited research on offenders who kill in self-defence. There is an underlying assumption that these offenders are 'blameless and passive targets',<sup>248</sup> engaged in one-off retaliation against another person's wrongdoing. A Chicago study compared the characteristics of people who killed defensively with the characteristics of other

242 Ibid 26.

243 This average is based on the 9 cases where the exact age of the victim is included in the sentencing remarks.

244 Chan and Payne, above n 240, 18.

245 Ibid 11.

246 The Victorian laws regarding intoxication relate to the 'reasonableness' elements of offences and so have little effect on defensive homicide, which concedes the lack of reasonableness and focuses on the subjective mental state. See *Crimes Act 1958* (Vic) s 9AJ.

247 Chan and Payne, above n 240, 17.

248 Gary Kleck and Marc Gertz, 'Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun' (1995) 86 *Journal of Criminal Law & Criminology* 150, 150. This view has been subject to criticism. See David Hemenway, 'Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates' (1997) 87 *Journal of Criminal Law & Criminology* 1430. Kleck and Gertz, above n 248, acknowledge the broad range of scholarship which takes the opposite view but go on to refute the opposition which is ongoing and is closely associated with the politics of gun control: at 151-7. See, eg, Deborah Azrael and David Hemenway, "'In the Safety of Your Own Home": Results from a National Survey on Gun Use at Home' (2000) 50 *Social Science and Medicine* 285; J F Denton and W V Fabricius, 'Reality Check: Using Newspapers, Police Reports, and Court Records to Assess Defensive Gun Use' (2004) 10 *Injury Prevention* 96; Timothy C Hart and Terance D Miethe, 'Self-Defensive Gun Use by Crime Victims: A Conjunctive Analysis of its Situational Contexts' (2009) 25 *Journal of Contemporary Criminal Justice* 6.

homicide offenders.<sup>249</sup> If the image of an innocent and victimised defensive killer is accepted, they should have little in common with other killers. However, this was not the case. Of the defensive killers, 70 per cent had a criminal record (10 per cent greater than typical homicide offenders), and were more likely to have prior convictions for violence offences than other homicide offenders.<sup>250</sup> On this basis, the authors concluded that ‘individuals who fight back against predatory attack are not necessarily the law-abiding citizens or innocent victims that we often believe them to be’.<sup>251</sup> The defensive homicide cases in Victoria are consistent with the findings for Chicago. Jewell, Tresize, Vazquez and Talatou did not have any prior convictions for any offences, although Talatou had only been in Australia for four years at the time of his offending. Doubleday did not have any convictions for violence, but did have multiple convictions for other offences. The other 10 defendants, who represented 66 per cent of those convicted of defensive homicide fighting offences, had prior convictions for violence offences. This is almost double the rate of 34 per cent of male homicide offenders overall who have prior convictions for violence.<sup>252</sup> This comparison indicates that the defensive homicide offenders are at least as intoxicated and violent as other male homicide offenders, and are often even more so. They are not the vulnerable victims of violence that the VLRC and the Parliament reformed the law to assist.

Like the mental health cases, the fighting cases are also a poor fit to the actual defensive homicide provisions. The mental health cases were incompatible because the characteristics of the defendant meant they were unable to satisfy the elements of the offence. With the fighting cases, the defendants did not have any constitutional impairment, but rather their conduct on the occasion in question was not compatible with the elements. The sentencing remarks in *Treize* are applicable across this type of offending, and highlight the disconnect between these cases and the elements of the offence. In sentencing *Treize*, Coghlan J remarked that without independent evidence, he could only determine that ‘Dacre did not do anything of substance which merited your attack on him’,<sup>253</sup> but that ‘in your alcohol-fuelled state you somehow *reasoned* that he was a threat to you’.<sup>254</sup> As the Crown had accepted the plea to defensive homicide, the judge had to sentence on the basis his Honour outlined. His reference to *Treize* ‘reasoning’ that Dacre posed a threat brings the factual situation within the scope of defensive homicide

249 Kent R Kerley et al, ‘Fighting Back: Lethal Responses to Predatory Attacks’ (2002) 17 *Journal of Police and Criminal Psychology* 52, 55–7. The study utilised the data set from Carolyn Rebecca Block, Richard L Block and Illinois Criminal Justice Information Authority, *Homicides in Chicago, 1965–1995: Part 1: Victim-Level Data* (Inter-University Consortium for Political and Social Research, 1998); Carolyn Rebecca Block, Richard L Block and Illinois Criminal Justice Information Authority, *Homicides in Chicago, 1965–1995: Part 2: Offender-Level Data* (Inter-University Consortium for Political and Social Research, 1998), which documented 23 819 unlawful killings. 128 of the defensive killings occurred in the course of a robbery, seven in the course of arson, 28 in the course of burglary and two in the course of rape.

