

**REVIEW INTO DEFENCES TO HOMICIDE**

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## Executive Summary

Men don't have a prerogative on violence. Women can engage in violent behaviour – physical, psychological and emotional.

But, distressingly, there is a level of systemic violence in our society that characteristically sees men committing violence against women, most often in the residential home. This is evidenced by an array of disturbing statistical facts:

- One in three women will be raped, beaten or abused in some other way during her life, according to the United Nation's report 'Not a Minute More: Ending Violence Against Women', which said violence against women was the "most universal and unpunished crime of all" (report released 22/11/2003, as per The Sunday Age, 23/11/03).
- The last government survey on women's safety (1996) reported that 1.1 million Australian women had experienced some form of violence in a domestic relationship. In 2001, 13,500 women reported to police that they had been sexually assaulted.
- In 1998-1999, there were 21,817 applications for intervention orders in Victoria, with 77 per cent of victims female and 89 per cent of perpetrators male (The Bulletin, *Breaking the Silence*, Deborah Light, June 4, 2003)
- More than 25 per cent of Victoria's police force resources are spent dealing with family violence (according to Victorian Police Commissioner Christine Nixon, The Bulletin, *Breaking the Silence*, June 4, 2003)
- In a 1997 survey, of 1000 men aged 15–25, a third agreed there were situations where it was "ok for a male to force a female to have sex," (Anne Summers, *The End of Equality*, 2003, p.114)

There is an old maxim that only the oppressed understand oppression.

When the Bracks' Government denied a pardon to Heather Osland, women all over the State were distraught and angry. These were not restricted to the small group of heroic women who had worked week after week for several years to support Heather through her trial and conviction.

When a public meeting was called soon after, around 100 women from all manner of occupations and backgrounds crowded into a city meeting room. Most of these women did not know Heather personally.

But when campaign leader and Heather Osland's advocate Chris Momot spoke quietly and truthfully of the nature of Frank Osland's brutal regime, there was

scarcely a woman present not shedding tears of shared pain or compassion. While most of these women were not necessarily victims of violence in the way Heather was, they nonetheless had empathy for Heather's tortuous and awful experience.

It is a truism that violence against women, while often manifested as sexual assault, is fundamentally about the exercise of male power over another. Power relations are played out daily and in all human relationships. Cultural attitudes emerge and become institutionalised. When a high proportion of young men think it is ok to be rough with a woman for sex, we can safely assume there is a deeper-seated culture abroad that subtly feeds and legitimises this notion of acceptable violence within a relationship. Women experience and witness this culture in an oppressive way.

When a society's prevailing politico/legal culture is largely reflective of male values, attitudes and behaviour, the experiences of women – in all their diversity and commonality – come to be misunderstood and marginalised. This makes it harder (but not impossible) for a man to understand the actual experience, for example, of domestic violence; and leads some male judges to make comments about male/female relationships which seem perverse and outrageous to women.

It also makes it harder for a woman to gain full protection of the law because the awful realities that characterises domestic violence are not seen through the prism of her experience. After all, why didn't she just leave him?

The legal system as we currently know it, perpetuates male notions of provocation and self-defence by a triggering action; and has difficulty with the idea that a woman could 'pre-plan' the execution of her husband. Yet women, even without the actual experience of domestic violence themselves, understand deep down that a woman could, after years of brutality, humiliation, domination and control, seek a way out of her misery by a form other than instant provocation.

Women have more of an appreciation of the level of ongoing fear and the traumatic environment that is inextricable for other women who live with family violence. They are also more able to appreciate that if a woman attacks her abuser in the midst of being attacked herself – that she and her children could quite likely end up the victims. Yet when women who kill in response to family violence find themselves defending a murder charge, their abuse often continues through the judicial system.

It does not have to happen this way. In this joint submission, the Victorian Women's Trust and the Heather Osland Support and Action Group believe a civil society must strive to have all of its members understand the nature and ramifications of violence against another person, and of systemic male violence against women. It needs also to have legal structures that strive to ensure access to justice for women.

