HOMICIDE LAW REFORM IN VICTORIA, AUSTRALIA

From Provocation to Defensive Homicide and Beyond

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Homicide law reform surrounding the partial defences to murder currently animates legal stakeholders in Australia and the United Kingdom, particularly in relation to cases of lethal intimate partner violence. In 2005, the Victorian Government implemented a series of homicide law reforms, central to which was the abolition of the partial defence of provocation and the instatement of an offence of defensive homicide. This article, based on a larger qualitative research study with British, Victorian and New South Wales legal stakeholders, explores experiences and perceptions of reforms in Victoria. An analysis of the impact of homicide law reform, using Hudson’s principles of discursiveness and reflectiveness as a framework for analysis, reveals some dissonance between the intent and outcomes of these legal reforms. This study concludes that reforms crafted to counter gender bias in the operation of homicide law have produced mixed results for female victims of intimate partner homicide and related case law.

Keywords: homicide law reform, provocation, defensive homicide

Introduction

On 23 November 2005, the Victorian Government announced its implementation of a package of reforms that represented ‘the most significant reforms to homicide laws since the death penalty was abolished 30 years ago’ (Office of the Attorney-General 2005). The reforms were targeted at overcoming the gender-biased operation of homicide law, particularly in relation to the operation of the partial defences to murder in the trials of men who had killed female intimate partners. Central to these reforms was the abolition of the partial defence of provocation and the instatement of a new offence of defensive homicide aimed at providing a ‘safety net’ for women who kill in the context of prolonged family violence. Five years after these reforms were implemented, this article considers the experiences of members of the judiciary, prosecution and defence counsel, to reveal the perceived strengths and weaknesses, and workability, of the Victorian homicide law reforms.

Criminal justice responses to violence against women and the sexist assumptions and operations of the law have been the focus of considerable feminist criminological study (Laster and O’Malley 1996; Gelsthorpe and Morris 1988; Smart 1989; Naffine 1990; Morris and Gelsthorpe 2000). This body of work has collectively been concerned with the problems and possibility of attending to law reforms that attempt to take account of the ‘other’. As Walklate (2008) has argued, women have historically constituted this ‘other’ within the law. However, in attempting to include this ‘other’, questions are raised as to the appropriateness of law as a vehicle for change, noting that the criminalization of

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Significant contradictions emerge when the inclusion of the other is the explicit aim of legal reform. Carlen (2008) has called this ‘imaginary penalties’, as a way to describe how the incorporation of the other engenders a range of contradictions between the demands of justice and the demands of social conditions. Walklate has taken up this idea of the ‘imaginary’ to consider the ways reforms aimed at improving justice responses to violence against women depend on the suppression of available knowledge that challenges the efficacy of reforms. Victoria is currently grappling with the contradictions that have arisen out of the abolition of the partial defence of provocation (and the introduction of the offence of defensive homicide), and the different experiences of legal practitioners. The crux of these contradictions often lies in the tensions between more punitive sentencing (Garland 2001) and efforts to effectively disturb the sexist assumptions of the law (Morris and Gelsthorpe 2000).

Concerns with ‘white man’s justice’ (Hudson 2006) have depended on the ideal of the rational man as the subject/object of law remaining, undisturbed by attempts to include complex stories of women in cases of intimate partner homicide. Hudson contends that all justice processes should embrace principles of discursiveness, relationalism and reflectiveness to ‘escape’ sexism and racism. In this study, Hudson’s principles of discursiveness and reflectiveness frame our analysis of the data and discussion of the Victorian homicide law reforms.¹

According to Hudson (2006), the ‘principle of discursiveness’ is concerned with bringing inside the discursive circle of justice those who are excluded from it, and challenging the ways that legal claims can often only be acknowledged if they are ‘voiced in the terms of the dominant group’ (Hudson 2006: 34). The principle of discursiveness does not simply seek to create spaces in proceedings for participants to speak, but also to challenge the very identity of law. Moreover, it suggests that any range of issues may be raised including details and areas previously outside the remit of the law, such as violence and relationships in the private sphere. Our data analysis is informed by this principle in relation to the introduction of the offence of defensive homicide as a reform designed to bring women’s stories into the courtroom, to recognize the violence (including the threat of violence and abuse) perpetrated against them, particularly in relation to battered women who kill.

The ‘principle of reflectiveness’ means that individual cases should not be:

... subsumed into a restricted range of legal categories; rather they should be considered in the totality of their features and weighed against broader horizons of justice. Concretely, reflective justice means that each case should be considered in terms of all its subjectivities, harms, wrongs and contexts and then measured against concepts such as oppression, freedom, dignity and equality. (Hudson 2006: 39)

This principle is concerned with how the courts, rather than those who come before them, determine what is relevant or irrelevant to each case, and that the rules and categories

¹We focus on these two principles because not only did key elements of each emerge from our empirical data, but also Hudson regards these as being closely related: ‘... they may be thought of as conditions that must be incorporated if discursiveness is to move beyond the closures of established justice, beyond the fixed identities and categories of dominant legal discourse’ (Hudson 2006: 39). We note that Hudson was most interested in applying these to the case of restorative justice; however, we consider them to also provide insight for other areas such as homicide law reform and specifically legal responses to intimate partner homicide.
developed by the powerful are often ‘impregnable against the claims of the powerlessness’, especially in terms of the whiteness and maleness of the law (Hudson 2006: 38). We are mindful of the principle of reflectiveness in relation to the abolition of the partial defence of provocation and the desire to name the killing of women by intimate partners more appropriately, labelling the act as murder rather than manslaughter.

**Research Design**

This article is based upon data collected as part of a broader empirical research project focused on homicide law reform in the United Kingdom, Victoria and New South Wales (NSW), which have all been host to ongoing debate around and reform of the use of provocation in homicide trials. Importantly, each of these jurisdictions has taken a different approach to reform. The study is based on 81 in-depth interviews conducted in the United Kingdom, Victoria and NSW in 2010 with members of the relevant judiciaries, Public Prosecution Offices, defence counsel and policy stakeholders involved in the law-reform process. Of these participants, 13 were female (16 per cent) and 68 were male (84 per cent). All legal participants had at least 24 months’ experience as a legal practitioner and were selected based on their involvement in at least one trial of intimate partner femicide between 2006 and 2009, in the capacity of prosecutor, defence counsel or judge. All participants were contacted via email to request their participation in the study.²

The Victorian sub-sample that is the focus of this article comprised 31 interviews, including with: members of the Victorian judiciary (n = 8), homicide prosecutors employed by the Office of Public Prosecutions (OPP) (n = 8), currently practising defence counsel (n = 10) and key policy stakeholders involved in the Victorian Law Reform Commission (VLRC)’s 2004 review of defences to murder (n = 5). These interviews were conducted between April and November 2010, and each ranged from 30 to 90 minutes in duration.

