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'His home is his castle. And mine is a cage':[1] a new partial defence for primary victims who kill

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She said 'I'm savin' up my money and when I get the nerve I'll run
But Jim don't give up easily so I intend to buy a gun
He will never see the way he treats me is a crime
Somebody oughta lock him up but I'm the one 'Who's done the time'[3]

Abstract

This article provides an in-depth analysis of the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 which had the effect of repealing the Australian state of Victoria's only general 'partial defence' of defensive homicide, and replaced the existing statutory self-defence in murder/manslaughter provisions and general common law self-defence rules with a single test. The abolition of defensive homicide means there is now no general 'partial defence' to accommodate cases falling short of self-defence. The change is likely to mean that some primary victims will find themselves bereft of a defence. This is the experience in New Zealand where the Family Violence Death Review Committee recently recommended the reintroduction of a partial defence, post-abolition of provocation in 2009. Primary victims in New Zealand are being convicted of murder and sentences are double those issued pre-2009. Both jurisdictions require that a new partial defence be introduced, and accordingly, an entirely new defence predicated on a fear of serious violence and several threshold filter mechanisms designed to accommodate the circumstances of primary victims is advanced herein. The proposed framework draws upon earlier recommendations of the Law Commission for England and Wales, and a comprehensive review of the operation of ss 54 and 55 of the Coroners and Justice Act 2009, but the novel framework rejects the paradoxical loss of self-control requirement and sexed normative standard operating within that jurisdiction. The recommendations are complemented by social framework evidence and mandatory jury directions, modelled on the law in Victoria. A novel interlocutory appeal procedure designed to prevent unnecessary appellate court litigation is also outlined. This bespoke model provides an appropriate via media *and optimal solution to the problems faced by primary victims in Victoria and New Zealand.*

1 Ariel Caten, 'A Man's Home Is His Castle' (lyrics) on Faith Hill's album, *It Matters To Me* (1995).

2 I am incredibly grateful to Professor Warren Brookbanks (University of Auckland, New Zealand), Associate Professor Thomas Crofts (University of Sydney, Australia), Ben Livings (Senior Lecturer, University of New England, Australia), Associate Professor Arlie Loughnan (University of Sydney, Australia) and Professor Alan Reed (Associate Dean for Research and Innovation, Northumbria University) for their very helpful comments on earlier drafts of this article. Elements of this paper were presented to the Sydney Law School, Institute of Criminology (Nicola Wake, 'Extreme Provocation and Loss of Control: Comparative Perspectives' 18 March 2015). I thank members of the institute for their thoughtful contributions on that presentation. Any errors or omissions remain my own.

3 Caten (n 1).

Introduction

The Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (the 2014 Act) abolished the Australian state of Victoria's only general 'partial defence'[4] of defensive homicide and replaced the existing statutory self-defence in murder/manslaughter provisions and general common law self-defence rules with a single test.[5] In the absence of a partial defence, self-defence becomes an all-or-nothing claim, where a successful plea results in an outright acquittal, and an unsuccessful plea results in conviction for the offence charged. The 2014 Act also expanded the admissibility of social framework evidence (which includes, inter alia, the history of the relationship, cumulative impact of family violence, and social, economic and cultural factors that may impact on a family member) from homicide to all self-defence cases.[6] These amendments were complemented by the introduction of new juror directions in cases involving family violence.[7] Despite the aims of the Victorian Department of Justice (VDoJ), this 'one-size-fits-all' approach to self-defence may have unintended consequences in practice, with significant ramifications in intimate partner homicide cases.[8]

This article commends the amendments to self-defence, but the impact of these reforms 'should not be overstated'.[9] The existence of a partial defence is necessary to capture cases that fall outside the scope of self-defence, but do not warrant the murder label.[10] The evaluation undertaken by jurors in determining whether a partial defence applies can serve an important role in assessing societal opinion of the killing, thereby assisting the sentencing judge in imposing sentence.[11] It also has the effect of involving

4 The conviction was actually for defensive homicide, rather than a reduction from murder to manslaughter (although the effect was to substitute a murder conviction with the lesser offence); the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, s 3(4).

5 Ss 322N and 322K of the 2014 Act abolished common law (s 322N) and statutory versions of self-defence (Crimes (Homicide) Act 1958, ss 9AC (self-defence in murder cases) and 9AE (self-defence in manslaughter cases)).

6 Crimes Act 1958, s 322J, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014. For a detailed exposition of the relational nature of domestic violence, see Thom Brooks, *Punishment* (Routledge, 2012) ch 10.

7 Jury Directions Act 2013, ss 31 and 32, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, pt 4.

8 This article takes as its main focus cases of female on male intimate partner homicide, addressing the potential impact of the absence of an applicable partial defence. It should be noted, however, that the impact is relevant to both male and female defendants, both of whom may suffer from domestic abuse. The feminine pronoun will also be used throughout this article when referring to the primary victim, but this should not be interpreted as implying that only women may be considered the primary victim, nor should it be read as implying that the partial defence(s) are gender-specific. For a definition of the term 'primary victim', see page 153 below. For an excellent analysis of defensive homicide cases involving male defendants see, Kellie Toole, 'Self-defence and the Reasonable Woman: Equality before the New Victorian Law' [2012] 36 Monash University Law Review 250.

9 Hansard, Legislative Council, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014, second reading, 7 August 2014, Ms Pennicuik (Southern Metropolitan) 2419 citing Debbie Kirkwood, Mandy McKenzie, Libby Eltringham, Danielle Tyson, Bronwyn Naylor, Chris Atmore and Sarah Capper, 'Submission on the Department of Justice's Defensive Homicide: Proposals for Legislative Reform-Consultation Paper' (2013).

10 For a detailed analysis of potential partial defences, see Thomas Crofts and Danielle Tyson, 'Homicide Law Reform in Australia: Improving Access to Defences for Women who Kill their Abusers' (2013) 39 Monash University Law Review 864.

11 See, generally, Family Violence Death Review Committee (FVDRC), *Fourth Annual Report* (2014).

jurors in an important 'dialogue with the legislature and prosecutors'.[12] A comparative analysis with the position in New Zealand demonstrates that primary victims are being convicted of murder and sentenced more harshly than if a partial defence was available. The Family Violence Death Review Committee (FVDRC) defines the primary victim as an individual experiencing 'ongoing coercive and controlling behaviour from their intimate partner'. The predominant aggressor is the principal aggressor in the relationship who 'has a pattern of using violence to exercise coercive control'.[13] These terms will be used throughout this article. New Zealand has a restrictive sentencing regime and tighter self-defence provision than Victoria, but these differences do not detract from the unfairness in labelling the primary victim a murderer.[14] As Quick and Wells point out, evading the stigmatic murder label is often as important to primary victims as the sentence imposed.[15]

It is essential that Victoria and New Zealand adopt a more nuanced approach to reforming homicide defences. The introduction of a bespoke partial defence or offence predicated on a fear of serious violence provides a novel *via media* and optimal solution to the problems faced by primary victims within Victoria and New Zealand. These innovative proposals draw upon earlier recommendations of the Law Commission for England and Wales, in addition to an in-depth review of the operation of ss 54 and 55 of the Coroners and Justice Act 2009 (the 2009 Act), as enacted.[16] The entirely new partial defence would operate to reduce a murder conviction to manslaughter where the defendant kills in response to a fear of serious violence from the victim against the defendant or another identified individual.[17] The defence is qualified by appropriate threshold filter mechanisms designed to preclude the availability of the defence in unmeritorious cases. These clauses include a 'normal person' test and provisions stipulating that the defence is not available where the defendant intentionally incited serious violence, acted in a considered desire for revenge or on the basis that no jury, properly directed, could reasonably conclude that the defence might apply.[18] In cases where sufficient evidence is raised that the partial defence might apply, it is then for the prosecution to disprove the defence to the usual criminal standard. The defence is complemented by bespoke provisions on social framework evidence and *mandatory* juror directions where family violence is in issue. A new interlocutory appeal procedure that would serve to prevent unnecessary appellate court litigation is also advanced. The following analysis demonstrates not only the need for such a partial defence within Victoria and New Zealand, but also the extent to which this newly proposed model provides an advantageous framework for reform.

12 Mike Redmayne, 'Theorising Jury Reform' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial* vol II (Hart 2006) 102, cited in Thomas Crofts, 'Two Degrees of Murder: Homicide Law Reform in England and Western Australia' (2008) 8(2) Oxford University Commonwealth Law Journal 187–210, 198.

13 FVDRC (n 11) 6. These terms are useful in that they are gender-neutral but, as Hamer identifies, they could not be used in a forensic context. My thanks to Associate Professor David Hamer (University of Sydney) for making this point. See also n 8 above on use of the feminine pronoun in this article.

14 For detailed discussion on the abolition of provocation and the restrictive sentencing regime operating in New Zealand, see Warren Brookbanks, 'Partial Defences to Murder in New Zealand' in Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate 2011) 271–90.

15 Oliver Quick and Celia Wells, 'Getting Tough with Defences' [2006] Criminal Law Review 514. See also Crofts and Tyson (n 10).

16 Law Commission, *Partial Defences to Murder* (Law Com No 290 2004); Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304 2006).

17 Coroners and Justice Act 2009, s 54(3).

18 Ibid s 54(5)–(6).

The decision to abolish partial defences in Victoria

In 2005, defensive homicide replaced provocation in a move intended to send a clear message that killings borne of male possessiveness, envy and rage were unacceptable.[19] The Victorian Law Reform Commission (VLRC) recommended abolition at a time when the Court of Appeal was considering the case of *Ramage*.[20] Ramage claimed he had lost control and killed his estranged wife, Julie, when she asserted that sex with him 'repulsed her', and said she was happy with another man.[21] In a 'dramatic' display of 'victim blaming' the trial became 'an examination, and ultimately crucifixion' of Julie, where her new relationship, marital unhappiness and comments regarding her life without Ramage were closely scrutinised.[22] Julie was unhappy as a result of Ramage's controlling and oppressive behaviour and the violence he inflicted on her, but a significant amount of abuse evidence was excluded on grounds that it was temporally too remote and/or 'potentially highly prejudicial'.[23] Morgan's observation that 'dead women tell no tales, tales are told about them' is a remarkably apt epithet of the case.[24] Convicted of manslaughter, Ramage was sentenced to 11 years' imprisonment, but released after a minimum non-parole period of 8 years. Following sentence, Julie's sister expressed her disappointment, noting that a murder conviction would have resulted in a higher sentence.[25] The recommendations of the VLRC, coupled with public outrage regarding the decision reached in *Ramage*, influenced the abolition of the partial defence.[26]

In the absence of provocation, the VLRC considered a new partial defence of excessive self-defence necessary to accommodate killings in response to domestic abuse, should self-defence fail.[27] The government responded by introducing defensive homicide. Designed to apply to 'understandable over-reaction' scenarios, murder could be reduced to defensive homicide where the defendant killed believing it necessary to defend herself/another, but reasonable grounds for that belief were absent.[28] The test asked jurors to assess whether the defendant believed her conduct was necessary to defend herself/another from death or really serious injury. If jurors concluded the defendant held that belief, or the prosecution failed to disprove that beyond reasonable doubt, the defendant would be acquitted of murder, and jurors were required to determine her liability for defensive homicide. The defendant would be guilty where the prosecution proved beyond reasonable doubt the defendant had no reasonable grounds for the belief.[29]

The repeated use of defensive homicide in cases involving one-off violent confrontations between men of comparable strength meant that defensive homicide might

19 VLRC, *Defences to Homicide: Final Report* (2004) (comments on provocation). Note, the VLRC recommended the introduction of excessive self-defence, not defensive homicide.

