

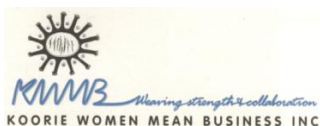
Submission on the Department of Justice's *Defensive Homicide: Proposals for Legislative Reform - Consultation Paper (2013)*

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The submission is endorsed by:

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- Associate Professor Bronwyn Naylor (Faculty of Law, Monash University)
- Domestic Violence Victoria
- The Victorian Women's Trust
- Human Rights Law Centre
- Victorian Women Lawyers
- Women's Domestic Violence Crisis Service
- Koorie Women Mean Business
- inTouch Multicultural Centre Against Family Violence
- The Federation of Community Legal Centres
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- No To Violence
- Women's Health Victoria
- Women's Legal Service Victoria
- Victorian Aboriginal Legal Service
- Women with Disabilities Victoria
- Peninsula Community Legal Centre

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Summary of key points in this submission

A specific partial defence to murder should be retained in the interests of women charged with murder for killing an intimate partner. Therefore, we recommend that:

- Defensive homicide should not be abolished.
- If defensive homicide is abolished, excessive self-defence should be reintroduced.
- If excessive self-defence is not reintroduced, a family violence-specific partial defence, such as that introduced in Queensland, should be considered as a possible option. A family violence-specific defence is not ideal but would be preferable to having no other partial defence.
- Further steps should be taken to improve the likelihood that women who kill in response to family violence will successfully be able to raise self-defence.
- A sustained effort is needed to shift gender-stereotypes and misconceptions about family violence. Recent research has demonstrated that these misconceptions continue to impact on the recognition of the nature and impact of family violence in legal responses to women who kill intimate partners. Indigenous women are particularly disadvantaged in accessing justice.
- Specialised family violence training and cultural awareness education is essential for legal professionals including prosecutors, defence counsel and judges. Such training should include the relevance of family violence evidence to elements of self-defence and defensive homicide legislation.
- Steps could be taken to reduce the overcharging of female defendants. In some cases in which women kill to defend themselves from family violence, the OPP could consider charging the defendant with defensive homicide or manslaughter from the outset rather than murder (if it is not feasible to dismiss). Charging women with manslaughter or defensive homicide may make it more likely that they would go to trial on the basis of self-defence.
- Improvements should be made to the family violence evidence provisions.
- Legal professionals should be prompted to use expert evidence about family violence, and to use a broader range of experts to provide this evidence – in particular, those who have an extensive, specialised knowledge of family violence.
- A specialist list for homicide cases involving family violence should be established.

The proposal to abolish defensive homicide without introducing any other partial defence is a controversial step when compared with other jurisdictions in Australia and overseas. It would leave Victoria as the only other Australian state, along with Tasmania, that has no partial defence to murder. Other states have a range of partial defences such as diminished responsibility, excessive self-defence and provocation. While there may be problems with the operation of each of these defences in some cases, it would be far more problematic to have no partial defence for women who kill in the context of family violence

The Department of Justice's arguments in the Consultation Paper are based on a perception that family violence is currently well recognised in homicide cases. This perception is not supported by recent research by DVRCV and Monash University (Kirkwood, McKenzie & Tyson 2013).

Our starting point is that women who kill to protect themselves from family violence should have access to a full acquittal on the grounds of self-defence. However, based on recent research that examined in detail cases of women who have killed partners since the 2005 reforms, we do not yet have sufficient evidence to show that self-defence can readily be raised by female defendants at trial (Kirkwood, McKenzie & Tyson 2013).

We acknowledge that there are problems with defensive homicide in that it creates a focus on women's defensive actions as unreasonable. However, in the current context we believe it remains necessary to maintain a partial defence so that women who kill abusive intimate partners have an alternative or 'back-up' option rather than facing the prospect of a murder conviction.

Proposal 1: Defensive homicide should be abolished

We do not support this proposal.

While we acknowledge that there are problems with defensive homicide, we recommend it be retained in the interests of women who kill abusive intimate partners.

We believe that the push for its abolition is partly driven by recent press coverage (eg. Petrie: 'Murder "deals" under fire' *The Age* June 25, 2012; Michael: 'Deals could let potential murderers off hook in Victoria' *Herald Sun* June 25, 2012; Clark: 'Giving a stronger voice to crime victims' *Herald Sun Law Blog* June 20, 2012).

To argue for the abolition of defensive homicide on the basis that men who kill other men are inappropriately using it ignores the fact that men who kill other men have routinely pleaded guilty to, or been found guilty of, manslaughter by an unlawful and dangerous act.

Abolishing defensive homicide without replacing it with any other partial defence will be detrimental for women who kill male partners in the context of family violence. If the government is seriously committed to addressing the impact of family violence on women who kill their abusers, it should retain the partial defence of defensive homicide.

Defensive homicide was introduced for sound reasons

The Victorian Law Reform Commission (VLRC) undertook a comprehensive review of defences to homicide (VLRC 2002, 2003, 2004). A primary reason for the review was to address the inadequate legal responses to women who kill abusive partners (VLRC 2002, p.7).

A gender bias in the law's responses to men and women who kill partners was well documented by the VLRC, as it has been by many others in jurisdictions across Australia and internationally (Scutt 1997, Howe 1994, 1997, Tyson 1999, 2013, Bradfield 2000, Kirkwood 2003, Cleary 2002, 2005, Hubble 1997, Morgan 1997, 2002, Easteal 1993, Stubbs 1992, Stubbs and Tolmie 1994, 1999, 2008, Sheehy, Stubbs and Tolmie 1992). This research shows that women defendants are highly disadvantaged due to misconceptions about the gendered dynamics of family violence.

After a lengthy research, consultation and submission process, the VLRC recommended a partial defence be introduced to act as a 'halfway house' for women who kill violent partners. The VLRC saw this as necessary in light of the proposed abolition of the partial defence of provocation.

Recent research shows a partial defence remains necessary for female defendants who kill abusive partners

A recent research paper by DVRCV and Monash University provides a comprehensive analysis of the reforms as they relate to women who kill intimate partners in Victoria (Kirkwood, McKenzie & Tyson 2013). The study examines all cases of women who killed partners since the introduction of the reforms in 2005. This report is available on the DVRCV website.¹

¹ See www.dvrcv.org.au

The study identified eight cases of women who have killed their intimate partners or ex-partners since the reforms. Of these cases, more than half (5 of 8) were resolved by guilty pleas:

- one case was dismissed based on the argument that the killing was in self defence (*DPP v Dimitrovski* 2009)
- two women pleaded guilty to defensive homicide (*R v Edwards* [2012] VSC 138 and *R v Black* [2011] VSC 152)
- one woman was convicted of defensive homicide at trial (*R v Creamer* [2011] VSC 196)
- three women pleaded guilty to manslaughter (*R v Downie* [2012] VSC 27, *R v Hudson* [2013] VSC 184 and *R v Kulla Kulla* [2010] VSC 60)
- one woman was convicted of manslaughter at trial (*R v Kells* [2012] VSC 53).

The study shows that:

- Gender-based stereotypes continue to influence perceptions of what is a reasonable and proportional response.
- Family violence and its impact on women who kill their abusers is not well recognised through the legal responses to women defendants
- Family violence evidence is not being clearly linked to elements of the defences in the way it was envisioned by the VLRC. There is little recognition of the cumulative impact of family violence, and limited understanding of the impact of sexual violence or non-physical forms of violence (such as threats, psychological abuse and coercive, controlling behaviour).

