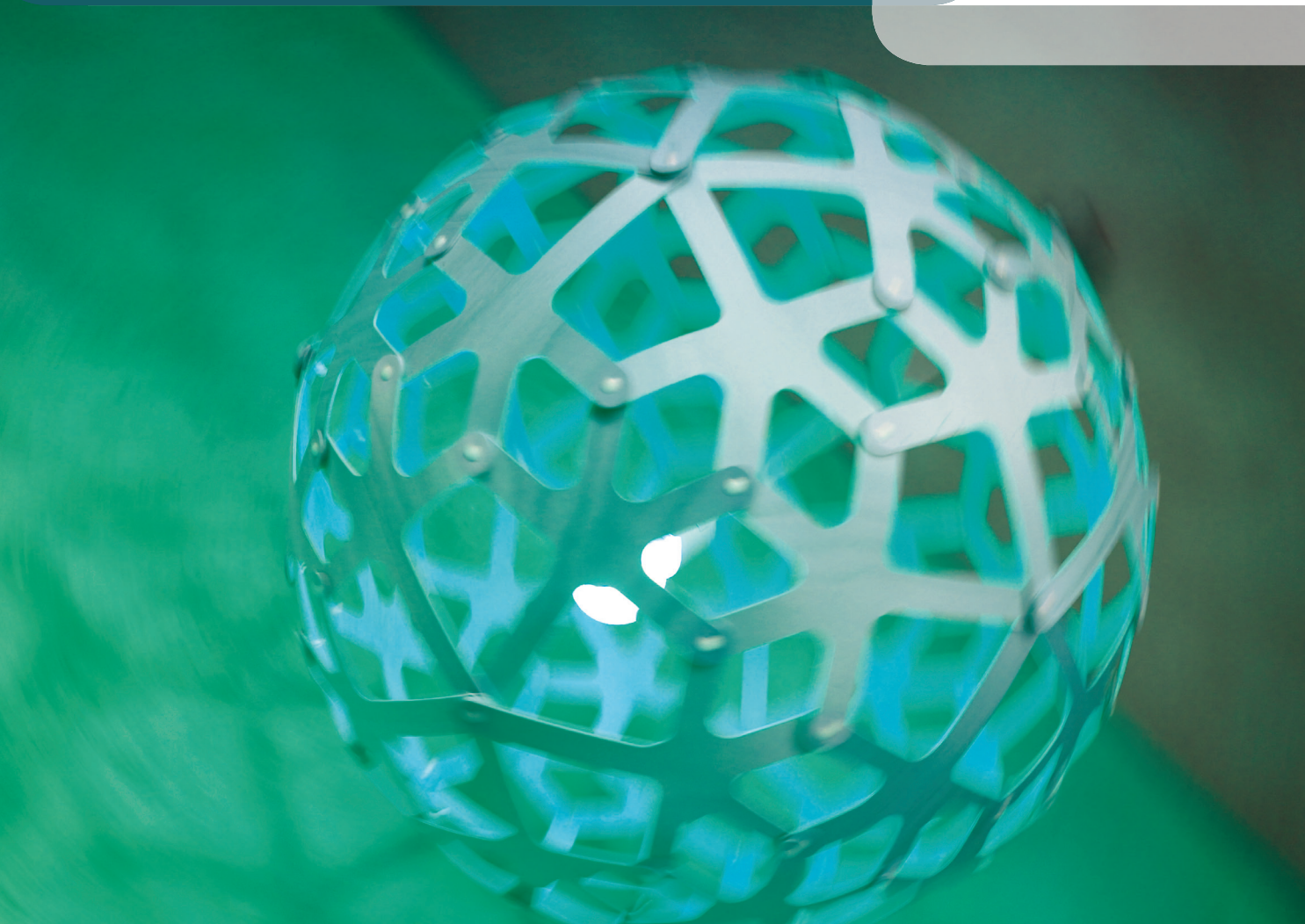


Defensive Homicide

Proposals for Legislative Reform

Consultation Paper

Criminal Law Review



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Preface

From the Secretary, Department of Justice

Family violence is a significant community safety issue. Raising public awareness of the problem and taking steps to address it is a key priority for the department.

In a small but nonetheless significant number of situations, a person may kill in response to family violence or a person may kill as their last act of family violence. Family violence is also a factor in other criminal offences such as assaults and rape.

Victoria's *Action Plan to Address Violence against Women and Children* was launched in October 2012 with the central tenet that violence against women and children in any form and in any community is unacceptable. The Action Plan continues to guide work across government in relation to preventing family violence, holding perpetrators accountable and making sure women and children are safe.

The department provides programs and services such as the Victims of Crime Helpline and the Victims Assistance and Counselling Program managed by the Victims Support Agency to assist victims of family violence. Victims are also supported through legislation, such as the *Family Violence Protection Act 2008*.