20 Ibid; *Ramage* [2004] VSC 508 [22] (Osborn J).

21 *Ramage* (n 20) [40] (Osborn J).

22 Graeme Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' [2006] 18(1) Current Issues in Criminal Justice 51, 54. See also, Phil Cleary, *Getting Away with Murder: The True Story of Julie Ramage's Death* (Allen & Unwin 2005) 136.

23 *Ramage* [2004] VSC 391 [46] (Osborn J).

24 Jenny Morgan, 'Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told about Them' (1997) Melbourne University Law Review 237.

25 AAP, 'Provoked Wife Killer Gets 11 Years' *Sydney Morning Herald* (Sydney 2004).

26 Ibid.

27 VLRC (n 19) 102.

28 Ibid para 3.101, citing Supplementary Submission 27 (Criminal Bar Association).

29 Ibid 12–13.

be perceived to have failed to produce the results intended.[30] The offence was criticised as inherently complex, difficult to apply, and lacking common sense.[31] It had the effect of diverting attention away from the (in)adequacy of self-defence. Popular opinion was heavily influenced by evocative media reports, lamenting deals that could 'get potential murderers off the hook', and advocating 'a stronger voice for crime victims'.[32] Men who 'escaped' potential murder convictions include: Dambitis,[33] who killed his victim with lumps of wood and his fists two days after being released from prison; Giammona,[34] who stabbed another prison inmate 16 times; a schizophrenic man who killed two men believing he was the clone of Hitler or Hitler's grandson;[35] Smith,[36] who, in a drug-induced psychosis, stabbed his victim 50 to 60 times because he allegedly called him gay and threatened him; and a drug addict, with 91 previous convictions, who killed his victim during the course of a drug-related robbery.[37]

Between 2005 and 2014, there were 33 convictions for defensive homicide in Victoria: 28 out of 33 were of men; 32 out of the 33 victims were men; and 27 out of the 28 men killed another man; meaning that only five women were convicted of the offence.[38] It was the case of *Middendorp*,[39] together with a comprehensive review produced by the VDoJ, which operated as a catalyst for abolition. Middendorp was convicted of defensive homicide after he brutally stabbed his estranged partner, Jade, to death because she attempted to bring a male friend into their home. According to Middendorp, Jade threatened him with a knife and, because of earlier violence, he believed he needed to defend himself from death or serious injury. The relationship was plagued by alcohol and physical abuse. Earlier reports by Jade indicated that Middendorp was responsible for the violence, but Middendorp blamed Jade, and her reliability was questioned at trial, where she was obviously unable to defend herself.[40] Like Julie Ramage, it was Jade who was put on trial when she was described as 'a troubled young woman' who deserved the 'prospect of growing out of her [drug and alcohol] addiction'.[41] At the time of the killing, Middendorp was subject to bail conditions and a family violence intervention order as a result of several alleged offences against Jade.[42] Middendorp was described as over 6 feet tall and 90kg,

30 VDoJ, *Defensive Homicide: Review of the Offence of Defensive Homicide* (VDoJ Discussion Paper 2010) 36.

31 VDoJ, *Defensive Homicide: Proposals for Legislative Reform* (VDoJ Consultation Paper 2013). See also, Adrian Lowe, 'New Calls for State to Overhaul Homicide Laws' (2010) The Age 6; and, Geoff Wilkinson and Courtney Crane, 'A Law Meant to Protect Women Is Being Abused by Brutal Men' *Herald Sun* (Melbourne 2012) citing Kate Fitz-Gibbon and Sharon Pickering.

32 Michael, 'Deals Could Get Potential Murderers off the Hook in Victoria' *Herald Sun* (Melbourne 2012); Robert Clark, 'Giving a Stronger Voice to Crime Victims' *Herald Sun* Law Blog (Melbourne 2012).

33 [2013] VSCA 329.

34 [2008] VSC 376.

35 *Ball* [2014] VSC 669.

36 [2008] VSC 617 [9].

37 *Taiba* [2008] VSC 589. See, generally, Matt Johnson, 'Killer Blow: Defensive Homicide Laws Hijacked by Thugs Will Be Scrapped' *Herald Sun* (Melbourne 2014).

38 Hansard, Legislative Assembly, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014, second reading, 3 September 2014, Mr McCurdy, Murray Valley, 3144. For a contextual analysis of these figures see, DVRCV, *Justice or Judgement? The Impact of Victorian Homicide Law Reforms on Responses to Women Who Kill Intimate Partners* (DVRCV Discussion Paper No 9 2013).

39 [2010] VSC 202.

40 Ibid [7].

41 Ibid [17].

42 Ibid [4].

compared to Jade who was smaller and weighed approximately 50kg.[43] Middendorp wrestled the knife from Jade and stabbed her four times in the shoulder before she managed to stagger from the house. Witnesses observed Middendorp follow her, shouting, 'she got what she deserved', and calling her 'a filthy slut'.[44]

The facts in *Middendorp* bore the hallmarks of a brutal killing borne out of anger, sexual jealousy and male possessiveness. Middendorp was sentenced to 12 years' imprisonment with a minimum non-parole period of 8 years. The verdict was vituperatively criticised as 'laughable', 'too lenient', 'unsatisfactory' and 'all about provocation'.[45] There was widespread concern that the precedent might result in similar verdicts in other femicide cases. The case coincided with the VDoJ's review which concluded that the offence had been inappropriately used as a vehicle to drive provocation-type arguments; the (unclear) benefit to having defensive homicide for primary victims was substantially outweighed by the expense of inappropriately excusing men who kill; and the shift in emphasis from self-defence to defensive homicide implied that the primary victim's response was irrational rather than reasonable in the circumstances.[46] Shortly thereafter, the offence was abolished by the 2014 Act.

The decision to abolish defensive homicide was not unanimously supported. Indeed, a number of eminent scholars have advocated that reform should have focused upon plea-bargaining practice in Victoria, rather than the relatively embryonic operation of defensive homicide.[47] *Middendorp* is one of a limited number of defensive homicide convictions reached by jury verdict. In this respect, it is apparent that any partial defence needs to be framed in order to ensure that it is left to the jury in appropriate cases. The vast majority of defensive homicide convictions were achieved via plea bargains, mandating that the Crown withdraw related homicide charges.[48] Although plea-bargaining is an expeditious and financially beneficial way of obtaining a conviction, the lack of transparency associated with this prosecutorial discretion circumvents juror – and therefore social – evaluation as to whether an individual should be convicted of murder or manslaughter. It also prevents effective analysis of the reasons for accepting such pleas.[49] This lack of transparency fuelled 'public perceptions of clandestine outcomes, inequality and a lack of accountability' in relation to the application of defensive homicide.[50]

43 *Middendorp* [10].

44 Ibid [9].

45 Adrian Howe, 'Another Name for Murder' (2010) The Age; Kate Fitz-Gibbon, 'Defensive Homicide Law Akin to Getting Away with Murder' *The Australian* (Sydney 2012). Middendorp's subsequent appeal against conviction and sentence was unanimously dismissed; *Middendorp* [2012] VSCA 47.

46 VDoJ (n 31) viii–ix, and 27–8.

47 Kirkwood et al (n 9).

48 Hansard, Legislative Assembly, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014, second reading, 3 September 2014, Mr Pakula (Lyndhurst), 3135.

49 Asher Flynn and Kate Fitz-Gibbon, 'Bargaining with Defensive Homicide: Examining Victoria's Secretive Plea Bargaining System Post-Law Reform' (2011) 35 Melbourne University Law Review 905. See also, Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective* (Palgrave Macmillan 2014).

50 Flynn and Fitz-Gibbon (n 49) 907. Flynn and Fitz-Gibbon suggest that best practice guidelines modelled on the Attorney General's 'Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise' framework operating in England and Wales would assist in improving transparency, thereby ensuring that pleas are accepted only in appropriate cases. See also, Kirkwood et al (n 9) 8, and Debbie Tyson, *Sex, Culpability and the Defence of Provocation* (Routledge 2013).

Amendments to self-defence: attempting to compensate for the lack of a partial defence?

The prospect of having no partial defence for primary victims highlighted the need to improve the law on self-defence and evidence admissibility. The 2014 Act replaced the existing statutory self-defence provisions relating to murder/manslaughter[51] and the general common law self-defence rules with a single test.[52] Self-defence represents an 'all-or-nothing' claim, where a successful plea results in an outright acquittal, and an unsuccessful plea results in conviction for the offence charged. This effectively mirrors the law of England and Wales.[53] The test requires that the defendant believed force was necessary in self-defence and the conduct was reasonable in the circumstances as perceived by the defendant.[54] The introduction of s 322M of the 2014 Act implies that self-defence may be more accessible to primary victims in Victoria than it currently is in England and Wales. Section 322M specifies that, in cases involving family violence, self-defence may apply even where the threat is not imminent, or the force used is excessive.[55] The assumption is that reformulated self-defence will capture deserving cases, while other cases where self-defence is unsuccessfully raised will be considered during sentencing.[56] In murder cases, s 322K(3) requires that the defendant believed the conduct was necessary in order to defend herself/another from death or really serious injury. Section 322L further precludes the availability of the defence where the victim's conduct is lawful, and the defendant knows that the conduct is lawful at the time.[57]

The emphasis on family violence under s 322M challenges the stereotypical notion of self-defence as a one-off confrontation between two individuals of equal strength. It reflects contemporary recognition that a more nuanced approach must be adopted in cases where the primary victim wards off a physically stronger aggressor in a non-traditional self-defence situation. Ramsey heralded the Victorian provisions on self-defence as a radical and trendsetting example of feminist-inspired reform.[58] The cases of *SB*, in which a *nolle prosequi* was entered, and *Dimotrovski*, which resulted in a magistrates' discharge, have been 'cautiously' cited as evidence that earlier amendments to self-defence are working in practice.[59] Yet, the assumption that these cases demonstrate success of the new provisions 'may be premature'.[60] SB shot her stepfather after he demanded oral sex from her at gunpoint. Dimostrovski stabbed her husband after he hit her in the face, pushed her to the

51 See n 5.

52 Ibid.

53 Criminal Justice and Immigration Act 2008, s 76.

54 Crimes Act 1958 (Vic), s 322K, as amended by the Crimes (Abolition of Defensive Homicide) Act 2014.

55 This effectively re-enacts and expands the scope of s 9AH of the Crimes (Homicide) Act 2005 (the 2005 Act) beyond homicide cases. It should be noted that a lack of imminence will not necessarily bar a successful self-defence claim in England and Wales; *Attorney General for Northern Ireland's Reference (No 1 of 1975)* [1977] AC 105 (HL). Nor does the defendant have to 'weigh to a nicety the exact measure of his defensive action'; *Palmer* [1971] AC 814; Criminal Justice and Immigration Act 2008, s 76(7).