This is why we advocate law reform that better reflects the realities of provocation and self-defence when women are involved; stronger judicial and broader community education so that the real nature of domestic violence is exposed and understood; and the acceptance of a social framework evidence.

Our submission focuses more on the problems associated with women raising self-defence in family violence related killings. This is because we believe women are entitled to use a full-defence when charged with murder.

However, we do believe the partial defence of provocation needs to remain an option for women, and have endorsed some reform options. We particularly feel provocation has failed many female victims of homicide, and could be improved by limiting its use (mainly by men) in sexual jealousy and separation assault killings.

We also endorse the introduction of an amendment that finalises the removal of a trigger incident as being necessary to raise provocation as a defence. The introduction of instructions from judges to juries in judges' bench books for provocation cases that involve family violence, also has our support.

In reforming self-defence, we believe the introduction of social framework evidence would better serve women who kill in family violence related homicides. This would reduce the recent trend in such cases of having to prove women are suffering from a "syndrome", and instead focus on their acts of survival by putting the nature of their relationship in context.

We also endorse the initiative of wider judicial and community education on the real nature of domestic lives. Ultimately we hope this wider education will lead to a reduction in family violence related homicides.

## **Background:**

We commend the Victorian Law Reform Commission's (VLRC) review into defences to homicide, as we believe the legal system needs improvements to address the needs of women in Victoria. We particularly congratulate the authors of the Options paper for the quality of their comprehensive review, and thank the Commission for this opportunity to contribute to the debate.

This submission is a joint submission endorsed by both the directors of the Victorian Women's Trust and members of the Heather Osland Support and Action Group.

The Victorian Women's Trust (VWT) is inspired by the vision of a just and humane society in which women enjoy full participation as citizens. Fully independent, the Women's Trust was established in 1985 in recognition of women's role in shaping Victoria. The VWT believes that by creating a better world for women, we create a better world for men, children, families and communities.

As a philanthropic organisation, the VWT has funded many family violence related projects, including grants addressing the issue of domestic homicides (for example, we funded the Women's Coalition Against Family Violence's 'Blood on Whose Hands?', as well as Brimbank Community Centre's 'Women who kill in self-defence – Community action and education project'). These grants are a response to the needs of women in the community.

The Heather Osland Support and Action Group (HOSAG) was formed following the rejection of Heather Osland's petition of mercy. The group has evolved from, and includes members of the Release Heather Osland Group. The aims of HOSAG are similar to RHOG, but due to the exhaustion of Heather's legal appeals, the work of HOSAG now focuses more on supporting Heather for her release from prison.

The Women's Trust has had a long association with the Release Heather Osland Group, and now the Heather Osland Support and Action Group. Running parallel to our granting work, the Victorian Women's Trust is also involved in supporting Heather in an advocacy sense. Heather Osland Support and Action Group meetings are held at the Victorian Women's Trust, with staff of the VWT actively involved in the group's work.

Soon after Victorian Attorney General Rob Hulls denied Heather's Petition of Mercy for release, he announced the Law Reform Commission reference into defences to homicide. We believe that the widespread community reaction to Heather's unjust situation influenced the decision to have the review.

## **Introduction:**

We appreciated the Defences to Homicide Options Paper's use of real case studies to illustrate the problems in the defences, disparities in sentencing, and gender bias in the law. To begin our submission, we have provided a distillation of Heather Osland's grim experience:

***Heather was in a violent relationship with Frank Osland for 13 years. During this time, she and her children were physically, sexually and emotionally abused, and exposed to extreme acts of sadism such as the killing of family pets. Police regularly visited the Osland home, telling neighbours to stay away from Frank as he was "dangerous". The abuse would escalate once the police left.***

***Heather tried to leave Frank on eight occasions, but in each instance, Frank would hunt Heather down and threaten her life, or her family's life, if she left again. On one occasion, Frank axed in a door to find Heather. Frank would stalk Heather's workplace, sometimes resulting in Heather losing jobs because Frank was constantly harassing her and other staff.***

***On the morning of July 30, 1991, Heather and her adult son David were both abused by Frank and their lives threatened. Later that day, Heather put sedatives in Frank's food. David hit Frank with a piece of pipe that killed him.***

