

JUSTICE BETTY KING: A STUDY OF FEMINIST JUDGING IN ACTION

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I INTRODUCTION

Justice Betty King sat on the Supreme Court of Victoria for 10 years from 2005–15. Prior to that she was a judge of the Victorian County Court from 2000–05 after a career at the Victorian Bar from 1975–2000. During her career she was a pioneer for women in many respects, being only the 24th woman called to the Victorian Bar, the first woman prosecutor in Victoria, the first woman Commonwealth prosecutor, and one of the first Victorian women appointed a QC.¹ As a Supreme Court judge, Justice King was known for ‘speaking her mind’, her ‘no nonsense approach and colourful attire’.² She gained a high profile in her role in the series of trials associated with the Melbourne gangland killings dramatised in the television series, *Underbelly*.³ She was the judge who banned the broadcast of *Underbelly* in Victoria during the murder trial of one of its protagonists, Carl Williams,⁴ and she also banned a *Today Tonight* episode featuring a showdown between Carl Williams’ mother and the mother of Lewis Moran during the trial of Evangelos Goussis for Moran’s murder.⁵ In a May 2010 interview she spoke out against the media’s treatment of prominent defendants

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1 Liz Porter, ‘King of Her Court’, *The Age* (online), 18 November 2007 <<http://www.theage.com.au/news/in-depth/king-of-her-court/2007/11/17/1194767017489.html>>; Stefanie Garber, ‘High-Profile Judge Betty King Retires’, *Lawyers Weekly* (online), 17 August 2015 <<http://www.lawyersweekly.com.au/wig-chamber/16981-high-profile-judge-betty-king-retires>>.

2 Garber, above n 1; Shannon Deery and Padraic Murphy, ‘Gangland Judge Has Had Enough’, *Herald Sun* (online), 15 August 2015.

3 *Underbelly* (Directed by Tony Tilse et al, Screentime for the Nine Network, 2008), series 1.

4 Porter, above n 1; John Silvester, “‘You Are a Killer and a Cowardly One’”, *The Age* (online), 8 May 2007 <<http://www.theage.com.au/news/national/you-are-a-killer-and-a-cowardly-one/2007/05/07/1178390226004.html>>; John Silvester, ‘King’s Court – A One-Off Judge Calls Time’, *The Age* (online), 11 July 2015 <<http://www.theage.com.au/victoria/kings-court--a-oneoff-judge-calls-time-20150709-gi8c4o.html>>.

5 Elissa Hunt, “‘I’m The Queen of Banning Things’, Says Betty King”, *Herald Sun* (online), 22 April 2008 <www.heraldsun.com.au/news/special-reports/crime-mothers-gagged-by-judge/story-e6frf7r6-1111116125901>.

and their family members as celebrities, and disavowed any interest in being treated as a celebrity herself.⁶

Our focus in this article is on a lesser-known aspect of Justice King's judicial life, that is, her sentencing decisions in domestic homicide and domestic violence cases. These cases are of interest for several reasons. First, many domestic homicides occur against a background of domestic violence and abuse, and feminist legal scholars and criminologists have long been interested in what sentencing remarks may reveal about judicial understandings of and attitudes towards domestic violence.⁷ Second, after the partial defence of provocation was abolished in Victoria in 2005,⁸ judges were required to develop a new sentencing jurisprudence in cases where defendants claimed to have been provoked into killing the victim. Sentencing decisions from this period therefore also reveal judicial thinking about the existence and relevance of allegedly 'provocative' conduct on the part of the victim, and attitudes towards defendants' victim-blaming narratives and claims in mitigation of sentence. During the period 2005–15 there were 61 cases in the Victorian Supreme Court ('VSC') in which men were convicted of killing a female intimate partner or male sexual rival, and 15 cases in which women were convicted of killing a male intimate partner or female sexual rival, a total of 76 cases. Justice King presided in 13 of these cases – more than double the number of any of her judicial colleagues.⁹

Although Justice King never, to our knowledge, publicly identified as a feminist, we argue in this article that her sentencing decisions in domestic homicide and domestic violence cases constitute instances of feminist judging. In the following section we explain our methodology for identifying, contextualising and analysing Justice King's sentencing judgments in relevant cases. We then present our analysis around the major themes we found emerging from Justice King's judgments in these cases. These are themes of empathy for victims; taking domestic violence seriously; insisting on the need for men to control their anger and rage; challenging defendants' self-serving claims; and support for women's rights to equality, autonomy and safety. We conclude that

6 Michelle Batsas, 'Interview with Justice Betty King' (2010) 44 *Young Lawyers Journal* 10.

7 See, eg, Jeremy Horder, 'Sex, Violence and Sentencing in Domestic Provocation Cases' [1989] *Criminal Law Review* 546; 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, 1994) 104; Isabel Grant and Debra Parkes, 'Sentencing for Domestic Attempted Murders: "Special Interest Pleading"?' (1997) 9 *Canadian Journal of Women and the Law* 196; Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 309–55, including chapters 19–21: Kirsty Duncanson 'Truth in Sentencing: The Narration of Judgment in *R v Webster*' at 209, JaneMaree Maher, 'Commentary on *R v Middendorp* (Defensive Homicide)' at 325, Heather Douglas, 'Intersectionality and Indigenous Sentencing Courts: *R v Morgan*' at 339; Elizabeth Katz, 'Judicial Patriarchy and Domestic Violence: A Challenge to the Conventional Family Privacy Narrative' (2015) 21 *William and Mary Journal of Women and the Law* 379.

8 *Crimes (Homicide) Act 2005* (Vic) s 3, in force 22 November 2005.

9 No other judge presided in more than six such cases. Apart from Justice King, the judges presiding in the highest number of domestic homicide cases were Justices Coghlan, Hollingworth, Lasry and Curtain (six cases each) and Justice J Forrest (five cases).

Justice King's sentencing judgments in these cases bear many of the hallmarks of feminist judging.

II METHODOLOGY

In an earlier study, we undertook a systematic content analysis of Victorian sentencing judgments after the abolition of the defence of provocation. We identified cases for analysis via the Australasian Legal Information Institute databases for the VSC and the Victorian Court of Appeal ('VSCA'). We initially searched for all Supreme Court sentencing judgments in which the defendant was convicted of murder, manslaughter or defensive homicide between 22 November 2005 (the date on which the *Crimes (Homicide) Act 2005* (Vic) came into force) and 31 December 2015, and from this dataset we selected the cases in which the defendant had killed a current or former intimate partner or a sexual rival.¹⁰ We defined these as 'domestic homicide' cases.

Our interest in analysing these cases was in the incidence and nature of judicial statements containing language and/or concepts associated with provocation, including the notions of loss of control, being provoked, infidelity and sexual jealousy, anger and rage, and mutual violence. We have reported the results of this analysis elsewhere.¹¹ As we coded these cases, however, it became evident that Justice King had a very distinct judicial voice and that other themes appeared consistently in her judgments (and not in those of other judges), including statements of empathy and compassion for victims, declarations about the unacceptability of domestic violence and the seriousness of domestic killings, forthright challenges to defendants' attempts to deflect blame onto other causes, and strong assertions of women's equality and rights. We therefore decided to explore the wider occurrence of these themes through a content analysis of all relevant sentencing judgments delivered by Justice King.

To our original dataset of 'domestic homicide' cases, then, we searched for and added cases in which Justice King was the trial judge and in which the defendant was convicted of attempted murder, accessory to murder, incitement to murder or conspiracy to murder in a domestic context (which we labelled as 'domestic secondary homicide' cases), or in which the words 'domestic violence', 'domestic abuse', 'family violence' or 'intervention order' appeared in her sentencing judgment (which we labelled as 'domestic violence' cases). We next searched the VSCA database for appeals against any of Justice King's judgments in our first instance dataset. Finally, we searched both the VSC and VSCA databases for citations of any of Justice King's judgments in our first instance dataset. The total number of cases in each group is set out in Table 1

10 See Jenny Morgan, 'Who Kills Whom and Why: Looking Beyond Legal Categories' (Occasional Paper, Victorian Law Reform Commission, 2002) 23 (noting that 'some instances of men killing men share much in common with some instances of men killing women and should be connected, notwithstanding the different gender of the victims').

11 Rosemary Hunter and Danielle Tyson, 'The Implementation of Feminist Law Reforms: The Case of Post-provocation Sentencing' (2017) 26 *Social and Legal Studies* 129.

below. In order to provide context for these cases Table 1 also shows the number of non-domestic homicide and secondary homicide cases over which Justice King presided.

Table 1: Homicide and Domestic Violence Cases Presided over by, or Citing, Justice Betty King¹²

Category of Cases	Sentencing Judgments (Defendants)	Appeals (Defendants)
Domestic homicides	13 (9 men, 4 women)	5 (5 men)
Non-domestic homicides	45 (46 men, 4 women)	12 (12 men, 1 woman)
Domestic secondary homicide offences	2 (1 man, 1 woman)	0
Non-domestic secondary homicide offences	8 (7 men, 2 women)	2 (1 man, 2 women)
Domestic violence	6 (6 men)	0
Citations of King J's judgments	2 (2 men)	2 (2 men)
Total domestic cases	23 (18 men, 5 women)	7 (7 men)
Total non-domestic cases	54 (53 men, 6 women)	14 (13 men, 3 women)

In the 13 domestic homicide cases, the defendant was male in nine cases and female in four cases. All but one of the male defendants killed female partners; the other killed his ex-wife's new partner. All of the male defendants pleaded guilty to murder or were found guilty of murder by a jury. The female defendants all killed male partners and all pleaded guilty to manslaughter. In the other domestic cases (secondary homicide offences and domestic violence), five male defendants attacked female partners, one male defendant attacked two male sexual rivals; and one male defendant attacked a man who intervened to prevent him harming his ex-girlfriend. The one female defendant pleaded guilty to incitement to murder her ex-husband. Five of Justice King's domestic homicide cases were appealed to the VSCA.¹³ However only two of these appeals were upheld (one appeal against conviction and one appeal against sentence).