The department, in partnership with Victoria Police, courts and other justice agencies, has recently strengthened the system's response to family violence. Recent initiatives include:

- ♦ introducing new indictable offences with increased penalties (a maximum of five years' imprisonment) for repeated and serious breaches of Family Violence Intervention Orders and Family Violence Safety Notices. .
- ♦ increased funding of \$500,000 per year to increase the number of people who can be assisted by court-mandated Men's Behaviour Change programs, almost doubling the current capacity of the program, and
- ♦ introducing legislative amendments to extend Family Violence Safety Notices (issued by police) from 72 hours to 120 hours, maximising access to legal advice and court listing days.

I welcome other important initiatives over the last two years such as the Victoria Police Enhanced Service Delivery Model and the best practice policy on prosecuting in family violence cases developed by the Office of Public Prosecutions (OPP). Victoria Police's approach provides a more targeted response to repeat victims and recidivist family violence offenders. The OPP policy assists in creating a deeper understanding of the dynamics of family violence – helping legal practitioners and the judiciary contribute to improving the overall effectiveness of the criminal justice system in dealing with family violence.

The proposals for changes to laws presented in this paper offer significant opportunities for Victoria to improve the operation of the criminal justice system in relation to homicide offences in particular and family violence more generally.

Greg Wilson

Secretary

From the Director, Criminal Law Review

Over the last decade, homicide laws in Australia have undergone significant change. Some jurisdictions have abolished provocation. Some jurisdictions have made changes to self-defence laws. A number of reviews have been conducted on various aspects of homicide laws and some are currently underway.

Murder is the most serious offence we have. Any defence, partial defence or excuse to the offence of murder requires close scrutiny. At the same time, the way in which our laws operate in certain situations has been called into question. Laws that developed in the context in which men kill often did not adapt well to provide substantive equality for women who kill in self-defence.

The recommendations in the Victorian Law Reform Commission's Report in 2004 on *Defences to Homicide* and the *Crimes (Homicide) Act 2005* resulted in significant changes to the law. They also sought to engender cultural change, especially in relation to understanding the dynamics of family violence. Cultural change in particular requires renewed effort to sustain this change. This paper provides an opportunity to assess the impact of such changes and considers ways of continuing the process of review and further improvement of our criminal justice system.

This examination has resulted in proposals to further improve the way in which homicide laws operate, together with draft provisions showing how these proposals could be implemented in legislative form. Whether defensive homicide should be retained or abolished raises important and difficult policy issues. How it works in practice and what might happen if it is abolished warrants careful consideration.

A further issue concerns how evidence laws work in homicide trials where questions are asked about homicide victims. The abolition of provocation has reduced the problem of 'victim blaming' in homicide cases, but it remains a problem. This paper asks whether new laws should be introduced to address this problem and includes draft provisions setting out how such changes could be made.

In response to the department's Discussion Paper on defensive homicide, we received many helpful and thoughtful submissions. I would like to thank everyone who made a submission to the department. These submissions and the many relevant academic writings on these issues significantly assisted the development of proposals for reform set out in this paper.

I would also like to thank past and present members of Criminal Law Review who contributed to the development of this paper and the proposals for reform.

Greg Byrne

Director

The purpose of this paper

In August 2010, the Department of Justice released a Discussion Paper which involved a review of the offence of defensive homicide. The Discussion Paper covered a range of issues and asked nine specific questions. The Discussion Paper also asked a general question to elicit other ideas for improvement to defensive homicide, homicide and parts of the criminal justice system connected to these offences.

This Consultation Paper contains proposals for legislative reform, and asks several questions, in relation to issues considered in the Discussion Paper and addresses some consequential issues. It includes draft legislative provisions to illustrate the way in which the proposals and questions could be enacted. This will facilitate consideration of the proposals and questions, and enable interested persons to comment on them.

With the benefit of further submissions, the department will then provide advice to the Attorney-General concerning possible legislative reform of defensive homicide and related issues.

How to make a submission

If you wish to comment on the matters raised in this paper, you can make a written submission.

Please email or post your submission to:

Defensive Homicide: Submissions
Department of Justice
GPO Box 4356
Melbourne Vic 3001
E. clr@justice.vic.gov.au

If you have any questions regarding the submission process, call (03) 8684 0873.

Please note:

Unless marked 'private and confidential' all correspondence and submissions will be regarded as public documents, and may be made available on the Department of Justice's website, or be viewed by members of the public on request.

Even if a submission is marked 'private and confidential' the submission is still subject to the provisions of the *Freedom of Information Act 1982* (Vic) (FOI Act). However, it should be noted that the FOI Act requires the department, if practicable, to notify you if a request is made for access to a document containing information relating to your personal affairs and, if a decision is made to release that document, to notify you of rights of appeal under that Act.