The interviews focused on the respondents’ experiences and perceptions in the courtroom and the workability of homicide law reforms, exploring the experiences of members of the judiciary and legal counsel during homicide trials, specifically in relation to the partial defences to murder. The value of using in-depth interviews with key stakeholders to inform criminological research has been acknowledged in the work of government bodies such as the Sentencing Advisory Council (SAC) and the VLRC, who regularly use consultation processes to inform their reports and submissions (see SAC 2007; 2009; VLRC 2004). However, in contrast to such processes, this study ensured participant confidentiality and accessed a broader and more senior sample of legal stakeholders who have traditionally not contributed publicly to discussions about law reform or the operation of the law in practice. By ensuring the participants’ confidentiality, we were able to draw more deeply and extensively upon the often candidly described experiences of the respondents, their perceptions of how the law operates in practice and their assessments of the 2005 reform of Victorian homicide law.³

²Ethics clearance was received for this research from the Monash University Human Research Ethics Committee, reference number CF10/0451–2010000212.

³The interviews were analysed using the qualitative data software NVivo and transcripts were then thematically coded across the three jurisdictions. The transcripts resulting from the Victorian interviews have been analysed for this article.
Homicide Law Reform and the Defence of Provocation in Australia and Abroad

There has been over a decade of debate, criticism and reform in relation to the partial defence of provocation within Australian and international jurisdictions. Where it is successfully used, the partial defence of provocation reduces murder to manslaughter in cases in which the offender responded with lethal violence to an immediately provoking situation or behaviour that was beyond their control (VLRC 2004). Critical to the assessment of whether, and to what extent, an offender’s loss of control is due to a provoked behaviour is the question of whether an ‘ordinary person’ would respond with the same degree of loss of self-control as has the accused (Morgan 1997; Stewart and Freiberg 2008). When used successfully, this defence serves to recognize ‘human imperfection’ and the role that anger and other emotions can play in diminishing a person’s self-control (Dressler 2002: 978). It also provides a distinction between lethal violence that is committed without premeditation as a loss of self-control and lethal violence that is planned and executed (Kissane 2004).

Over the past two decades, the provocation defence has been the subject of considerable debate across various Australian states and territories, as well as in the international context (Dressler 2002). Commentators have recognized the flawed nature of the defence and called for its reform, if not abolition (Brookbanks 2006). Such debates have been largely divided between two opposing contentions: the need to abolish the partial defence (Coss 2006a; Horder 2005; Cleary 2004; Howe 2002; Burton 2001; Wells 2000; Morgan 1997) and the need to reform its availability and applicability in certain situations of lethal violence (McSherry 2005b; Rozelle 2005; Neal 2004; Dressler 2002; Eburn 2001; Brown 1999; Gorman 1999; Nourse 1997).

Feminist analyses have been of particular importance to debates surrounding provocation, highlighting the gendered nature of the law, and specifically the abuse of the partial defence of provocation by men who kill within intimate relationships. From this perspective, the defence has come to be known as the ‘heat of passion’ defence (Fontaine 2009; Lee 2003; Dressler 2002; Coker 1992), referring to its use—or arguably abuse—by men who kill a female intimate partner often in the context of separation, estrangement or infidelity (Bradfield 2003; Forell 2006; VLRC 2004). The defendants in these trials have often made claims along the lines of: “I lost it”, “I snapped”, “I blew a fuse”, “my mind went blank” or “black”, [or] “I saw red” (Tyson 2006: 3). Morgan (1997: 273) argues that, through the successful use of provocation in such cases, judges send a problematic message ‘about male culture, and a particular message about the inequality of women’.

In critiquing the treatment of female victims where the defence of provocation is successfully used, Naylor (2002) has noted that trials can become a ‘slander fest’ in relation to the character and behaviour of the victim. Arguing that provocation ‘invites the defamation of the dead person’, Wells (2000: 101) asserts that women killed by their male partners are often stereotyped according to their alleged ‘infidelity, nagging, or other undesirable characteristics’. Reflecting on the reliance on these stereotypes, some commentators have asked why ‘the defence of provocation allows women to be dragged through the dirt so that men can get away with murder’ (Kissane 2004: 4). Such concerns have been at the forefront of debates around the need to either abolish or reform the defence to minimize the gendered nature of homicide law in Australia and abroad (Cleary 2004; Wells 2000; Morgan 1997).
Tasmania was the first Australian state to abolish the partial defence of provocation in May 2003 with the enactment of the Criminal Code Amendment (Abolition of the Defence of Provocation) Act 2003 (Bradfield 2003). Victoria became the second state to abolish provocation in November 2005, followed by Western Australia (WA) in August 2008 (through the Criminal Law Amendment (Homicide) Act 2008). The willingness to abolish provocation in these three jurisdictions has been praised as one of the ‘boldest strides toward a feminist transformation of homicide law’ (Ramsey 2010: 3), with international scholars suggesting that Australia’s willingness in this regard can be linked to the abolition of the mandatory life sentence for murder in some states (Forell 2006). Other Australian states have reviewed and reformed the defence. Both the Australian Capital Territory (ACT) and the Northern Territory (NT) have implemented provisions that exclude the use of the defence in response to non-violent, sexual advances (Riley 2008). NSW has also sought to retain but reform the provocation defence by removing the requirement of a sudden, provoking incident (Riley 2008; Coss 2006b).

In line with reforms throughout Australia, comparable international jurisdictions have also sought to address some of the problematic aspects of homicide law through reform packages targeted at the partial defence of provocation. Within the English criminal justice system, the defence of provocation was abolished in October 2010 following over a decade of review and scholarly debate (Horder 2005; Burton 2001; Wells 2000). Prior to the abolition of the defence, the Ministry of Justice announced a review of homicide law to determine whether ‘the law as it now stands meets the needs of the 21st century’ (Ministry of Justice 2008: 1). In response to the subsequent review by the Law Commission, the UK Government introduced the Coroners and Justice Act 2009, which served to abolish provocation and introduce a two-limbed partial defence of loss of control (ss. 54–6). Other international jurisdictions, such as New Zealand, through the Crimes (Provocation Repeal) Amendment Act 2009, and some American states such as Texas, have also implemented reforms that abolish provocation as a partial defence to murder. The Victorian case study, however, remains one of the most significant because of the significant level of public interest in the defence of provocation, particularly in response to a number of high-profile cases of intimate partner homicide.