***David and Heather were initially tried together, however the jury could not decide a verdict for David.***

***In a separate trial, David was acquitted of murder on the grounds of self-defence of both himself and his mother. He and his siblings were later awarded crimes compensation for the violence they experienced and witnessed against their mother.***

***However, Heather Osland was convicted of murder and sentenced to 14½ years in prison. She has since exhausted her legal avenues for release, including a High Court appeal and a Petition of Mercy. Heather has now spent over 7½ years behind bars.***

## Reform Options – Provocation:

At this point in time, we do not endorse the abolition of provocation as a partial defence to homicide. Our reasoning for this is that we believe there are existing problems with the availability for women to use self-defence in female perpetrated homicides. Until self-defence can be utilised by women more effectively, we believe provocation should remain as an option for women who kill.

We are also wary the abolition of provocation could lead to more people being sentenced for murder, potentially buying into a more excessive law and order regime. Alternatively, with no half way option for juries, there is also the potential for people who are guilty of murder to be acquitted on sympathetic grounds.

Another reason for retaining provocation at this time, is that Indigenous people are over-represented as both perpetrators and victims of homicide. Indigenous people are more than eight times more likely to be homicide victims than non-indigenous people (The Sunday Age, June 23, 2001). Unfortunately, the reality is that socially and economically disadvantaged communities have higher rates of violence. We would not want to fuel this current over-representation of aboriginal incarceration rates which could happen if provocation was abolished.

We do believe, however, there is room for improvement in the defence of provocation, namely, in limiting the circumstances of its use.

We recommend provocation as a defence made unavailable:

- (i) in cases of separation assault killings, or as Helen Brown specifies in the VLRC options paper, *“where a defendant alleges provocation where the deceased has left, attempted to leave or threatened to leave an intimate sexual relationship”*
- (ii) in cases of sexual jealousy, as Helen Brown defines as being, *“where a defendant alleges provocation because of suspected, discovered or confessed infidelity”*

*(Helen Brown, ‘Provocation as a Defence to Murder: To Abolish or Reform?’ 1999, as quoted in the Victorian Law Reform Commission’s Defences to Homicide Options Paper, 2003, p.91).*

Our reasoning for the above suggested reforms is that both men and women have the right to leave a relationship. This should not be viewed as “provocative” conduct and responded with an extreme act of violence. Gone are the days when women in particular are “owned” by their spousal partner.

It is the right of both women and men to have the freedom of movement. By leaving the law as it stands, and excusing a homicide by deeming the act of leaving a relationship or the act of sexual infidelity or suspected infidelity as grounds to be sufficiently provoked into killing, we are condoning the use of violence over a basic human right. This should not be the case.

In regards to further reforms of provocation, there is also still too much of a reliance on a “trigger incident” to successfully prove provocation. While the reliance on a trigger incident is no longer deemed necessary, as acknowledged in the VLRC’s review, it is still considered a convincing factor in using provocation as a defence.

As such, there is an urgent need to remove the need for a 'triggering incident'. Comparatively to men, women are not as likely to kill in such an immediate reactionary way, therefore this reliance on a trigger incident disadvantages women. It is also particularly hard for women who kill in family violence related homicides to successfully raise provocation as a defence without a trigger incident. As discussed in our recommendations for self-defence reforms, women who kill in response to family violence rarely confront their abuser in the midst of an attack.

We recommend the Law Reform Commission includes a provision making it clear that a trigger incident is not a requirement to use provocation as a defence.

We also endorse the option to introduce procedural reforms, namely directions in judges’ bench books to instruct the jury on cases that relate to family violence.