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Abbreviations

ALRC	Australian Law Reform Commission
The department	Department of Justice
DPP	Director of Public Prosecutions
Discussion Paper	Department of Justice, <i>Defensive Homicide</i> , Discussion Paper (2010)
DVRCV	Domestic Violence Resource Centre Victoria
JCV	Judicial College of Victoria
LIV	Law Institute of Victoria
NSWLRC	New South Wales Law Reform Commission
OPP	Office of Public Prosecutions
Tyson, Capper and Kirkwood	Joint submission from Dr Danielle Tyson, Sarah Capper and Debbie Kirkwood on behalf of Dr Danielle Tyson, the Victoria Women's Trust, DVRCV, Federation of Community Legal Centres, Koorie Women Mean Business and Women's Health Victoria
VLA	Victoria Legal Aid
VLRC	Victorian Law Reform Commission
VLRC / NSW test	This refers to the test for self-defence which applies in New South Wales. In the VLRC Report, the VLRC recommended that Victoria adopt this same test.
VLRC Report	Victorian Law Reform Commission, <i>Defences to Homicide: Final Report</i> (2004)

In this paper, the Acts referred to are Victorian Acts unless otherwise stated.

Executive Summary

Defensive homicide

Defensive homicide has now been in operation in Victoria for more than seven years. In recent years, it has attracted considerable public attention. This has included the criticism that it is not producing the results that were intended and calls for its abolition.

The first step in the department's review of defensive homicide led to the publication of a Discussion Paper in August 2010. While defensive homicide is the primary focus of the review, the review also considers the operation of self-defence more generally and the way in which the criminal justice system works in cases where a woman kills in response to family violence.

Since the Discussion Paper, the number of defensive homicide convictions has increased from 13 to 28. This has included the conviction of three women for the offence of defensive homicide. These cases, as well as cases in which men have been convicted of defensive homicide, shed further light on the operation of the reforms introduced by the *Crimes (Homicide) Act 2005*.

The data from the 28 convictions for defensive homicide indicates that:

- ♦ the overwhelming majority of offenders were men (25 out of 28)
- ♦ the overwhelming majority of victims were men (26 out of 27)
- ♦ all three female offenders killed a man (3 out of 3)
- ♦ a minority of offenders had a family relationship with the victim (7 out of 28)
- ♦ a majority of the intimate partner killings were by women (3 out of 4)
- ♦ the majority of offenders pleaded guilty (19 out of 28), and
- ♦ the majority of female offenders pleaded guilty (2 out of 3).

These figures should be considered in the context of family violence killings. The Australian Institute of Criminology found that in 2008–09 and 2009–10:

- ♦ 66% of domestic homicides were intimate partner homicides
- ♦ 88% of all homicide offenders were men and 12% were women, and
- ♦ 68% of all homicide victims were men and 32% were women.

A number of criticisms of defensive homicide concern the structure of the offence and suggestions that excessive self-defence would be better recognised as a partial defence to murder (resulting in a conviction for the offence of manslaughter), rather than an offence. This also raises the issue of the complexity of defensive homicide and excessive self-defence. In Part 2 of this paper, the department has identified ways in which the complexity of defensive homicide could be reduced. However, there is an irreducible level of complexity involved in any form of excessive self-defence.

Changes to reduce the complexity of defensive homicide are unlikely to make any significant difference from a policy perspective to the outcomes of the application of defensive homicide.

Excessive self-defence was recommended by the VLRC as a 'safety-net' to support women pleading not guilty to murder and manslaughter and running a complete self-defence case. Whether a 'safety-net' is required depends upon the effectiveness of complete self-defence in the context of a woman who kills in response to family violence. The changes to self-defence in the context of family violence appear to have made a difference. However, it is not possible to draw definitive

conclusions about how defensive homicide is likely to continue to be used by women in the future, from the small number of cases to date.

For instance, of the three women convicted of defensive homicide to date, the Court of Appeal said that one woman fell outside the parameters of murder by a narrow margin and it could be argued that another woman potentially had a good case for self-defence but pleaded guilty to defensive homicide instead. However, it is very difficult to comment about such cases without seeing and hearing all of the evidence or the decisions that lawyers must make in deciding whether to advise their clients to plead guilty or not guilty. Further, the number of cases is insufficient to identify any discernible trend.

One of the questions posed in the Discussion Paper was how effective self-defence would be where the threat faced was not immediate. All three of the defensive homicide cases involving female offenders involved an immediate threat. Accordingly, the new laws have not been tested in this situation.

In over seven and a half years of operation, there has been one trial where a woman was convicted of defensive homicide and two women have pleaded guilty to defensive homicide. To obtain a small, but potentially sufficient, sample of defensive homicide trials involving women, there would need to be at least 10 trials. At the current rate, it would take 75 years before 10 women would be convicted of defensive homicide at trial. Accordingly, it would appear to require too long a period of time for definite conclusions to be drawn based on the data where women are accused, particularly since during that period, at the current rate, 250 men would be convicted of defensive homicide at a trial or by plea of guilty.