*The Road to Change: Homicide Law Reform in Victoria*

Subsequent to the debate and controversy surrounding the partial defence of provocation, and particularly influenced by the work of Morgan (2002), the VLRC conducted an extensive review of the partial defence of provocation in 2004. The review culminated in the 2004 release of the final report *Defences to Homicide*, which has since been described as ‘the most comprehensive and cogent critique of the doctrine’ of provocation in Australia (Freiberg and Stewart in press). The VLRC report recommended the abolition of the partial defence of provocation, as well as 54 recommendations targeting homicide law. Launching the report, Commissioner Justice Neave (2004: 1) explained that it was ‘unanimously decided that provocation was unsalvageable’. This decision was based upon the Commission’s belief that rage, alongside situations of infidelity and estrangement, should ‘no longer be an excuse for intentionally killing another person’ (Neave 2004: 1). The recommendations attempted to bring into the legal process women’s accounts of violence and recognition of the importance of naming the crime as murder rather than manslaughter based on socially outdated accounts of male frailty and
ongoing concerns that the legal process was mimicking the power relations of violence against women.

In response to concerns that abolishing provocation would disadvantage battered women who kill, the VLRC recommended the reinstatement of a partial defence of excessive self-defence (VLRC 2004). This proposed defence would be available to persons who killed in self-defence, yet would recognize that their use of lethal violence was disproportionate to the threat posed (Neave 2004). Following the publication of the final report, these recommendations were praised for successfully ‘confront[ing] the reality of male violence and condemn[ing] it’ (Coss 2006: 138).

Following the response to the recommendations of the VLRC, the partial defence of provocation was abolished on 23 November 2005. The government recognized that the new legislation would ‘better reflect modern community standards’ (Office of the Attorney-General 2005) and that the partial defence of provocation was an ‘outrageous, outdated’ defence (Office of the Attorney-General 2010: 21). Former Attorney-General Rob Hulls announced that ‘Gone are the days when prehistoric assumptions about honour and violence—about male and female behaviour—should be allowed to hold traction in our legal system’ (Shiel 2005: 3). In the period prior to the reforms, the use of the defence involved cases of male–female intimate partner homicide (see Table 1). Through our analysis of legal stakeholder experiences of the abolition of the partial defence of provocation, we consider Hudson’s (2006) principle of reflectiveness and the extent to which the abolition of this category has better facilitated the consideration of women’s accounts of violence by the courts.

Introduced alongside the abolition of provocation was a new offence of defensive homicide, as set out in the Crimes (Homicide) Act 2005 (s. 9AD). This new offence was instated in place of the recommended partial defence of excessive self-defence made by the VLRC (2004). It was proposed that the offence would ‘provide a jury and sentencing judge with more options than the current “all or nothing” provisions’ for self-defence cases (Office of the Attorney-General 2005). Hulls highlighted that, through the new offence:

\[\ldots\text{where a killing occurs in the context of family violence, the legislation will affirm that she can argue self-defence even if the threat from which she was defending herself is not immediate, and even where her response involved greater force than the harm with which she was threatened.}\] (Shiel 2005: 3)

Since its implementation (November 2005–April 2011), the offence has led to 15 convictions in the Victorian Supreme Court (VSC) (see Table 2). Of these convictions, 11 have resulted from guilty pleas whilst the remaining four have been the result of a jury verdict. The significant number of pleas accepted by the Crown has meant that there is only a limited volume of case law to examine when reviewing how defensive homicide has been operating to date, and therefore the opinions of legal stakeholders as to the workability of the offence remain crucial. However, from the interview data, it is possible to consider initial experiences of the legal reform and the extent to which it has resulted in bringing women’s circumstances into the discursive realm of the law and better aligned the reform with what Hudson denotes as the principle of discursiveness.

\[\text{4For the purpose of this analysis, we consider the partial defence of provocation a legal category.}\]
When considering the gendered operation of the offence, it is worth noting that the vast majority of offenders convicted of defensive homicide thus far have been male and all cases bar one (see *R v. Middendorp* [2010] VSC 202, hereinafter *Middendorp*) have involved a male victim (Department of Justice (DOJ) 2010).

**Initial Experiences of the Offence of Defensive Homicide**

The different law reforms have had an effect of making the law vastly more complicated and of making the job of judges, prosecutors, defence counsel and juries much, much more difficult. So the

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**Table 1** *Cases of provocation manslaughter from January 2000 to November 2005*

<table>
<thead>
<tr>
<th>Defendant</th>
<th>Trial year</th>
<th>Plea/trial</th>
<th>Defendant gender–victim gender</th>
<th>Relationship between victim and offender</th>
<th>Nature of provocation</th>
<th>Sentence max/min</th>
</tr>
</thead>
<tbody>
<tr>
<td>Feti Turan</td>
<td>2000</td>
<td>Verdict</td>
<td>Male–male</td>
<td>Offender killed son</td>
<td>Verbal exchange</td>
<td>4 yrs/2 yrs</td>
</tr>
<tr>
<td>Cornelis Teeken</td>
<td>2000</td>
<td>Verdict</td>
<td>Male–male</td>
<td>Victim in relationship with offender’s ex-wife</td>
<td>Verbal exchange</td>
<td>5 yrs/3 yrs</td>
</tr>
<tr>
<td>Barbara Denney</td>
<td>2000</td>
<td>Verdict</td>
<td>Female–male</td>
<td>Married</td>
<td>Violence</td>
<td>3 yrs–wholly suspended</td>
</tr>
<tr>
<td>Teklemariam Abebe</td>
<td>2000</td>
<td>Plea</td>
<td>Male–male</td>
<td>Victim in relationship with offender’s ex-wife</td>
<td>Verbal exchange</td>
<td>8 yrs/6 yrs</td>
</tr>
<tr>
<td>David Changan</td>
<td>2001</td>
<td>Verdict</td>
<td>Male–male</td>
<td>Offender killed father</td>
<td>Verbal exchange</td>
<td>6 yrs/3 yrs</td>
</tr>
<tr>
<td>Francesco Farfalla</td>
<td>2001</td>
<td>Verdict</td>
<td>Male–female</td>
<td>Intimate relationship</td>
<td>Verbal exchange</td>
<td>9 yrs/7 yrs</td>
</tr>
<tr>
<td>Jesus Butay</td>
<td>2001</td>
<td>Verdict</td>
<td>Male–female</td>
<td>Married</td>
<td>Verbal exchange</td>
<td>8 yrs/6 yrs</td>
</tr>
<tr>
<td>Albert Goodwin</td>
<td>2001</td>
<td>Plea</td>
<td>Male–female</td>
<td>Married</td>
<td>Verbal exchange</td>
<td>6 yrs/2 yrs 8 months</td>
</tr>
<tr>
<td>Dennis Hunter</td>
<td>2002</td>
<td>Verdict</td>
<td>Male–female</td>
<td>Married</td>
<td>Verbal exchange</td>
<td>7 yrs/4 yrs 6 months</td>
</tr>
<tr>
<td>PP (youth offender)</td>
<td>2002</td>
<td>Verdict</td>
<td>Male–male</td>
<td>None</td>
<td>Violence</td>
<td>6 yrs/4 yrs</td>
</tr>
<tr>
<td>Nanh Nguyen</td>
<td>2003</td>
<td>Verdict</td>
<td>Male–male</td>
<td>Acquaintances</td>
<td>Verbal exchange</td>
<td>8 yrs/5 yrs</td>
</tr>
<tr>
<td>Vangel Stavreski</td>
<td>2004</td>
<td>Plea</td>
<td>Male–female</td>
<td>Offender killed daughter</td>
<td>Violence</td>
<td>3 yrs–wholly suspended</td>
</tr>
<tr>
<td>James Ramage</td>
<td>2004</td>
<td>Verdict</td>
<td>Male–female</td>
<td>Estranged marriage</td>
<td>Verbal exchange</td>
<td>11 yrs/8 yrs</td>
</tr>
<tr>
<td>Thao Tran</td>
<td>2005</td>
<td>Verdict</td>
<td>Female–male</td>
<td>Married</td>
<td>Violence</td>
<td>3 yrs–wholly suspended</td>
</tr>
</tbody>
</table>