A valuable starting point in the development of judges’ bench books, lies with Debbie Kirkwood’s suggestions in her submission to the Model Criminal Code Officer’s Committee on behalf of the ‘Women who kill in self-defence campaign’, August, 1998:

*“Judges should direct juries of the following:*

*\* Women are or can be ‘locked into’ violent relationships through socialisation, economics, responsibility for children, lack of alternatives such as housing, independent income, broader family support, the opinions of neighbours or family friends.*

*\* Women may live apparently ‘independent’ lives, without any (or little) indication to the outside world of the violence occurring with the home, but this does not mean it does not happen, or is not happening.*

*\* Women are frequently beaten ‘where it doesn’t show’, so that there may well be no outwardly visible signs, such as bruising, or wear sunglasses or makeup to conceal marks/bruises.*

*\* Women are likely to be reticent about complaining to others, or telling others, and `select' those whom they tell'.*

*\* If women do tell (any) others, they are likely to downplay or understate (rather than exaggerate) the violence to which they are being subjected.*

*\* Where there is evidence of sexual assault it should also be put to the jury that if they believed rape had occurred they could fit that in to self-defence.*

*\* Threats to kill if a woman leaves ought to be taken seriously given research which shows women are at increased risk of violence and death when attempting to leave.*

*\* The jury needs to be directed that proportionality and imminence may be a different matter for a woman in a battering situation than for a man in a bar room brawl.*

*\* In terms of proportionality it should be pointed out that women are generally not of equal size or strength, nor are they as experienced in physical fighting as men.*

*\* Juries should be directed that the law does not stipulate that an accused apprehend immediate danger when she or he acts.*

*\* The jury should consider the cumulative effects of a history of threats/violence.*

*\* The judge should make it clear that the woman does not have to fit the criteria of the Battered Woman Syndrome in order to be acting in self-defence.”*

## Self Defence Issues in Family Violence Related Homicides

We believe that women who kill to protect their lives in response to family violence should be able to use self-defence in defending a murder charge. While provocation is a partial defence, women who kill in life threatening family violence situations are entitled to accessing a full-defence in response to a murder charge.

The High Court's definition of self-defence is simple. That is, *"whether the accused believed upon reasonable grounds that it was necessary to do what he or she did."*

While straightforward, the defence has been difficult to use for women. As acknowledged in the Law Reform Commission's options paper, there are three main impediments to the use of the defence by women who kill in response to family violence, namely, *"the immediacy of the threat, the proportionality of the response, and the availability of alternative options."*

While proving the immediacy of the threat and in turn the proportionality of the response are no longer deemed necessary factors in assessing self-defence cases, in a practical sense they are still viewed as crucial elements in such cases, as acknowledged in the VLRC's options paper.

Dr Patricia Eastaerl addresses the continuation of these factors in her article, 'Women Who Kill a Violent Partner - Where's the Justice?', which is posted on HOSAG's website:

*"Although changes in legal interpretation have done away with ideas that the retaliation must be immediate and proportional to the attack in the bar room brawl sense, in fact these concepts continue to be used by judges and juries in their deliberations and by lawyers in their advice to clients in pleading. Self-defence is still defined in male terms of being and behaving in the world."*

<http://home.vicnet.net.au/~rhoq/legal2.htm>

In the Law Reform Options Paper's examination of the "immediacy of the threat", we appreciated the example of a hostage situation in differentiating between what could be seen as an "inevitable" threat to one's life, as opposed to the "immediacy of the threat".

Similarly, domestic violence poses "hostage" like situations for families and can put the lives of sufferers under constant "inevitable" threat. In Heather Osland's High Court appeal, her lawyer Dr Jocelyne Scutt drew parallels of Heather's situation with a hostage situation. As HOSAG member Dr Debbie Kirkwood wrote in 'The Trials of Heather Osland':

*“Dr Scutt presented a clear picture of the abuse Heather suffered and the effect of that abuse on the family. In explaining to the Court the 'Battered Woman's reality', she compared Heather's life to being locked in a closet and to a hostage situation. Dr Scutt clearly indicated that this case was not asking for women in Heather's situation to be exempt from murder laws or for women generally to be given special treatment, rather that the laws of self defence and provocation be open to women's experiences as well as men's.”*

In rejecting Heather's appeal to the High Court, Justices Kirby, McHugh and Callinan voted against a retrial, supporting the jury's view that the killing of Frank Osland was too pre-planned, concealed and pre-meditated for Heather to argue on the grounds self-defence.