Accordingly, it is important to consider defensive homicide both in policy terms as well as how it applies when men kill.

From a policy perspective, the VLRC acknowledged that its consultations revealed that there was both support for, and opposition to, recognising excessive self-defence. Submissions received in relation to the department's Discussion Paper also revealed mixed views about defensive homicide from a purely policy perspective.

In some ways, defensive homicide distorts homicide laws and has unintended effects. The existence of defensive homicide shifts the focus of debate from the adequacy of complete self-defence to defensive homicide. This creates a real risk that the existence of defensive homicide suggests that a woman who kills in response to family violence is not acting reasonably, or will often not be acting reasonably, and therefore it is better to plead guilty to defensive homicide than raise self-defence at a trial.

On balance, the department considers that it is difficult to conclude that this defence clearly works to the benefit of women who kill in response to family violence. Accordingly, it is not clear that it achieves its intended objective. Further, defensive homicide may work to the detriment of women who kill in response to family violence and its existence may inhibit attempts to drive further cultural change in considering the situation of women who kill in response to family violence.

There is clear evidence that defensive homicide inappropriately provides a partial excuse for men who kill. Defensive homicide is primarily relied upon by men who kill. In many of these cases, men have killed in circumstances which are very similar to those where provocation previously applied.

For the following principal reasons, the department proposes that the partial defence of defensive homicide be abolished:

- ♦ it is inherently complex, making it difficult for judges and juries, and the community, to understand and apply
- ♦ there is no clear benefit to having defensive homicide as part of the legal framework for women who kill in response to family violence, and
- ♦ it inappropriately excuses killing by men.

To date, men have comprised 25 of the 28 convictions for defensive homicide. The price of having defensive homicide for the comparatively small number of women who kill is substantially outweighed by the cost of inappropriately excusing men who kill.

Self-defence

The 2005 reforms to self-defence included setting out the social context evidence that is relevant in cases of family violence. This was a significant and important change. However, defensive homicide may detract from the position that a woman who kills in response to family violence should rely on self-defence laws.

The ability to introduce social context evidence to better understand family violence, its dynamics and its effects was limited to homicide offences. Self-defence may be relevant to many other offences and family violence may be a relevant factor in considering self-defence in relation to other offences. For instance, a woman who attempts to kill or cause serious injury to her partner in response to family violence should also be able to adduce social context evidence to explain why she was acting in self-defence.

Accordingly, the department proposes removing the limit on using social context evidence laws only in homicide cases. Such evidence should be available wherever self-defence may be raised. Further, greater use of social context evidence in relation to a number of offences should result in the legal profession and the courts:

- ♦ being more familiar with the laws governing this kind of evidence, and
- ♦ better understanding the ways in which this kind of evidence may be relevant.

In turn, this should improve the effectiveness of social context evidence laws when used in homicide cases.

The proposals in this paper include having one test for self-defence which applies to all offences (as was the case before 2005). Even before defensive homicide laws were introduced, Victoria's self-defence laws differed from those in other jurisdictions in Australia. Most other states in Australia have changed their test for self-defence. The second limb of the common law test focused on whether the person had reasonable grounds for believing it was necessary to do what they did. The VLRC Report recommended that this be changed to the test used in other jurisdictions, including New South Wales. That test is whether the person's response was reasonable in the circumstances as perceived by them.

The VLRC recommendation provides a more objective test as it focuses on the person's response, rather than their grounds for believing action was necessary. However, it is not fully objective because, like the common law test, it must be determined in accordance with the circumstances as perceived by the person.

The paper includes a discussion of both of these proposals and asks whether Victoria should adopt the common law test or the test recommended by the VLRC.

Evidence about homicide victims

A number of submissions identified problems with the evidence that is led in some homicide trials about homicide victims. The abolition of provocation may have reduced ‘victim blaming’, but it continues to be a problem. This paper suggests two new ways of tackling this issue. First, by modifying existing laws concerning ‘improper’ questions (e.g. questions that are offensive, demeaning or based on stereotypes) so that they apply to questions asked about a homicide victim. This would prohibit these questions unless they are necessary in the interests of justice. Secondly, by adapting character evidence laws to enable the prosecution to lead evidence in rebuttal to address issues raised about the victim that bear on the issues in the case.

These two potential reforms aim to limit victim blaming and inappropriate questioning. Sometimes questions which may be regarded as offensive or damaging to the victim’s reputation are integral to the issues in dispute in the case. These potential reforms would not prevent such questions from being asked if they are relevant and necessary as part of the accused’s defence. However, where this evidence concerns the homicide victim’s character, the possible reforms would enable the prosecution to lead evidence to the contrary to provide the jury with a more complete picture of the issues in the case.