In the remainder of this article we explore how the themes identified above played out in Justice King's sentencing judgments in domestic cases. In

¹² Note that the number of defendants exceeds the number of cases since some cases included more than one defendant.

¹³ This was a relatively high rate of appeals compared to other judges who presided over domestic homicide cases. Justice King's appeal rate in these cases was exceeded only by Justice Lasry's, who was appealed in three of his six domestic homicide cases.

categorising Justice King's judgments as feminist in these cases, we have drawn upon Rosemary Hunter's body of work on feminist judging, and on literature engaging with that work. In a series of articles,¹⁴ Hunter has identified indicia of feminist judging, including asking the woman question (i.e. how apparently neutral rules have differential gender impacts); including women (representing women's previously excluded experiences and 'feminist common knowledge' in legal discourse,¹⁵ and incorporating women's experiences and interests in the development of legal doctrine); challenging gender bias (in legal rules and decision-making); contextualisation, particularity and attention (reasoning from context and the reality of women's lived experience, making individual rather than abstract or categorical decisions, paying particular attention to the individuals before the court); openness to experiences and perspectives far removed from her own¹⁶ (and not adversely judging other women for making different choices); anti-essentialism (avoiding universal, essentialist legal categories and classifications);¹⁷ remedying injustices (to women and other traditionally excluded groups); seeking to improve the material conditions of women's lives; promoting substantive (rather than merely formal) equality; making feminist choices (thinking carefully about the consequences of decisions for differently situated women, being accountable for exercises of discretion, keeping abreast of feminist legal literature and drawing on feminist theoretical knowledge);¹⁸ and employing an ethic of care.¹⁹ While a feminist judge may be critical of laws creating gender or social injustice, they are likely to be supportive of laws designed to address harms to women or other excluded groups.²⁰ Particular feminist judicial practices in the context of domestic violence might include supporting, affirming and validating – not minimising – the experiences of victims of violence, expressing support and sympathy, naming harm and impressing on perpetrators the unacceptability of violent behaviour.²¹ Since these are very much indicia rather than a checklist, programme or agenda, an individual judge may engage in feminist judging using only some but not all of these approaches.

Hunter further argues that while we might expect judges who have self-identified as feminists to engage in feminist judging, it is not reasonable to impose the same expectations on all women judges. Nevertheless, it is possible for observers to identify feminist judging by analysing the content and emphases

14 See Rosemary Hunter, 'Can *Feminist* Judges Make a Difference?' (2008) 15 *International Journal of the Legal Profession* 7; Rosemary Hunter, 'An Account of Feminist Judging' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010) 30; Rosemary Hunter, 'Justice Marcia Neave: Case Study of a Feminist Judge' in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart Publishing, 2013) 399; Rosemary Hunter, Sharyn Roach Anleu and Kathy Mack, 'Judging in Lower Courts: Conventional, Procedural, Therapeutic and Feminist Approaches' (2016) 12 *International Journal of Law in Context* 337.

15 Hunter, 'Justice Marcia Neave', above n 14.

16 Hunter, Roach Anleu and Mack, above n 14, 347.

17 Hunter, 'An Account of Feminist Judging', above n 14, 41–2.

18 Hunter, 'Can *Feminist* Judges Make a Difference?', above n 14, 10–14.

19 Hunter, Roach Anleu and Mack, above n 14, 348.

20 *Ibid* 352.

21 *Ibid* 348.

of a judge's decisions, even if she has not self-identified as a feminist, or indeed has actively eschewed that label.²² As Baines notes, there may be good reasons for women judges to be unwilling to self-identify as feminists, including a judicial culture which tends to regard feminism as a form of bias.²³ Further, instances of feminist judging are most likely (although by no means exclusively) to be found in areas of law persistently raising issues of gender justice, such as family law, reproduction, sex discrimination, and sexual and domestic violence.²⁴ Thus, a judge may only engage in feminist judging in some cases, and may otherwise judge in ways that are indistinguishable from their judicial colleagues.²⁵ The fact that Justice King did not identify as a feminist and may have taken a particular approach in domestic violence cases which was not evident in other cases, therefore, does not undermine our argument.

In the following sections we identify and illustrate the themes which strikingly emerged from Justice King's sentencing judgments in domestic homicide and domestic violence cases. In the conclusion we return to the above indicia of feminist judging and apply them to this group of Justice King's judgments.

III EMPATHY FOR VICTIMS

A very obvious and consistent theme that emerged throughout Justice King's sentencing judgments was her empathy and compassion for the victim and their family members, evident in her repeated acknowledgement of the devastating consequences and trauma produced by domestic killings and serious violence. She not only demonstrated her understanding of the pain and suffering of family members, witnesses and others related or connected to the victim whose lives had been forever changed by the loss of a loved one, but also acknowledged the inability of the sentencing process to alleviate that pain and suffering. In many cases, these statements included direct reference to material raised in victim impact statements, but she often went further than this by assuring family members that the sentence she was about to impose was in no way intended to reflect the worth of the victim's life, and by attempting to give family members, particularly children, hope for the future. While most other judges devoted a paragraph or two of their sentencing judgments to victim impact, Justice King's

22 Hunter, 'Can *Feminist* Judges Make a Difference?', above n 14, 9.

23 Beverley Baines, 'Must Feminist Judges Self-Identify as Feminists?' in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart Publishing, 2013) 380. For a refutation of the bias argument, see Hunter, 'Can *Feminist* Judges Make a Difference?', above n 14, 15–27; Hunter, 'An Account of Feminist Judging', above n 14, 30–5.

24 Hunter, Roach Anleu and Mack, above n 14, 351–2; Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-Making' (2015) 68 *Current Legal Problems* 119, 133–6. But for examples of the wide range of less obvious areas in which feminist judging might be found, see Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010); Douglas et al, above n 7.

25 See Hunter, 'Justice Marcia Neave', above n 14; Hunter, 'More than Just a Different Face?', above n 24.

judgments stood out for both the length and the content of her remarks on this issue.

A Victim Impact

One notable feature of Justice King's sentencing comments was her understanding of the tragedy of homicide for family members and those connected to both the victim and the defendant. For example, in *R v Neacsu* she observed that the deceased man's family 'were obviously a close family, and ... [had] lost a son and a brother who they loved greatly'.²⁶ In *R v Hopkins* she said to the defendant's family: 'It is difficult to watch a person you love and care about descend into the depths of a drug dependency, and become involved in a crime of an unspeakable nature. They love you and their hearts will be breaking over what has happened to you'.²⁷ In referring to the victim impact statements tendered to the court in *R v Downie* she said:

The one thing that can be said in relation to all the persons who are connected to someone who has been killed in this appalling manner is that their lives have been forever changed. That was demonstrated from the Victim Impact Statements, and I do take into account what they had to say.²⁸

And in *R v Pitt*:

the tragedy of their loss is mirrored in those statements. You can see the pain and the anguish which will never go away. ... For each of [the] ... family, it is a loss of someone you loved unreservedly, the value of his life can be reflected in only one thing, that is the love and affection in which you all held him.²⁹

In *R v Mulhall*, Justice King noted that while victim impact statements were 'important documents' for a court, they necessarily involved determining and making 'rulings on the issue of admissibility and relevance on the day of the hearing' which, she acknowledged, 'could only traumatise the victims further'.³⁰ In this case she commented that '[d]espite the inadmissible material ... all of the documents were in fact tendered and I have read them. ... I have put to one side the material that is not admissible and not of any assistance for the process of assisting me in determining the appropriate sentence'.³¹ Yet she was also concerned to signal that the fact that some of the material was inadmissible did not render the statements irrelevant. Addressing the defendant directly, she continued:

There is no doubt that all of the people who have put in a victim impact statement are bereft. You have taken from them someone they loved, someone they cared about deeply and that will never change. Joy Rowley will not return to their lives. Your actions have ensured that.³²

Justice King made similar comments, however, independently of and even in the absence of victim impact statements, particularly in relation to children of the

26 [2012] VSC 388, [36].

27 [2011] VSC 517, [48].

28 [2012] VSC 27, [19].

29 [2012] VSC 591, [17].

30 [2012] VSC 471, [8].