56 See Crofts and Tyson (n 10) 865.

57 This effectively replicates s 9AF of the 2005 Act (now repealed).

58 Carolyn Ramsey, 'Provoking Change: Comparative Insights on Feminist Homicide Law Reform' (2010) 100(1) Journal of Criminal Law and Criminology 32–108 (commenting on earlier amendments to self-defence under the 2005 Act).

59 See, Crofts and Tyson (n 10) 884.

60 Toole (n 8) 270.

ground and attacked their daughter.[61] These cases did not proceed to trial because it was recognised that both defendants were acting in self-defence; their actions complied with 'traditional notions of self-defence'.[62] The problems presented by judicially invented constructs of imminence and proportionality were not at issue.[63]

Even with bespoke provisions dedicated to the unique circumstances of family violence, some primary victims may find themselves bereft of a defence in homicide cases. Abolition of both provocation and defensive homicide renders self-defence 'an all or nothing roll of the dice for women in these circumstances, and if they are unable to convince the court that self-defence has been made out, then what these women will face is conviction for murder'.[64] Despite the problems associated with defensive homicide, a number of legal practitioners, academics and key stakeholders identified that abolition would be a 'retrograde step'.[65] 'Introduced for sound reasons', defensive homicide provided 'a very important and compelling safety net for women who experience, and respond to family violence';[66] removal of that safety net on grounds that men have been inappropriately using it, in male-on-male combat, unfairly disadvantages primary victims.[67]

Five women were convicted of defensive homicide, all of whom might have faced a murder conviction had the offence been abolished.[68] One of the most recent female-on-male defensive homicide convictions did not involve family violence or a relationship between the defendant and victim. Copeland,[69] a 24-year-old heroin addict and prostitute, stabbed her 68-year-old client in the back and left, taking $420 from his wallet. According to Copeland, she feared that she would be raped or killed when he threatened her with a knife during an argument regarding payment. It was 'quite impossible' to tell exactly what happened, but had the evidence supported Copeland's version of events, self-defence would have been available.[70] The media labelled Copeland a 'drug addled prostitute',[71] and the sentencing judge was unsympathetic towards the mental illness from which she suffered. Maxwell J noted that there was 'no particular feature of Copeland's drug dependency which made it peculiarly or unusually intractable'.[72]

Copeland is clearly very different from the other female defensive homicide convictions that have involved significant history of abuse in intimate partner relationships. Consideration of a defendant's recognised medical condition would require the

61 See, Kim Stevens, 'Breakthrough Case – Dismissed Murder Charge Defence Successful under New Laws' *Shepparton News* (Shepparton 8 May 2009) 3, cited in VDoJ (n 30) 31–2, paras 108–9.

62 Danielle Tyson, Sarah Capper and Debbie Kirkwood, 'Submission to Victorian Department of Justice, Review of the Offence of Defensive Homicide' (2010) 8.

63 Toole (n 8) 270.

64 Ramsey (n 58). See also, Caroline Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14(1) Journal of Gender, Social Policy and the Law 27–71. Hansard (n 38) Mr Pakula (Lyndhurst) 3137.

65 Hansard (n 38) Ms Graley (Narre Warren South) 3146, citing Mary Crooks and Sarah Capper of the Victorian Women's Trust.

66 Kirkwood et al (n 9) 1.

67 Ibid 8. See also, VDoJ (n 30) viii, ix and 29.

68 DVRCV, *Defensive Homicide an Essential Safety Net for Victims* (DVRCV 2014). See, *Williams* [2014] VSC 304; *Copeland* [2014] VSC 39 (11 February 2014); *Edwards* [2012] VSC 138; *Creamer* [2011] VSC 196; and *Black* [2011] VSC 152.

69 *Copeland* (n 68).

70 Ibid.

71 Mark Russell, 'Drug-addled Prostitute Jailed for Kitchen Knife Killing' (2014) The Age.

72 *Copeland* (n 68) [65].

introduction of a new partial defence equivalent to s 2 of the Homicide Act 1957, as amended, and not one predicated on a fear of serious violence.[73] It might be appropriate to consider a defendant's recognised medical condition as part of the circumstances of the individual case where he/she fears serious violence, considered further below.[74] The remaining defensive homicide convictions of primary victims illustrate the need for a partial defence based upon a fear of serious violence.

It has been suggested that the availability of defensive homicide, or an alternative partial defence, may result in defendants pleading guilty to a lesser offence rather than risk a murder conviction in claiming self-defence. It is also possible that a halfway house potentially encourages compromise manslaughter verdicts based upon an ostensible disproportionate use of force, for example, where a primary victim uses a weapon to kill an aggressor.[75] The case of *Edwards*[76] reflects circumstances in which the availability of defensive homicide may have prevented a successful self-defence claim. According to Edwards, the predominant aggressor threatened her life and repeatedly punched and kicked her in the days preceding the fatal attack. Edwards said:

> I went to sleep for while, and I was hoping that it all would be over when I woke up. And when I woke up, he was still drunk . . . and then . . . he said that he was going to cut my eyes out and cut my ears off. And disfigure me. And then he said he was going to get some petrol from out the back and he was going to set me on fire and ruin my pretty face so that no one would look at me ever again. And I panicked.[77]

'Wild and angry', the predominant aggressor approached Edwards brandishing a knife. During the struggle that ensued, he lost his balance and fell. Edwards then grabbed the knife and stabbed him. It was accepted that Edwards believed it was necessary to defend herself, but her plea meant she accepted there were 'no reasonable grounds' to believe she was in 'danger of death or serious injury'. The wounds inflicted were 'a disproportionate response to the threat'.[78] The reforms might assist primary victims like Edwards to claim self-defence, but there is 'little evidence to suggest that self-defence would become more accessible'.[79] The prosecution case, in stark contrast to Edwards' version of events, was that she stabbed her sleeping husband. In this respect, there was (and remains) a risk that jurors might reject self-defence. In the absence of a partial defence, defendants like Edwards might be convicted of murder. There is no guarantee that the absence of a partial defence will prevent primary victims from pleading 'guilty to murder in order to receive a discounted sentence' in such cases. Of course, the bargaining power of defence counsel will be substantially reduced in the absence of a partial defence.[80]

73 The VLRC (n 19) 243 opposed the introduction of diminished responsibility, preferring that mental conditions that do not meet the requirements of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic), ss 20–5, are considered as part of mitigation during sentencing. For an analysis of the challenges in applying a defence in the context of co-morbidity see, Arlie Loughnan and Nicola Wake, 'Of Blurred Boundaries and Prior Fault: Insanity, Automatism and Intoxication' in Alan Reed and Michael Bohlander with Nicola Wake and Emma Smith (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate 2014) ch 8.

74 See generally *Asmelash* [2013] AII ER (D) 268.

75 VLRC (n 19) para 3.92. See also, Crofts and Tyson (n 10) 887.

76 *Edwards* (n 68).

77 Ibid [28].

78 Ibid [49].

79 Kirkwood et al (n 9) 5.

80 Ibid 5.

Designed to accommodate the circumstances of primary victims, s 322M specifies that, where family violence is in issue, a person may believe that conduct is necessary, and the response may be reasonable in the circumstances as perceived by them, even if the person is responding to harm that is not immediate, or the response involves the use of force in excess of the threatened or inflicted harm. Priest has criticised the provision as a 'breathtaking extension' of self-defence:

> Taken to their logical (or, perhaps, their illogical) conclusion, these new provisions suggest that a number of 'trivial' acts of 'harassment' (whatever the term might embrace) by a family member, which do not involve actual or threatened abuse, might permit a person to use disproportionate force to kill that family member even where 'harm' is not 'immediate'.[81]

As Priest identifies, s 322M appears to imply a different approach in family violence cases. This might have unintended consequences for defendants who find themselves in a potentially analogous situation to vulnerable family members, but for failing to fall within that category. For example, in the context of terrorist/hostage, human trafficking, or other situations where 'the threat is not immediate, but . . . more remote in time' or, arguably, ongoing.[82] In such situations 'there may not be a need to prevent immediate harm but rather an immediate need to act to prevent inevitable harm'.[83] The Judicial College of Victoria, however, has suggested that the common law approach regarding immediacy and the reasonableness of the force used will continue to apply.[84] In practice, the provision reiterates the common law principle that when acting in the 'agony of the moment' the defendant does not need to 'weigh to a nicety the exact measure of his necessary defensive action'.[85] A similar clause recommended by the VLRC would have been of general application.[86] The VLRC proposal extended necessity in self-defence to cases where the defendant 'fears inevitable, rather than immediate harm'. The provision was intended to clarify the common law position that the significance of the defendant's 'perception of danger is not its imminence. It is that it renders the defendant's use of force really necessary.'[87] In this respect, whether the defendant/victim is a family member and/or family violence is in issue would be more appropriately categorised as a matter of evidence rather than a principle of law.[88] The effect would be to extend s 322M to all self-defence cases.

81 P Priest, 'Defences to Homicide' (2005) 8 cited in Australian Law Reform Commission, *Family Violence: A National Legal Response* (Australian Law Reform Commission No 114 2010).

82 VLRC (n 19) para 3.61.

83 Ibid para 3.54.

84 Judicial College of Victoria, *Bench Notes: Statutory Self-Defence* (Judicial College of Victoria 2014).

85 *Keane* [2010] EWCA Crim 2514 [3].

86 For example, 'where a young man, who kills defending himself against someone who is physically much stronger and in genuine fear for his life, uses a level of force which may at first appear to be excessive'; VLRC (n 19) 84.