This new capacity for the prosecution to lead evidence of the victim’s good character may in some cases deter particular lines of questioning by removing the unfair advantage that may arise because the homicide victim is not a witness in the proceeding. The potential reforms would remove any unfair advantage the accused may have while being consistent with the accused’s right to a fair trial. This paper asks whether these two potential reforms should be introduced.

Monitoring and reviewing

The proposals in this paper involve significant reforms. The VLRC recommended that the department review the operation of excessive self-defence five years after it had commenced operation. That recommendation fixed an appropriate time frame for reviewing such an important change.

The department’s proposals (as informed by comments on this paper) should, if enacted by the government, also be reviewed to see if they achieve the intended outcomes. The department proposes that these laws should be reviewed five years after their commencement.

Proposals and questions

Proposal 1 – Defensive homicide (Part 2)

The department proposes that the offence of defensive homicide be abolished.

Proposal 2 – Excessive self-defence (Part 2)

The department proposes that excessive self-defence (in any form) should not be introduced.

Proposal 3 – Self-defence (Part 3)

The department proposes that the first limb of the common law test of self-defence should be reinstated, namely, whether the accused believed that it was necessary to do what he or she did to defend himself, herself or another.

Question 1 – Self-defence (Part 3)

Should the test for self-defence be that the accused believed that it was necessary to do what he or she did to defend himself, herself or another, and

- (a) had reasonable grounds for that belief (the common law test), or
- (b) the accused's response was a reasonable response in the circumstances as perceived by the accused (the VLRC / NSW test)?

Proposal 4 – A consistent test for self-defence (Part 3)

The department proposes that the test for self-defence should be set out in the *Crimes Act 1958* and should apply consistently to fatal and non-fatal offences.

Proposal 5 – Abolition of the common law test for self-defence (Part 3)

The department proposes that the common law test for self-defence be expressly abolished, wherever the new statutory test for self-defence applies.

Proposal 6 – Social context evidentiary laws (Part 3)

The department proposes that the social context evidence laws contained in section 9AH of the *Crimes Act 1958* be extended to apply to any claim of self-defence and not be limited to where the offence charged is murder or manslaughter.

Question 2 – Improper questions about homicide victims (Part 4)

Should new evidence laws be introduced to prohibit questions in a homicide case about the victim (unless necessary in the interests of justice) where, if the victim was alive and giving evidence in court, the question would:

- ♦ be offensive, humiliating or demeaning to the victim
- ♦ treat the victim without respect
- ♦ fail to respect the victim's reputation, or
- ♦ have no basis other than a stereotype (e.g. a stereotype based on the victim's sex, race, culture, ethnicity, age or mental, intellectual or physical disability)?

Question 3 – Evidence in rebuttal about homicide victims (Part 4)

Should new evidence laws be introduced to provide that in a criminal proceeding for a homicide offence, if the accused introduces evidence to show that the victim was not a person of good character, either generally or in a particular respect, the prosecution:

- ♦ may adduce evidence about the victim to show that the victim was a person of good character, either generally or in a particular respect, but
- ♦ may not use the evidence to infer guilt (tendency reasoning)?

The rules governing hearsay, opinion, tendency and credibility evidence would not apply to this evidence.

Proposal 7 – Review of the operation of reforms (Part 5)

The department proposes that there be a review of the operation of reforms arising from this review five years after the reforms commence operation.

1 Introduction

The VLRC Report on *Defences to Homicide* emphasised the importance to law reform of the social context within which homicides occur:

Defences and/or partial defences to homicide should not be based on abstract philosophical principles, but should reflect the context in which homicides typically occur. In particular, the law should deal fairly with both men and women who kill and defences should be constructed in a way that takes account of the fact that they tend to kill in different circumstances.¹

The VLRC recommended significant changes to the law of homicide. Many of these recommendations were implemented in the *Crimes (Homicide) Act*. This Act, which commenced operation on 23 November 2005:

- ◆ abolished provocation as a partial defence to murder
- ◆ defined the law of self-defence in relation to homicide in legislation
- ◆ recognised excessive self-defence through the creation of a new offence of defensive homicide, and
- ◆ clarified the laws of evidence so that relevant evidence about family violence can be admitted in homicide proceedings to explain to a jury the context in which the person killed and social, psychological and economic factors that can affect family violence victims.

These reforms recognised that homicide laws, and particularly self-defence, had developed in the context of violence by men, inappropriately partially excused men who kill women (in particular, the law of provocation) and failed to properly recognise women who kill in response to family violence (in particular, the law of self-defence). The reforms recognised that change to the law and to the culture of the criminal justice system was required.