31 Ibid.

32 Ibid [9].

victim. In *R v Bayram* she said: ‘Your wife was a much loved woman, held in great affection by those who knew her. ... You have deprived ... her mother of her daughter, her niece of her aunt, her brother of his sister, and most importantly, your children of their mother’.³³ In *Hopkins*, she noted: ‘it is not necessary to have a victim impact statement to appreciate the consequences and impact this trauma will have upon their lives, particularly as the children all saw their mother in hospital before she died’.³⁴ Similarly in *R v Wilson*:

The result is that the older child now has to take on the role of mother for her younger sister, whilst coming to grips with her own grief at the loss of her much loved mother. You have destroyed many lives through your inexplicable actions. It is not possible for this court to replace the girls’ mother, or the daughter that her mother has lost, or the sister or the friend, or all the irreplaceable roles that Carol Neeve had in her life.³⁵

And in *Mulhall*:

I was most distressed to hear each of the children reliving what they envisaged the murder to be like. That appears to me to be such an [sic] sad thing for them to be doing to themselves and not something, I would think, that their happy mother would want them to do.³⁶

In *Downie*, a case involving a woman who killed an abusive male partner, Justice King commented specifically on her hopes for the future of the six children of the defendant and victim. Justice King noted that they were ‘the ones who will suffer badly from this dreadful offence’ and that while they currently resided with the defendant’s parents, she hoped they had a ‘good, strong interaction’ with the deceased’s family as well. She said: ‘People need to be loved by many, and children in the vulnerable position that these children are, need all the love, affection and care that they can receive’.³⁷

Justice King’s compassion for victims also extended to defendants whom she considered to be victims. As outlined below, in two cases involving Aboriginal women who killed abusive male partners, *R v Kulla Kulla*³⁸ and *R v Hudson*,³⁹ Justice King denounced the institutional and social structures which had failed to protect them from lifetimes of abuse. In addition, in *Kulla Kulla* she criticised one of the victim impact statements for showing a lack of compassion for the defendant and a lack of understanding of the circumstances of the killing.⁴⁰ Addressing the defendant in her sentencing judgment, Justice King said the witness who had prepared the victim impact statement:

was in court [during the plea hearing] and would have heard the circumstances of your life and your history and she may now understand, perhaps, a little more of your situation. That I will not know, as this victim impact statement was presented prior to the plea on your behalf.⁴¹

33 [2011] VSC 10, [12].

34 *R v Hopkins* [2011] VSC 517, [24].

35 [2011] VSC 123, [28].

36 *R v Mulhall* [2012] VSC 471, [11].

37 *R v Downie* [2012] VSC 27, [20].

38 [2010] VSC 60.

39 [2013] VSC 184.

40 *R v Kulla Kulla* [2010] VSC 60, [29]–[30].

41 *Ibid* [30].

B Worth of the Victim's Life

In addition to demonstrating her understanding of the pain and suffering of family members, witnesses and others related or connected to the victim, Justice King's sentencing comments openly acknowledged the incapacity of the legal process to alleviate that pain and suffering. For example, in *Mulhall* she noted that:

the sentence that is going to be imposed on you, James Mulhall, for the offence of murder is not an indication of the worth of their loved one. ... I am obliged as a matter of law to take into account various matters which I will mention and deal with shortly and determine what is the appropriate punishment for the offence to which you have pleaded guilty, not about evaluating the worth of Joy Rowley. Her worth is calculated by those who loved her and her worth is really immeasurable, not capable of being reflected by a sentence of imprisonment on the man who took her life.⁴²

Similar statements about the worth of the victim's life were made in *Wilson*,⁴³ *R v Dutton*⁴⁴ and *Neacsu*,⁴⁵ and were elaborated in *R v Parker*:

The sentence is not and is never intended to be a reflection of the worth of their son, father, partner, brother. I am aware that very few people who have lost someone to a crime of violence will ever walk away from a court satisfied that justice has been done. Like every other judicial officer we would like to ease the pain of these very wounded people but it cannot be done, because I cannot restore Beau Lawson to them, and their pain is the loss of that much-loved person and, you, Scott Parker, are responsible for that. You saw and heard the pain you have inflicted and you will have to live with that knowledge for the rest of your life.⁴⁶

Justice King often combined her comments lamenting the limitations of the sentencing process in reflecting the worth of the victim's life, with words of solace designed to give family members, particularly children, hope for the future and for the ability one day to move on with their lives. For example, in *Wilson*, she said she hoped that 'at some time in the future, when time has helped to heal, that when they think of Carol Neeve, those who do so will remember her with a smile and joy for the life that she lived, rather than the pain of how she died'.⁴⁷ In *Mulhall*, she urged the deceased's children:

to remember her with love and pleasure for how she lived, not just remember the horror of how she died. Having read the victim impact statements it is obvious she was a woman who made them laugh, smile, love and care. To honour her they should, if it is possible, continue to love, smile, laugh, care ... and cry sometimes, but above all remember the happiness that she brought into their lives. To remember only how she died and what she and they will not have in the future, is to ultimately treat the life that she has lived as not being the most important thing about her, and I would urge them all not to do that.⁴⁸

42 *R v Mulhall* [2012] VSC 471, [10].

43 *R v Wilson* [2011] VSC 123, [29].

44 [2010] VSC 107, [21].

45 *R v Neacsu* [2012] VSC 388, [36].

46 [2013] VSC 479, [28].

47 *R v Wilson* [2011] VSC 123, [29].

48 *R v Mulhall* [2012] VSC 471, [11].

She offered similar encouragement to bereaved relatives in *Downie*,⁴⁹ *Pitt*⁵⁰ and *Parker*.⁵¹ Finally, in *R v Marshall*, a case in which the victim survived a horrific attack by the defendant who was convicted of intentionally causing serious injury, Justice King strongly supported the victim in recovering from the attack and regaining her sense of self-worth:

What I wish to say to her during these remarks is that she remains a beautiful woman and most fortunately she remains alive. She is able to see her son grow, develop and help nurture and care for him. Most of the victims in my court do not get that opportunity. I hope that she has at some stage in the future an ability to move on with her life so that she does not remain a victim in any way. It may seem like an impossibility to her at this point but those who inflict horrendous injuries of this nature ought not be allowed to win. She needs to be the winner, not an endless victim and with her son, they need to move on and live their lives, enjoying those lives and enjoying each other. I say to Ms Gagliardi, she is obviously a very strong woman, and she should use her strength to be the victor in this crisis for her and her son.⁵²

IV TAKING DOMESTIC VIOLENCE SERIOUSLY

A second theme which recurred throughout Justice King's sentencing judgments in domestic homicide and domestic violence cases was the view that domestic violence is a matter of the utmost seriousness, and is never to be dismissed as 'just a domestic'. She ensured that the fact of violence and its effects were not minimised, and repeatedly asserted that the courts would not tolerate domestic violence. It was a social evil which must be addressed. In this regard, Justice King's remarks were reminiscent of moralising lectures given to defendants about the need for specific and general deterrence for other kinds of anti-social behaviour such as drink driving, hooliganism and drug- or alcohol-fuelled violence. The difference was that domestic violence had not, in the past, been included within this catalogue of evils. Moreover, while other VSC judges in domestic homicide cases also made comments about the seriousness of domestic violence, not all of them did so, and none did so as consistently or at such length as Justice King.⁵³ Further, she made it clear that domestic violence is a gendered crime, overwhelmingly perpetrated by men against women.

A Broad Understanding of Domestic Abuse

One notable feature of Justice King's sentencing comments on domestic violence was that she understood domestic violence in its broadest, feminist sense⁵⁴ – that is, as a pattern of abusive behaviours, extending well beyond

49 *R v Downie* [2012] VSC 27, [19].

50 *R v Pitt* [2012] VSC 591, [17].

51 *R v Parker* [2013] VSC 479, [28].

52 [2012] VSC 587, [26].

53 For a systematic comparison of Victorian Supreme Court judges' sentencing judgments in domestic homicide cases from 2005–15, see Hunter and Tyson, above n 11.

54 For a comparison between feminist and non-feminist understandings of domestic violence, see Rosemary Hunter, 'Narratives of Domestic Violence' (2006) 28 *Sydney Law Review* 733.

physical violence, designed to exercise power and control over the victim by inducing a state of constant fear, self-blame and diminished autonomy.⁵⁵ For example in *Hopkins*, she noted that the victim did not call the police in response to previous assaults by the defendant because of her fear of him.⁵⁶ In *Pitt*, a case of a woman who killed her partner, she described the defendant's relationship with the victim in her own words taken from a psychologist's report:

He was very controlling. ... Peter and I never separated but I asked him to leave the house on lots of occasions. There was some physical abuse. He'd push and shove me and sometimes I had bruises. He'd intimidate me. He wouldn't leave me alone. He'd just keep asking me where I was and what time did I do this and that. He had very few friends and he'd follow me. He'd phone me and say where are you? Then he'd say he's just around the corner and wanted to drop in and see me. My friends would comment on this and ask how I put up with this.⁵⁷

Two contexts in which Justice King's broad understanding of domestic violence came to the fore in particular, were in situations where evidence of a history of violence was either limited – in the *Azizi* case – or overwhelming – in the cases of Aboriginal women defendants who had killed abusive partners. In *R v Azizi*,⁵⁸ the defendant killed his wife against what appeared to be a background of ongoing abuse, and her plans, in light of that abuse, to leave the marriage. Both were refugees from Afghanistan, who had spent time living in Iran before coming to Australia. The victim, Ms Rahimi, had disclosed the abuse to her sister, and to a social worker and domestic violence support worker via interpreters. Justice King noted that Ms Rahimi had tended to use indirect and generalised language to speak about the abuse, but that did not mean it should be minimised:

Approximately a month before she died, [Ms Rahimi's sister] had conversations with [Ms Rahimi] in which she told her that her life was very bad and all the things that were happening to her, when she was in Iran, were happening again. I accept that statement to be, relating to the fact of domestic violence being inflicted upon her. It is clear, from the manner in which [the sister] gave her evidence, that the language and words used by Afghani women are much kinder and more gentle words, than those commonly used by Australian women. This was consistent with the statements made by [Ms Rahimi] to various workers through interpreters.⁵⁹

She was far from specific as to the violence that had been inflicted upon her, but made it clear that this was a relationship in which she felt abused – physically and emotionally.⁶⁰

Azizi was convicted of murder but appealed against his conviction to the VSCA on the grounds that the hearsay evidence of domestic violence given by Ms Rahimi's sister, the social worker, domestic violence worker and an interpreter should not have been admitted. The Court of Appeal noted that King J had concluded that the 16 pieces of evidence were 'evidence of the relationship

55 Ellen Pence and Michael Paymar, *Education Groups for Men Who Batter: The Duluth Model* (Springer, 1993); *ibid*; Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007).