The study found that there is no evidence that self-defence can be effectively utilised by women defendants at trial. To date there is only one case of woman who killed an intimate partner being dismissed on the basis of self-defence (Freda Dimitrovski). The case occurred soon after the reforms were implemented – at a time when legal professionals’ awareness of issues relating to family violence and defences to homicide was high.

There were also particular factors in this case that may have contributed to the outcome. Freda Dimitrovski’s defensive actions in stabbing her husband were a response to an immediate physical assault on her and her adult daughter, in the presence of her four-year-old grandchild. Her daughter appears to have been a direct witness to the killing. Freda Dimitrovski had been subjected to physical and psychological abuse over thirty years. Heather Douglas’s (2012) analysis of cases in Queensland and Victoria demonstrates that some battered women meet the ‘benchmark’ for a claim of self-defence better than others. Those acquitted had suffered physical abuse over many years, and their children had also been threatened by the abuser (2012, p.377). These circumstances appear to have applied in the case of Freda Dimitrovski. Although the dismissal in this case was an encouraging sign, no other case since then has resulted in an acquittal.

The DOJ Consultation Paper argues that for women who kill, ‘while the risk of conviction for murder based on misconceptions and outdated or stereotypical views about family violence cannot be ignored, it is unlikely’ (p.33). However, as the research by DVRCV and Monash University found, there is no evidence to support such a claim. Rather, this research found that stereotypes about family violence and about women who are victims of violence are entrenched in our society (Kirkwood, McKenzie & Tyson 2013). Despite the 2005 Victorian reforms, these misconceptions also persist in legal proceedings and a sustained effort is still required to shift them.

Considering this, we have little confidence that women who kill abusive partners will be able to successfully claim self-defence in homicide trials. There remains a need for a partial defence as a 'safety net' for such women.

In the almost eight years since the reforms, three women who killed an intimate partner have utilised defensive homicide and four women have relied on manslaughter. The majority of women have pleaded guilty rather than proceed to trial.

There is no certainty that, in the absence of defensive homicide, these women would have proceeded to trial arguing for an acquittal based on self-defence. They may have pleaded guilty to murder in order to receive a discounted sentence, rather than risk a murder conviction and longer sentence at trial.

While defensive homicide is not an ideal defence as it creates a focus on women's defensive actions as unreasonable, in the current context, defensive homicide is preferable to having no partial defence.

If there is no partial defence, the bargaining capacity of defence counsel in plea negotiations may also be significantly reduced. This may disadvantage not only those women relying on defensive homicide, but potentially those women who have relied on manslaughter.

Removing defensive homicide will not improve women's ability to successfully argue self-defence.

The DOJ Consultation Paper argues that the existence of defensive homicide is 'counter productive' (p. 26) because it has shifted the focus away from the adequacy of self-defence for women who kill abusive partners.

However, there is little evidence to support the idea that self-defence would become more accessible to these women if defensive homicide were removed.

The DVRCV/Monash University research shows that there are other reasons why women's self-defence claims are likely to be unsuccessful (Kirkwood, McKenzie & Tyson 2013). These include entrenched gender biases and misconceptions about the nature and impact of family violence, and inadequate use of the family violence provisions (s 9AH *Crimes Act 1958*).

The case of Karen Black demonstrates the relevance of defensive homicide in this context. Karen Black stabbed her partner twice while he had cornered her in the kitchen. She stated that she feared he would 'force himself on me sexually' and was 'thinking well what else could he do to me' (*R v Black* [2011] VSC 152, para 18). Karen Black appears to be the person that the Consultation Paper is referring to when it says 'another woman potentially had a good case for self-defence but pleaded guilty to defensive homicide instead' (p.viii).

However, the DVRCV/Monash research suggests that in Karen Black's case, had defensive homicide not been available, a murder conviction could have been the likely result. This is because of a perception that the violence Karen Black was subjected to by her partner was 'limited' (see *R v Black* [2011] VSC 152 para 22; *Black v The Queen* [2012] VSCA 75, para 29). This perception was based on an inadequate understanding of the impact on Karen Black of a history of threats and intimidation, and the serious harm of sexual violence. Further, the description of the stabbing as 'disproportionate' to the threat posed by her partner because he was unarmed (*R v Black* [2011] VSC 152, para 22) reflects a limited recognition of

gender-based disparities in size and strength. The killing occurred when Karen Black was cornered in the kitchen by her partner, who was ‘a lot taller’ than she was (*R v Black* [2011] VSC 152 para 2).

The DOJ Consultation Paper argues that if defensive homicide were abolished, women who kill abusive partners may be able to plead guilty to manslaughter (or be convicted of it at trial). The Consultation Paper also suggests that manslaughter applies to a variety of cases, including killings that appear to involve an intention to cause death, because of ‘jury verdict, a technical issue or a guilty plea to the lesser offence’ (p.32). However, there are clearly differences in the elements of the offences of manslaughter and defensive homicide - as the Paper notes, manslaughter does not apply where a person intends to kill or cause serious injury towards another person (p.32). In the case of Karen Black, because in her interview with police she expressed an intention to kill her partner (*R v Black* [2011] VSC 152, para 6), this may have reduced the likelihood that a manslaughter plea would be accepted.

The DOJ Consultation Paper further argues that if a woman who killed in response to family violence was convicted of murder, her situation could be taken into account at sentencing (p.32). While a judge may be able to exercise discretion in imposing a sentence, average sentences for murder remain high in Victoria at 20 years (Sentencing Advisory Council 2013). There is a stigma attached to the label of ‘murder’ (New South Wales Select Committee on the Partial Defence of Provocation [NSWSCPDP] 2013, p.87). To label a woman who kills out of fear of an abusive partner as a ‘murderer’ is also unjust and obscures the family violence to which she has been subjected.

Heather Douglas has argued that defensive homicide was a ‘merciful outcome’ for Karen Black, considering that ‘certain stereotypes about battered women continue to inform the choices made by prosecution authorities and juries’ (2012, p. 377). The limited recognition of the nature and impact of family violence in the case of Karen Black, and in the other cases examined in the research by Kirkwood, McKenzie & Tyson (2013), leads us to conclude that it is currently unlikely that such women would successfully be able to claim self defence (even if the test for self defence was amended along the lines proposed by the DOJ: see pp. 36-46). More extensive measures to address stereotypes and misunderstandings about women and family violence are required for women’s self-defence claims to be successful. Challenging these entrenched attitudes within the culture of the criminal justice system will take a sustained effort over a considerable period of time, and requires additional measures beyond legislative reform. In the meantime we believe that a partial defence remains necessary.

There are additional barriers to justice for Indigenous women

In the DVRCV/Monash University study of cases of women who killed intimate partners in Victoria (Kirkwood, McKenzie & Tyson 2013), two of the eight women were identified by the sentencing judge as Indigenous (Melissa Kulla Kulla and Veronica Hudson).² Both had suffered repeated family violence from previous partners. In both cases there was evidence of prior family violence from the deceased, and in both cases the killing occurred in the context of an immediate confrontation with the deceased.