250 Kerley et al, above n 249, 59.

251 *Ibid.*

252 Chan and Payne, above n 240, 27. The figure of 34 per cent relates to the identified violent offences of murder, sexual assault, assault and robbery.

253 *Treize* [2009] VSC 520 (31 August 2009) [47].

254 *Ibid.* (emphasis added).

by finding that a rational, but erroneous, decision-making process preceded the stabbing. However, ‘reasoning’ is clearly incompatible with Trezise’s frenzied behaviour and intoxicated state. Trezise’s situation is not unique in this regard because all of the fighting cases were characterised by unconstrained drunken impulse, rather than flawed reasoning.

Far from representing offending that has historically been excluded from the scope of self-defence, the defensive homicide fighting cases are archetypal examples of the offending that defined and dominated it in the past. The remarks of the sentencing judge in *Talatonu* expose the nature of these cases generally, as his Honour demystifies the offending by describing it as nothing more than mundane violence. He concluded that *Talatonu* was ‘inclined to use knives to settle alcohol-fuelled disputes’,<sup>255</sup> and that ‘anger arising from being abused and assaulted, together with intoxication, provide an uncomplicated explanation’ for the offending.<sup>256</sup> These remarks clearly differentiate this type of commonplace offending from the narrow category of offending that Parliament and the VLRC intended to result in defensive homicide convictions for certain vulnerable defendants in abusive relationships. Whereas in sentencing Trezise the judge adapted his remarks to make the plea satisfy the elements of the offence, the judge in *Talatonu* described the offending without seeking to reconcile the plea with the offence. In so doing, he highlighted the distance between the circumstances of *Talatonu*’s offending and the intended nature of the offence. His remarks have significance beyond the immediate case, because the other fighting offences so closely resemble the circumstances in *Talatonu*. While the defensive homicide convictions have been criticised in the context of the plea bargaining process,<sup>257</sup> the circumstances of cases leading to convictions on the basis of guilty pleas differ little in context from the cases of *Parr*, *Doubleday* and *Dambitis*, where the convictions resulted from jury verdicts.

#### IV CONCLUSION

The offences across all the categories of male offending are striking in their similarity both to each other and in their conformity to the general profile of homicide offending. They have different factual contexts, but the encounters are all sudden and frantic due to disinhibition through intoxication and habitual reliance on violence as a conflict-resolution strategy. The situations quickly, unexpectedly and unintentionally escalated from routine violence to homicide after some minor insult, offence or tension.<sup>258</sup>

255 *Talatonu* [2012] VSC 270 (22 June 2012) [17].

256 *Ibid* [12].

257 Flynn and Fitz-Gibbon, above n 14, 922–8.

258 See Polk, above n 239, 88–92 for how apparently minor or trivial insults may take on an increased importance for socially marginalised men for whom the response to threats of violence or general aggression is integral to their social and personal identity.

Defensive homicide has inadvertently brought ordinary violence within a special offence framed to assist a narrow group of disadvantaged defendants. In so doing, it has expanded the range of legal options available to violent men, despite being part of a reform package designed to narrow those options through the abolition of the partial defence of provocation. In 2010, the Department of Justice reviewed the offence.<sup>259</sup> The review was, in part, a response to opinions expressed by the public and the Opposition that convictions for defensive homicide would have resulted in convictions for murder at common law. In reality, it is uncertain whether the introduction of defensive homicide has affected convictions for murder at all. While it was intended as an alternative verdict to murder, it is being utilised as a generic intermediate offence, and likely serving as an alternative verdict to manslaughter. Edwards, Spark and Martin all initially offered to plead to manslaughter, which suggests that their admission was to guilt of an offence less than murder, rather than to guilt according to the actual provisions of defensive homicide. The convictions of the other defendants are comprehensible only as homicides less serious than murder, rather than as actual defensive homicides.