56 *R v Hopkins* [2011] VSC 517, [12].

57 *R v Pitt* [2012] VSC 591, [21].

58 [2010] VSC 112.

59 *Ibid* [6].

60 *Ibid* [10].

between the deceased and the accused and clearly admissible to provide the context in which these otherwise isolated acts, on Tuesday 20 November 2007, occurred'.⁶¹ Her Honour had also decided that the evidence was capable of demonstrating a tendency in the applicant to act in a particular way over a lengthy period of time which could be seen as 'powerful and strong evidence capable of refuting the version of events given by the accused as to how the deceased met her death'.⁶²

The Court of Appeal proceeded to scrutinise each of the 16 representations separately and in isolation. They considered that Ms Rahimi's alleged statements to her sister were 'vague, non-specific and undated'.⁶³ Rather than understanding this vagueness and lack of specificity as the kind of language Afghani women would use to speak about domestic violence, the Court used it as a basis for dismissing the relevance of the statements. Further, they considered conversations held eight years previously to be of no relevance. In the Court's view, relationship evidence would only be relevant concerning the time immediately prior to the victim's death. Otherwise, it would be too prejudicial because of 'the danger that the jury would speculate that the relationship between the deceased and the applicant had been continuously violent'.⁶⁴ The Court further dismissed the relevance of Ms Rahimi's recent telephone call to her sister on the basis that: 'The deceased appears to have been describing a situation rather than an event. There does not appear to be any spontaneity in the statements attributed to her and there is no indication as to when the events she is said to have described occurred'.⁶⁵ These findings appear to be based on a narrow conception of domestic violence as individual incidents of physical attack rather than as a pattern of abusive and controlling behaviour.⁶⁶

Similarly, the Court of Appeal ruled out the representation made by Ms Rahimi as reported by the interpreter on the basis that it 'was not related to any specific event occurring at any particular time, nor did it contain any detail as to the nature of the abuse to which the deceased was referring'.⁶⁷ The domestic violence worker's evidence that Ms Rahimi had told her about a recent assault and long-term abuse was ruled out on the basis that it was conclusory and non-specific, and was not evidence of what Ms Rahimi had actually said.⁶⁸ This left just one statement made to the social worker, which was deemed to be sufficiently specific about a particular incident of physical violence and sufficiently proximate to the killing, but this had to be excluded because of the Crown's failure to call the (unknown) telephone interpreter through whom the

61 *Azizi v The Queen* (2012) 224 A Crim R 325, 331 [24], quoting *R v Azizi (No 2)* [2010] VSC 658, [25].

62 *Ibid*, quoting *R v Azizi (No 2)* [2010] VSC 658, [29].

63 *Ibid* 334 [38].

64 *Ibid* 334 [39].

65 *Ibid* 336 [46].

66 For a similar approach in which non-physical violence was largely discounted, see *R v Black* [2011] VSC 152. In *Creamer v The Queen* (2012) 221 A Crim R 284, 294, the Court of Appeal did recognise the existence of psychological abuse, but ruled that this form of abuse could not be given much weight in explaining the defendant's actions or reducing her moral culpability.

67 *Azizi v The Queen* (2012) 224 A Crim R 325, 340 [61].

68 *Ibid* 342 [72]-[73].

conversation had been conducted to testify that she had interpreted the conversation accurately.⁶⁹

In sum, the Court of Appeal concluded there was no admissible evidence to support the contention that the defendant had a tendency to be violent towards his wife.⁷⁰ As a result, the appeal was upheld and a new trial ordered. On the retrial, Azizi was again convicted of murder, but when it came to sentencing, the trial judge noted that he was imposing a sentence

on the basis that although [Ms Rahimi] and you had a troubled relationship, in which [Ms Rahimi] was wishing to divorce you, there is no admissible evidence that you were physically or otherwise abusive or violent towards her, before the incident which caused her death.⁷¹

This basis for sentencing clearly failed to account for the lived reality of the relationship.

Justice King's concern fully to understand women's lived realities was especially evident in the two cases in which she sentenced Aboriginal women for the manslaughter of their abusive partners. In *Kulla Kulla*, she movingly summed up the defendant's appalling history of being the victim of abuse, in a way that was both empathetic and determinedly non-judgemental:

I do not intend to go through your life in any further detail. I have read the files. They are, as I have indicated, frightening. Your life has been a tragedy, nothing less than a tragedy. In relation to various men in your life, you seem to have been a consistent victim of domestic abuse. You have been stabbed in the chest. You have been stabbed elsewhere, with a screwdriver. You have been assaulted with a hammer. You have been abducted and beaten with a stock whip, on a very regular basis, by the man who abducted you. You had a star picket crashed into your hand, and every time you escaped from this man, he tracked you down, and took you back. You have scars all over your body from the various injuries inflicted upon you, by men, over these years.⁷²

Similarly, in *Hudson*, Justice King demonstrated a clear grasp of the psychological effects of domestic violence, including self-blame, fear, feelings of worthlessness and helplessness, which explain women's 'failure' to leave violent relationships, and also of the social circumstances, including the abuser's determination to maintain control and the ineffectiveness of community support, which trap women in such relationships. For example, in relation to one episode of severe violence: 'You were so afraid of Edward Heron that when he told you that you could not leave or seek medical treatment for what he had done to you, you just stayed there on the floor, in your house, too scared to move all night'.⁷³ Following that episode, Heron was convicted of grievous bodily harm and imprisoned for five years. But when he was released, 'he tracked you down, found where you were living and you returned to him instantly, out of a combination of love, fear, lack of choices and hopelessness'.⁷⁴

69 Ibid 342 [74], 344 [84], relying on the High Court authority of *Gaio v The Queen* (106) 104 CLR 419.

70 Ibid 348 [102].

71 *DPP v Azizi* [2013] VSC 16, [54].

72 *R v Kulla Kulla* [2010] VSC 60, [54].

73 *R v Hudson* [2013] VSC 184, [20].

74 Ibid [22].

You came to accept that you deserved to be punished by Edward Heron, as well as the other men in your life. You accepted punishment was appropriate, because you made them angry, or upset them. In relation to Mr Heron, you believed to a large degree that he protected you, and this was just one of the prices you paid for that protection.⁷⁵

It would appear from all of this material that you were subject to constant violence by this man and everyone appeared powerless to prevent it including yourself. Your life clearly has been one where you have lacked the power to do much to make it better or worth living. Your life is a tragedy in the true sense ...⁷⁶

I do accept that you have a post-traumatic stress disorder, from the life and treatment that you have received over the years in terms of physical, sexual and emotional abuse. You have been, as Miss Lechner, clinical psychologist, says, violated, belittled and isolated from any form of support by the deceased.⁷⁷

You are, from what I can see, a very talented artist and it is to be hoped that with time that will develop and you will ultimately be able to be more self-supporting, increase your self-esteem, reduce your dependency upon violent, aggressive, exploitive men ...⁷⁸

In both of these cases, despite her understanding of the defendants' victimisation, Justice King imposed relatively severe prison sentences of six years (three years non-parole).⁷⁹ However, these sentences appeared to reflect the belief that prison offered these women a place of safety and opportunities to regain their health and engage in personal development not available in the outside world.⁸⁰

The only other VSC judge to demonstrate an equivalent understanding of the power and control dynamics of domestic violence was Justice Elizabeth Hollingworth in *DPP v Williams*.⁸¹ In that case, the defendant was found not guilty of murder but guilty of the defensive homicide of her abusive partner. Justice Hollingworth explained:

There is no evidence that you or the children had ever complained to anybody about family violence, before Mr Kally 'disappeared'. But the lack of complaint is not uncommon in cases of family violence. Family violence, by its very nature, often occurs behind closed doors. Outsiders, even close friends and family, may not be aware what is going on within a relationship. Family violence is not limited to physical abuse; it also includes sexual abuse and various forms of psychological abuse, including intimidation, harassment, damage to property, and threats of abuse. A number of acts that form a pattern of behaviour may amount to abuse, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.⁸²

She went on to detail instances of the deceased's treatment of the defendant and concluded: 'I am satisfied that his behaviour towards you, over many years, was abusive, belittling and controlling, and involved both physical and

75 Ibid [27].

76 Ibid [30].

77 Ibid [35].

78 Ibid [36].

79 *R v Kulla Kulla* [2010] VSC 60, [70]; *R v Hudson* [2013] VSC 184, [39].