In Veronica Hudson’s case, her partner had been ‘appallingly violent’ towards her, according to the sentencing judge (*R v Hudson* [2013] VSC 184, para 19). Five years earlier, in breach of a domestic violence protection order, he had severely assaulted her, for which he served a five-year prison sentence. After his release from prison he tracked her down and his violence towards her continued. Witnesses said he was

² *R v Kulla Kulla* [2010] VSC 60; *R v Hudson* [2013] VSC 184

constantly monitoring her, and family members expressed a fear that she would eventually be killed (*R v Hudson* [2013] VSC 184, para 29). The sentencing judge also noted that three days before killing her partner, Veronica Hudson's throat had been cut 'from ear to ear', and stated: 'it would appear that the deceased man may have been responsible for the infliction of that injury' (*R v Hudson* [2013] VSC 184, para 25). No case was made for self-defence. Veronica Hudson pleaded guilty to manslaughter and received a six-year sentence. This was the same outcome in Melissa Kulla Kulla's case.

As Stubbs and Tolmie point out, there are significant barriers to justice for Indigenous women, and additional pressures to plea bargain. Indigenous communities commonly express distrust of the legal system, and may face greater levels of trauma and risk (of conviction) in going to trial (2008, p. 150). Moreover, Indigenous women may experience the combined effects of poverty, violence, alcohol and substance abuse, gender and race discrimination, and a historical context that includes colonisation, dispossession and the disruption of family life through the government removal of children (Stubbs & Tolmie 2008, p. 141). In this context, Indigenous women may understandably be fearful of the justice system. They may find it hard to access good legal advice and experience barriers in communication; and there may be cultural traditions that make it inappropriate to speak about a deceased person or certain matters publicly (Stubbs & Tolmie 2008, p. 150).

Sheehy, Stubbs and Tolmie's (2012) study of trends in homicide cases found that in Australia, as in other countries, Indigenous women 'are even more over-represented among those women who forego their trial rights' and instead resolve their cases by guilty pleas (p.396). This raises the question of 'whether they receive equal access to justice' (2012, p.396). Indigenous women may be particularly disadvantaged by the abolition of defensive homicide, which would further limit the range of legal options available.

There is only one case in which a male who killed an intimate partner relied on defensive homicide

The abolition of provocation appears to have had its intended impact on the legal responses to men who kill an intimate partner. In her review of cases since the 2005 Victorian reforms, Tyson found that in the majority of cases where women have been killed by an intimate male partner or ex-partner, 'most of these male defendants have not successfully relied on a 'sexed excuse' for their crime. Rather, the majority of these male defendants have pleaded guilty to murder' (Tyson 2013, p. 130-131).

The DVRCV/Monash University research also identified that, of 31 cases of men who have killed an intimate partner between 2005-2013, the majority (24) was convicted of murder (a total of 14 pleas, 10 verdicts). Six received a manslaughter conviction - four at trial and two the result of guilty pleas (Kirkwood, McKenzie & Tyson 2013).

To date only one man has successfully used defensive homicide after killing an intimate partner (*R v Middendorp* [2010] VSC 202). We are concerned about the outcome of defensive homicide in this case, as outlined in our previous submission (Tyson, Capper and Kirkwood 2010). However, of the total of 31 cases of men who killed an intimate partner, this was the only case in which defensive homicide was the outcome. The publicity surrounding the use of defensive homicide in the *Middendorp* case appears to have created a widespread impression that defensive homicide is frequently being misused by violent men who kill female partners. However the data discussed above shows that this is not the case.

There is no evidence that defensive homicide is a particular defence that works to the advantage of violent men. The reliance on partial defences or manslaughter by men who kill other men is nothing new – men

have always relied on these forms of reduced culpability. However, abolishing it would work to women's disadvantage.

We do not believe that the benefits of abolishing defensive homicide would outweigh the potential costs to women defendants.

It is apparent that the key concern of the Department of Justice is not about men killing women and utilising defensive homicide, but rather that of men killing other men (eg. p.viii, ix, 29). Our concern is with intimate partner killings and family violence - the issues that the reforms were designed to address. We therefore do not concur with the Consultation Paper's claim that defensive homicide should be abolished due to men using it as a partial defence when killing other men. The fact that defensive homicide is 'only ... relevant in a small number of cases in which a women kills a man' (Consultation Paper p.30) does not negate its value in those cases. It is unjust to remove a safety net for women who have suffered long-term family violence because of a perception that male offenders are inappropriately using it.

Separate consideration should be given to measures to improve legal responses for women who kill abusive partners, and to measures to reduce the number of cases in which men are perceived to be inappropriately excused for killing other men. For instance, in relation to male offender defensive homicides, as outlined in the DOJ Consultation Paper, 17 of the 25 cases were guilty pleas. This strongly indicates that if the Department wants to address what it deems as an inappropriate reliance by men on defensive homicide, the Department should focus on the issue of plea negotiations. Clearly the latter is more of a problem than the issue of jury decision making, as most of these cases are not going to trial (see, for example, Flynn and Fitz-Gibbon 2011 cited in DOJ 2013, p.2; see also Tyson 2013, p. 130).

Abolishing defensive homicide at this stage would be a simplistic and limited response to a complex issue. We believe that it is essential to prioritise family violence law reform and to find other ways to address any identified problems with the use of defences by men who kill other men. This may mean coming up with reforms that accommodate both concerns, but must not result in simply throwing the baby out with the bathwater.

Abolishing defensive homicide would be out of step with current thinking in Australian jurisdictions

If Victoria abolishes defensive homicide, it will be the only state, apart from Tasmania, to have no other partial defence to murder. Such a step would leave Victoria in an exceptional situation. Other states have retained a range of partial defences such as diminished responsibility, excessive self-defence and provocation.

In her submission to the New South Wales Select Committee on the Partial Defence of Provocation (NSWSCPDP), Professor Julie Stubbs advocated for the retention of a partial defence for women (NSWSCPDP 2013, p. 70). This recommendation drew on the findings of research by Sheehy, Stubbs and Tolmie that raised legitimate concerns about the impact of abolishing partial defences on female defendants. This research examined cases in Australia, Canada and New Zealand between 2000-2010. The study showed that overall trends in New Zealand— a jurisdiction that abolished the partial defence of provocation in 2008 and did not introduce an alternative partial defence - showed a higher proportion of such cases proceeding to trial and resulting in a conviction for murder (2012, p. 11-12).

It is significant, therefore, that the recent review of provocation in NSW by the New South Wales Select Committee on the Partial Defence of Provocation (NSWSCPDP) made a strong case for the retention of a

partial defence for women who kill abusive intimate partners (2013, p.87). Abolishing defensive homicide in Victoria would be a controversial and problematic change that would be out of step with current views within the legal community concerning the continued need for a partial defence for women who kill in the context of family violence.

Further review by the Victorian Law Reform Commission is required

According to the report by the NSW Select Committee on the Partial Defence of Provocation, '[a] number of Inquiry participants ... noted the complexity of, and interrelationships between, the law of homicide and defences to homicide' (p.82). This was 'put forward as a reason to refer the issue of the partial defence of provocation, and the law of homicide and defences to homicide more broadly, to the Law Reform Commission'.

For example, the NSW Select Committee cited Professor Julie Stubbs, who stated:

“The laws of homicide defences, partial defences, sentencing and the rules of evidence intersect and change in one area is likely to have implications for other areas. The issues before the Committee are complex and reforms in other jurisdictions have taken diverse directions, and the emerging evidence suggests that they have not always achieved their objectives. This reinforces the fact that achieving effective law reform in this area is challenging. Because of that complexity, I have recommended ... that the matters be referred to the New South Wales Law Reform Commission for a comprehensive review.” (p. 82-3).’