In our view, and the eyes of many women everywhere but in the court system itself, this judgement represented a significant failure in understanding the real nature of domestic violence.

It fails to understand that the threat to Heather Osland's life was “inevitable”, and that Heather responded to this threat to her life by using the only realistic means possible. It also fails to understand the different ways in which women respond to violence. In ‘The Trials of Heather Osland’ Debbie Kirkwood critiques the focus on the issue of “planning” in Heather's case:

*“Even if Heather and David's actions are seen to constitute a 'plan', planning should not rule out self-defence. A woman in a situation of ongoing abuse, who is in fear for her life, may need to take steps in order to survive and that is what self defence is about - survival.”*

Heather Osland's guilty verdict also fails to understand the different ways in which women respond to violence. It fails to understand that for women in Heather's situation, “alternative options” like leaving the relationship are not necessarily feasible. It should not be forgotten that Heather Osland tried to leave her abuser on eight occasions, and in response, was hunted, stalked and her life threatened.

For women who kill in response to family violence, the time of killing for many will occur when the abuser is not in the midst of an attack. Many women will also use a weapon to undertake the killing. As Debbie Kirkwood explains in ‘The Trials of Heather Osland’:

*“Most women who kill violent partners after a long history of threatening abuse believe that they have no alternative. In order to survive they may kill the abuser while he is asleep or incapacitated. In such cases women take a number of steps to carry out and conceal the killing.”*

One of the reasons why women who kill in response to family violence use weapons and/or kill when the abuser is asleep or sedated, is because of the disparities in the size and strength of women comparative to men. It is also because of the fear the abuser has placed on the victims.

Violence against women in the home is often about the abuser exerting extreme acts of control on the victim – too often, the victim can feel powerless against the abuser and as such, believes the only way they can defend themselves against the abuse is when they are not physically under attack.

As such, the law makes it difficult for women who have killed in response to family violence to use self-defence as the killing takes place in a “non-confrontational” situation. Worse still, often these sorts of homicides are viewed as “cold-blooded”.

While men often successfully raise the defences of provocation and self-defence because they responded “in the heat of the moment”, as such these killings are viewed as “hot-blooded” homicides and seen as less culpable than killings viewed as “cold blooded” homicides. Such labels and misconceptions fail to understand the different ways in which women respond to violence compared to men.

### **Suggested Reforms to Self-Defence:**

We believe there is room to clarify the law of self-defence, particularly in order to make it more workable in cases of women who kill in response to family violence.

We agree with the introduction of a provision that defines the threat of “inevitable” harm as reasoning for the use of fatal force as opposed to the current emphasis on “imminent” or “immediate” harm in self-defence cases.

For juries and judges and the wider community to better address cases where women kill in response to family violence, we recommend the introduction of social framework evidence. We caution against the introduction of a specific battered women syndrome defence, as it pathologises women by relying on a psychological condition to account for their actions:

*"Although legal rules of self-defence have moved away from the bar-room brawl model, the use of battered women syndrome means that women must now conform to a medical model for their evidence to be credible. Secondly, in crude terms, syndrome evidence suggests that the woman is not bad, but mad. This may suggest that the more appropriate defences are those of mental impairment or diminished responsibility. Again, this pathologises the experience of battered women and takes their situation out of a social context."*

(E Sheehy, J Stubbs and J Tolmie, *“Defending Battered Women on Trial: The Battered Women Syndrome and its Limitations”* (1992) Crim LJ 369; P Eastal *“Battered Women Syndrome: What is Resonable?”* (1992) as quoted in *Principles of Criminal Law*, S Bronitt and B McSherry, 2001, p.309).

Similarly, we advise against the re-introduction of the defence of diminished responsibility, as it dictates an “abnormality of mind” of the accused, and we believe that women who kill in order to protect their lives are exercising a rational response to the threat against their lives.

### **Social Framework Evidence:**

The introduction of social framework evidence provides the scope for juries to be exposed to the broader context of family violence. Unlike the reliance on proving the accused was suffering from ‘Battered Women Syndrome’ (which became the focus of Heather Osland’s High Court appeal, as opposed to determining whether she acted in self defence) social framework evidence removes the need to prove the accused has a psychological condition at the time of killing.