However, defensive homicide having a neutral impact on the number of murder convictions does not mean that its effect overall is neutral. The limits of defensive homicide are being critically blurred through its operation as a generic intermediate offence. Like manslaughter, defensive homicide is at risk of becoming 'broad and uncertain in scope' and a 'residual, amorphous "catch-all" homicide offence'.<sup>260</sup> As always with homicide offences, the number of male offenders eclipses the number of female offenders and the uncertainty over its scope is being resolved by using the offence as a general concession to male violent tendencies. It seems likely that the offence will be increasingly understood according to patterns of violent male behaviour. The danger is, therefore, that defensive homicide will evolve in the same way as self-defence and, over time, abused women could have difficulty persuading a court to understand their conduct according to the provisions of the offence. In this way, defensive homicide will become part of the problem for which it was intended to serve as a solution, and women will still not have an effective defence where they kill abusive partners. The partial defence of provocation assisted some women who killed abusive partners to avoid a murder conviction, and so its abolition caused some concerns about further disadvantage to women in that position.<sup>261</sup> However, the Parliament pursued the abolition on the basis that the full defence of self-defence, properly framed and supported by s 9AE, would provide better protection for abused women than the partial defence of provocation. It is, perhaps, an irony now worth seriously considering that the introduction of excessive self-defence, concurrent with the abolition of provocation and the codification of self-defence, undermined the intention that courts should properly consider the experiences of abused women in the context of the complete defence of self-defence.

259 See generally Department of Justice (Vic), above n 11.

260 Law Commission, *Murder, Manslaughter and Infanticide*, House of Commons Paper No 30, Session 2006–7 (2006) 20 [2.9].

261 *Homicide Defences Final Report*, above n 1, 38 [2.47].

APPENDIX: SUMMARY OF MALE OFFENDERS CONVICTED OF DEFENSIVE HOMICIDE IN VICTORIA, 2005–13<sup>262</sup>

	Case	Type	Offender Age	Victim Age	Victim/Offender Relationship	Weapon	Circumstances	Offender History	Plea or Verdict	Date of Offence
1	<i>R v Smith</i> [2008] VSC 87 (1 April 2008)	Fight	32	34	Social gathering at boarding house	Knife — 5 stab wounds	Fight broke out. Victim and offender stabbed with the same knife	Long term substance abuse problems, affected by alcohol and illicit drugs. Prior convictions for violence. Prior jail time of two months. Aboriginal	Plea	25 May 2006
2	<i>R v Edwards</i> [2008] VSC 297 (13 August 2008) <i>DPP v Edwards</i> [2009] VSCA 232 (9 October 2009)	Fight	43	Age not specified	Partner of victim was former partner of offender	Table leg, alcohol bottles, kicking	Victim and offender intoxicated. Victim threatened to hit offender with table leg	'[S]hocking' criminal history — 23 of 28 years of adult life spent in custody. On parole at time of offence	Plea — plea to manslaughter rejected	4 June 2006
3	<i>R v Gianmoria</i> [2008] VSC 376 (26 September 2008)	Fight	28	29	Both in custody	Knife — 16 stab wounds	Fight in victim's cell	Significant criminal history — 113 prior convictions, 1 prior conviction for a violent offence	Plea	23 March 2006
4	<i>R v Smith</i> [2008] VSC 617 (15 October 2008)	Mental health issue	19	31	Friends for a few weeks	Knife — 50-60 stab wounds	Offender interrupted trying to steal victim's house	Drug induced psychosis. 2 prior offences relating to drug use. No prior convictions for violence	Plea	14 June 2006
5	<i>R v Taha</i> [2008] VSC 589 (23 December 2008)	Fight	31	Age not specified	Victim supplied illicit drugs to offender	Knife — 3 stab wounds	Offender interrupted trying to steal 'ice' from victim	Addicted to 'ice'. 91 prior convictions, some for violence	Plea	6 February 2007
6	<i>R v Braker</i> [2008] VSC 178 (12 May 2009)	Fight	23	'[I]deally young	Offender residing in victim's previous residence	Knife — 11 stab wounds	Victim confronted offender and threw first punch	Drug user since 12 years old, a long record of previous convictions, 9 prior convictions for violence	Plea	18 December 2007
7	<i>R v Irazse</i> [2009] VSC 320 (31 August 2009)	Fight	20	20	Friends	Knife — 36 stab wounds	Victim and offender intoxicated at offender's house	Intellectual disability, chronic adjustment disorder. Aboriginal. No prior convictions	Plea	1 March 2008
8	<i>R v Spark</i> [2009] VSC 374 (11 September 2009)	Family	37	Likely in his 60s	Victim was uncle of offender	Baseball Bat, punching	Victim threatened to sexually abuse offender's children as he had sexually abused the offender	2 prior convictions for minor offences of violence	Plea — plea to manslaughter rejected	22 December 2007
9	<i>R v Wilson</i> [2009] VSC 431 (21 September 2009) <i>Wilson v F</i> [2011] VSCA 12 (2 February 2011)	Fight	24	32	Social gathering at boarding house	Knife — 7 stab wounds	Offender intoxicated. Victim produced knife which offender used to stab him	Drug and alcohol addiction, paranoid schizophrenia, prior convictions, intoxicated at time of offence, under community treatment order	Plea	22 July 2007
10	<i>R v Parr</i> [2009] VSC 468 (16 October 2009)	Fight	29	Age not specified	Lived in same flat.	Knife — 17 stab Wounds	Fight between offender and victim over shared accommodation	Chronic poly-drug user, large number prior convictions including for violent offences	Verdict — pleas to defensive homicide rejected	3 September 2007