Given that the Department of Justice is proposing controversial and potentially complex changes to the laws of homicide defences in Victoria, we recommend that the Department refer the issue of defensive homicide, together with the defence of self-defence more broadly, to the Victorian Law Reform Commission.

Proposal 2: Excessive self-defence should not be introduced

We do not support this proposal.

If Proposal 1 is accepted and defensive homicide is abolished, there is a need for a partial defence that women defendants can raise as an alternative to the full defence of self-defence. It is important that there are a variety of defences available to adequately respond to the different circumstances in which both women and men kill, rather than aiming for a one-size-fits-all model. **We therefore propose that if defensive homicide is abolished, the partial defence of excessive self-defence should be reintroduced.**

Defensive homicide was established in Victoria as a result of the VLRC's recommendation to reintroduce excessive self-defence. We support, in principle, the approach taken by the VLRC in relation to the elements of excessive self-defence. We also support, in principle, the proposal laid out in the DOJ Consultation Paper on page 20, as follows:

Defence to murder (self-defence)

- (1) Subject to sub-section (2), a person (A) is not guilty of the offence of murder if:
 - (a) A believes that his or her conduct is necessary to defend himself or herself or another person; and
 - (b) A's conduct is a reasonable response in the circumstances as A perceives them.
- (2) If the prosecution:
 - (a) does not prove that A did not believe that his or her conduct was necessary to defend himself or herself or another person; and
 - (b) does prove that A's conduct was not a reasonable response in the circumstances as A perceived them,then A is guilty of manslaughter by excessive self-defence and liable to level 3 imprisonment (20 years maximum).

We believe that in cases where women have killed in a context of family violence victimisation, these provisions would assist in emphasising to defence counsel and prosecutors that women's primary trial avenue or plea negotiating starting point should be self-defence. This approach is also consistent with the 'safety net' recommendation of the Victorian Law Reform Commission's *Defences to Homicide: Final Report* (2004).

We have some concerns about excessive self-defence replacing defensive homicide. For instance, excessive self-defence is a defence only, whereas defensive homicide is an offence as well as a (partial) defence. As an offence, there is the possibility of women being charged with the lesser offence of defensive homicide rather than murder (as discussed on page 21 of this submission). This would not be possible with excessive self-defence which is not a separate offence.

However, these issues are complex and we believe that they require further consideration. As noted above, we recommend that the development of excessive self-defence legislation be returned to the VLRC to review.

We recognise that the Department of Justice is concerned that the above model of excessive self-defence would open the floodgates for men who kill other men to receive more lenient outcomes. As noted previously, this is not our primary concern. However, to reduce the likelihood of this happening, the Department of Justice could consider mandating a jury direction that the absence of reasonable grounds for the belief means that the accused is less likely to hold a belief that action is necessary.³ This would however need to be linked with some jury directions about the impact of family violence on a person's perceptions of why their actions are necessary to defend themselves in relevant cases.

If the Department remains unwilling to reintroduce excessive self-defence as above due to concerns about it being inappropriately used by male defendants, then they could consider adopting a narrower approach to excessive self-defence as follows:

³ See discussion in DOJ Consultation Paper 2013, p.40.

Defence to murder (self-defence)

(1) Subject to (2), a person (A) is not guilty of murder if:

(a) A believes that his or her conduct is necessary to defend himself or herself or another person from the infliction of death or really serious injury; and

(b) A's conduct is a reasonable response in the circumstances as A perceives them.

(2) If the prosecution:

(a) does not prove that A did not believe that his or her conduct was necessary to defend himself or herself or another person from the infliction of death or really serious injury; and

(b) does prove that A's conduct was not a reasonable response in the circumstances as A perceived them,

Then A is guilty of manslaughter by excessive self-defence.

This model narrows the first limb of self defence to be defending from 'death or really serious injury'. We prefer the broader approach but would rather the above than no partial defence.

A family violence-specific defence?

We believe the introduction of a family violence-specific defence is not ideal, however it is preferable to having no other partial defence for women who kill their abusive partners.

The DOJ Consultation Paper points out that in a previous submission we did not support limiting defensive homicide to situations involving family violence (Tyson, Capper and Kirkwood 2010 cited in DOJ 2013, p. 11). It notes: 'Tyson, Capper and Kirkwood also indicate that limiting the defence to family violence would risk discouraging women who kill in response to family violence from going to trial and relying on self-defence for a complete acquittal. If the offence is only used for family violence cases, it may be mislabelled as 'the family violence defence' (p.12). We still have reservations about introducing circumstance-specific defences. However, in the event that defensive homicide is abolished and excessive self-defence is not reintroduced in either of the forms we suggest, we would support the introduction of a family violence-specific defence such as that introduced in Queensland. However, we would like to be consulted further about the format of such legislation if this course of action was adopted in Victoria. We recommend that this be referred to the VLRC to review the models of family violence-specific defences and determine the most appropriate legislation for Victoria.

In February 2010, the Queensland government introduced a new separate partial defence of 'killing for preservation in an abusive domestic relationship'. Section 304B of the Queensland Criminal Code provides that:

an accused person killed the deceased under circumstances that would ordinarily constitute murder; the deceased has committed acts of serious domestic violence against the accused in the course of their abusive domestic relationship and, at the time of the killing the accused believes it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death. There must also be reasonable grounds for the accused's belief having regard to the abusive domestic relationship and all the circumstances of the case (Exp. Notes, 2002: 2 cited in Douglas 2012, p. 373).

If a jury is not satisfied, beyond reasonable doubt, that the preservation defence has been disproved by the Crown, the accused would be found not guilty of murder, but guilty of manslaughter. What distinguishes this defence from existing defences of self-defence and provocation in Queensland is that the preservation defence does not rely on the accused person responding to a specific assault or imminent threat from the deceased person and there is no emphasis on the timeframe between the actions of the deceased and the killing by the accused person (Exp. Notes, 2009: 9 cited in Douglas 2012, p. 374).

So far there have been very few cases which have used this new partial defence. In a review by Heather Douglas of the cases considering the new partial defence, self-defence was used successfully in both *R v Falls* (2010) and *R v Irslinger* (2012), and in *R v Ney* (2012), the defendant pleaded guilty to manslaughter, based on diminished responsibility (2012, p. 375). One reason Douglas gives to explain the positive outcomes in *Falls* and *Irslinger* is that expert evidence about the experience of living in an abusive relationship has been relevant to self-defence in Queensland for some time (2012, p. 375). Moreover, Douglas notes that in *Falls* the judge's 'summing up to the jury was particularly significant' because 'it confronted two of the key problems associated with battered women in Queensland in attempting to apply self-defence to their circumstances.' The trial judge in this case emphasised that 'the mere endurance of a threat can become a form of violence and that this might give rise to legitimate use of force in self-defence ... the threat could continue regardless of the fact that the deceased was temporarily unable to carry out the threat (i.e., asleep)' (2012, p. 376-377). Moreover, Douglas observed that in *Irslinger* 'self-defence was the focus of the defence case, and the preservation defence was raised as a "fall-back" option' (2012, p. 375). This led her to conclude that while the preservation defence may have limited application in Queensland law when the dynamics of family violence are adequately explained to both the jury and jury (in the event of a trial), women's self-defence claims are more likely to be recognised and lead to an acquittal (as they did in these two cases).