In cases of ‘non-confrontational’ family violence related homicides, social framework evidence would be particularly useful in explaining the nature of the relationship in the lead-up to the homicide.

The VLRC’s suggested provision of social framework evidence on matters like “the general dynamics of abusive relationships”, “the issue of timing” and “why a battered woman may have to plan to kill in order to protect herself” (p.130), would have assisted Heather Osland, and indeed other women in similar life threatening situations.

The introduction of social framework evidence is also likely to address the three factors that make it hard for women who kill in response to family violence (immediacy of the threat, proportionality of the response and alternative options). In particular, it would help explain to juries the lack of alternative options available to battered women. Despite the increasing knowledge people have of the nature of family violence, there is still the misconception that women have a viable choice of leaving the relationship.

The community at large, has difficulty understanding the downward and complex spiral of low self-esteem, fear, humiliation and helplessness that too often iron grips a woman to the extent that the notion of leaving a relationship is impossible.

To avoid judges ruling the introduction of social framework evidence as irrelevant to some self-defence cases, we recommend the introduction of a provision specifying that the history of domestic violence is in fact relevant and admissible in such cases.

In introducing social framework evidence, it also needs to be ensured that the 'common knowledge' rule does not overrule the permission to give social framework evidence. While the problem of family violence is widespread, the nature of it is still not "commonly known" to many people. This is supported by the Office of the Status of Women's 1995 report into Community Attitudes to Violence Against Women, that found the community does not fully understand family violence. For this reason we recommend a provision stating that a complete understanding of family violence is not within the jury's common knowledge.

If social framework evidence is introduced, there is obvious scope to expand expert witnesses who are able to give evidence (as opposed to the limitation of psychiatrists being able to prove the accused suffered from battered women syndrome). We would welcome the provision to allow experts on domestic violence to provide social framework evidence. This could include Domestic/Family Violence workers with several years experience (for example refuge work). To ensure that they are able to give evidence, we support a provision that specifies that domestic violence is an area of expertise.

## **Wider Judicial and Community Education:**

The appeal of judicial education and wider community education on the issue of domestic violence lies in its potential to lead to less family violence related homicides. And surely this must be the ultimate goal.

Our thoughts on judicial education and wider community education stem from two key issues introduced in our Executive Summary – the high level of systemic violence men commit against women; and a prevailing politico/legal culture, largely reflective of male values, attitudes and behaviour, which misunderstands and marginalises women’s life experiences.

We contended earlier that it is hard (but not impossible) for a man to understand the actual experience of domestic violence; and that the awful realities of domestic violence need to be seen through the prism of a woman’s experience. The ways these two needs can be addressed is through a greater representation of women working in the judicial system itself (as solicitors, barristers and judges), through programs of judicial education, and wider community education.

Part of the problem in grappling with the extent and complexity of domestic violence is the fact that it remains hidden away from many others in the broader community. Indeed, there are significant anecdotal accounts of perpetrators making sure that the marks of their violence are not evident on the parts of a woman’s body that is revealed in public.

The question of judicial education goes much further than the provision of a judge’s benchbook. For instance, we believe there is scope for commissioning high quality curriculum material (texts/film) that can be adopted in undergraduate and postgraduate law courses; as well as in the activity of the newly established Judicial College.

Too often the effort to design and run community education campaigns against domestic violence are left to a few community groups (including women’s organisations such as the Victorian Women’s Trust) who struggle for resources and personnel.

What is needed is a much greater level of commitment by Government and relevant statutory agencies to community education on domestic violence.

After all, we are well-used to significantly resourced campaigns about industrial work safety, water conservation, smoking, and gambling, to name a few. Indeed, given the estimated extent of the problem of domestic violence – and the raft of longterm consequences for families, men, women and children, an attempt to change attitudes and behaviour with respect to domestic violence should be a matter of the utmost priority.

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On behalf of the Board of the Victorian Women’s Trust and the Heather Osland Support and Action Group