80 *R v Kulla Kulla* [2010] VSC 60, [66]; *R v Hudson* [2013] VSC 184, [34]–[36].

81 [2014] VSC 304.

82 Ibid [20].

psychological abuse'.⁸³ She further noted that while the final act which triggers the killing in such cases may be relatively minor, that act must not be seen in isolation, but the defendant's behaviour must be understood as a response to her long history of being attacked.⁸⁴ Yet, Justice Hollingworth acknowledged that this analysis was based on having heard evidence from Professor Patricia Easta, an academic expert on family violence.⁸⁵ While the introduction and positive reception of such evidence is to be welcomed, Justice King's knowledge and understanding of domestic violence appears not to have been reliant on the contingency of expert evidence being provided in any case.

B Condemnation of Violent Behaviour

As well as understanding the dynamics of domestic violence and its effects, Justice King did not allow violent behaviour to go unnoticed and uncommented upon. While other judges in domestic homicide cases tended simply to recount the occurrence of domestic violence fairly briefly and without editorialising, Justice King, as indicated above in *Azizi*, routinely documented and condemned the violence to which the defendant had subjected his partner prior to her death. In *Mulhall*, she managed to highlight the defendant's previous violence towards the victim while at the same time reminding herself that it was not the behaviour for which he was being sentenced:

I have to ensure that in relation to the matters referred to by your daughter, Tara Mulhall, that I do not punish you for what she states in her victim impact statement relating to conduct on other occasions and I will ensure that I do that. The import of her victim impact statement is such that it reinforces ... the violence that you demonstrated towards Joy Rowley in the period prior to her death, and it would not be permissible to use the statement for those purposes.⁸⁶

The previous assault upon Joy Rowley, whilst you are not to be punished for it, puts in context the necessity for specific deterrence in your case. ... the law will do all it can to protect women from from violent domestic partners.⁸⁷

In other cases she commented more generally on the unacceptability of domestic violence and the need for general deterrence. For example in *R v Misalis*:

the sad truth is that you are alive and in this court, and she is dead. She is another victim of domestic violence, whatever the underlying reason for that violence is. The courts and our community have said that women in particular must be protected from their partners. We have white ribbon days, we have marches in our streets in support of women and their right to not be abused or have their lives taken by their partners, but still it continues.⁸⁸

She made similar comments in domestic violence cases in which the defendant was convicted of intentionally causing serious injury rather than homicide. For example in *DPP v Lewis* she said: 'Domestic violence of this level

83 Ibid [26].

84 Ibid [32].

85 Ibid [33].

86 *R v Mulhall* [2012] VSC 471, [7].

87 Ibid [33].

88 [2014] VSC 617, [72].

or any level is unacceptable and calls for significant punishment to be imposed'.⁸⁹ And in *Marshall* she condemned the defendant's 'wanton disregard of the intervention orders' made against him,⁹⁰ and observed:

Our community has expressed through the Parliament and the legislation enacted that it will not tolerate behaviour of this nature. The fact that you were in a domestic relationship with Ms Gagliardi at one stage does not, in any way, reduce your culpability for the infliction of such terrible physical and psychological injuries upon her, not to mention her son. A strong message must be sent that the courts will not accept behaviour of this kind.⁹¹

In *R v Alioglu*⁹² the defendant had brutally attacked his partner and her daughter, against a background of his previous violence, threats and harassment of his partner, breach of an intervention order, and violence towards previous partners, including the murder of his wife, all of which were described in detail in the sentencing judgment. Justice King concluded:

Your history, together with your behaviour on this occasion, demonstrates an attitude towards women that is unacceptable in our society. You have attacked three of your partners over your lifetime. One you have killed in a most despicable manner ... You stabbed Ms Chodir four times, in the presence of your two-and-a-half year old daughter, and in the presence of Daniela Krasser a nine year old child. Your behaviour towards her mother by choking, punching and stabbing her, has caused this child to have to react in such a way that she stabbed you; a matter that will undoubtedly haunt her for a long time to come. When she did that to save the life of her mother, you grabbed her hand, held her arm and cut from her elbow to her wrist, a vindictive act. ... What you did to this child is unspeakable. What you did to her mother was evil.⁹³

Nevertheless, Justice King did not take a strictly formal equality approach in her condemnation of domestic violence. It was men's violence against women that was of greatest concern to her, in line with its predominance as a social phenomenon and in the cases coming before her. In two cases of non-Aboriginal women who killed or incited the killing of abusive partners, she minimised the defendant's violence in circumstances in which other judges might have been more condemnatory, or might have characterised the relationships as mutually violent.⁹⁴ In *Downie*, who pleaded guilty to manslaughter, she merely stated in terms of the history of the relationship: 'It would appear that, over the last few years post the divorce, each of you have taken out various intervention orders against each other and could each be described as behaving badly towards the other'.⁹⁵ And in *R v Koljatic-Bestel*, in which the defendant pleaded guilty to two counts of incitement to cause serious injury and one count of incitement to murder, she described the circumstances as:

89 [2009] VSC 334, [12].

90 *R v Marshall* [2012] VSC 587, [31].

91 *Ibid* [21].

92 [2013] VSC 179.

93 *Ibid* [29].

94 Cf Beale J in *R v Johnston* [2015] VSC 16, who noted that the female defendant had a history of being both a victim and perpetrator of domestic violence, but focused on her role as a perpetrator in highlighting the need for general deterrence in her sentence: at [48], [58].

95 *R v Downie* [2012] VSC 27, [4].

you had separated from your husband, due to allegations of domestic violence towards yourself and your children. There was unfortunately a significant and bitter custody dispute relating to the two children that was on going at the time of this offending. Intervention orders were sought, granted and broken and it would appear it was a most unpleasant time.⁹⁶

In neither case did she categorise the defendant as a violent person, and, although she referred to the need for the sentence in *Downie* to incorporate general deterrence, this was expressed to be deterrence of vigilante killings rather than of domestic violence.⁹⁷

In relation to Aboriginal women who killed abusive partners, as indicated above, it was the men who perpetrated violence against them whom Justice King condemned, and she also condemned the general community for failing to protect Aboriginal women and children and failing to prevent violence in Indigenous communities.⁹⁸ In *Kulla Kulla*, she detailed the total failure of the child protection system to care for or protect the defendant as a child from sexual assaults, violence, injuries or chronic ill-health, and concluded:

As a country and a society, we should be thoroughly ashamed of ourselves, that you have been neglected and abused in the manner that you have been, it is exceedingly distressing that in this country, where we pride ourselves on quality [sic], tolerance and fairness, you could be so neglected, so abused and yet we, as a society, did nothing to stop it. When you were living with a 40 year old man in a park at the age of 12, we as a society did not stop that, we did not come in and protect you, which clearly we should have done. As a community, we should hang our heads in shame. This is not about your Aboriginality, this is about your childhood, which was taken from you, while we, as a society, did not make any of the difficult decisions that may have prevented this terrible harm, that was done to you.⁹⁹

And in *Hudson*:

There are so many appalling stories within the indigenous community in Australia and it is hard to know where to start to do something about it. What is not to be doubted is that something must be done. We cannot let this continue as a society. We must stop this appalling violence being inflicted one upon the other by members of the indigenous community. Whilst there have been so many attempts to alleviate these problems, we have had, as a community, such limited success. ... as a community it is horrific that this goes on within our caring, egalitarian society. You have had 46 years of abuse, sexual, physical and emotional and we, the rest of the community, appear to have been powerless to stop it.¹⁰⁰

96 [2011] VSC 124, [5].

97 *R v Downie* [2012] VSC 27, [38].

98 Cf the judgments of Curtain J in *R v Blackwell* [2013] VSC 499 and Hollingworth J in *DPP v Kerr* [2014] VSC 374. These cases are discussed in Danielle Tyson et al, 'The Effects of the 2005 Reforms on Legal Responses to Women Who Kill Intimate Partners' in Kate Fitz-Gibbon and Arie Freiberg (eds), *Homicide Law Reform in Victoria: Retrospect and Prospects* (Federation Press, 2015) 76. See also Danielle Tyson, Deborah Kirkwood and Mandy McKenzie, 'Family Violence in Domestic Homicides: A Case Study of Women Who Killed Intimate Partners Post-Legislative Reform in Victoria, Australia' (2017) 23 *Violence Against Women* 559.

99 *R v Kulla Kulla* [2010] VSC 60, [51].

100 *R v Hudson* [2013] VSC 184, [31]–[32].