Noting the concerns about family violence-specific defences that we expressed in our previous submission in 2010 (see DOJ 2013 p.12), the DOJ consultation paper suggests that the same kind of concerns would also exist with defensive homicide: '... defensive homicide itself may distort defences and detract from a claim of full self-defence. There is a much greater risk of distortion of defences and this takes away from what should be the primary focus, namely the complete defence of self-defence' (DOJ 2013, p. 12).

As discussed, we are concerned about the risk of detracting from a focus on the complete defence of self-defence. However, we believe a family violence-specific defence is more likely to be labelled 'the family violence defence' – and to become the default defence for women who kill abusive partners than other more general, less circumstance specific defences. Whether the broader framework of defensive homicide or excessive self-defence also detracts from a claim of full self-defence depends on how this law operates in practice. As Kirkwood, McKenzie and Tyson's (2013) research also shows, additional steps are needed to improve understandings of family violence so that we can see the change in legal culture that the reforms promised to deliver.

Proposal 3: The first limb of common law self-defence should be reinstated

We support this proposal.

The first limb of the common law of self-defence is broader than the new codified law of self-defence. A broader test is likely to be beneficial to women defendants.

The wording could be:

A believes that his or her conduct is necessary to defend himself or herself or another person

The common law test confirmed in *Zecevic's* case, which specified that the defence of self defence was made out where 'the accused person believe on reasonable grounds that it was necessary in self-defence to do what he or she did', had been regarded by the courts as extending to (at least potentially) threats of sexual violence and prolonged incarceration (see discussions in *Viro*, and *Zecevic* both in the High Court of Australia). We propose that this broader definition of the first limb be reinstated.

We believe that in cases where women have killed in a context of family violence victimisation, this restructure of the relevant provisions would assist defence counsel and prosecutors in highlighting that women's primary trial avenue or plea negotiation starting point should be self-defence.

Question 1: What should the second limb of the test for self-defence be?

The second limb of the self-defence test – A's conduct is a reasonable response in the circumstances perceived by them - was the VLRC's recommended test. We support this approach.

The reason why this change is preferable is demonstrated by the recent DVRCV/Monash University research (Kirkwood, McKenzie & Tyson 2013). The limited understandings of women's actions in the context of family violence indicates that a more subjective test that considers why the woman perceived their actions as necessary in their circumstances is preferable to a more objective test.

For example, Karen Black's conduct was described as unreasonable in the context of her being subjected to what was viewed as 'limited' family violence, and that being a victim of violence had caused her to 'over-react' when cornered by her partner. In the case of Melissa Kulla Kulla, who pleaded guilty to manslaughter, the sentencing judge took into account her significant cognitive impairment, exceedingly deprived background and lengthy alcohol and drug abuse history. The judge commented that Melissa Kulla Kulla had suffered abuse virtually from the time she was born, and that she had been subjected to repeated domestic violence from multiple men, including stabbings and other injuries which had left scars all over her body. Given that the deceased had picked up a kitchen knife and threatened to kill Melissa Kulla Kulla, a test that entailed assessing the reasonableness of belief from Melissa Kulla Kulla's perspective would be more accommodating of her experiences.

Proposal 4: There should be a consistent test for self-defence for all offences

We support this proposal.

Where possible, self-defence should be defined consistently and be available as a defence to both fatal and non-fatal offences.

Proposal 6: Social context evidentiary laws should be extended to all claims of self-defence

We support this proposal.

Family violence social context evidence should apply to all offences where self-defence is argued, not only to homicide.

However, as we discuss above, the more significant issue to address is the limited extent to which social context evidence is being used now, and the need to amend the *Crimes Act* 1958 s 9AH along with policy change. We propose other changes to strengthen the use of s 9AH and of understandings of family violence, to make self-defence more likely as a route of argument at trial – see final section of this submission.

Question 2: Should new evidence laws be introduced to prohibit improper questions about homicide victims?

We support this proposition.

New evidence laws should prohibit questions that, if the victim were alive, would be offensive, humiliating, disrespectful, or purely based on a stereotype. However, it may require more than is proposed here to tackle the culture of aggressive, demeaning and intrusive questioning of witnesses that currently occurs in Victorian courts.

We support the proposal for potential reforms that ‘are designed to strike an appropriate balance between the ability of a person to conduct their defence and ensuring that the proceeding is conducted fairly and with respect to the victim and their family’ (p. 52-3). We also agree with the proposal that the proposed restrictions not limit the evidence which may be adduced under section 9AH of the Crimes Act (the social context evidence provisions) (p. 53).

4.3 Evidence in rebuttal about homicide victims

The primary rationale for the Department’s proposals to reform ‘how evidence laws work in homicide trials where questions are asked about homicide victims’ are motivated by long-held concerns about the problem of ‘victim-blaming’ in homicide cases (2013 p. ii). While it is acknowledged that such concerns have largely been addressed by the abolition of provocation (p. ii), the paper reproduces a quote from Tyson’s book, *Sex, Culpability and the Defence of Provocation*, in which she argues that:

What the discussion of the *Middendorp* and *Sherna* decisions has also shown is that the characters of dead women who have been killed by their intimate partners or ex-partners are still being put on trial (Tyson 2013, p.140 cited in DOJ 2013, p.54).

We are in agreement that more is required to tackle the ongoing problem and culture of disingenuous questioning tactics used by defence counsel. Typically, such tactics construct the victim in homicide cases as to blame for her own death, or construct the victim in rape cases as ‘asking for it’. Aggressive and denigrating tactics are often used to discredit and break down witnesses when giving evidence in court (as was noted in our previous submission to DOJ 2010 in relation to the questioning of Dawn Waite at the second trial of Robert Farquharson [Tyson, Capper and Kirkwood 2010, p.20]).

However, for the DOJ consultation paper to then claim that 'similar narratives of victim blame are emerging through the offence of defensive homicide' (p. 49) is misleading because it gives the impression that defensive homicide is being used by men who have killed women to avoid culpability for murder.

If we follow this logic, then one could arguably make a case for the abolition of manslaughter by unlawful and dangerous act given that this was the outcome in the case of *Sherna*. But as Tyson (2013) also pointed out in relation to this case:

Although the jury determined that it did not accept the male defendant's subjective but unreasonable belief that he did what was necessary to defend himself (thus, they found him not guilty of defensive homicide), their decision to return a conviction of manslaughter by an unlawful and dangerous act shows how provocation-type arguments are being mobilised in the guise of other offences (eg the problem of victim blame in the context of provocation ends up being a problem in another context, which is manslaughter), an area that, to date, has not received much critical attention from provocation's critics (on this point see Stewart and Freiberg 2009: vii).

It is important therefore to ensure that law reformers have access to a sophisticated evidence base upon which to make recommendations. It is presently unclear how the 2005 Victorian reforms are impacting on cases involving men who kill their intimate female partners. What is certain is that we need an understanding that is based on more than a cataloguing of outcomes in such cases.

DVRCV along with Monash University Criminology and Law has received funding from the Legal Services Board to continue their research on the impact of domestic homicide law reform. This will enable them to focus on cases of men who kill a female partner, as well as to continue their analysis of cases of women who kill men. Through an in-depth analysis of transcripts of criminal trials, plea hearings and sentences, the research team will examine understandings of family violence, defences used, sentencing outcomes, the use of expert witness evidence, indications of gender stereotyping and the use of provocation-type narratives. The final report of this research will be published in 2015.