262. Revised and updated version of appendix B in Department of Justice (Vic), above n 11, 73–7.



	Case	Type	Offender Age	Victim Age	Victim/Offender Relationship	Weapon	Circumstances	Offender History	Plea or Verdict	Date of Offence
11	<i>R v Crawford</i> [2009] VSC 516 (16 October 2009) ( <i>Double day</i> )	Fight	22	Age not specified	Patrons at same hotel	Garden stake	Victim and offender intoxicated. Fight outside hotel	Addiction to cannabis, affected by alcohol at time of offence, criminal history but not for violence	Verdict	26 July 2008
12	<i>R v Evans</i> [2009] VSC 993 (16 December 2009).	Fight	24	37	Residents of same boarding house	Knife — 1 stab wound	Fight between victim and offender over money and stolen goods	Prior convictions, including for violence, serious drug and alcohol addiction	Plea	19 July 2008
13	<i>R v Milderford</i> [2010] VSC 202 (19 May 2010) <i>Milderford v The Queen</i> (2012) 218 A Crim R 286	Family	25	Age not specified (only female victim)	Short de facto relationship had recently ended but still cohabiting	Knife — 4 stab wounds to back	Dispute over access to shared house	Intoxicated at time of offence, history of drug abuse, prior convictions, violent relationship with victim	Verdict	1 September 2008
14	<i>R v Martin</i> [2011] VSC 217 (20 May 2011)	Fight	29	79	Friends	Knife — 7 stab wounds, hitting, kicking	Victim's sexual advances provoked attack. Offender intoxicated.	Marfan Syndrome, depression, previously suicidal, alcohol and drug dependent, intellectual disability, 13 relevant prior convictions	Plea — plea to manslaughter rejected	27 January 2010
15	<i>R v Ghasseini</i> [2011] VSC 178 (3 May 2011)	Mental health issue	59	Over 55	Residents of public housing estate for over 55s	Knife — multiple stab wounds	Victim tried to trip offender	Serious mental health issues, convictions for violence offences, under community treatment order	Plea	22 December 2009
16	<i>R v Swelling</i> [2011] VSC 382 (22 August 2011).	Family	53	74	Victim was father of offender	Tomahawk — struck 10 times	Familial and financial tensions	Depression, no previous criminal convictions	Verdict	8 July 2010
17	<i>R v Jewell</i> [2011] VSC 463 (27 September 2012)	Fight	22	Age not specified	Victim had been at offender's sister's birthday party	Ornamental knife — stabbed twice	Scuffle resulting from property damage	No prior convictions, intoxicated at the time	Plea	24 January 2010
18	<i>R v Mowks</i> [2011] VSC 626 (2 December 2011).	Family	22	42	Victim was uncle of offender	Tomahawk — struck twice	Victim and offender intoxicated. Fight ensued	Serious child abuse by victim, history of severe psychological problems, limited criminal history	Plea	14 July 2009
19	<i>R v Takanu</i> [2012] VSC 270 (22 June 2012)	Fight	50	33	Friends	Knife — multiple stab wounds	Victim taunted and punched offender and brandished bottle at him. Both intoxicated	Samoan national, illegal immigrant, no prior convictions	Plea	28 January 2011
20	<i>R v Vazquez</i> [2012] VSC 593 (14 August 2012)	Fight	25	Age not specified	Friends	Shotgun — 1 shot	Dispute over property damage resulting from drug debt	Autoimmune hepatitis since a child user of alcohol, marijuana and amphetamines. No prior convictions	Plea	13 September 2010
21	<i>DPP v McGeehan</i> [2012] VSC 417 (13 September 2012) ( <i>Dambis</i> 's)	Fight	40	24	Street fight	Block of wood — head injuries	Incident began with 3 men attempting to stop intoxicated victim from threatening some young boys	Post-traumatic stress disorder and depression from treatment in Latvia under the former Soviet regime, alcoholic. Prior convictions for violence	Verdict	12 September 2009