5 Of the 15 convictions obtained for defensive homicide to date, only two have involved a female defendant—Karen Black plead guilty to the defensive homicide of her de facto husband, and Eileen Cramer was convicted of the defensive homicide of her husband.
Five years after its implementation, the offence of defensive homicide has attracted criticism and calls for review, particularly in the aftermath of the conviction and sentencing of Luke Middendorp in May 2010\(^6\) (Howe 2010; Murphy 2010). As one member of the Victorian judiciary commented, ‘it is disturbing that defensive homicide has been resorted to by men in circumstances that the Law Reform Commission didn’t really envisage’ (VicJudgeG). This sentiment was echoed by Attorney-General Robert Clark, who commented in the wake of the Middendorp sentencing that ‘this law is not working as it’s supposed to have worked and justice is not being served’ (Lowe 2010: 6). Of the 15 convictions obtained thus far, Middendorp remains the only defensive homicide case that has involved a male perpetrator killing a female intimate partner. Specifically, the conviction and sentencing in Middendorp have been criticized by anti-domestic violence campaigners as evidence that the law is continuing to fail to protect women within the context of family violence (Munro 2010) and that the offence does not adequately address ‘the grim, gendered realities of family violence’ (Capper and Crooks 2010: 21).

Former Attorney-General Hulls has cautioned against judgment of the law based on one trial, stating that any review of the offence would be ‘a considered review of how the

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\(^6\)Luke Middendorp stabbed his former defacto, Jade Bownds, at their shared home following an argument in which he claimed that she had threatened him with a knife. Middendorp, who had been previously charged with assaulting Bownds, was on conditional bail at the time of the killing.
law has operated’ to date (Hulls 2010: 21). The beginnings of this review are evidenced in the August 2010 publication of a Discussion Paper by the Department of Justice, which acknowledges some of the questions surrounding the operation of the offence during its first five years. The review aims to consider the options available for improving how the justice system deals with homicides occurring in the context of family violence, and to ‘examine whether the application of the offence reflects the Government’s intentions and that of the VLRC’ (Office of the Attorney-General 2010).

In addressing some of these issues, three key concerns regarding the offence of defensive homicide emerged from our fieldwork interviews: that the new offence has over-complicated the law of self-defence; that the offence is not operating as intended for battered women who kill; and that the offence has mirrored the problems previously associated with the defence of provocation.

**Complicated Justice: The Law of Self-Defence**

Our experience as judges is that there are lots of problems and that maybe we haven’t got the solution to the problem. I don’t think we are making it worse but it’s very complicated, very, very complicated. (VicJudgeD)

Prior to the introduction of the offence of defensive homicide in Victoria for women who had been victims of intimate partner violence, significant parts of their story could not be told to the court, and consequently remained outside the discursive realm of the law. The introduction of defensive homicide was aimed at changing this. However, the key impact of the new offence of defensive homicide has been to complicate the law to the extent that it is difficult, if not impossible, to operate in the jury environment. The interview process revealed a predominant perception amongst respondents that the introduction of defensive homicide has complicated the Victorian law of self-defence by creating multiple avenues through which self-defence can be argued. Respondents perceived the offence to be overly complicated and expressed doubt that members of a jury could adequately comprehend its various elements. This view is supported by previous research conducted by Najdovski-Terziovski, Clough and Ogloff (2008: 80) into the perceptions of Victorian Supreme Court and County Court judges of the directions given to jurors. Their study found that the ‘over-intellectualisation of criminal law’ in Victoria has served to reduce the effectiveness of judicial communication with members of the jury.

In responding to the question of whether the Victorian judiciary has found the new offence to be too complicated, one judicial respondent commented ‘well, anyone in this building will tell you that because we are the ones who have to explain it to a jury, it’s not easy, and I’m sure it’s very difficult for them to understand’ (VicJudgeA). Subsequently, other judicial and legal counsel respondents have questioned whether jury members could be expected to understand such complicated aspects of the law of self-defence. As one judicial respondent reflected, ‘it’s probably almost as impossible to charge a jury on defensive homicide as it was on self-defence, without getting into a huge mass of double negatives, and that must make it very difficult for a jury’ (VicJudgeG). This concern was also expressed by members of the OPP and was remarked on by a respondent:

The introduction of the law of defensive homicide has been a complete debacle and because of that law being introduced juries now ... need to be given instructions about concepts that are just completely
bamboozling to lawyers. And honestly the juries must be looking at us and thinking we’re absolutely mad. (VicProsecutorA)

The juror directions under the new legislation were also described by prosecutorial respondents as ‘mind-boggling’ and ‘unbelievably convoluted’, and by judicial respondents as ‘incomprehensible’, ‘too complex’ and ‘very complicated’. In discussing ways to overcome this, one judicial respondent suggested that it would be ‘of great assistance, if not essential’ for self-defence directions to be given to the jury in writing, for reference during deliberations (VicJudgeG). The importance of accurate juror understanding of the law is highlighted in the DOJ review (DOJ 2010: s. 183), where it is argued that ‘Jurors have a weighty and challenging task in homicide cases in which the issue of self-defence is raised. It is essential that the law be sufficiently clear so that judges can clearly explain it to jurors’.