In the meantime and as we have already noted above, of the 31 men who have killed intimate partners since the abolition of provocation in 2005, the majority have been sentenced on the basis of murder (14 after pleading guilty to murder and 10 after being found guilty of murder after a trial). Arguably, one could conclude from this that the abolition of provocation has been a successful development.

Of the remaining seven men who did have their culpability for murder reduced, two pleaded guilty to manslaughter, three were convicted of manslaughter by an unlawful and dangerous act after a trial, one was found guilty of manslaughter by criminal negligence and recklessly causing injury after a trial, and only one was found guilty of defensive homicide after a trial (*Middendorp*) (see Kirkwood, McKenzie & Tyson 2013, p.54).

We remain very concerned about the use of defensive homicide in the *Middendorp* case. We are also supportive, therefore, of the Department's proposal for modification of the laws regulating character evidence to allow the prosecution to adduce evidence in rebuttal about the victim's character to counter the continuation of damaging myths and stereotypes about victims in homicide trials.

However, the laws governing the admissibility of evidence (relationship or otherwise) are complex. We would reiterate that proposals to further reform the laws governing evidence should be reviewed by the Victorian Law Reform Commission.

Question 3: Should new evidence laws be introduced to allow rebuttal evidence about the character of homicide victims?

We support this proposition.

New evidence laws should be introduced to allow rebuttal evidence about the character of homicide victims. But we also note that '[t]he rules governing hearsay, opinion, tendency and credibility evidence would not apply to this evidence' (DOJ 2013 p. xii).

Tyson's (2013) research shows that the issues of victim-blaming in homicide trials are complex and cannot be confined to the use of one particular form of evidence, for example, about the character of homicide victims. A key issue raised in relation to the *Middendorp* case, for example, concerned the use of evidence of the relationship which was introduced into the trial to show that both parties had previously been violent towards one another and engaged in frequent fights and arguments (Tyson 2013, p. 122). In our previous submission, we expressed concern about the way in which the killing was represented by the presiding judge as the inevitable culmination of a 'tempestuous, even violent relationship' (Tyson, Capper and Kirkwood 2010). In particular, we took issue with the way this misrepresented the family violence in this case as 'mutual', as if both parties were equally culpable for the violence and as 'bad' as each other. As the recent DVRCV/Monash research has also shown, this misperception about the dynamics of family violence was also present in some of the cases they analysed (Kirkwood, McKenzie & Tyson 2013, p.33).

However, it appears unlikely that the complex issues surrounding the impacts of different forms of evidence on constructions of both the victim and the relationship between the victim and offender in homicide trials will be given the attention they clearly deserve. This is to be inferred from the point made on p. 49 of the Department's Consultation Paper where it 'notes the current complexity of this area of law, and that there are strong reasons for not changing the laws governing admissibility of relationship evidence in the context of only homicide cases'. While we agree in principle with the Department's proposal to introduce new evidence laws to allow rebuttal evidence about the character of victims, we argue that the problem of victim-blame is unlikely to be addressed by this alone, and note the need for future research examining the impacts of the introduction of relationship evidence in homicide trials.

Proposal 7: These reforms should be reviewed after five years

We support the proposition to review changes to the law.

If any of the proposals outlined in the DOJ Consultation Paper are enacted by the Government, we agree that there should be a review of these changes. We recommend the review involve ongoing monitoring from the date the changes are made particularly if defensive homicide is abolished because it is highly likely that women will fall through the gaps. If the monitoring identifies problems with the application of the new legislation, then it may be necessary to have a review sooner than five years.

A key reason that Victoria has progressed reform of homicide laws further than any other Australian jurisdiction is due to the careful, considered and lengthy consultation process undertaken by the VLRC (2002, 2003, 2004). Our view is that if further significant reform is required to the law of homicide in Victoria, that the government consider referring the issue to the Victorian Law Reform Commission so that a public consultation process can take place.

Is there any other aspect of the *Defensive Homicide: Proposals for Legislative Reform Consultation Paper* that you would like to comment on?

Additional measures are needed to improve responses to family violence homicides

Victoria has been held up as a model for other Australian jurisdictions in its introduction of family violence evidence (for example, NSWSCPDP 2013). Section 9AH was introduced with the intention to expand understandings of the nature, dynamics and impact of family violence. It was also to be used by counsel and experts to highlight the social and economic context which, for many women, limits their ability to leave abusive relationships. However, according to the DVRCV/Monash research, which examined the seven cases of women prosecuted for killing intimate partners since the 2005 reforms to homicide laws, understandings remain limited and s 9AH is being used in only a minimal way.

The research found that in several cases, family violence as defined in s 9AH was identified and discussed (for example, it was directly discussed in the case of Karen Black, Jemma Edwards, Eileen Creamer, Jade Kells, and Veronica Hudson). However, despite the identification of family violence, it was only linked in a limited way to arguments about the defensive nature of the accused women's actions.

The DVRCV/Monash research shows that understandings of family violence remain narrow. In particular:

- while physical forms of family violence are recognised and seen as 'serious', non-physical forms of family violence (such as threats, psychological abuse, and coercive and controlling behaviour) are not perceived as 'serious'
- sexual violence within relationships is not well recognised (for example, in the cases of Karen Black and Eileen Creamer).

The research also demonstrates that the impact of prior family violence on women's responses to abusive, intimidating or threatening behaviour is not well recognised. For example, as discussed, in Karen Black's case, although she stated that her partner had never been physically violent towards her, she said she had been subjected to intimidating and threatening behaviour and sexual violence. Her son had witnessed intimidating and abusive behaviour. Her partner had left a knife and a gold coin on her pillow when she went out with a girlfriend which led her to restrict her contact with friends and family because she feared his reaction. According to established family violence risk assessment frameworks (such as Victoria's widely-used *Family Violence Risk Assessment and Risk Management framework* – see Appendix) these factors would be assessed as indicating that Karen Black faced an elevated risk of lethal violence. However, the sentencing and appeal judges in this case regarded the violence she had been subjected to as 'limited' and did not recognise that Karen Black may genuinely have feared serious harm or injury on the night of the killing.

The reasons why women may remain in abusive relationships are not well understood, and women who remain with abusive partners tend to be perceived as making unreasonable or irrational choices. For example, in many cases examined in the DVRCV/Monash research, the women were described as irrational for staying (see previous discussion of Jemma Edwards's case – her ability to 'make calm or rational choices' was said to be 'impaired' by the abuse) (Kirkwood, McKenzie & Tyson, 2013, p.45). Several women were described as 'dependent' on their partners or as having repeatedly made 'poor choices' of partners (for example, Jemma Edwards, Veronica Hudson and Eileen Creamer were all described in this way). The ability to call expert evidence about family violence was introduced to shift the focus away from a narrow emphasis on the psychopathology of female defendants towards an understanding of the impact of family

violence, and the social and economic factors that prevent women from leaving abusive partners. However, such evidence did not appear to be used in the cases examined in the DVRCV/Monash research.

This research demonstrates that a range of additional measures and reforms are needed if the potential of Victoria's changes to family violence evidence laws is to be realised.

Some relevant measures are:

- Amendments to s 9AH
- Aligning s 9AH with the preamble in the *Family Violence Protection Act 2008* (Vic)
- Utilising appropriate family violence expert witnesses
- Ongoing professional development for legal professionals
- Reducing 'overcharging' by prosecutors
- Documenting plea negotiations
- Mandatory jury directions
- A family violence homicide specialist list

These are discussed below.