87 'If the captor tells [the defendant] that he will kill her in three days' time, is it potentially reasonable for her to seize an opportunity presented on the first day to kill the captor or must she wait until the third day? I think the question the jury must ask itself is whether, given the history, circumstances and perceptions of the appellant, her belief that she could not preserve herself from being killed by [the deceased] that night except by killing him first was reasonable.'; *Lavellee* [1990] 1 SCR 852, 899 (Wilson J). See, generally, VLRC (n 19) 81.

88 See, *Zecevic* (Vic) (1987) 162 CLR 645, 622 (commenting upon the dangers of elevating matters of evidence to substantive legal principles).

It is important to note that s 322M does not apply only to abused women, but extends to other family members. The 2014 Act defines 'family member' and 'family violence' in wide terms in order that 'a fairly broad cohort of persons and circumstances' may be brought within the new test.[89] The term family member covers current and former marital relationships; intimate personal relationships; parental relationships (step or biological); guardians; a child in residence; and a person who is or has been a member of the household. The definition of family violence includes, inter alia, physical, psychological and sexual abuse, which may manifest as a single act, or several acts amounting to a pattern of behaviour.[90] It is apparent that the broad ambit of this element of the defence may have unintended consequences in practice.

However, the extent to which s 322M will change the substantive approach is questionable. A provision similar to s 322M was introduced in England and Wales in relation to the use of force by householders.[91] Where a defendant is protecting herself/another against a trespasser, force will only be regarded as unreasonable if it is 'grossly disproportionate'. Herring points out that s 43 makes 'little change to the law because the jury would, even under the standard approach, take into account the emergency of the moment when considering whether a householder was acting reasonably and would be likely to only find a grossly disproportionate amount of force to be unreasonable'.[92] The clause has been heavily criticised as a 'triumph of rhetoric over reason' and it highlights the dangers associated with enacting legislation specific to discrete categories of offender that may do little to change the substantive approach.[93] The primary victim might face similar problems. As Hollingworth J identified in *Williams*:[94]

> what happens in such cases is that the victim of family violence finally reaches a point of explosive violence, in response to yet another episode of being attacked. In such a case, it is not uncommon for the accused to inflict violence that is completely disproportionate to the immediate harm or threatened harm from the deceased.[95]

A woman is more likely to use a weapon, and it is not uncommon for substantially more strikes to be inflicted than may have objectively been reasonable to incapacitate a man.[96] Hollingworth J acknowledged that viewing the infliction of 16 blows with an axe in response to a minor or trivial threat as being a very serious example of an offence might not be the right conclusion where the defendant has suffered a history of abuse.[97] This implies that greater weight will be attached to the impact of family violence during sentencing, but such a defendant might still be convicted of murder. In cases involving excess force, an appropriate partial defence is an essential safety net for primary victims.

89 Hansard (n 38) Mr Morris (Mornington) 3135.

90 Crimes Act 1958, s 322J(2) and (3), as amended by the Crimes Amendment (Defensive Homicide) Act 2014 (Vic).

91 Criminal Justice and Immigration Act 2008, s 76(5A), as amended by the Crime and Courts Act 2013, s 43.

92 Jonathan Herring, *Criminal Law: Texts, Cases and Materials* (OUP 2014) 646.

93 Vivien Cochrane, 'Allowing Disproportionate Force in Self-defence – A Triumph of Rhetoric over Reason' (Kingsley Napley Criminal Law Blog 9 May 2013). See also, Claire De Than and Jesse Elvin, 'Mistaken Private Defence: The Case for Reform' in Reed et al (n 73) 139.

94 *Williams* (n 68).

95 Ibid [35]–[36].

96 Ibid [34].

97 Ibid [33]–[36].

The amendments to self-defence are complemented by new jury directions designed to assist jurors to understand the impact of abuse, and how this can evoke 'possibly the worst behaviour from everybody in an unbelievably hot-tempered, violent home where domestic family violence is prevalent'.[98] By requiring the trial judge to provide a direction on family violence where it is requested by counsel, unless there are good reasons not to, these amendments are targeted towards proactively tackling misconceptions regarding family violence. The trial judge will explain, inter alia, that family violence may be relevant to assessment of whether the primary victim was acting in self-defence; and that family violence may include sexual and psychological as well as physical abuse.[99] Importantly, the trial judge may inform jurors that there is no typical, proper or normal response to family violence. Jurors are to be advised that it is not uncommon for a primary victim of family violence to remain with an abusive partner, or to leave and return to that partner; and/or not to report or seek assistance to stop such conduct.[100] Social framework evidence is no longer limited to homicide cases and may extend to all self-defence claims. Amendments to the Evidence Act 2008 mean that the court can refuse to hear evidence where it unnecessarily demeans the victim.[101] This change does not limit the use of evidence providing an important contextual narrative or where there are good forensic reasons for its admission.[102] The effect is to address 'the despicable practice of gratuitous blame directed at victims during homicide trials', while simultaneously allowing evidence relating to family violence to be admitted.[103]

A partial defence is still necessary

These provisions undoubtedly serve an important educative function in assessing the impact of family violence on the primary victim, but the extent to which they will affect the outcome of self-defence cases remains unclear. In this respect, the impact of these changes 'should not be overstated'.[104] The case law demonstrates that there continues to be only limited understanding of the relationship between social framework evidence and defences. Section 322M must be considered in light of the other elements of self-defence; namely, that in murder cases the defendant must fear death or really serious injury.[105] In a detailed study of intimate partner homicide between 2005 and 2013, it was revealed that 'there continues to be a focus on physical forms of violence and a lack of understanding of the serious impact of non-physical

98 Hansard (n 38) 3138 and 3146.

99 Jury Directions Act 2013, ss 31 and 32, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, pt 4. See also, Legislative Assembly, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014, second reading, Hansard, 20 August 2014, Mr Clark Attorney General.

100 Jury Directions Act 2013, s 32, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, pt 4.

101 See generally Jeremy Gans and Andrew Palmer, *Uniform Evidence* (OUP 2014).

102 Evidence Act 2008, s 135, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, pt 3(9).

103 Hansard (n 38) 3138.

104 Hansard (n 9) Ms Pennicuik (Southern Metropolitan) 2419 citing Kirkwood et al (n 9).

105 'Although it has not been determined, it seems likely that it can include psychological injuries as well as physical injuries. It will be for the jury to decide whether what the accused was threatened with was an "injury" as well as whether that threatened injury was "really serious".'; Judicial College of Victoria (n 84) para 8.9.2.1, line 21. The case of *Creamer* indicates that being forced into group sex also amounts to serious injury; (n 68) 24–9. See also, DVRCV (n 38) 20.

forms of intimate partner violence, such as psychological coercion and intimidation, and sexual forms of violence'.[106] Black[107] was convicted and sentenced to 9 years' imprisonment after pleading guilty to the defensive homicide of her de facto husband. Black stabbed him after he cornered her in the kitchen, repeatedly jabbing her with his finger. In evidence, Black said:

> He was coming closer and closer to me . . . and I was thinking because he was so drunk he would probably want to force himself on me sexually . . . and I was just thinking what else could he do.[108]

The sentencing judge noted that the aggressor was unarmed and that stabbing him twice might be viewed as disproportionate.[109] The threat was described as 'being limited to intimidation, harassment, jabbing and prodding'.[110] Black's appeal against sentence was dismissed, the Court of Appeal concluding that the sentencing judge was 'justified in making the observation that the violence which confronted the appellant was not as serious as many of the other cases'.[111] The cumulative impact of family violence and how it contributed to Black's perception of the danger she faced was clearly misunderstood.[112] Where domestic violence has become the norm, the primary victim will have an acute awareness of the danger that she is in at the time of the act, but may subsequently understate the impact of that abuse. Black downplayed the violence she had suffered saying, '[h]e was never physically violent towards me, but he'd poke me with his fingers and point at me and jab me in the chest and forehead. He would sometimes force himself on me sexually.'[113] In the absence of a partial defence, there is a real risk that the primary victim will be convicted of murder, particularly where the impact of family violence is misunderstood by the legal profession.

These concerns are compounded by the fact that a move to make juror directions mandatory where family violence is at issue was rejected by the Victorian Parliament in favour of judicial flexibility.[114] There is a mandate requiring the trial judge to give directions where necessary to avoid substantial miscarriage of justice, but failure to make the family violence directions mandatory is arguably a missed opportunity. As Kirkwood et al point out, mandatory directions would have 'an educative value for the judiciary and legal practitioners', as well as assisting 'judges to better direct juries when family violence is led, when the implications of the evidence are not spelled out by the defence, or when the evidence is used to argue for reduced culpability rather than an acquittal'.[115] The onus rests on defence counsel to raise the issue, and, in practice, they will need to be, 'sufficiently aware of family violence and to raise it at an early stage to avoid damage being done without it'.[116] There is a risk that the new jury directions will be inconsistently applied, with potentially significant consequences in terms of juror decision-making.

106 DVRCV (n 38) 20.

107 *Black* (n 68).

108 Ibid [18].

109 Ibid [22].

110 Ibid.

111 *Black* [2012] VSCA 75 [29].

112 DVRCV (n 38) 39.

113 *Black* (n 68) [12].

114 Hansard (n 9) Mr Tee (Eastern Metropolitan) 2423.

115 Kirkwood et al (n 9) 22.

116 Hansard (n 9) Ms Pennicuik (Southern Metropolitan) 2419 citing the DVRCV, the Victorian Women's Trust and Dr Danielle Tyson.

Jurors serve a vital role in such cases, but it is essential that appropriate guidance is available in order to help them in that role.

This lack of understanding at both a legislative and a practical level suggests that separating genuine from fabricated facts in order to prevent victim blaming might be difficult to achieve in practice.[117] There was significant debate during the trial of Creamer as to whether she was a victim of domestic violence.[118] The relationship between Creamer and the aggressor was described as 'largely, if not entirely, dysfunctional'.[119] Each engaged in extra-marital affairs, encouraged by the aggressor.[120] The aggressor frequently requested that Creamer engage in group sex, which she 'resented strongly'.[121] On the weekend of the killing, Creamer believed that the aggressor had arranged for her to engage in group sex. According to her evidence, the aggressor had hit her in the genitals with a knobkerrie while she was sleeping, accused her of having sex with his brother, and insisted that she smell his semen-stained sheets before placing them over her head.[122] Immediately before the fatal act, the aggressor repeatedly smacked Creamer in the face and threatened to 'finish her off', before attempting to push his penis in her mouth and urinating on her.[123] Creamer managed to hit the aggressor in the genitals before grabbing a knife and stabbing him to death. The prosecution asserted that, rather than being a victim of domestic abuse, Creamer had initially denied her involvement in the killing because she had no excuse. She was portrayed as being jealous of the aggressor's extramarital affairs and annoyed at his decision to leave her for his former wife.[124] The forensic evidence did not fully accord with Creamer's account, and the sentencing judge rejected a significant proportion of her evidence, describing her as an 'unsophisticated witness'.[125] In particular, Coghlan J suggested that the jury had rejected Creamer's allegation that she had been raped previously by the aggressor because Creamer chose to stay with him and had not disclosed such evidence prior to trial.[126]

Toole notes that the availability of defensive homicide worked to Creamer's advantage. Rather than 'being obsessive, jealous and controlling . . . her husband encouraged and facilitated [Creamer's] affairs'.[127] In this respect, Toole argues that defensive homicide had the 'potential to both protect and criminalise lethal conduct by women in inappropriate and unintended ways'.[128] In contrast, the Domestic Violence Resource Centre Victoria (DVRSV) contends that this assessment demonstrates a 'lack of understanding about how psychological manipulation, sexual degradation and coercive control are forms of family violence'.[129] The primary victim may feel unable to disclose

117 See, for example, *Creamer* (n 68) and *Sherna* [2011] VSCA 242; [2009] VSC 526. See generally Evidence Act 2008, s 135, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, pt 3(9).

