

Debbie Kirkwood

# heather osland still seeking justice

third time to the High Court of Australia

In this article, Debbie Kirkwood describes Heather Osland's continuing struggle to access crucial information relating to the Victorian Government's rejection of her Petition of Mercy. Debbie will be attending Heather's High Court hearing in Canberra this month and will provide a further update for the next newsletter.

*... if my husband had [have] killed me, as I know he would have, he probably would have received a shorter sentence than I did (Heather Osland).<sup>1</sup>*

## Background

Many readers will be familiar with Heather Osland's story. Heather was convicted in 1996 for the killing of her violent husband Frank Osland in Bendigo, Victoria. She was sentenced to 14.5 years in prison (with a minimum of nine-and-a-half years). Her adult son, David, who struck the blow that killed his stepfather, was acquitted on the basis that he acted to defend himself and his mother. Evidence at the trial showed that Heather and her four children from a previous marriage had endured over 13 years of physical, sexual and psychological abuse.

Heather Osland unsuccessfully appealed her conviction to the High Court of Australia in 1998, with a majority decision (3:2) deciding against her. The key problems for Heather's defence appear to be the perception that the killing was planned and concealed. The judgment appeared to overlook the fact that David, who successfully argued self-defence, was also involved in the 'planning' and the 'concealing'.

There was widespread community concern about the injustice and extensive media coverage. A campaign

formed to support Heather, seek her release from prison and to advocate for reform of the laws relating to homicide. Campaigners argued that women must sometimes take steps to kill in self-defence and cannot wait until an imminent attack in which they may be killed. They also argued that it is essential that evidence of the history of violence and its cumulative impact be permitted in the trials of women who kill violent partners.

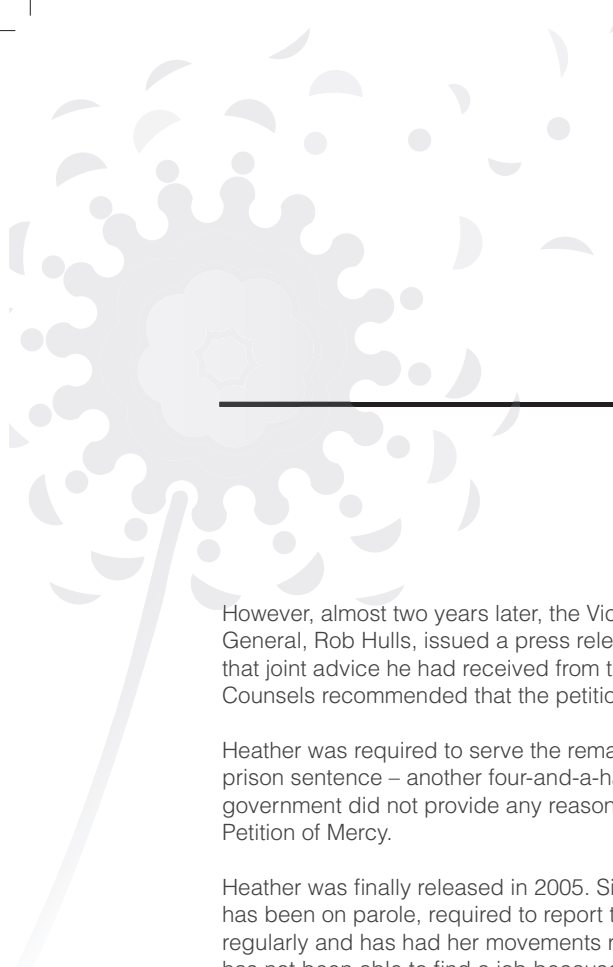
## Petition of Mercy

Having exhausted all legal avenues, Heather Osland sought a Petition of Mercy from the Victorian Government. The government has the ability to use its prerogative of power, or discretion, to release a person from prison on the grounds of compassion.

Heather's detailed Petition of Mercy application outlined six grounds for compassion, including that: with appropriate law reform acknowledging gender difference in provocation and self-defence, she would have been found to have acted in self-defence; her sentence was severe compared to similar cases; she already suffered 13 years of family violence; the State failed to protect her from the violence; there was new and additional evidence about the abuse she experienced; and she had never committed any other offence and is not a threat to the community.

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<sup>1</sup> Heather Osland, speaking of her trial in 1996. Quotes are from personal communication with Heather



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However, almost two years later, the Victorian Attorney-General, Rob Hulls, issued a press release stating that joint advice he had received from three Queen's Counsels recommended that the petition be denied.

Heather was required to serve the remainder of her prison sentence – another four-and-a-half years. The government did not provide any reasons for rejecting the Petition of Mercy.

Heather was finally released in 2005. Since then she has been on parole, required to report to Corrections regularly and has had her movements restricted. She has not been able to find a job because of her criminal conviction. While Heather's children have all received crimes compensation for witnessing the abuse of their mother, she has never received compensation.

Two weeks after rejecting the Petition of Mercy, Rob Hulls referred the issue of defences to homicide to the Victorian Law Reform Commission for review. Heather's case was cited as a key reason for the review (Victorian Law Reform Commission *Defences to Homicide Issues Paper*, 2002). As a result of the review, extensive legislative changes were made to Victorian law, including reforms to self-defence and rules of evidence for women who kill violent partners – changes that would certainly have benefited Heather had she been tried today.

## Freedom of Information request

Not surprisingly, Heather was devastated by the rejection of her Petition of Mercy. In November 2001, in an effort to understand the reasons behind the decision, she applied under the *Freedom of Information (FOI) Act* for access to all advice obtained by the government regarding her Petition of Mercy. However, the government refused to release the documents. Of 263 pages, they provided the first and last page, containing no relevant information.

Heather appealed to the Victorian Civil and Administrative Tribunal (VCAT). VCAT found that the documents were exempt from FOI on the grounds of legal professional privilege (section 32 of the *FOI Act*) but that the documents should be released under the

public interest override. In 2005, VCAT granted Heather the right to access the information. Speaking of the VCAT decision, Heather said, 'Justice Morris gave me my first win and my first sense of victory in the legal system when he gave me the right to view the documents.'

This was a tremendous victory for Heather and her pro bono legal team. However, the government appealed the VCAT decision in the Victorian Court of Appeal. Heather lost this subsequent appeal and, in turn, sought an appeal in the High Court of Australia. Heather was successful at the High Court, which ordered the matter to be reheard by the Victorian Court of Appeal and this time required them to first read the documents on which they were making a decision. Unfortunately, the Court of Appeal again found that the public interest was insufficient to warrant the release of the documents. However, just last month Heather was granted leave to appeal to the High Court.

The High Court's decision to grant Heather special leave to appeal relates to the media release issued by Rob Hulls in which he states that the decision to reject the Petition of Mercy was made on the basis of advice from a panel of three QCs. The media release omits to mention other legal advice received, including advice previously commissioned from another eminent QC. It was argued that this media release misled the public about the advice received, particularly in light of the VCAT finding that the advices were materially different. The High Court has indicated that this misleading or inaccurate media release enlivens the public interest override of documents that are otherwise exempt from FOI legislation.

## Where to now?

Almost ten years since first seeking access to information under FOI, Heather Osland is still fighting legal battles. As yet, she is no closer to understanding why her Petition of Mercy was rejected. Her High Court hearing will be held in Canberra before the full bench on 14 April 2010. It is likely that the decision will be reserved and handed down some months later. We hope that Heather and her pro bono team will be successful. As Heather says, 'To read the documents and to find out why they didn't allow me to go home will finally give me some closure.'