C Taking Domestic Murders Seriously

The issue of taking domestic violence seriously arises in particularly acute form when it comes to domestic homicide. In the past, many of the cases which successfully attracted the defence of provocation were those in which a man killed his female intimate partner, with the result that ‘domestic’ killings often ended up as convictions for manslaughter with a correspondingly lower sentence.¹⁰¹ The fact that the defence of provocation allowed violent men to blame their victims and ‘get away with murder’ attracted trenchant feminist criticism,¹⁰² which in turn ultimately led to the abolition of the defence of provocation in Victoria.¹⁰³ This still left open the possibility that the domestic setting and alleged provocative behaviour by the victim might be pleaded and taken into account as mitigating factors in sentencing.¹⁰⁴ In *Azizi*, however, Justice King made a strong statement about the seriousness of domestic murders and the equal rights of domestic partners to be protected by the law:

Every woman and man in this country is entitled to the protection of the law. Marriage does not sanction or give permission to any husband to treat his wife in a manner that is inconsistent with her rights as a fellow human being. No man has the right to order or direct a woman to behave in a certain way, merely because he is her husband. And of course the same applies in reverse. Both women and men, have a right to be protected within a marriage. Matters such as this used to be referred to many years ago as a domestic murders [sic]. It makes it no less significant or painful in terms of consequences, than any other type of murder. The punishment for a so-called domestic murder is not one that is reduced because of that fact. In the pantheon of murders, a domestic murder does not occupy a lowly position because of its nature. The protection of persons within a marriage is, and should be, a high and proper priority of the criminal justice system. Accordingly, it must be recognised that the courts take a most serious view of the protection of persons in an abusive and/or violent domestic situation.¹⁰⁵

It is notable that *Azizi* was only Justice King’s second post-provocation domestic murder case, and the first in which the defendant’s controlling violence was in issue. This specific passage was cited with approval by the VSCA in the leading case on post-provocation sentencing, *Felicite v The Queen*.¹⁰⁶ And following the Court of Appeal, it was also cited by Kaye J in the sentencing of *Azizi* following his re-trial.¹⁰⁷ This then gave Justice King further leverage in two sentencing judgments given close together in 2012. In *Neacsu* she said: ‘The courts have consistently stated in relation to the crime of murder that killings of a

101 Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (Routledge, 2013) 30–3.

102 See, eg, Adrian Howe, ‘Provoking Comment: The Question of Gender Bias in the Provocation Defence – A Victorian Case Study’ in Norma Grieve and Ailsa Burns (eds), *Australian Women: Contemporary Feminist Thought* (Oxford University Press, 1994) 225; *ibid*; Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective* (Palgrave Macmillan, 2014).

103 Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) 55–8; *Crimes (Homicide) Act 2005* (Vic) s 3.

104 Victorian Law Reform Commission, *ibid* n 103, 4–5; Felicity Stewart and Arie Freiberg, ‘Provocation in Sentencing’ (Research Report, 2nd ed, Sentencing Advisory Council, July 2009) 4 [1.1.9], 14 [4.1.2].

105 *R v Azizi* [2010] VSC 112, [24].

106 (2011) 37 VR 329, 332 [16].

107 *DPP v Azizi* [2013] VSC 16, [35].

domestic nature are no less serious than killings involving unrelated or stranger killings'.¹⁰⁸ And in *Mulhall* she repeated and embroidered the point:

The courts have consistently stated in relation to the crime of murder that killings of a domestic nature are no less serious than killings involving unrelated or stranger killings. Accordingly, whilst women are still dying at the hands of their domestic partners, the issue of general deterrence, in my view, remains very important.¹⁰⁹

How, then, did Justice King's assertion in the passage from *Azizi* that 'the same applies in reverse'¹¹⁰ play out in cases in which women killed male intimate partners? In one of the four such cases she dealt with, *Pitt*, she made a similar statement:

The need for general deterrence ... is of importance in your case ... domestic relationships and violence within them, are matters of significant community concern. No one is entitled to kill their partner, because of unhappiness or an anger [sic]. Domestic violence goes both ways and the punishment must be equal. Men kill women in domestic settings, and it is no less grave a crime, when women kill men in the same circumstances.¹¹¹

In the other three cases, however, there was no mention of gender symmetry. Instead, as discussed above, Justice King tended to minimise women's violence and to characterise Aboriginal women defendants as victims rather than perpetrators. The difference between the *Pitt* case and these other cases appears to be that the facts of *Pitt* accorded most closely with the 'typical' domestic homicide scenario in which the male defendant killed his female partner after becoming enraged by something she had allegedly done or said. Justice King was generally unsympathetic to male rage – this formed another significant theme of her sentencing judgments.

V MEN'S ANGER AND RAGE

The former defence of provocation required the victim to have said or done something provocative which caused the defendant to lose control and kill her or him, and which was capable of causing an ordinary person to lose control and form an intention to kill or cause the victim grievous bodily harm.¹¹² In a number of domestic homicide and domestic violence cases after the abolition of provocation, defendants claimed to have lost control in response to provocation by the victim as a factor which should mitigate their sentence. VSC judges generally did not accept these kinds of claims, finding either that the defendant had not in fact lost control, or that the victim had done nothing to provoke her death.¹¹³ Among them, Justice King took a notably dim view of such claims, consistently distinguishing provoked loss of control from unprovoked anger and

108 *R v Neacsu* [2012] VSC 388, [38].

109 *R v Mulhall* [2012] VSC 471, [33].

110 *R v Azizi* [2010] VSC 112, [24].

111 *R v Pitt* [2012] VSC 591, [27].

112 Victorian Law Reform Commission, above n 103, 23.

113 Hunter and Tyson, above n 11, 17–18.

rage, and calling on men to take responsibility for controlling their anger. For example in *Hopkins*:

I am satisfied that your drug consumption during the week had some impact upon your behaviour, but not to such a level that you were not in control of your own thoughts and actions. I am satisfied that you were not psychotic either on that day of the murder or for the whole of the previous week, be that a drug induced psychosis or otherwise, but I do accept that you were in a drug fuelled rage. ... It is your anger erupting into rage that has allowed you to commit this offence ... Rage – drug fuelled or otherwise – is not an excuse, it is no more than part of an explanation for your behaviour.¹¹⁴

And in *Mulhall*:

That you had previously harmed her and assaulted her in a significant manner and had been charged with that assault indicates that you should have been alert and aware of your responsibility to ensure that you did not place yourself in a state or situation where you may have caused her harm, such as consuming the disinhibiting substances alcohol and cannabis, or losing your temper. ... Women are entitled to have domestic relationships with people that do not result in their death simply because their partner loses their temper or has too much to drink or a combination of cannabis and alcohol reduces their inhibitions. It is inexcusable ...¹¹⁵

Justice King made similar comments in non-homicide domestic violence cases. For example in *Marshall*:

A strong message must be sent that the courts will not accept behaviour of this kind and that people in domestic situations are entitled to feel safe from the rage of their ex-partners, because clearly this is rage. Your comments as you punched and hit this woman with a sledgehammer, that she had ruined your life can only be expressions of rage fury [sic] and anger.¹¹⁶

And in *R v Singh*:

The community, rightly, abhors violence of this level occurring as a result of someone's anger, our society is constructed on the basis of people maintaining self control and respecting the laws and mores that govern our society. A loss of temper, for whatever reason cannot excuse or mitigate in any way the seriousness of offending of this nature, particularly when there is no real explanation for the loss of temper or the display of anger.¹¹⁷

In *Parker*, the defendant, driven by anger and rage at his ex-girlfriend, had killed a man who tried to intervene to pull him away from her. Justice King did not accept that the defendant's dysfunctional upbringing was to blame:

at some stage all of us are responsible for who we are and our own actions. You are no longer a child, you are an adult of 26, and you must take responsibility for your own actions and learn to control your anger and your rage, something you were unable to do at the time of this offending. You have been unable to control that anger and rage in the past as is demonstrated by your prior criminal history particularly as it relates to assaults and criminal damage.¹¹⁸

114 *R v Hopkins* [2011] VSC 517, [39].

115 *R v Mulhall* [2012] VSC 471, [32]–[33].

116 *R v Marshall* [2012] VSC 587, [21].

117 [2013] VSC 47, [23].

118 *R v Parker* [2013] VSC 479, [45].

In *Azizi*, as well as accepting evidence of the defendant's tendency to be violent towards his wife, Justice King noted evidence of his tendency to be angered by women standing up to him:

her death clearly resulted because of your belief that, you were entitled to dominate and dictate to your wife, what she could and could not do. Her growing resistance to your dominance must well have angered you, an anger which I noted flashed in this court room when you were giving evidence, and I interrupted you to allow the interpreter to catch up with the translation. Your reaction to my stopping you, was very evident to any observer, and involved you raising your voice, and telling me to be quiet.¹¹⁹

In *Bayram*, Justice King characterised the case as another in which a man had killed in anger a woman who was standing up to him, in this case his wife who wanted a half share of the marital assets following their divorce:

Your counsel informed the court that the argument was over your wife's desire that the house be sold and your insistence that the house not be sold. It is quite clear that that is the basis of the argument that resulted in your killing your wife. ... I therefore am prepared to act on the basis that that was the reason why your wife was killed, not that it was planned or premeditated but that you severely overreacted to her desire for a fair and equitable sharing of the joint assets.¹²⁰

On appeal, however, the VSCA accepted as 'the true facts' that the defendant did not wish to sell the house because he wanted to keep it as a home for his children.¹²¹ Justice King had therefore mischaracterised the defendant's motivation for killing his wife, which led her to overstate the seriousness of the offence,¹²² and the defendant's appeal against sentence was upheld.

Subsequently, in *Neacsu*, the defendant's counsel attempted to rely on the VSCA's decision in *Bayram* to argue that the defendant's killing of his estranged wife's new partner was similarly provoked, but Justice King sharply distinguished the two cases:

you had no right to kill the man with whom she had formed a relationship because of your anger as [sic] being, as it was described, 'cuckolded'. Your relationship had been well and truly over and our society has moved forward and does not excuse any person on the basis of the crime being a 'crime of passion'. Provocation has been abolished in this State, and rightly so. ... Here you have chosen to pursue the issue of whom your wife was living with, and decided to pursue it whilst armed with a knife ... Accordingly, whilst this may be a crime of anger or rage, I do not accept that it was a crime of passion in the ordinary mitigatory sense.¹²³

As with domestic violence, for Justice King, the problem of violence resulting from a failure to control anger was a gendered problem – a problem of men rather than of women. In the *Hudson* case, for example, an eruption of anger on the defendant's part was far less noteworthy than her history of victimisation:

This crime would appear to be one motivated by alcohol and anger on first view of it, but what must be understood in dealing with this matter is the long history both

119 *R v Azizi* [2010] VSC 112, [44].