Amendments to s 9AH

We recommend that s 9AH be amended in line with the *Family Violence Protection Act 2008* (Vic). In particular, s 9AH should be aligned with the definition of family violence in the *Family Violence Protection Act 2008* (Vic), and information from the Preamble about the gendered nature of family violence and the exploitation of power imbalances should be included. For example:

Section 9AH(3), in addition to the current provisions, should include information about the following features of family violence (from the *Family Violence Protection Act 2008*, Preamble):

- that while anyone can be a victim or perpetrator of family violence, **family violence is predominantly committed by men against women, children and other vulnerable persons;**
- that children who are exposed to the effects of family violence are particularly vulnerable and exposure to family violence may have a serious impact on children's current and future physical, psychological and emotional wellbeing;
- that family violence—
 - i. affects the entire community; and
 - ii. occurs in all areas of society, regardless of location, socioeconomic and health status, age, culture, gender, sexual identity, ability, ethnicity or religion;
- that family violence extends beyond physical and sexual violence and may involve emotional or psychological abuse and economic abuse;
- that **family violence may involve overt or subtle exploitation of power imbalances** and may consist of isolated incidents or patterns of abuse over a period of time.

Section 9AH(3) needs to encompass the range of experiences of women subjected to family violence.

For example, family violence evidence could include:

- The impact of having been abused in the past (see, for example, the discussion of the cases of Melissa Kulla Kulla, Veronica Hudson and Karen Black in the DVRCV/Monash research - these women had experienced a history of childhood abuse or domestic violence from multiple partners)
- that apparently 'mutual' violence or evidence of past violence from the accused does not necessarily negate a claim to self defence (see the cases of Jemma Edwards, Jade Kells, and Melissa Kulla Kulla, discussed in the DVRCV/Monash research)
- a sense of self-blame and shame is common among victims of family violence. Victims typically feel responsible for the violence perpetrated against them, and this may impact on their assessment of their criminal liability (see the discussion of Karen Black's case p.42 in the DVRCV/Monash research)
- cultural, social and personal barriers that prevent women from seeking assistance (see the cases of Melissa Kulla Kulla and Veronica Hudson, discussed in the DVRCV/Monash research)

Section 9AH(4) should be aligned with the *Family Violence Protection Act 2008* s 5 definition of family violence. This includes information about the controlling coercive nature of family violence, economic abuse, and behaviour that 'causes fear':

Family Violence Protection Act 2008:

s 5: Meaning of family violence

For the purposes of this Act, **family violence** is—

- behaviour by a person towards a family member of that person if that behaviour—
 - i. is physically or sexually abusive; or
 - ii. is emotionally or psychologically abusive; or
 - iii. is economically abusive; or
 - iv. is threatening; or
 - v. is coercive; or
 - vi. **in any other way controls or dominates** the family member and **causes that family member to feel fear for the safety or wellbeing** of that family member or another person; or
- behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

Section 9AH(5) should include reference to family violence evidence-based risk factors that can indicate an increased risk of the victim being killed or seriously injured, to provide critical social context for what may trigger a family violence victim's action that results in the killing of the family violence perpetrator.

See the Appendix of this submission for a list of risk indicators from the *Victorian Family Violence Risk Assessment and Risk Management* framework. This risk assessment tool developed by the Department of Human Services was introduced in 2007 and is widely used by service providers across legal and community sectors in Victoria. This could be included as a Schedule to the *Crimes Act 1958*.

Reducing 'overcharging' by prosecutors

According to the DVRCV/Monash research (Kirkwood, McKenzie & Tyson 2013), all of the women who killed their intimate partners were charged with murder. The research found that in most cases the Crown was willing to accept a plea of guilty to a lesser offence of manslaughter or defensive homicide (Kirkwood, McKenzie & Tyson 2013). This situation has been described as one of women who kill intimate partners being 'overcharged' (NSW Select Committee on the Partial Defence of Provocation (NSWSCPDP) 2013, p. 157). Women facing murder charges are under pressure to plead guilty to lesser offences to avoid risking a murder conviction at trial in circumstances where there are defensive elements or where the intent is less than is required for murder (NSWSCPDP 2013, p. 166). This means that in cases where there may be good grounds on which to argue self-defence, the new provisions are not being adequately tested at trial. As a consequence, 'the case law on self-defence is not [being] given the opportunity to develop so that it can accommodate the circumstances of battered defendants in an appropriate way' (Tolmie 2005, p. 40).

Women who plead guilty to lesser offences may be deprived of potentially valid claims to an acquittal on the basis of self-defence (Sheehy, Stubbs & Tolmie 2012). This could be avoided if there were consultation between police and prosecutors about the most appropriate charge to lay (Stubbs & Tolmie, cited in NSWSCPDP 2013, p. 167). As noted by Stubbs and Tolmie, women defendants may be more willing to go to trial and argue self-defence if they are charged with a lesser offence of manslaughter or defensive homicide (NSWSCPDP 2013, p. 167). In agreement with this proposition, the NSW Committee formed the view that specific guidelines are required to assist prosecutors to determine the appropriate charge to lay against defendants in circumstances where there is a history of violence towards the defendant (2013, p. 167). Such guidelines could also be developed for the Victorian context.

The Victorian OPP should review its policies and consider adding guidelines regarding considerations where women have killed abusive partners.

According to the current *Director's Policy: The Prosecutorial Discretion Policy 2* (Director of Public Prosecutions Victoria, 27 July 2013), particular attention should be given to prosecutions for certain categories of offenders and offences:

'2.8 Exercise of the prosecutorial discretion in specific factual circumstances

2.8.1 The general prosecutorial criteria, as set out above, are applicable to all potential prosecutions, regardless of the circumstances of individual cases. However it is recognized that matters regularly arise involving certain categories of offences, or categories of offenders, in which particular attention needs to be given to the prosecutorial criteria, and in particular the "public interest" test, before a decision is made to commence or continue a prosecution' (p.15)⁴

We urge the OPP to consider including family violence as a specific factual circumstance in its prosecutorial policies. The OPP has already developed a family violence policy (see Director of Public Prosecutions Victoria *Director's Policy – Family violence*, 2 April 2010). This could be a useful starting point in developing

⁴ Online at: <http://www.opp.vic.gov.au/getattachment/c19fca74-1629-41df-a13c-9e017aabd79d/2-The-Prosecutorial-Discretion.aspx>

prosecutorial policies that recognise the impact of family violence on women who kill abusive intimate partners.

Documenting plea negotiations

According to the DVRCV/Monash research (Kirkwood, McKenzie & Tyson 2013), of the seven women whose prosecutions proceeded, all attempted to plead guilty to the lesser offences of manslaughter or defensive homicide. It is unclear why, since the introduction of the reforms, most cases have involved plea outcomes and not proceeded to trial. The OPP also appears to have accepted guilty pleas to defensive homicide in a large number of cases of men who have killed other men. According to the DVRCV/Monash research, of the 22 cases of men who killed other men, guilty pleas were accepted in most cases (a total of 16 cases).

It is difficult to ascertain the rationale behind the determination of guilt in the majority of these cases as they are settled privately via plea bargaining, which, as several authors have argued is a flawed process due to a perceived lack of transparency (Stubbs & Tolmie 2008; Flynn & Fitz-Gibbon 2011; Flynn 2012; Tyson 2011) – plea bargaining effectively ‘privatises justice’ (Stubbs & Tolmie 2008, p. 149).