118 DVRCV (n 38) 27.

119 *Creamer* (n 68) [6].

120 Ibid [7].

121 Ibid [7] and [14].

122 ibid [17] and [19]. A knobkerrie is a South-African weapon in the form of a stick with a knob on the end of it [20].

123 Ibid [21]–[22].

124 ibid [10]–[12].

125 Ibid [16].

126 Ibid [32].

127 Toole (n 8) 283.

128 Ibid 286.

129 DVRCV (n 38) 28. See also, Evan Stark, 'Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control' (1995) 58 Albany Law Review 973.

details of abuse because 'of a deep sense of shame and self-blame'.[130] It is worrying that such abuse continues to be viewed at the 'lowest end of the spectrum'.[131] The amendments to prevent victim blaming and fact fabrication are welcome, but it may be difficult in practice to reliably distinguish genuine from disingenuous facts, particularly given the hidden nature of domestic abuse.

Irrespective of the changes to self-defence, it remains clear that some defendants will fall outside the scope of self-defence simply because the force used was excessive. In such cases, a reduction from murder to manslaughter may be apposite in terms of appropriate standardisation of the defendant's culpability level.[132] The suggestion that lower culpability may be reflected in sentencing mitigation where self-defence fails ignores the injustice associated with labelling the primary victim a murderer where she genuinely believed force was necessary, but was mistaken regarding the level of force. The murder label unfairly stigmatises those who kill their abusers and it 'obscures the family violence to which s/he has been subjected'.[133] The Victorian Sentencing Council acknowledged that the removal of provocation would result in significantly higher sentences for provoked killers, given the increased maximum penalty and stigma attached to murder.[134] The same can be said of the abolition of defensive homicide. Experience in New Zealand is that primary victims are being convicted of murder and sentenced more harshly than if a partial defence was available.[135]

The impact of abolishing the partial defence in New Zealand

The New Zealand criminal justice system has been described as 'out of step internationally in the way it responds when the victims of family violence kill their abusers'.[136] Last year, the FVDRC noted that there needs to be a radical change in the way New Zealand deals with 'dangerous and chronic cases of family violence'.[137] In particular, the FVDRC advocated reintroducing a partial defence to New Zealand, post-abolition of the provocation defence in 2009.[138] The New Zealand Law Commission (NZLC) had previously recommended abolition, complemented by developments to the law on self-defence. The NZLC advocated that priority should be given to drafting a new sentencing guideline to ensure that 'full and fair account' may be taken of provocative conduct and other mitigating factors during sentencing.[139] Provocation was abolished, but the remaining recommendations were not taken forward. The result is that self-defence laws in New Zealand remain demonstrably unsuited to primary victims who kill a predominant aggressor and, despite appellate court guidance on the impact of provocation in sentencing, primary

130 DVRCV (n 38) 27.

131 *Creamer* [2012] VSCA 182 [41].

132 See, for example, *Monks* [2011] VSC 626. Unlike other defensive homicide cases, Monks received little media attention and has been described as vindicating 'the VLRC position that the offence could appropriately apply in family situations other than where a woman killed an abusive male partner'; Toole (n 8) 484.

133 Kirkwood et al (n 9) 6.

134 Sentencing Advisory Council (Vic), *Provocation in Sentencing: Research Report* (2009). The maximum sentence for manslaughter in Victoria is 20 years' imprisonment. In contrast, the maximum sentence for murder is life imprisonment; Crimes Act 1958, ss 5 and 3, respectively.

135 See, for example, *Ribia* [2012] NZHC 6720; *Wihongi* [2012] 1 NZLR 755.

136 FVDRC (n 11) 6.

137 Ibid.

138 Ibid.

139 NZLC, *The Partial Defence of Provocation* (NZLC No 98 2007) paras 2.04 and 2.08.

victims are in a significantly worse position than if a partial defence was available.[140] As Brookbanks stated:

> By abolishing the provocation defence, the legislature has drawn a line in the sand. Those who cross it, whatever their motive or disposition, can no longer expect a sentencing court to look at their situation with such compassion or understanding, as might have previously marked the court's response as a concession to their 'human frailty'.[141]

The self-defence provision operating in New Zealand appears to reflect the approach adopted in Victoria and England and Wales, but the manner in which it has been interpreted renders it difficult for primary victims to successfully claim the defence.[142] Section 48 of the Crimes Act 1961 provides that: '[e]veryone is justified in using, in the defence of himself or another, such force, as in the circumstances as he believes them to be, it is reasonable to use'.[143] The relaxation of the imminence requirement in Victoria and England and Wales has not occurred in New Zealand, where 'immediacy of life-threatening violence' is required in order to justify killing in self-defence.[144] In cases where the defendant had a viable, non-violent option, the threat is not considered sufficiently imminent to satisfy self-defence. This approach fails to recognise that when a primary victim kills an intimate partner it will rarely be in the face of an imminent attack, since by then 'any attempt at self-protection may be too late'.[145] The apparently viable escape option is similarly not possible for the primary victim who fears that she will be in even more danger should she attempt to do so.[146] The FVDRC noted that by focusing on the imminence of the threat, the primary victim's circumstances are limited to a short time-frame. This results in vastly different rulings in factually similar cases where self-defence is precluded in the absence of an imminent threat.[147] The problem with this arbitrary approach to culpability is that it results in some primary victims being labelled murderers, while others receive an outright acquittal. The availability of a partial defence would assist in ameliorating this inherently unjust bifurcatory divide between justified killings in response to an imminent threat and *ostensibly* unjustified killings undertaken when a predominant aggressor is off-guard. The circumstances of the primary victim have been acknowledged to a limited extent in that expert evidence is admissible to explain how she might be more aware of covertly threatening behaviour which may not appear objectively apparent. It remains clear, however, that self-defence in its current form does not adequately accommodate the circumstances of primary victims.[148] Like the VLRC, the NZLC recommended replacing the 'imminence'

140 NZLC (n 139) para 1.84. Horder and Fitz-Gibbon have suggested that the sentences imposed post-2009 might also be higher than those issued pre-2009 in the context of domestic abuse; Jeremy Horder and Kate Fitz-Gibbon, 'When Sexual Infidelity Triggers Murder: Examining the Impact of Homicide Law Reform on Judicial Attitudes in Sentencing' Cambridge Law Journal <doi: 10.1017/S0008197315000318>.

141 Warren Brookbanks, 'Provocation and Sentencing' (2013) (April) New Zealand Law Journal 120–4, 124.

142 Elisabeth McDonald, 'Criminal Defences for Women' in *Women in the Criminal Justice System* (New Zealand Law Society 1997) 46–9.

143 'Everyone authorized to use force is criminally liable for any excess according to the nature and quality of the act that constitutes that excess'; Crimes Act 1961, s 62.

144 *Wang* (1989) 4 CRNZ 674, 683.

145 NZLC, *Battered Defendants Victims of Domestic Violence Who Offend* (NZLC PP41 2000) para 38.

146 Ruth Busch, 'Don't Throw Bouquets at Me . . . (Judges) Will Say We're In Love: An Analysis of New Zealand Judges' Attitudes towards Domestic Violence' in Julie Stubbs (ed), *Women, Male Violence and the Law* (Institute of Criminology and Sydney University Law School 1994) 104.

147 FVDRC (n 11) 122.

148 *Lavellee* (n 87) cited in *Oakes* [1995] 2 NZLR 673, 676 (CA).

requirement with the need for an 'inevitable attack', but these recommendations were not acted upon.[149]

The absence of a partial defence means that mitigating factors are considered solely during sentencing in determining whether a life sentence would be 'manifestly unjust' and in setting a minimum non-parole period. The restrictive sentencing regime operating in New Zealand mandates that a murder conviction automatically attracts a life sentence, unless the nature of the offence and the circumstances of the defendant would render such a sentence 'manifestly unjust'.[150] The minimum non-parole period on a life sentence for murder may not be less than 10 years or 17 years in the 'most serious cases'.[151] It is only in 'limited circumstances when a finite sentence may be imposed'.[152] There is no legislative guidance on the impact of the predominant aggressor's conduct and/or provocation in relation to the assessment of whether to impose a life sentence, but the Court of Appeal in *Hamidzadeh*[153] and *Taulekí*[154] confirmed that both are potentially relevant mitigating factors.[155] In all cases, only 'exceptional' circumstances will result in the presumption of life imprisonment being overturned.

The type of case in which the presumption has been rebutted include, inter alia, mercy-killing cases[156] and those involving serious domestic abuse.[157] Sentences of 10 years' and 12 years' imprisonment were issued in the cases of *Rihia*[158] and *Wihongi*,[159] respectively, which to date represent those cases in which a primary victim has been convicted of the murder of a predominant aggressor post-abolition of the provocation defence.[160] The low number is attributable to the rare cases in which a primary victim responds with lethal force rather than signifying that this particular category of defendant is being afforded an alternative defence.[161] The horrific abuse and mental impairments suffered by Rihia and Wihongi meant that their cases were 'exceptional'.

149 NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC Report 73 2001) 9–12.

150 Sentencing Act 2002, s 102 (1). '"Unjust" can only mean that in the context of a particular murder and particular offender, the normal sentence of life imprisonment runs counter to both a Judge's perception of a lawfully just result and also offends against the community's innate sense of justice.'; *O'Brien* (2003) CRNZ 572 [19].

151 *Hamidzadeh* [2013] NZSC 33 [5]. Sentencing Act 2002, ss 103 and 104. See, generally, Geoff Hall, *Sentencing: 2007 Reforms in Context* (LexisNexis 2007) 487.