120 *R v Bayram* [2011] VSC 10, [10].

121 *Bayram v The Queen* [2012] VSCA 6, [16].

122 *Ibid* [27].

123 *R v Neacsu* [2012] VSC 388, [43].

relating to your personal history, and the history of the relationship between yourself and Edward Heron.¹²⁴

And in *Pitt*, despite her remarks noted above about domestic violence being equally serious whether perpetrated by men or women, Justice King directed a more general message about anger particularly to men:

People do not seem to understand how devastating a knife can be. You had no intention to kill Peter Williams and you wouldn't have killed him, if you hadn't picked up a knife. It appears to be the weapon of choice, for young men and often those involved in domestic disputes, simply because in those cases, its [sic] there and available. That your momentary anger has allowed this to engulf you all, is so sad for every person in this courtroom ...¹²⁵

This point was echoed in the later case of *Parker*:

All of the men, particularly the young men of our society ought to come and sit here on this bench and look at the sad eyes that populate this court, the sad eyes of children, parents, partners, and friends who have lost someone they love and treasure because someone lost their temper, or got a bit angry or was showing off.¹²⁶

In these comments, Justice King appears to be reflecting her experience of the many non-domestic homicide cases over which she presided (see Table 1 above), in which murders and manslaughters were often precipitated by men's failure to curb their anger. This may have contributed to her view of anger and rage as masculine characteristics which needed to be controlled, while women's anger was seen as less typical and less socially problematic.

VI CHALLENGING THE DEFENDANT

A further consistent theme in Justice King's sentencing judgments was her forthright challenges to defendants' attempts to lead self-serving evidence in mitigation of sentence, such as blaming the deceased or drugs or alcohol for what had occurred, claiming to be remorseful, and asserting his love for the deceased and consequent devastation at her loss. She subjected such claims to sceptical scrutiny and often rejected them.

A Questioning the Defendant's Credibility

A particular feature of Justice King's sentencing judgments in this respect was her preparedness to question the truth of the evidence led by the defendant's counsel on the plea and in doing so, to challenge the defendant's version of events. For example in *Neacsu*, in which the defendant killed his wife's new partner, she observed that 'the evidence of a witness who saw you and the deceased man fighting ... does not, in my view, support that the deceased man was the initial aggressor in respect of this matter'.¹²⁷ On her reading of the evidence, it was 'clear' that:

124 *R v Hudson* [2013] VSC 184, [12].

125 *R v Pitt* [2012] VSC 591, [26].

126 *R v Parker* [2013] VSC 479, [51].

127 *R v Neacsu* [2012] VSC 388, [15].

when he answered the door, he was unarmed. The only evidence is that you were at the door with a knife, that you had forced your estranged wife to take you there, that as the deceased fled from you down the stairs, you chased him and yelled out 'he stole my wife, he stole my wife'.¹²⁸

She also took issue with the expert evidence in the case which she found to be 'inconsistent with most of the material ... and also the excuse provided to the court'.¹²⁹ Rejecting the defendant's stated reason for taking a knife with him to the scene, she said she did not find his explanation to be plausible¹³⁰ and added that in her view 'what occurred on this night was a decision relating to confirming your suspicions and confronting the deceased, if your suspicions proved correct'.¹³¹ Ultimately, Justice King concluded that she was 'not satisfied, on the balance of probabilities, that the deceased man was in any way the initial aggressor, as a result of the totality of the evidence'.¹³²

Justice King made similar comments rejecting the defendant's claim that the deceased was the aggressor in *Parker*,¹³³ and *Azizi*.¹³⁴ In *Parker* she expressed concern about the defendant's lack of insight into his offending and his continuing attempts 'to justify your actions by talking about pre-emptive strikes, and how you felt under threat. You need to accept responsibility not only for what you did on this night, but why you did it'.¹³⁵ In *Azizi*, commenting on the defendant's complaint to his sister-in-law that his wife 'was becoming too Australian, that is, she was not a docile and good wife in the terms that you expected her to be', she noted that those words were said 'only a matter of days prior to her death' and while she could not speculate 'on what precisely precipitated the argument', she was satisfied that 'your wife did not in any way attack you first, or attack the children, or do anything to cause you to lose control and attack her in the manner in which you have'.¹³⁶ She also took particular issue with the request by the defendant's counsel that she should take into account the loss of his wife as a mitigating factor:

your counsel indicated that I should take into account the loss of your wife, or, as he put it, the loss of your best friend. That I certainly shall not do. You gave evidence on oath about the fact that this was a very happy marriage, that Marzieh Rahimi was much loved by you and was your best friend and treated in a loving and caring way, when the evidence demonstrates, quite conclusively, that your wife in fact wanted a divorce, she wanted to separate from you, that there had been threats and some sporadic violence within the marriage. You can not [sic] kill someone and then claim their loss as a factor that mitigates your penalty.¹³⁷

In *Wilson*, Justice King said that after hearing the defendant's evidence she did not accept it 'as being truthful'.¹³⁸ Contrary to his claim to have attempted

128 Ibid.

129 Ibid [18].

130 Ibid [11].

131 Ibid [12].

132 Ibid [19].

133 *R v Parker* [2013] VSC 479, [31].

134 *R v Azizi* [2010] VSC 112, [22].

135 Ibid [47].

136 *R v Azizi* [2010] VSC 112, [22].

137 Ibid [43].

138 *R v Wilson* [2011] VSC 123, [20].

suicide after realising that his partner was dead, she did ‘not believe that there was any real or serious attempt at self harm’ and she did not find the defendant’s behaviour, ‘in the presence of the neighbours or the police or ambulance officers’, to be genuine, noting that it was inconsistent with phone calls he had made to his friends and a text message he had sent to his sister.¹³⁹

B Questioning the Defendant’s Mental State

In *Mulhall*, referring to what she described as ‘a semi-rambling record of interview’, Justice King noted how the defendant had ‘protested constantly about how much [he] loved’ the deceased but observed that his ‘behaviour was not in any way consistent with that professed love’.¹⁴⁰ She noted that after the killing, the defendant had left the deceased’s body in the house and gone out on a spree with her money:

You have treated her body in a cavalier and indifferent manner. You have stolen her car, her savings and spent them on gambling and drinking. Whilst it may have been initially accepted that you were in some form of alcoholic fug or shock, that cannot have persisted for the days that followed.¹⁴¹

Your counsel submitted that I ought not be satisfied that this was an aggravating feature of the crime and for that submission relied upon the contents of your record of interview as demonstrating the confused behaviour of a man shocked by his own actions. As indicated, I do not accept that it can be viewed in just that light. The behaviour is purposive. It is not the behaviour that one would expect to be consistent with shock or horror at your actions but rather doing things that you wished to do, such as betting or gambling at the casino.¹⁴²

Justice King was also prepared to challenge psychiatric evidence which she found implausible. For example in *Misalis*, expert evidence was given by a forensic psychologist:

and I found his evidence very troubling. ... In his report he described you as having a ‘moderate depressive episode’, but during his evidence before me referred to you having ‘severe depression’ ... When specific questions were asked as to the basis upon which he came to certain conclusions, I found the explanations less than satisfying.¹⁴³

She noted that the psychologist’s evidence was ‘totally inconsistent’ with that of the defendant’s GP who had treated him for many years,¹⁴⁴ and she ultimately concluded that the defendant had a clear understanding of the wrongness – indeed illegality – of killing his wife:

What I also note and consider to be of some significance is that five minutes prior to ringing your son you rang your solicitor. There can be no reason for you to ring your solicitor after murdering your wife, except that you have an appreciation, a clear appreciation, that what you had done was to commit a serious crime. ... Your first thought was not to ring your son, it was to ring your lawyer.¹⁴⁵

139 Ibid.

140 *R v Mulhall* [2012] VSC 471, [16].

141 Ibid [22].

142 Ibid [23].

143 *R v Misalis* [2014] VSC 617, [42].