**Battered Justice: Homicide Law for Battered Women Who Kill**

For women offenders, the introduction of the offence of defensive homicide was intended to bring into the discursive legal realm women who had experienced long-term violence at the hands of intimate partners they had killed. In response to legal concerns that abolishing provocation would disadvantage women who kill in response to prolonged family violence, the Victorian Government argued that defensive homicide would provide a half-way house for such cases, to counter the ‘all or nothing’ options of murder and self-defence. Supporting this implementation of a safety net, one policy respondent explained the necessity in relation to jurors’ interpretations of the circumstances within which such women often kill:

If you didn’t have defensive homicide there would be a real risk that many people who have that sort of hypersensitivity to the first sign of the abuse cycle, that juries will see the response as being excessive . . . so I think it is a sensible safety net to have. (VicPolicyD)

However, this approach was criticized by another policy respondent, who argued that it ‘would be too easy to get women off on defensive homicide when they should be off on self-defence’ (VicPolicyC). In this respect, the respondent believed that the implementation of the offence was ‘unnecessary’ (VicPolicyC). Similarly, another policy respondent reflected that women who kill in response to prolonged family violence are ‘really much more deserving of understanding and pity’ and should be entitled to ‘a complete self-defence defence’ (VicPolicyD). Morgan (2002) has previously argued, in relation to the partial defence of provocation, that battered women who kill their abusers would not need to access alternative legal categories if the law of self-defence adequately catered for them. It is also arguable that a conviction for defensive homicide in these cases sends a problematic message to the community that the actions of such defendants are not reasonable.

In addition to the debate surrounding the necessity of this safety net, defence counsel respondents expressed concern that the law reforms have served to further disadvantage battered women who kill. As one member of the Victorian Bar commented:

Like so much, the parliament has interfered . . . made things a lot harder for the battered woman, which I don’t think was their intention. But you’ve now got to bring the circumstances under the umbrella of defensive homicide. So yeah, that would make it a lot harder but some cases are crystal clear. (VicDefenceA)
A limited number of cases of defensive homicide involving a female defendant have thus far been brought through the courts in Victoria, with only one conviction for a female defendant being obtained following trial. It is therefore difficult to determine whether the reforms have functioned to disadvantage or support women who kill in response to prolonged violence.

_Provocation by a New Name: The Guise of Defensive Homicide_

I’m not quite sure that the way that defensive homicide has worked since the changes has been particularly effective in solving the evils that the abolition of provocation was meant to. (VicProsecutorD)

Creating a new legal category, and attempting to better include women in the discursive legal realm, do not necessarily mean the attitudes within legal cultures will change regarding gender relations, particularly dominant gender discourses and gender stereotypes. The third key concern that emerged throughout the interviews was over whether defensive homicide has provided an avenue through which the problems previously associated with the defence of provocation have continued to manifest within the criminal justice system. Respondents specifically from the prosecution and policy samples put forward this argument in relation to the courtroom narratives advanced in the trials of Anthony Sherna (DPP v. Sherna (No. 2) [2009] VSC 526, hereinafter _Sherna_) and in _Middendorp_. In discussing the _Sherna_ trial, one stakeholder commented that it ‘was clearly run as a provocation defence ... a classic provocation defence, but the word provocation was never used’ (VicPolicyA). Similarly, a prosecutorial respondent commented that _Middendorp_ took ‘on all the features that we saw in provocation, which was an unsatisfactory partial defence’ (VicProsecutorH). Scholars have argued that there is a problematic likelihood that the successful use of the offence in _Middendorp_ may pave the way for other male defendants to use it in cases in which they are accused of killing an intimate partner following a history of domestic violence (Tyson et al. 2010).

Respondents who expressed concern that defensive homicide has mirrored the problems originally associated with the provocation defence also emphasized the role of the offence in producing trial narratives based on victim blame. As one policy respondent explained:

... merely abolishing the partial defence has not necessarily eliminated all the problems ... these have now emerged in different guises, particularly through the various forms of manslaughter and the new offence of defensive homicide. (VicPolicyB)

Another respondent, from the policy sample, suggested that, whilst the legislation has been altered, little change has been achieved in practice:

... if we fast-forward right up to defensive homicide laws we’re now talking about the same narratives dominating the courtroom. So we say we’ve changed the law, we’ve abolished provocation, but we’ve allowed the same narratives to coexist with the abolition of the law. (VicPolicyA)

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7Anthony Sherna was convicted of the manslaughter of his defacto wife, Susanne Wild. Sherna strangled Wild to death and buried her in the backyard of their shared home following a disagreement over his dog. The jury was instructed to consider a verdict of defensive homicide alongside other defences to murder. Whilst Sherna was not convicted of defensive homicide, as the jury found him guilty of the alternative verdict of manslaughter, the case has been linked to the operation of the new law.
These views align with previous commentary on the operation of the offence in which commentators have asked: ‘[I]n the absence of provocation as a defence is defensive homicide becoming its replacement?’ (Capper and Crooks 2010: 21).

More specifically, respondents argued that, through the use of defensive homicide, victims are continuing to be put on trial and their actions used to excuse the lethal violence perpetrated against them. Prior to its abolition, this was widely recognized as a key problem associated with the courtroom operation of provocation (Coss 2006a; Howe 1999; Morgan 1997), with one judicial member commenting that it was ‘a most regrettable aspect’ of the provocation defence (VicJudgeG). Discussing this in relation to defensive homicide, a respondent from the prosecution sample suggested that the very name of the offence implies that the victim is somewhat responsible for the lethal violence committed against them:

... defensive homicide actually indicates that the person was defending themselves, the wording of it indicates that the other person has done something wrong. How is that any different to provocation? And in fact to me it implies more fault on the part of the victim than less. Provocation at least involved some sort of loss of control on the part of the accused, whereas defensive homicide makes it sound like they’re defending themselves. (VicProsecutorD)

This perception was expressed by another prosecutorial respondent, who observed that the reforms have merely ‘changed the terminology’ (VicProsecutorG). These arguments build on critical legal commentary that views defensive homicide as ‘basically provocation in a different form’ (Lowe 2010: 6).