152 *Hamidzadeh* (n 151) [4]. A life sentence is 'almost invariably' imposed; *Hessell* [2009] NZCA 450 [63].

153 *Hamidzadeh* (n 151). For a helpful analysis of the *Hamidzadeh* case see, Brookbanks (n 141) 120–4.

154 [2005] 3 NZLRC 372.

155 See, generally, Sentencing Act 2002, s 9(1) and 9(2).

156 In *Law* (2002) 19 CRNZ 500, the mercy killing of an elderly woman suffering from Alzheimer's disease by her husband attracted an 18-month term of imprisonment. See also, *Reid* HC Auckland CRI-2008–090–2203, 4 February 2011 (confessing to a crime that might not have otherwise been discovered and attempting suicide after the offence indicated significant remorse – the defendant suffered from major depression and psychotic delusions); *Cunnard* [2012] NZHC 815 (peripheral role as a secondary party, previous good character, evident remorse, restorative justice conference held with the victim); *Nelson* [2012] NZHC 3570 (deficiency in decision-making faculties, youth, inability to process information, tumultuous family situation); see, generally, Rajesh Chhana, Philip Spier, Susan Roberts and Chris Hurd, *The Sentencing Act 2012: Monitoring the First Year* (Ministry of Justice 2004).

157 See *Rihia* and *Wihongi* (n 135).

158 *Rihia* (n 135).

159 For an in-depth analysis of the case of *Wihongi* (n 135), see Nicola Wake, 'Anglo-Antipodean Perspectives on the Positive Restriction Model and Abolition of the Provocation Defence' in Ben Livings, Alan Reed and Nicola Wake (eds), *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* (Cambridge Scholars Publishing 2015) 391–9.

160 FVDRC (n 11) 6.

161 Ibid 102.

This resulted in the notorious presumption of life imprisonment being overturned in each case.[162]

A comparison between *Rihia* and the earlier manslaughter conviction of *Sualape* demonstrates the stark reality that primary victims are not only being convicted of murder, but sentences are double the length of those imposed pre-2009 in factually similar cases. Rihia was convicted and sentenced to 10 years' imprisonment after she pleaded guilty to the murder of her estranged husband. Their relationship was plagued by violence and alcohol abuse.[163] They had been drinking heavily throughout the day, during the course of which their seven-year-old daughter was removed by Child, Youth and Family Service staff over concerns regarding the alcohol consumption and the predominant aggressor's presence at the property. Fearing a retaliatory beating, and angry at the predominant aggressor's involvement in the removal of their daughter, Rihia stabbed him in the chest during the course of an argument.[164]

Psychologists described Rihia as suffering from 'complex post-traumatic stress disorder' and 'borderline personality disorder' characterised by 'alcohol abuse, emotional dysregulation, outbursts of anger, and feelings of abandonment' induced by familial violence.[165] Rihia's parents were alcoholics and she had been removed from their care as a consequence of abuse. Rihia was abused by her first husband, with the result that her seven children were taken into care.[166] The 'extreme reaction' to Rihia's despair at losing her daughter was described by the sentencing judge 'as being rooted firmly in the abuse' she had suffered from the predominant aggressor and others.[167] There were 36 reported incidents of violence between Rihia and the predominant aggressor. Police confirmed that in 33 out of the 36 cases the predominant aggressor was responsible, and the court said it was 'reasonable to infer that there were more than only three or four incidents a year'.[168] The trial judge was satisfied that Rihia would not have killed 'had it not been for the significant impairment' she suffered through years of alcohol and physical abuse.[169]

Sualape, in contrast, received a sentence reduction of 7.5 years to 5 years on grounds that the initial sentence did not reflect the cumulative impact of the abuse and degradation she suffered, in addition to her vulnerability by reason of ethnic and cultural background.[170] Sualape successfully argued that she was provoked to kill her abusive partner of over two decades after he said he was leaving her for another woman. The initial sentencing judge described the killing as 'brutal'. Sualape had questioned the predominant aggressor over his decision to leave her before repeatedly hitting him over the head with an axe in what Randerson J dubbed a 'frenzied attack' with a 'strong element of deliberation about it'.[171] It was not accepted that Sualape suffered from battered-woman syndrome and the degree of physical and emotional abuse was deemed

162 *Hamidzadeh* (n 151) 33. See also, *Rapira* [2003] 3 NZLRC 794 (CA) [121]. The assessment as to whether the presumption is displaced must be undertaken in light of ss 7–9 of the Sentencing Act 2002

163 *Rihia* (n 135) [2].

164 Ibid [10]–[12].

165 Ibid [20].

166 Ibid [28].

167 Ibid [30].

168 Ibid [16].

169 Ibid [28].

170 *Sualape* [2002] NZCA 6.

171 Ibid citing original ruling [6]–[8].

to be exaggerated.[172] According to Randerson J, it was the sexual infidelity which proved to be the main trigger for a killing on the borderline between murder and manslaughter. The jury's verdict was termed 'merciful' in the circumstances.[173] That 'merciful' decision resulted in a sentence 2.5 years shorter than that imposed in *Rihia*, despite Randerson J's obvious misgivings regarding the verdict.

Upon appeal, Baragwanath J concluded that Randerson J had not attached sufficient weight to the family abuse suffered by Sualape. The appellant's role in what was described as a 'chronically dysfunctional marriage' was governed by 'traditional Samoan norms'.[174] The appellant was responsible for the care of her four children from a previous marriage, five children with the predominant aggressor, his disabled mother, and eight of his brother's children whose wife had died.[175] The relationship involved physical and emotional violence, including bashings, cutting with a machete, and the infliction of a venereal disease, consequent upon repeated infidelities.[176] The aggressor was a world-renowned tattoo artist, popular for *p'ea* tattoos which are designed to display cultural identity, and commonly used as part of a 'right [sic] of passage' ritual into manhood.[177] On one occasion, he organised a tattooist convention which was of cultural significance to the local Samoan community, in which the appellant's family were prominent, and attended with a lover with whom he 'cohabited openly'.[178] It was said that this brought great shame to Sualape's family.

Baragwanath J held that essential considerations ought to have included: the exemplary past behaviour of the primary victim; the cumulative impact of the sustained pattern of abusive and insulting conduct of the predominant aggressor; the gross humiliation of the appellant and her family by the aggressor's conduct in Samoa; and the appellant's perception, from what appeared to be a position of subordination in both her relationship and culture, of a lack of realistic options available effectively to relieve herself of what was progressively becoming an intolerable burden.[179] Sualape's actions were 'more than a jealous response by a jealous wife, but the consequence of the victim's treatment of her over two decades, and of her limited perception of means by which it might be resisted'.[180]

Randerson J's view reflected a narrow interpretation of Sualape's circumstances, which focused principally on the fatal attack and the exchange between the primary victim and predominant aggressor immediately preceding it. By labelling sexual infidelity as the triggering event, Randerson J implied that Sualape's conduct was undertaken in response to the predominant aggressor's attempt to exercise personal autonomy in leaving a relationship to commence a new one. In reality, his sexual infidelity constituted the final straw in the living nightmare he had inflicted on her, and it was this combination that eventually tipped her over the edge. In this respect, it is essential that sexual infidelity is considered as part of the narrative leading to the fatal act. More recently, the Court of Appeal in *Hamidzadeh*[181] recognised that the 'circumstances in which sexual infidelity may be treated as reducing culpability is a difficult issue'.[182] Their Lordships noted Lord Judge CJ's comments, in

172 *Sualape* (n 170) citing original ruling [15] and [22].

173 Ibid citing original ruling [27].

174 Ibid [3] and [7].

175 *Sualape* (n 170) [4].

176 Ibid [5].

177 Karen Hudson, 'Tattooist Murdered' (1999) about.com.

178 *Sualape* (n 170) [6].

179 Ibid [8].

180 Ibid [23].

181 *Hamidzadeh* (n 151).

182 Ibid [64].

Clinton, on the sexual infidelity exclusion in the loss of control defence.[183] Lord Judge acknowledged that:

> Sexual infidelity has the potential to create a highly emotional situation or to exacerbate a fraught situation, and to produce a completely unpredictable, and sometimes violent response. This may have nothing to do with any notional 'rights' that the one may believe she or he has over the other, and often stems from a sense of betrayal and heartbreak, and of crushed dreams.[184]

The Court of Appeal, in *Hamidzadeh* concluded, however, that 'while an angry and emotional response to the end of a relationship may be understandable, the ordinary expectation of the community is that this ought not to justify the use of violence, especially where there are fatal consequences'.[185] The problem is that in cases like *Sualape* the sexual infidelity and revelation that the relationship is at an end constitutes 'an important and relevant component of the cocktail of events' that combined to make the defendant lose control.[186] The sexual infidelity served to humiliate and degrade the victim in circumstances which she was powerless to prevent. In this respect, the sexual infidelity formed part of the domestic abuse, in a similar way that taunts designed to belittle or denigrate the victim do. As the Court of Appeal identified in *Clinton*, to 'compartmentalise sexual infidelity and exclude it when it is integral to the facts as a whole . . . is unrealistic and carries with it the potential for injustice'.[187]

The ruling in *Sualape* also highlights the problems associated with focusing on a narrow time-frame in domestic abuse cases. Despite Randerson J's misgivings regarding the mitigatory force of the abuse Sualape suffered and the respective (lack of) weight attached to sexual infidelity, the sentence imposed was significantly shorter than that imposed in the similar case of *Rihia*. The problem with considering mitigation solely at the sentencing stage is that it circumvents important juror and therefore societal evaluation as to whether a manslaughter verdict and a corresponding lower sentence ought to apply. The role of the jury in such cases represents an important 'bulwark against overzealous prosecutors and cynical judges'.[188] The jury verdict confers 'a societal stamp of approval that must be given weight'. It tends to result 'in both a finite sentence, and a sentence that is likely to be somewhat shorter than the lowest available minimum term for murder'.[189] In all cases, however, it is essential that the defence is appropriately framed and sufficient guidance is provided to jurors in order for them to perform their role effectively.

The *via media*: a new partial defence

It is essential that New Zealand and Victoria adopt a more 'nuanced and less black and white approach to reforming of the criminal defences to homicide'.[190] An optimal solution would be to introduce a new partial defence predicated on a fear of serious violence.[191] This entirely new defence draws upon earlier recommendations of the Law Commission for

183 *Clinton* [2012] EWCA Crim 2; [2012] 3 WLR 515 [16], cited in *Hamidzadeh* (n 151) [65].

184 *Clinton* (n 183) [16].

185 *Hamidzadeh* (n 151) [68].

186 Hansard, Parliamentary Debates, HC Deb 9 November 2009, col 88 (Mr Grieve).

187 *Clinton* (n 183); see also Horder and Fitz-Gibbon (n 140) 18 and 20.