144 Ibid [44].

145 Ibid [59].

C Questioning the Defendant's Remorse

Justice King also subjected defendants' claims to be remorseful to critical scrutiny before allowing remorse to operate as a mitigating factor. In *Hopkins*, for example, she accepted the defendant's plea of guilty, and that it was entered at an early stage, but said she did not find the plea to be 'any indication of remorse'.¹⁴⁶ Among other things, she observed the defendant's inability or refusal to refer to his victim as 'her, the person, Nicole Millar'.¹⁴⁷

You certainly acknowledge through your counsel and in your discussions with the professionals the terrible thing that you have done, although denying any memory of what occurred. But at no time do you really express great sorrow or sympathy or pain for Nicole Millar. There is reference to the pain and suffering caused to her children, but Ms Millar is rarely mentioned in a personal capacity. So I accept that you regret your actions, but I have formed the view that your true remorse and sympathy is directed at yourself and the situation in which you find yourself, rather than what you have done to Nicole Millar.¹⁴⁸

In *Azizi*¹⁴⁹ and *Marshall*,¹⁵⁰ Justice King took specific issue with requests by the defendant's counsel that she take into account the defendant's attempts to apologise to the family of the deceased as indicative of remorse. In *Marshall*, for example, she subjected the defendant's apology to a similarly close textual analysis and found it wanting:

It is noteworthy that you apologise and say sorry to all categories of people including Carla's family, your family, emergency services, neighbours, before you actually say sorry to Ms Gagliardi. You again in that letter also focus on your own situation including comments relating to finding you have self worth and gaining confidence since your time in custody.¹⁵¹

And in *Alioglu* she said of the defendant's alleged remorse:

your remorse does seem to centre very much upon your feelings of self-pity and that you, to a large degree, consider yourself the victim in this particular case. I do not find you remorseful and I do not find that you have any reasonable prospects of rehabilitation. In fact I think your prospects of rehabilitation are exceedingly poor.¹⁵²

VII WOMEN'S RIGHTS TO EQUALITY, AUTONOMY AND SAFETY

When making its recommendation to abolish the defence of provocation, the Victorian Law Reform Commission was guided by principles of substantive equality.¹⁵³ Of particular concern was the way provocation operated

146 *R v Hopkins* [2011] VSC 517, [32].

147 *Ibid* [51].

148 *Ibid*.

149 *R v Azizi* [2010] VSC 112, [42], [45], [47].

150 *R v Marshall* [2012] VSC 587, [30].

151 *Ibid*.

152 *R v Alioglu* [2013] VSC 179, [42].

153 Victorian Law Reform Commission, *Defences to Homicide*, Issues Paper (2002) 66; Victorian Law Reform Commission, *Defences to Homicide*, Options Paper (2003) xvii–xviii. See also Morgan, above n 10, 37–43.

as a legitimate excuse for a person to kill another person, usually a woman, who was exercising her ‘personal rights, for instance to leave a relationship or to start a new relationship with another person’.¹⁵⁴ It followed that in post-provocation sentencing in line with the spirit of the reforms, when the defendant used lethal violence in response to the exercise by the deceased of her personal rights (for example, her rights to autonomy and self-determination in relationships, friendships, work or education) that should not be regarded as a factor reducing the defendant’s moral culpability. In our analysis of post-provocation sentencing judgments, we found that although the VSCA’s jurisprudence failed fully to embrace the spirit of the reforms,¹⁵⁵ the practice of trial judges generally did so.¹⁵⁶ Justice King went much further than her judicial colleagues, however, in making explicit statements affirming women’s rights to autonomy and equality, in line with the reforms.¹⁵⁷

In *Azizi*, for example, Justice King found that the defendant had treated his wife ‘as a person lacking in individual rights, and a person that must do what she was told to do by you’.¹⁵⁸ She continued:

It is clear that you were unable to accept that your wife had rights, which rights included the ability to leave you, if that was what she desired, to seek an intervention order against you, if that was what she required and to be supported to live separately and apart, if that was what she required.¹⁵⁹

She delivered a similar lecture to the defendant in *Neacsu*:

Our community, parliament and the courts have repeatedly said that women are not chattels, they are not something that is owned by a man, any man. Your wife was entitled to leave you. You may not have liked that, but she had the right to do so. She did not have to tell you where she was going, or if she was pursuing a relationship with another man. You had no right to know this, and you had no right to control what she did ...¹⁶⁰

Further, in several cases Justice King affirmed women’s right to feel safe in their own homes. For example in *Misalis* she stated of the defendant’s wife:

She should have been safe. She probably felt safe. Our community and our courts have consistently said, and more particularly in recent times, that women will be protected by the courts. That they have the right to feel safe from serious injury or death being caused by their partners.¹⁶¹

Justice King returned to this theme in *Marshall*, noting of the defendant’s attacks on his partner, ‘[s]he was, on both occasions, in her home and entitled to feel safe and secure’.¹⁶²

By contrast, other VSC judges dealing with similar factual scenarios either made no comment on women’s entitlement to end relationships and to be safe in their own homes without fear of violence, or made only brief, abstract or

154 Victorian Law Reform Commission, above n 103, 56.

155 Hunter and Tyson, above n 11, 12.

156 Ibid 13–21.

157 Ibid 21–4.

158 *R v Azizi* [2010] VSC 112, [18].

159 Ibid [21].

160 *R v Neacsu* [2012] VSC 388, [43].

161 *R v Misalis* [2014] VSC 617, [73].

162 *R v Marshall* [2012] VSC 587, [20].

conventional comments on men's jealousy and/or desire to control their partners.¹⁶³ And while Justice King's assertions about the seriousness of domestic murders were endorsed by the VSCA, as observed earlier, her assertions about women's rights to equality and autonomy were not directly cited either by the VSCA or by any other trial judges. The remarks of Justice Lasry in the case of *R v Singh*, however, bore a striking resemblance to the way Justice King might have spoken:

What can be said about this murder as an extreme example of family violence that has not already been said in so many other cases? You murdered someone you professed to love. You murdered someone who had no capacity to defend herself from the attack you launched against her. Despite feeling betrayed, you murdered someone who was completely entitled to end her marriage to you and form a relationship with someone else if she wished to.¹⁶⁴

This statement was unlike anything Justice Lasry had said before. Can we take it to be an unacknowledged citation of Justice King? Perhaps a farewell gift marking her retirement with reference to her perennial themes? It will be interesting to discover in future whether Justice King's approach may prove to have had any longer-term influence on her fellow judges.

VIII CONCLUSION

To return to the indicia of feminist judging outlined at the beginning of this article, it is clear that Justice King's sentencing judgments in domestic homicide and domestic violence cases exhibited several of those features. She included women by taking domestic violence and domestic homicide seriously, highlighting women's absences from defendants' purported statements of remorse, and asserting women's rights to autonomy, equality and safety in their own homes. She was open to experiences far removed from her own in the cases of Aboriginal women who killed abusive partners, and gave very particular and attentive consideration to the details of their lives. She sought to improve the material conditions of women's lives by ensuring women were protected from violence, and by calling on the community and the state to do more to protect Indigenous women and children in particular from lifetimes of abuse. She took a substantive rather than formal equality approach to the different contexts, motivations and consequences of men's violence and women's violence against intimate partners. Although we cannot know whether she drew on feminist theoretical knowledge, her understanding of the power and control dynamics of abusive relationships was wholly consistent with that knowledge. She most certainly displayed an ethic of care in her compassionate and empathetic response to the victims of the crimes she dealt with, and to those defendants who could also be characterised as victims. Yet she did not essentialise these people as victims, but sought to empower them to move on with their lives, encouraging

163 See Hunter and Tyson, above n 11, 23.

164 *R v Singh* [2015] VSC 738, [40].

them to cultivate happy memories of the deceased and not to allow themselves to be defined by their traumatic experiences.

It might be said that sentencing is inherently an exercise in particularity and contextualisation, as the judge is required to take into account all the individual characteristics and circumstances of the defendant, but one particular context for domestic homicides which has not always been foregrounded is the context of a history of violence preceding the victim's death. Justice King consistently focused on this context where it was relevant. She also implicitly challenged the gender bias of the former defence of provocation and attempts to make provocation-type arguments in mitigation of sentence, by rejecting victim-blaming accounts and other efforts to minimise defendants' culpability, and instead naming men's anger, rage and violence for what they were, and insisting defendants took responsibility for that behaviour. Her support for the feminist-inspired reforms to defences to homicide law was made manifest throughout her sentencing judgments in the wake of the reforms.

For all of these reasons, therefore, we would maintain that Justice King's sentencing judgments in domestic homicide and domestic violence cases were instances of feminist judging. By this we do not mean they should be celebrated uncritically. Although space does not permit extended discussion, some might take issue with Justice King's approach as an example of so-called 'carceral feminism' which is said to focus excessively on criminalising and imprisoning men.¹⁶⁵ Others might find that her sensitivity towards women from culturally and linguistically diverse backgrounds was not matched by a similar sensitivity for the position of men from such backgrounds – as illustrated, for example, in the difference between her view and the VSCA's view of the facts in *Bayram*.¹⁶⁶ But we do contend that feminist judging adds a new and valuable perspective which corrects some of the masculine biases in law and makes it more inclusive overall. As such, we would also suggest that Justice King's judgments deserve to be more widely known and might be considered as models by other judges. With her retirement, the VSC lost a highly distinctive and important judicial voice. We hope that others will be willing to step into her leopard-print boots.¹⁶⁷

165 See, eg, Elizabeth Bernstein, 'Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns' (2010) 36 *Signs* 45; Janet Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict' (2008) 9 *Melbourne Journal of International Law* 78; David Gurnham, 'A Critique of Carceral Feminist Arguments on Rape Myths and Sexual Scripts' (2016) 19 *New Criminal Law Review* 141; cf Lise Gotell, 'Reassessing the Place of Criminal Law Reform in the Struggle Against Sexual Violence: A Critique of the Critique of Carceral Feminism' in Nicola Henry, Anastasia Powell and Asher Flynn (eds), *Rape Justice: Beyond the Criminal Law* (Palgrave Macmillan, 2015) 53.

166 *R v Bayram* [2011] VSC 10, [10]; *Bayram v The Queen* [2012] VCA 6, [16], [27].

167 Silvester, 'King's Court', above n 4.