An examination of all cases of defensive homicide thus far found that in only a third of the cases (five of the 15 cases) did an incident of actual violence by the victim against the offender precede the homicide. In the remaining cases, a threat of violence, words alone or an unclear event caused the offender to fear death or serious injury (see Table 2). Any defence or offence (as is the case) that allows the words or actions of the victim to be ‘put on trial’ is highly problematic. In six of the 15 cases, only the victim and the offender were present during the homicide, allowing the offender’s version of events to remain relatively uncontested—a problem previously identified in relation to provocation (Morgan 1997).

**It’s Still Not Murder: Displacement of Intimate Homicide to Other Legal Categories**

Further highlighting how the legal category of defensive homicide has taken on some of the problems associated with the provocation defence, a respondent commented that ‘it doesn’t look like the abolition of provocation has got rid of the problem, just displaced it’ (VicPolicyB). Additionally, this respondent contended that it is not surprising that ‘defensive homicide has been used, not as a proxy, but also as another way of dealing with the law’ (VicPolicyB).

The interviews revealed that defence counsel that rely on other partial defences to homicide are still working to ‘diminish the seriousness of the offence’ (VicPolicyB). This view was shared by another policy respondent, who believed that male intimate homicide defendants are still ‘getting manslaughter, they’re getting it under no intention, which I cannot understand’ (VicPolicyC). Seeking to explain why this is occurring, a judicial respondent asserted that ‘juries will still acquit of murder if they think there is serious provocation. They’ll use some other concept... which is not a desirable result’ (VicJudgeH). Additionally, a respondent from the policy sample argued that the
displacement of such cases to other categories of homicide serves to undermine the goals of the VLRC reform package and that the problems identified by the Commission ‘have now emerged in different guises, particularly through the various forms of manslaughter and the new offence of defensive homicide’ (VicPolicyB).

The displacement of intimate femicide to other manslaughter categories following the abolition of the provocation of defence was predicted to a degree in the VLRC’s final report (2004) and adds further weight to the argument that the label of the crime is still not being adequately applied in some cases of defensive homicide. The Commission contended that abolishing provocation would likely lead to cases involving male rage and anger against a female resulting in a defence of manslaughter, no intent.

Reflections on the Partial Defence of Provocation

This study also explored legal stakeholder experiences of the abolition of provocation and whether five years after its abolition as a partial defence it is considered a successful reform by those charged with its operation. Our focus was to consider the ways the abolition of this legal category had enabled a more accurate naming of intimate partner homicide, and to determine the extent to which Hudson’s principle of reflectiveness consequently could be seen at work in the Victorian law reforms.

The influence of Ramage: a catalyst for reform

There were the odd cases where we got some aberrant verdicts but that happens in everything with juries. (VicJudgeH)

In the discussions of the partial defence of provocation in the interviews, the controversial trial and sentencing of James Ramage in 2004 were frequently cited as a catalyst for abolition (R v Ramage [2004] VSC 508, hereinafter Ramage). However, a key question emerged as to whether the case represented a one-off perverse verdict or a far-reaching wake-up call about the gender-biased nature of the defence of provocation.

In what became a ‘very public death’ (Kissane 2004: 4), Ramage ‘lost control and attacked’ his estranged wife, Julie, following a discussion in which she admitted to being in a new relationship and ‘either said or implied how much better sex with her new friend was’ (Ramage per Osborn J: 23). Described by Coss (2005: 135) as a key display of the ‘injustice of the provocation defence’, Ramage highlighted to the Victorian public the dangers of the provocation defence in putting the victim on trial and using her words alone to legitimize the use of lethal male domestic violence. As described by Howell (2005: 276), ‘Julie Ramage was dead and her husband had confessed to killing her, but at his murder trial … James Ramage put his victim firmly in the dock’. The dangers of the provocation defence in Ramage were further captured by Coss (2006b: 54) when he posed the question: ‘Why does a manipulative, controlling, proprietary male who kills when challenged warrant some sympathy, some excuse?’

Early victimological studies of the judicial process were often concerned with crimes against women, notably rape (McBarnet 1983). McBarnet’s seminal study of the victim and the offender in the courtroom identified the vulnerability, especially of the victim, in relation to the demands of the adversarial trial. As both the process and product of
legal rules, the denigration of the victim through the use of gendered assumptions and stereotypes has been noted in various criminological studies of the cross-examination of victims of sexual violence (Lees 1997). However, in the case of intimate partner homicide, cross-examination of the victim cannot occur and, instead, the examination of the victim is woven throughout the trial process without a clear point at which the prosecution can put forward a counterargument. McBarnet concluded that victim denigration is often the product not of the defence or prosecution, but rather of the judge using his/her formal powers to categorize the offence and/or defences. In this sense, we are interested in the extent to which the principle of reflectiveness and the accurate categorization of offences can prevent the highly gendered denigration of victims of intimate partner homicide.

In the Victorian context, debates surrounding the provocation defence became ‘swept up in a tide of outrage over the James Ramage verdict’, which was cited by advocates as a key reason to abolish the partial defence and to develop a more appropriate legal category that would not result in female victims of lethal intimate partner violence being ‘put in the dock’ (Brookbanks 2006; Neal 2004). Whilst the verdict and sentencing in Ramage did not directly impact the VLRC’s (2004) recommendations, which came prior to that decision, the case has been linked to the subsequent quick response of the Victorian Government in abolishing the partial defence (Ramsey 2010; Howell 2005). This link was recognized throughout the interviews, with one respondent commenting that, whilst Ramage was not ‘important to the Law Reform Commission, it was important to Parliament’ (VicPolicyC). The government sought to respond to the public outcry over the Ramage case with the definitive legal response of abolishing the partial defence and introducing the offence of defensive homicide. This was presented as an attempt to make the category of homicide more reflective of the nature of the killing, particularly in cases of intimate partner homicide. It was also a clear recognition that the partial defence of provocation was a legal category insufficiently calibrated to cases of women killed by their intimate partners.

Whilst it is not the aim of this research to challenge the view that the verdict in Ramage is of grave concern, we did observe the reaction of respondents to the controversial case five years after its finalization in the VSC. Throughout the interviews, respondents—particularly from the defence counsel sample—questioned whether Ramage was representative of how the defence operated in the majority of cases, or whether it was a unique example of the injustice of the provocation defence. As one defence counsel stated in reflecting on the decision to abolish provocation:

I think it got changed for the wrong reasons, because you get a couple of so-called perverse or strange decisions and things that create publicity. The vast majority of times it was working OK. (VicDefenceB)

The two questions that emerged from the interviews concerned whether the partial defence was beyond salvation and whether its most problematic effects could have been minimized were it not abolished. In the Victorian context, the data revealed significant tensions around whether the legal category of the partial defence of provocation could be reformed enough to become responsive to women’s experiences of violence or whether it was so impregnable to women’s claims that only a new legal category would suffice.
The argument against abolition: was it necessary?