188 Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (New York University Press 2003) 247.

189 NZLC (n 139) para 1.89. Although compare the contrasting sentences in comparable provocation cases; *Ali* (3 years) and *Edwards* (9 years); ibid, para 1.90.

190 FVDRC (n 11) 103.

191 Coroners and Justice Act 2009, s 55(3). See also, Law Commission No 304 (n 16) para 5.55.

England and Wales, in addition to an in-depth review of the operation of ss 54 and 55 of the Coroners and Justice Act 2009, as enacted.[192] The partial defence would operate to reduce a murder conviction to manslaughter where the defendant kills in response to a fear of serious violence from the victim against the defendant or another identified individual.[193] The defence is qualified by appropriate threshold filter mechanisms designed to preclude the availability of the defence in unmeritorious cases. These clauses include a normal person test and provisions stipulating that the defence is not available where the defendant intentionally incited serious violence, acted in a considered desire for revenge, or on the basis that no jury, properly directed, could reasonably conclude that the defence might apply.[194] In cases where sufficient evidence is raised that the partial defence might apply, it is then for the prosecution to disprove the defence to the usual criminal standard. The defence should be complemented by bespoke provisions on social framework evidence and *mandatory* juror directions where family violence is in issue. An interlocutory appeal procedure designed to prevent unnecessary appellate court litigation is also outlined. The following analysis illustrates that this novel model provides an appropriate *via media* for the introduction of a new partial defence to Victoria and New Zealand, with the added benefit of developments based upon the experience of the operation of the loss of control defence in England and Wales.

The proposed defence requires that the defendant feared serious violence from the victim against the defendant or another identified individual. This mirrors the 'fear trigger' operating under the loss of control defence.[195] It is also similar to defensive homicide, which required the defendant to fear death or really serious injury. The proposed defence is designed to be available where the defendant kills in response to an anticipated (albeit not imminent attack); and where the defendant over-reacts to what she perceived to be an imminent threat.[196] Whether the defendant feared serious violence engages an entirely subjective enquiry.[197] The fear must be genuine but it need not be reasonable. Arguably, it would be difficult to prove that the fear was genuine if it were not based on reasonable grounds. There is no need to extend the defence to circumstances falling short of serious violence, but social framework evidence should be utilised to explain why an ostensibly trivial incident might cause the primary victim to fear such violence.[198] The term violence should be broadly construed as including psychological[199] and sexual harm, in addition to physical violence.[200] It should also include coercive or controlling behaviour as identified under the Serious Crimes Act 2015, which introduced a new offence based on such conduct.[201] The offence provides overdue recognition of the impact of coercive and

192 Law Commission No 290 and Law Commission No 304 (n 16).

193 Coroners and Justice Act 2009, s 54(3).

194 Ibid s 54 (5)–(6).

195 Ibid s 55(3).

196 Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* (Consultation Paper 19/08, 2008) para 28.

197 '[T]he reasonableness requirement is out of place when we are thinking of people who are acting out of fear or anger and are therefore likely to be in a somewhat emotional state'; Law Commission No 290 (n 16) para 3.154.

198 Law Commission No 304 (n 16) para 5.55.

199 Psychological abuse need not 'involve actual or threatened physical or sexual abuse' and may include (i) intimidation; (ii) harassment; (iii) damage to property; (iv) threats of physical abuse, sexual abuse or psychological abuse; Crimes Amendment (Abolition of Defensive Homicide) Act 2014, s 322J.

200 See, Rudi Fortson QC, 'Homicide Reforms under the CAJA 2009' (Criminal Bar Association 2010) para 90.

201 Serious Crimes Act 2015, s 76.

controlling practices, and it is appropriate that the definition of serious violence under the new defence incorporates this form of conduct.[202]

A fundamental difference between defensive homicide and the newly proposed defence is that defensive homicide remained unqualified by appropriate threshold filter mechanisms. The proposed defence is qualified by the normal person test which mandates that a person of the defendant's age, with a normal degree of tolerance and self-restraint and in the circumstances of the defendant might have reacted in the same or a similar way.[203] The VLRC was critical of the normal person test because it involves 'speculation about how a person *might have* reacted in the circumstances'.[204] This approach is necessary because it is impossible to say how a person *would have* reacted in the circumstances, particularly where there is evidence of domestic abuse.[205] The proposed test is similar to the normal person test operating in relation to the loss of control defence, with the exception that the term 'sex' is omitted. Use of the term 'sex' overstates the 'role of sex and gender in explaining D's reaction'.[206] In this respect, sex and gender are better considered by the judge and jury as part of the broader circumstances of the case.[207] Akin to the loss of control defence, 'circumstances' in this context is a reference to all of the defendant's circumstances other than those whose only relevance to the defendant's conduct is that they bear on her general capacity for tolerance and self-restraint.[208] In cases where the defendant has a recognised medical condition relevant to her fear of serious violence then that might, like sex and gender, form part of the circumstances for consideration.[209] A normal degree of tolerance means that, in evaluating the defendant's conduct, the jury cannot take into account irrational prejudices, such as racism and homophobia.[210] A normal degree of self-restraint excludes characteristics such as bad temper, jealousy, irritability and intoxication. Unlike the loss of control plea, the proposed defence specifically excludes self-induced intoxication from the assessment of the defendant's capacity for tolerance and self-restraint.[211] This statutory exclusion is designed to prevent unnecessary litigation in cases where the defendant is voluntarily intoxicated.

In terms of determining whether the proposed defence applies, the defendant's fear of serious violence is to be disregarded in cases where the defendant intentionally incited serious violence. The intentional incitement clause is different from s 55(6)(a)–(b) of the 2009 Act which stipulates that the defence will be unavailable where the defendant incited something to be said or done for the *purpose* of using it as an excuse to use violence. In *Dawes, Hatter and Bowyer*, the Court of Appeal held that the mere fact that the defendant was, 'behaving badly and looking for and provoking trouble' does not mean the defence is

202 In Victoria, violence also includes causing or putting a child at risk of witnessing physical, sexual or psychological abuse of a person by a family member, and this could form part of a new Victorian provision; Crimes Amendment (Abolition of Defensive Homicide) Act 2014, s 322J.

203 Coroners and Justice Act 2009, s 54(1)(c) and (3).

204 VLRC (n 19) para 3.84 (emphasis in original).

205 Fortson (n 200) para 148. Although cf Jo Miles, 'A Dog's Breakfast of Homicide Reform' (2009) 6 Archbold News 8.

206 Neil Cobb and Anna Gausden, 'Feminism, "Typical" Women, and Losing Control' in Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate 2011) ch 7.

207 Ibid.

208 Coroners and Justice Act 2009, s 54(3).

209 *Asmelash* (n 74).

210 Coroners and Justice Act 2009, s 54(1)(c).

211 Ibid.

unavailable.[212] This is because self-induced triggers are viewed in a narrow sense only for the purposes of the loss of control defence.[213] The exclusion will arguably only apply where the defendant has 'formed a premeditated intent to kill or cause grievous bodily harm to the victim, and incites provocation by the victim so as to provide an opportunity for attacking him or her'.[214] This approach was applied in *Duncan*,[215] where a defendant successfully claimed the partial defence after stabbing a love rival to death. Duncan was shopping with his two children when he saw the victim. As a result of seeing him, Duncan purchased a small-bladed paring knife, removed the packaging and concealed it within a carrier bag. His explanation was that some days before the victim had confronted him in a similar location and threatened him with a knife. According to witnesses, Duncan then proceeded towards the victim shouting at him. A fight ensued, during the course of which, the victim slashed Duncan across the face and body with a knife. It was at that point, Duncan claimed to have momentarily lost self-control and stabbed the victim to death. Duncan's loss of control plea was accepted by the Crown, Lord Thomas advocating that the case should be seen:

> As an acceptance of a basis of plea in a one-off case in circumstances which we have not gone in to. It should not be regarded as any precedent that where two people arm themselves and a wound is caused in the course of an intended knife fight, that that would ordinarily give rise to a loss of self-control.[216]

Despite the warning of Lord Thomas, the case illustrates that the circumstances in which a defendant's conduct might be construed as having been done for the *purpose* of using it as an excuse to use violence are likely to be limited. The Law Commission of England and Wales opined that to exclude the defence 'in the broader sense of self-induced provocation would be to go too far'.[217] Such an approach might exclude deserving claims where the incitement was induced by 'morally laudable' conduct, for example, 'standing up for a victim of racism in a racially hostile environment'.[218] The Law Commission did identify that 'there is much to be said . . . in denying a defence to criminals whose unlawful activities expose them to the risk of provocation by others'.[219] The recommended intentional incitement clause provides a *via media* between these ostensibly polarised approaches to self-induced provocation.

The provision would operate where the defendant *intentionally incited serious violence*. The defendant's conduct must be done for the *purpose* of inciting serious violence. In this respect, the 'mere fact that the defendant caused a reaction in others' would not result in the defence being excluded.[220] The approach in *Dawes, Hatter and Bowyer*, that provocative behaviour does not negate the defence, is equally applicable to the new proposal. This ensures that confrontational circumstances do not automatically preclude the partial defence, but, where the defendant intends to incite serious violence, the defence is

212 *Dawes, Hatter and Bowyer* [2014] 1 WLR 947 [58].

213 Law Commission No 304 (n 16) para 3.139.

214 Ibid.

215 *Duncan* [2014] EWCA Crim 2747.

216 Ibid [11].

217 Law Commission No 304 (n 16) para 3.139.

218 Ibid.

219 Ibid.

220 *Johnson* [1989] EWCA Crim 289 (CA) Watkins LJ. Note that the Court of Appeal in *Dawes, Hatter and Bowyer* (n 212) noted that 'the impact of *R v Johnson* is now diminished, but not wholly extinguished by the new statutory provisions'; [58]. See also, *Richard Anthony Daniel v The State* [2014] UKPC 3 [17]–[33].

precluded.[221] This is important as the primary victim may feel responsible for inciting the aggressor's response because she is aware that doing X makes him angry, but it cannot be said that it was her *intention* to have that effect. Contrary to the Law Commission's observation, judges and jurors would be in a position to 'differentiate satisfactorily between forms of self-induced provocation in the broader sense which should, and which should not, preclude a defence'.[222] It is true that this would be a challenging task, given the potential variables, but at present the exclusionary clause serves little purpose when viewed in the narrow sense, since arguably cases of premeditated killing would be excluded via s 54(4) of the 2009 Act in any event.