The VLRC recommended that the department review the operation of the law of excessive self-defence, recognised in the offence of defensive homicide, five years after it had commenced operation.

The department released a Discussion Paper, *Defensive Homicide*, on its website on 8 August 2010. The Discussion Paper was also sent to a number of stakeholders. Nineteen written submissions were received, from a broad range of stakeholders, including some joint submissions. A list of submissions is at Appendix 1. The department also met with the LIV on 9 September 2010 and the Coalition for Safer Communities on 15 September 2010.

The Victorian Coalition Government was elected in November 2010. Both prior to the election and following the election, the Attorney-General, the Honourable Robert Clark MP, expressed concerns about the operation of the offence of defensive homicide. When in opposition, Mr Clark said (in the context of the sentence for Luke Middendorp for killing Jade Bownds):

This law is just not working as it's supposed to have worked and justice is not being served. The law is complex, it may well be confusing to juries or others and the end results seem totally contrary to common sense and seem to be leading to unjust outcomes.²

The operation of defensive homicide has continued to be controversial. The Attorney-General asked the department to prepare proposals for possible legislation to reform the law concerning

¹ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) 15. See also Jenny Morgan, 'Homicide Law Reform and Gender: Configuring Violence' (2012) 45(3) *Australian & New Zealand Journal of Criminology* 351.

² Adrian Lowe, 'New Calls for State to Overhaul Homicide Laws', *The Age* (Melbourne), 20 May 2010, 6.

defensive homicide. This Consultation Paper sets out the department's proposals for possible legislative reform and the reasons for those proposals and asks several questions.

The submissions from stakeholders in relation to the Discussion Paper have been invaluable in developing the proposals and questions for reform. With some issues, this paper identifies all of the submissions that supported or did not support a position. With others, the issue is sufficiently covered by referring to one or two submissions that express similar views. This is for ease of reading rather than reflecting any view about the other submissions.

1.1 Continuing public interest in the operation of homicide laws

Since the publication of the department's Discussion Paper in August 2010, the operation of the offence of defensive homicide has continued to be an issue of public concern.

In February 2012, the *Herald Sun* reported research findings from Fitz-Gibbon and Pickering, where, following comments from judges and prosecutors about defensive homicide laws, they said that defensive homicide had complicated the law so much it was 'difficult, if not impossible, to operate in the jury environment'.³

The Attorney-General said that the law was not working as intended and had led to results that seemed 'unjust and contrary to common sense'.⁴ The *Herald Sun* further reported that '[c]rime victims and domestic violence lobby groups have led growing calls for the abolition of the state's defensive homicide law'. The LIV's spokesman, Rob Stary, who had represented both women who had been convicted of defensive homicide, at that time, indicated support for the law of defensive homicide and that both women (Karen Black and Eileen Creamer) had 'been subjected to physical and psychological domestic violence over many years'.⁵

Another aspect of the operation of defensive homicide arose in June 2012 when the *Melbourne University Law Review* published an article by Flynn and Fitz-Gibbon⁶ which set out the results of their examination of pleas of guilty to defensive homicide. Flynn and Fitz-Gibbon discussed issues concerning accountability and transparency in prosecution decision-making to accept pleas of guilty to defensive homicide. The lack of information concerning the reasons why the prosecution is accepting these pleas of guilty means that the community does not know whether offenders are properly being held to account for their actions, that is, whether any of these offenders should have been prosecuted for murder.⁷

The DPP and the Chief Crown Prosecutor responded to media articles concerning these practices stating that the 'necessary checks and balances are in place to govern all plea negotiations including homicide practices'.⁸ This debate led to broader observations concerning the operation of defensive homicide. *The Age* editorial discussed the importance of not losing sight of the reasons why reform was necessary in 2005, principally the issue of gender bias in the law, when undertaking the 'basically sound decision to amend the state defensive homicide law'.⁹

The importance of the context of these reforms and the context of gendered killings has also been considered by Tyson. Two of the most significant parts of the 2005 reforms were the abolition of

³ Geoff Wilkinson and Courtney Crane, 'A Law Meant to Protect Women is Being Abused by Brutal Men', *Herald Sun* (Melbourne) 10 February 2012.

⁴ Ibid. See also, Andrea Petrie, 'Killers Abusing Defence Law', *The Age* (Melbourne) 16 June 2013.

⁵ Courtney Crane, 'Growing Calls for Defensive Homicide Review', *Herald Sun* (Melbourne) 13 February 2012.

⁶ Asher Flynn and Kate Fitz-Gibbon, 'Bargaining with Defensive Homicide: Examining Victoria's Secretive Plea Bargaining System Post-Law Reform' (2011) 35 *Melbourne University Law Review* 927.

⁷ Andrea Petrie, 'Murder "Deals" Under Fire', *The Age* (Melbourne), 25 June 2012, 1.