I think the worst thing that’s happened is the abolition of provocation. I think that was a completely stupid thing to do . . . the rationale was that it was a defence used by men. You don’t abolish it because it’s used by men. If it’s used improperly juries can usually see through it. (VicDefenceJ)

Legal counsel with experience in homicide trials involving the partial defence of provocation in the years leading up to 2005 reflected that, in practice, it had become a very difficult defence to successfully run in court. Various respondents linked the decline of the successful use of the defence to the fact that, over time, juries have become less accepting of the traditional ‘she asked for it’ defence often attributed to male-perpetrated provocation cases. The reduced amenability of jury members to the use of legal categories dependent upon problematic gender discourses and stereotypes of gender relations was thus identified by respondents as a significant factor. As one defence counsel respondent reflected:

The days have long since gone when the husband can say, ‘you know, I came home and found her in bed with my workmate, my best mate, so I shot them both, sort of thing, or I shot her, you know let him go and shot her’. But juries don’t, they haven’t bought that for a long time. (VicDefenceA)

A prosecutorial respondent echoed this sentiment when considering the use of the defence in Ramage. ‘I know it worked in the Ramage case, which was really why it changed . . . but it was a pretty risky defence . . . it didn’t work very often in my experience so I wouldn’t have changed it’ (VicProsecutorB). Another respondent clarified, ‘I think provocation was on the way out as a defence anyway, except in the most extreme cases and they were there for the jury to decide’ (VicDefenceA). This opinion was supported by the judicial respondents in our study, one of whom reflected that ‘as we’ve become more enlightened about not tolerating relationships where men oppress women . . . juries are less likely to allow provocation defences’ (VicJudgeH).

Explaining why the final report of the VLRC (2004) did not find that the defence had become difficult to prove, a judicial respondent noted that ‘things had toughened since the period they sampled’ (VicJudgeC). Additionally, in relation to cases in which it was successfully run, a defence counsel respondent highlighted that ‘ultimately the juries were the deciders of fact’ and that it was perceived that ‘the juries were coping with it quite well’ (VicDefenceE). This central role of the jury in deciding on provocation defences was identified by another defence counsel respondent, who argued that provocation was:

... the one area I always thought where the community has a real input into who it wants to call a murderer . . . they’re the community and we should have always backed them up. But there you go. (VicDefenceJ)

In a similar vein, a judicial respondent commented that ‘juries are a good barometer for what the community thinks about these things’ (VicJudgeH). Reforming rather than abolition of the partial defence has been noted by commentators. Dressler (2002) cautioned, in relation to the partial defence of provocation, any reform package that significantly limits the role of the jury should be thoroughly questioned and adopted with caution.
Continuing recognition of the need to abolish provocation

In many of the cases where provocation was relied on it was just an excuse for someone behaving in a murderous and outrageous fashion. (VicProsecutorA)

In light of the above discussion, it is important to acknowledge that a larger proportion of the stakeholders interviewed agreed with the VLRC that the defence of provocation was unsalvageable and that abolition was necessary to minimize gender bias within the criminal justice system. Not surprisingly, all respondents from the policy sample were unanimous in their view that the defence needed to be abolished, with one stating that provocation was ‘beyond redemption’ (VicPolicyC). This interpretation recognizes that the legal category of provocation as a partial defence was complicit in sustaining problematic gender discourses and that the category had to change if the legal system were going to make a serious attempt at limiting recourse to socially unacceptable applications of gender relations in the context of intimate partner homicide.

In advocating for abolition, one respondent explained that, if you start with a consideration of the social operation of the defence, ‘you’re much more likely to go down the abolition path’ than if you were to begin with an analysis of the legal categories (VicPolicyC). This argument is supported by a previous study of the now-disbanded Law Reform Commission of Victoria, which emphasized the importance of examining social context in any homicide law reform initiative (Naylor 1993). In line with this view, another policy respondent asserted that it was important to ‘just sit back and talk about it philosophically. What are the values that should mitigate the harshness of a murder sentence? What are the values that should distinguish murder from manslaughter?’. This respondent believed that, if one adopts this attitude, it is hard to justify an approach to criminal law that is ‘unfair and inequitable’ (VicPolicyD).

Reflecting on the need to bring the law in line with community values—a key goal of the VLRC—one prosecutorial respondent questioned:

... what decade do we live in here? This is no longer the age where you’re entitled to lose your temper to such an extent just because they [the victim] might be fooling around. (VicProsecutorD)

This perceived contrast between the operation of provocation and society’s values was also noted by a respondent from the policy sample, who reflected that ‘when women were exercising their rights to, their equality rights, they were being murdered; and the notion that our society condoned that via the defence of provocation seemed not good’ (VicPolicyC). As argued by a judicial respondent, such problems with the provocation defence did not ‘sit well with 21st century law’ (VicJudgeB).

Finally, in reflecting on the problematic operation of the partial defence prior to its abolition, one prosecutorial respondent stated:

It [provocation] was being used as a cloak, as a cover for deliberate murders that were then dressed up as something less than that, and really some of the provocation defences that actually got up, if I can use that term, were ludicrous. And the community wouldn’t cop that anymore. (VicProsecutorA)

In cases of intimate partner homicide, provocation as a partial defence sometimes labelled the act that might reasonably be considered murder as manslaughter. As a respondent from the VSC judiciary commented, ‘[t]he whole question of whether homicide was in a sense directed towards assisting or at least protecting men, and men’s
behaviours and exposing women’ (VicJudgeG) was critical to the abolition of the partial defence of provocation. Whilst these views are certainly not new, and have been widely recognized in the previous research in this area, they do provide acknowledgement that, five years on, legal stakeholders continue to recognize the problems associated with provocation and do not perceive that, in practice, justice has been disadvantaged by the abolition of the partial defence.

*Provocation in Sentencing: Is It Enough?*

Of the hundreds of sentencing factors, provocation has been amongst the most controversial, problematic and variable in its treatment by the law. (Freiberg and Stewart in press)

Even given the removal of provocation as a partial defence to murder, the respondents still emphasized the importance of also changing gender discourses as they run throughout the entirety of a case, including the sentencing phase. This is central to considering the principle of reflectiveness as operating not only in a single or isolated phase of the criminal justice system, but also in the ways legal categories can be used or subverted throughout the life of the case. Alongside its recommendation to abolish the partial defence of provocation, the VLRC (2004) recommended that issues pertaining to provocation should continue to be considered by judges in sentencing (Stewart and Freiberg 2008). The VLRC (2004) explained that, through a consideration of the full range of options available when sentencing an offender for murder, members of the judiciary would be able to impose appropriate sentences that reflected the culpability of the offender. This reform was also previously implemented in Tasmania following the abolition of provocation in that state, and has since been implemented in WA and NZ (Freiberg and Stewart in press).