Section 54(4), which provides that the loss of control defence is not available where the defendant acted in 'a considered desire for revenge', forms part of the proposed framework.[223] The clause operates to prevent the use of the defence in premeditated, cold-blooded killings, but it does not preclude the defence simply because the defendant was angry at the victim for conduct which engendered a fear of serious violence.[224] The Royal College of Psychiatrists noted that:

> Physiologically anger and fear are virtually identical, whilst many mental states that accompany killing also incorporate psychologically both anger and fear . . . [T]he abused woman who waits until the man is 'helpless' is likely, not merely to be angry but also fearful that he will eventually kill her, and/or her children and that there is no way of preventing it other than by the death of the man.[225]

The word "'considered" denotes something over and above simple revenge'[226] and, as such, the primary victim who claims 'He deserved it!' remains eligible to claim the defence because jurors are in a position to distinguish genuine cases involving an element of retaliation from disingenuous claims.[227] Nevertheless, it may be difficult 'to determine whether the killing was one motivated by a considered desire for revenge or from other emotions' and, for this reason, social framework evidence should be used to explain why the primary victim may experience a complex array of emotions at the time of the fatal act.[228]

The proposed legislative framework does not include the loss of control requirement which is integral to ss 54 and 55 of the 2009 Act in England and Wales. By avoiding this controversial requirement, the proposed partial defence is closely aligned with self-defence. In cases where self-defence fails, the new partial defence might apply. At present, in England and Wales, a defendant claiming self-defence on grounds of a fear of serious violence may revert to a loss of control claim where the initial plea fails.[229] The problem is that the defendant will have to revert from alleging that she was acting reasonably in the

221 This is in line with the Law Commission's recommendation that the defence 'must not have been engineered by him or her through inciting the very provocation that led to it'; Law Commission No 304 (n 16) para 5.20. See also, Ministry of Justice (n 196) para 27. See generally Law Commission No 304 (n 16) para 3.139.

222 Law Commission No 304 (n 16) para 3.139.

223 Coroners and Justice Act, s 54(4).

224 Law Commission No 304 (n 16) paras 3.137 and 5.11.

225 Law Commission, *Partial Defences to Murder* (Law Com Consultation Paper No 173 2003) para 3.99.

226 *Evans* [2012] EWCA Crim 2 (Christopher Clee QC).

227 Law Commission No 304 (n 16) para 1.137.

228 David Ormerod, *Smith and Hogan's Criminal Law* (OUP 2011) 511.

229 Nicola Wake, 'Battered Women, Startled Householders and Psychological Self-defence' (2013) 77(5) Journal of Criminal Law 433, 434.

circumstances to asserting that she lost self-control. This is apt to cause juror confusion.[230] Rejection of the loss of control requirement also avoids the inherent contradiction in requiring the primary victim to simultaneously fear serious violence and lose self-control. For these reasons, loss of self-control does not form part of the proposed defence herein.

The loss of self-control requirement was introduced by the government of England and Wales in order to prevent the defence from being used inappropriately in cases of cold-blooded, gang-related or honour killings.[231] A review of jurisprudential authority suggests, however, that a significant number of loss of control claims are being filtered out *unnecessarily* by the loss of self-control element. It is right that these claims are being rejected, but the loss of self-control requirement is unnecessary because these claims could be filtered out by the alternative threshold filter mechanisms within the partial defence. As previously stated, loss of control and the newly proposed defence are unavailable where the defendant 'acted in a considered desire for revenge'.[232] Lord Judge CJ, in *Evans*, advocated that there 'was no need to rewrite . . . the language of the statute'.[233] In all cases, 'the greater the level of deliberation, the less likely it will be that the killing followed a true loss of self-control'.[234] The 'considered desire for revenge' exclusion is a more appropriate instrument for filtering out unmeritorious claims because, unlike the loss of self-control mandate, the 'words "considered", "desire" and "revenge" are not words of legal technicality. They are words of ordinary use.'[235]

The trial judge, in *Jewell*,[236] refused to leave the partial defence to the jury where the defendant prepared firearms and a survival kit 12 hours before he drove to the victim's home, armed with a shotgun and home-made pistol, and shot him without warning.[237] Jewell's explanation was that he feared serious violence from the victim who had allegedly threatened to kill him the evening before. The killing 'bore every hallmark of a pre-planned, cold-blooded execution'.[238] There was a 12-hour 'cooling period' between the alleged threat and the actual killing in which Jewell could have sought an alternative course of action, but failed to do so. The defence, however, was negated not by virtue of s 54(4), but by the loss of self-control requirement. The trial judge considered the remaining elements of the defence 'out of an abundance of caution' but that assessment was 'unnecessary as a dispositive conclusion'.[239]

The extent to which the loss of self-control requirement impacts upon the utility of the alternative threshold filter mechanisms within the defence was similarly highlighted in the

230 Wake (n 229) 438. In *Kojo-Smith and Caton* [2015] EWCA Crim178; [2015] 1 Cr App R 31 [88], counsel identified that the suggestion that the defendant might have reacted in anger would not assist in considering self-defence, but might imply a loss of self-control. Cf *R v Ward* [2012] EWCA Crim [2 1] and [11 10], where a loss of control plea was accepted following the rejection of affirmative self-defence.

231 Ministry of Justice (n 196) para 36. The term 'gang' is defined in the Policing and Crime Act 2009, pt IV, s 34(5), as amended by the Serious Crime Act 2015.

232 Coroners and Justice Act 2009, s 54(4).

233 *Evans* (n 226) [131].

234 Ibid [10].

235 Ibid (Andrew Edis QC and Simon Waley).

236 *Jewell* [2014] EWCA Crim 414.

237 Ibid [43].

238 Ibid [43].

239 Ibid [47].

case of *Barnsdale-Quean*.[240] The defendant had purchased a rolling pin and chain two weeks prior to the killing. On the day of the killing, he collected the chain from a flat in which he had stored it and the rolling pin from the kitchen. He tied two elasticated bands in a loop at the end of the chain, and carefully placed it over his wife's head while she was subdued due to antidepressant medication. He used the rolling pin as a tourniquet to strangle his wife to death before stabbing himself in an attempt to make it appear that she had committed suicide after attacking him. Barnsdale-Quean claimed that he could not remember what had occurred following his wife's alleged attack. The trial judge ruled that there was no loss of self-control on the facts or the defendant's account. In the event that the defendant had lost self-control, the defence would be negated by virtue of s 54(4). The Court of Appeal advocated that it was unnecessary to reach a conclusion in respect of s 54(4) because there was no evidence of loss of self-control. These rulings demonstrate that s 54(4) is capable of filtering out unmeritorious cases in the absence of the loss of self-control requirement.

In all cases, should the outlined threshold filter mechanisms of the proposed defence be bypassed, the trial judge has the authority to reject a claim on the basis that no jury, properly directed, could reasonably conclude that the defence might apply.[241] The grounds for the plea would be considered at a pre-trial hearing under case-management procedures. The implementation of an interlocutory appeal route would mean that the trial judge's decision could be challenged (only) before trial, thereby preventing unnecessary appellate court litigation.[242] In cases where family violence is in issue, the trial judge will be charged to provide juror directions equivalent to those operating in relation to self-defence in Victoria, considered above; the difference being that these directions ought to be mandatory. This will ensure that appropriate directions are consistently provided in all cases, rather than relying on ad hoc requests made by counsel.

Conclusion

The amendments to self-defence, social framework evidence and juror directions in Victoria challenge the traditional male-oriented perception of self-defence involving violent confrontations between parties of comparable strength. This view is incompatible with killings in response to familial abuse and, as such, the changes in the law serve an educative function, highlighting the need for greater understanding of the circumstances of the primary victim in order to ensure that self-defence captures deserving cases outwith traditional gender-biased notions of self-defence. Nevertheless, there will continue to be cases involving family violence that fall outside the scope of revised self-defence. In the absence of an applicable partial defence, the primary victim may face a murder conviction and longer sentence. This is the experience in New Zealand, post-abolition of the provocation defence in 2009. The injustice associated with labelling the primary victim a

240 *Barnsdale-Quean* [2014] EWCA Crim 1418. It is true that killings involving gang-related violence may be filtered out by the loss of self-control requirement, but such a claim would more efficaciously be filtered out by the fear of serious violence trigger on the basis that 'fear of serious violence' ought to be distinguished from 'fear before engagement in a fight'. Further, a person of the defendant's age with a normal degree of tolerance and self-restraint is unlikely to react in the same or a similar way to a gang member; *R v Gurpinar* [2015] EWCA Crim 178; [2015] 1 Cr App R 31 [55]. See also, *Kojo-Smith and Caton* (n 230) [94].

241 Coroners and Justice Act 2009, s 54(5)–(6). '[I]n many mixed motive cases the judge might take the view that, even if there is no "considered desire for revenge", it is nonetheless a case where no reasonable jury would find that the defence applies. We regard it as significant that of the provocation cases studied . . . in the two involving honour killing both the accused were convicted of murder. We are confident that that result would be no different under our recommendations.'; Law Commission No 304 (n 16) para 5.27. See also, paras 5.11(5), 5.25–32, and 5.60. Lord Judge identified that the fear trigger implies a higher threshold test than the common law had; *Thornley* [2011] EWCA Crim 153 [15] cited in *R v Lodge* [2014] EWCA Crim 446.

242 Law Commission No 304 (n 16) para 5.16.

murderer and the longer sentences imposed have resulted in calls for the reintroduction of a partial defence within that jurisdiction. The risk that primary victims may be convicted of murder is unacceptable, irrespective of the sentencing regime operating in these jurisdictions.

The introduction of a new partial defence, predicated on a fear of serious violence, provides an appropriate *via media* and optimal solution within both jurisdictions. The newly proposed framework would sit cogently alongside developments to self-defence in Victoria, providing a more comprehensive package of defences covering the potential various circumstances in which a primary victim may respond with lethal force. For New Zealand, the proposed defence is far removed from provocation and earlier concerns regarding the operation of that defence. It ensures that a partial defence is available to the primary victim who kills fearing serious violence from a predominant aggressor. The novel defence is restricted by the threshold filter mechanism of the normal person test, and alternative clauses stipulating that the defence is not available where the defendant intentionally incited serious violence, acted in considered desire for revenge, or on the basis that no jury, properly directed, could reasonably conclude that the defence might apply.[243] These proposals should be complemented by social framework evidence and mandatory juror directions, similar to those operating in Victoria. This would ensure that the partial defence is available only in deserving cases. A new interlocutory appeal procedure would provide defendants with an opportunity to challenge the judge's refusal to admit the defence prior to trial, thereby preventing unnecessary appellate court litigation. The abolition of all general partial defences in Victoria and New Zealand ought to be reconsidered, and this new proposal provides an optimal framework on which to base a new defence.

243 Coroners and Justice Act 2009, s 54(5)–(6).