⁸ Andrea Petrie, 'State to Change Defensive Homicide Law', *The Age* (Melbourne) 26 June 2012, 1.

⁹ Editorial, 'Defensive Homicide Warrants a Calm Review', *The Age* (Melbourne) 27 June 2012, 14.

provocation and the improvements to self-defence in the context of family violence. As Tyson indicated, in response to the *Herald Sun* articles in February 2012 referred to above, and the comment that defensive homicide is replacing provocation:

If you look at the Supreme Court cases involving men who have killed their current or ex-partners since the abolition of provocation and the *Crimes (Homicide) Act 2005* came into effect, the majority of these male killers have been sentenced on the basis of murder: 27 male defendants have been charged with murder for killing an intimate partner or ex-partner. Of these, 21 have been sentenced on the basis of murder; 12 were the result of a plea of guilty to murder and another nine were convicted of murder after a trial. There have only been six cases involving men who killed their intimate partner or ex-partner who have had their culpability reduced to manslaughter after a trial. The case of Middendorp is the only case involving a man who killed his ex-partner and who has been convicted of the offence of defensive homicide after a trial.

1.1.1 Other Australian jurisdictions

Examination of these kinds of laws is not limited to Victoria. The Legislative Council of the New South Wales Parliament established an inquiry into the law of provocation following the case of *Singh v The Queen*.¹⁰

The accused in *Singh* strangled his wife before cutting her throat eight times with a box cutter. The Crown refused a guilty plea to manslaughter, but at trial the accused was found not guilty of murder, and guilty of manslaughter on the basis of the partial defence of provocation. He was sentenced to eight years' imprisonment, with a six year non-parole period. The basis of the provocation in *Singh* was the accused's wife's desire to end their marriage, which would affect his Australian visa.

An earlier New South Wales case, *R v Stevens*, raised similar issues.¹¹ The prosecution accepted a guilty plea to manslaughter by provocation. The accused had violently beaten his partner, who died of abdominal bleeding. There was evidence of a history of violence by the accused against the victim, who was found to have over 76 separate injuries to her body, of varying ages. The most recent injuries were blunt trauma injuries to the head.

In both *Singh* and *Stevens*, the defence of provocation was founded on the accused's report of the victim's inflammatory statements and conduct. In *Singh*, this included hearsay evidence about what the deceased had said immediately prior to the attack, which included reference to an infidelity not supported by other witnesses. In *Stevens*, the accused made several allegations about the victim, including infidelity and 'bad mothering'.

The New South Wales Parliamentary Committee was established in June 2012 to 'inquire into and report on: the retention of the partial defence of provocation including abolishing the defence or amending the defence in light of proposals in other jurisdictions; the adequacy of the defence of self-defence for victims of prolonged domestic and sexual violence; and any other matters'. In its report dated April 2013, the Committee recommended (among other things) retention of the partial defence of provocation where a person kills in response to 'gross provocation'.¹²

In South Australia, the Honourable Tammy Franks MP introduced a Bill in May 2013 to remove non-violent homosexual advances from constituting provocation. Franks is currently engaging in public consultation regarding whether provocation should be abolished completely in that state.

¹⁰ *Singh v The Queen* [2012] NSWSC 637.

¹¹ *R v Stevens* [2008] NSWSC 1370.

¹² New South Wales, Legislative Council, Select Committee on the Partial Defence of Provocation, *The Partial Defence of Provocation* (23 April 2013).

By contrast, provocation was abolished in Victoria in 2005. The changes to the law in relation to provocation were discussed by Justice King in her sentencing remarks in *R v Neascu*, where Neascu pleaded guilty to murdering his ex-wife's lover:

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, but particularly you had no right to kill the man with whom she had formed a relationship because of your anger as 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.¹³

However, in considering the abolition of provocation in circumstances where men kill women, cases like *R v Middendorp*¹⁴ and *Sherina v The Queen*¹⁵ show that it is important to be aware that:

[t]he past should not continue to influence the present in undesirable ways and the partial defence [of provocation] should not re-emerge in a new guise as a particular variety of murder. Many of the old assumptions will need to be discarded and a new normative framework must be developed.¹⁶

1.1.2 Family violence generally

The importance of addressing family violence, and that it is a priority for Victoria Police, was reaffirmed by Chief Commissioner Lay shortly after he was appointed. In September 2012, *The Age* reported that:

Across Victoria, there was a 23 per cent increase in reports to police of family violence-related crime and a 45 per cent increase in the number of charges issued in 2011–12 compared with the year before.

The statistics show 50,382 reports of family violence to police resulted in 17,528 charges.

Over the past five years, reports have increased by 59 per cent and charges by 125 per cent.¹⁷

On 29 November 2012, the DPP, John Champion SC, said that:

Family violence was involved in 378 serious criminal matters received by the Office of Public Prosecutions (OPP) in the past year, according to statistics gathered as part of a new family violence policy.