Since its release, this recommendation has been a point of contention for both legal and academic commentators (Fitz-Gibbon 2009; McSherry 2005a; Bradfield 2003). McSherry (2005a) has argued that moving provocation-based elements to sentencing could lead to inconsistencies in sentencing across murder cases that involve aspects of loss of self-control. In support of this argument, Bradfield (2003) has commented that post-abolition caution is needed to ensure that undue sympathy is not afforded to intimate homicide offenders during the sentencing stage of the court process, and that a clear rejection of any claim of provocation is put forward by members of the judiciary. In short, it is essential that the gains made in removing the partial defence are not undermined by the mobilization of problematic gender tropes that, either explicitly or implicitly, continue to mobilize provocation-type narratives at the sentencing stage. As Stewart and Freiberg (2008) warn:

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

If this does not occur, Bradfield (2003: 324) argues, ‘the sentencing process will merely reiterate the legitimacy of men’s violence in response to sexual jealousy and possessiveness’.

Stewart and Freiberg (2008) observed that, in the first four years following the homicide law reforms, provocation had not yet emerged as a significant factor in Victorian
murder sentencing, having only been referred to briefly in a small number of judgments since 2005. However, mindful of Coss’s (2006a: 149) recommendation that sentencing be ‘closely scrutinized’ in the period following the homicide law reforms, this research questioned respondents about the need to consider provocation in sentencing and the effect of this aspect of the homicide reforms thus far. In response, respondents across all participant samples recognized the importance of considering provocation in sentencing, with one prosecutorial respondent pointing out that there is a ‘legitimate foundation’ for the courts to recognize at sentencing where ‘a person kills in a situation of extreme stress’ (VicProsecutorH). This sentiment was echoed by one judicial respondent, who stated that ‘the question of a trigger for actions is always a significant issue in sentencing’ (VicJudgeC).

In addition to acknowledging the importance of provocation as a factor influencing sentencing, one respondent highlighted that, without the historical constraints of mandatory sentencing and capital punishment, there is no longer ‘a justification for allowing’ provocation to reduce the offence from murder to manslaughter (VicPolicyD). This argument concurs with earlier academic commentary on Australia’s willingness to abolish the provocation defence (Forell 2006).

However, a smaller sample of respondents expressed concern about how provocation could be transferred to sentencing and the role it might play. In this regard, one defence respondent was of the view that, following a murder conviction, and regardless of whether provocation was raised in sentencing submissions, judges would now be likely to give ‘a fairly straightforward murder-type sentence’ (VicDefenceJ). This concern was mirrored by one judicial respondent, who questioned the role of provocation in sentencing post 2005, arguing that ‘we got rid of it and everybody thinks it should be in sentencing but where is it in sentencing? We’ve lost it. That’s the problem’ (VicJudgeA).

Furthermore, in relation to transferring the consideration of provocation from the juror’s verdict to the judge’s sentence, one respondent from the policy sample admitted that there was a fear that ‘the ghosts of the past would rise up and we would get a reproduction of all of the issues’ previously associated with provocation (VicPolicyB), and another noted a fear that the same narratives would be ‘hidden’ at sentencing (VicPolicyC).

**Conclusion**

Homicide law reform, and particularly the gender bias identified in the operation of the partial defences such as provocation, have produced mixed outcomes for the legal system. The analysis of legal stakeholder experiences and perceptions of the most recent homicide law reforms in Victoria grants further insight into some of the most nuanced aspects of legal reform for those charged with its operation.

The diverse range of experiences of the Victorian reforms yield important lessons for like jurisdictions. In the UK and Australian jurisdictions, legislatures have pursued diverging paths to redress the use of the law and the courtroom in mobilizing problematic accounts of women’s actions and words prior to their killing at the hands of intimate partners. Both the implementation of defensive homicide and the abolition of provocation have been advanced following high-profile cases of intimate partner homicide within the Victorian criminal justice system.

Our study suggests that, despite the reforms, significant problems persist within the Victorian context. These reforms, whilst including some promise of meeting Hudson’s (2006)
principles of discursiveness and reflectiveness, have fallen short of community expectations. The principle of discursiveness (Hudson 2006) and the promise of including within the legal discursive space women who had previously been left outside it did not eventuate in the period immediately following the implementation of the reforms. The interview data identified the respondents’ experiences of the new offence of defensive homicide and its purpose to return women’s stories to the legal battle. The result has been that, under the new legislation, the directions given to juries in the case of defensive homicide have become very complicated. Importantly, the objective of implementing reforms that result in enhancing justice for ‘marginalized and oppressed subjects’ (Hudson 2006: 31) means that often the principles of reflectiveness and discursiveness overlap. In the context of seeking to bring women into the realm of the law, the complications noted above militate against the appropriate labelling of the crime, and perhaps even current and future prosecutorial decision making as to what cases are brought before the court. Whilst seemingly achievable, the principle of discursiveness has significant effects for the workability of the principle of reflectiveness and the accurate categorization of offences.

In terms of the principle of reflectiveness (Hudson 2006), the reforms appear to have failed to effectively introduce a new legal category capable of more accurately labelling the crime and structuring what can be heard and adjudicated upon. For women offenders, the offence of defensive homicide is a useful legal category for bringing into the legal domain the complex circumstances of battered women who kill. However, what this defence provides is a half-way house or ‘safety net’ for these women, when the law could instead be further reformed to accommodate their circumstances in terms of an arguably more accurate legal category of self-defence. Consequently, through the inclusion of the stories of battered women who kill under the offence of defensive homicide, battered women have come to occupy a compromised legal category. In this scenario, the principle of reflectiveness has proven equally difficult to achieve under the Victorian reforms.

It seems reasonable to conclude that many within the legal system identify the need for more far-reaching reform within this area of the law, and more notably for a transformation of the legal subject such that problematic gender stereotypes are more difficult to apply. In such circumstances, Hudson’s principles of discursiveness and reflectiveness become more achievable. As Laster and O’Malley (1996) noted some 15 years ago, including the stories of the powerless, or further extending the reach of the law, may only meet with success if the foundational legal subject—the white male—is more comprehensively transformed (Walklate 2008).

References