Prior to the introduction of the reforms to homicide laws, the VLRC (2004, pp.108-10) recommended that the OPP develop guidelines requiring the documentation of plea negotiations in homicide cases. We are not aware of the current status of this, but believe this could be an important step in making plea negotiations more transparent.

Broadening the range of expert witnesses who can provide evidence about family violence

The VLRC (pp. 141-2, 180-88) suggests that the range of experts who can provide expert evidence on family violence should extend beyond psychologists/psychiatrists and include counsellors, social workers, family violence workers and people who have a specific understanding of particular cultural communities.

The DVRCV/Monash research found that the potential envisioned by the VLRC in relation to greater reliance on a broader range of experts with specific expertise about family violence has not been realised. There is little indication that a broad range of experts with specific family violence training are being called upon by counsel. Expert evidence continues to be confined to that provided by forensic psychiatrists and psychologists who undertake psychological assessments of the defendants and does not appear to provide evidence relating to the broader social context of family violence.

We recommend the establishment of a panel of family violence experts who can be drawn on by defence counsel to provide evidence in homicide plea hearings and trials. Funding could be provided by government to a relevant organisation to develop a model and establish a panel of suitably trained and experienced experts. It would be ideal if this organisation also facilitated ongoing training for these professionals.

Ongoing professional development for legal professionals about family violence

The DVRCV/Monash research (Kirkwood, McKenzie & Tyson 2013) demonstrates that at present, in cases of women who kill abusive partners, there is inadequate use of evidence of family violence and reference to s 9AH factors.

The findings demonstrate the need for education and training for legal professionals in relation to family violence. Such training should be ongoing, comprehensive and consistent; it should be provided to prosecuting and defence counsel, judges, expert witnesses and other legal professionals; and it should include cultural awareness training. As the VLRC recommended in 2004, this training should include

discussion of common myths, barriers to disclosing family violence, and how the use of expert evidence may assist in supporting a plea of self-defence (VLRC 2004, p.194). The training should also include how family violence relates to the elements of defences to homicide.

A family violence homicide specialist list for courts

We recommend that family violence be declared a special area of expertise within homicide law. This could be achieved with the implementation of a specialist domestic homicide unit within the Office of Public Prosecutions and a specialist Magistrates and Supreme Court domestic homicide list.

Considering that family violence is a factor in many homicides, a specialist list would be a valuable development. New Victorian Police data released just this week showed that 29 people have been killed in family violence related deaths just in the past year, a ‘worrying rise on the 13 people killed in family violence situations the previous year’ (as quoted in the *Herald Sun*, Ellen Whinnett, 25 November 2013).

Our 2010 submission provided some examples of cases in which the specialisation and experience of the presiding judge appeared to have made a difference in the recognition of family violence (Tyson, Capper & Kirkwood 2010, p.18).

Acknowledging domestic homicides as an area of expertise would require judges and magistrates presiding over such cases to have particular training and expertise in this area, including an understanding of the gendered nature of family violence and domestic homicides (Tyson, Capper and Kirkwood, 2010).

Jury Directions

Although the judge is not permitted to provide the jury with arguments not raised by counsel, there should be greater efforts to ensure that s 9AH is raised clearly and thoroughly by judges when the defence has provided at least some relevant evidence of family violence, whether or not the defence specifically draws attention to s 9AH factors.

Currently, if evidence that falls into the category of s 9AH(3) is given during the trial, judges should explain to the jury the relevance of that to the facts at issue.⁵ However, specific jury directions about this are not mandatory.

Mandatory jury directions might assist judges to better direct juries when family violence evidence 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. Introducing mandatory directions would also have an educative value for judiciary and legal practitioners.

The VLRC has recommended in its *Jury Directions: Final Report* (2009) that:

the nature and extent of a trial judge’s obligation to direct the jury about the elements of the offences, the facts in issue and the evidence so that it may properly consider its verdict should be set out in the legislation. (VLRC Recommendations 22 & 23)

We further note that jury directions are statutorily mandated in sexual assault trials (although they are currently complicated and in the process of being simplified – but, importantly, not abolished).⁶ As

⁵ *Victorian Criminal Charge Book* 8.9.2.1-8.9.2.4.

inspiration, s 37AAA(d)-(e) of the *Crimes Act 1958* (Vic) may offer a useful direction for how a mandatory direction(s) concerning s 9AH might be developed.

We therefore propose some mandatory directions, which draw on examples and principles regarding family violence as relevant to the evidence led. For example, there should be a requirement to remind the jury that just because the accused had previously used violence towards the deceased or did not leave when they apparently had the chance does not mean that they were not a victim of family violence. The Women Who Kill in Self-Defence Campaign's submission to the Model Criminal Code Officers' Committee Review of Fatal Offences Against the Person provides further examples of the type of information that could be included in directions.⁷

We also recommend that judges be encouraged to not only make verbal directions but also provide their directions in written form, together with jury guides (which contain a list of questions of fact designed to guide jurors to their verdict ie. to help to make the decision-making process clearer for jurors).⁸ This was recommended by the VLRC⁹ and is permitted under the *Criminal Procedure Act 2009* (Vic) s 223.¹⁰

Conclusion

Law reform concerning defences to homicide is complex. Our key point is that we do not support the abolition of defensive homicide because it would disadvantage women who kill abusive partners. This would therefore defeat the key purpose of the comprehensive review undertaken by the VLRC in 2002 – 2005.

Abolishing defensive homicide would be a radical step that would leave Victoria without a partial defence to murder. If any such change is to occur we strongly encourage the Department of Justice to refer this matter to the VLRC for further consideration.

⁶ *Crimes Act 1958* (Vic) s 37.

⁷ Available at <http://www.nwjc.org.au/mccode.htm>

⁸ For examples, see VLRC, *Jury Directions: Final Report* (2009), pp 166-83.

⁹ VLRC, *Jury Directions: Final Report* (2009) Recommendations 41-43.

¹⁰ For further support, see *Victorian Criminal Charge Book* 2.2.1 – Bench Notes: Providing Documents to the Jury. The VLRC noted in 2004 that written directions had been used in South Australia to assist the jury to understand the test for self-defence (*Defences to Homicide: Final Report*, 2004, p.95).

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Appendix 1

Family Violence Risk Assessment and Risk Management Framework - Aide memoire

Risk factors for victims	Yes	No	C
Pregnancy/new birth*			
Depression/ mental health issue			
Drug and/or alcohol misuse/abuse			
Has ever verbalised or had suicidal ideas or tried to commit suicide			
Isolation			
Risk factors for perpetrators			
Use of weapon in most recent event*			
Access to weapons*			
Has ever harmed or threatened to harm victim			
Has ever tried to choke the victim*			
Has ever threatened to kill victim*			
Has ever harmed or threatened to harm or kill children*			
Has ever harmed or threatened to harm or kill other family members			
Has ever harmed or threatened to harm or kill pets or other animals*			
Has ever threatened or tried to commit suicide*			
Stalking of victim*			
Sexual assault of victim*			
Previous or current breach of Intervention Order			
Drug and/or alcohol misuse/abuse*			
Obsession/jealous behaviour toward victim*			
Controlling behaviours*			
Unemployed*			
Depression/mental health issue			
History of violent behaviour (not family violence)			
Relationship factors			
Recent separation*			
Escalation—increase in severity and/or frequency of violence*			
Financial difficulties			

* May indicate an increased risk of the victim being killed or almost killed

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