This represented 13.9 per cent of the total number of criminal prosecution matters received by the OPP in the past year.

The statistics also reveal that more than 40 per cent of family violence-related matters involved sexual offending, and 92 per cent of the perpetrators were male.¹⁸

In July 2013, Chief Commissioner Lay described family violence as one of the most significant law and order problems in Victoria, with half of assaults in the state happening in the home.¹⁹

¹³ *R v Neascu* [2012] VSCA 388 [43].

¹⁴ *R v Middendorp* [2010] VSC 202.

¹⁵ *Sherina v The Queen* [2011] VSCA 242.

¹⁶ Felicity Stewart and Arie Freiberg, 'Provocation in Sentencing' (Research Report, Sentencing Advisory Council, 2nd ed, July 2009).

¹⁷ Nicole Brady, 'Charges for Family Violence Soar', *The Age* (Melbourne) 9 September 2012. In April 2013, Chief Commissioner Lay estimated that approximately 64,000 family violence offences would be reported in the 2012-13 financial year: Nino Bucci, 'Police Chief Says Family Violence Worse Than Imagined', *The Age* (Melbourne) 22 April 2013.

¹⁸ Office of Public Prosecutions, Victoria 'Media releases', www.opp.vic.gov.au.

While this paper focuses primarily on one part of family violence, namely where it leads to a woman killing in response to family violence, the volume of family violence, and the very high percentage of perpetrators who are male, is very important in framing this analysis.

1.1.3 Family violence in homicide cases

A recent study examined family violence or 'battered women's homicides' across Australia, New Zealand and Canada. Because there is no comprehensive database of all homicide cases, there are some limitations to the data which was derived from reported and unreported cases and media articles. The authors of the study, Sheehy, Stubbs and Tolmie (from the Universities of Ottawa, New South Wales and Auckland respectively) state that:

The homicide rate in Australia is at a historically low level (1.2 per 100,000), and there has been a marked reduction in the rate of homicides over the past decade, especially for homicides by men who killed friends or acquaintance [sic]; women rarely kill in such circumstances. However, the trend in domestic homicides is distinctive in that unlike other categories of homicide, the number has not declined. In 2008–2009, the most recent year for which data have been reported, more than half of all Australian homicides were 'domestic' (52%), that is they involved family members and/or others in a domestic relationship; among domestic homicides, intimate partner homicides made up the largest category (60%).²⁰

More recent data from the Australian Institute of Criminology for the financial years 2008–09 and 2009–10 indicates that domestic homicides had fallen to 36% of all homicides and intimate partners make up 66% of this category. Men comprised 88% of offenders and 12% were women. Men comprised 68%, and women 32%, of all victims of homicide.²¹

The findings of the study by Sheehy, Stubbs and Tolmie are set out below:

Table 1: Homicide prosecutions of battered women 2000–2010, Australia: Outcomes by State

Outcome	NSW	Vic	QLD	WA	SA	NT	ACT	Tas	Aust	%
Withdrawn	1								1	1.5
Dismissed at committal		1							1	1.5
Trials										
Acquittal (self-defence)	5	2	1	1	1		1		11	16.4
Manslaughter conviction	2	4	2	2	1				11	16.4
Murder conviction					1				1	1.5
Guilty Pleas										
Other offences				1		1*			2	3.0
Manslaughter	15	5	7	6	1	3		2	39	58.2
Murder	1								1	1.5
Total	24	12	10	10	4	4	1	2	67	100

¹⁹ Ellen Whinnett, 'Chief Commissioner Ken Lay Says More Men Need to Stand Up Against Domestic Violence', *The Herald Sun* (Melbourne) 22 July 2013.

²⁰ Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Battered Women Charged with Homicide in Australia, Canada and New Zealand: How Do They Fare?' (2012) 45(3) *Australian & New Zealand Journal of Criminology* 383, 385.

²¹ Australian Institute of Criminology, *Homicide in Australia 2008–09 to 2009–10: National Homicide Monitoring Program Annual Report*, Monitoring Report No 21 (2013). There is no explanation at this stage for why the percentage of 'domestic homicides' has fallen within an otherwise steady homicide rate.

As Sheehy, Stubbs and Tolmie say:

If these figures accurately reflect what is happening in practice, murder convictions of battered women appear to have become rare in Australia. By comparison, Bradfield's study of the period 1980–2000 found seven murder convictions (9%) and 10 acquittals (13%) from 76 cases (2002). This suggests that, over the past decade, greater recognition has been given to the context of domestic violence in cases involving battered women defendants for the purposes of assessing criminal liability and applying the legal defences. It also seems that in the majority of homicide cases involving battered women defendants, the prosecution accepted guilty pleas to charges less than murder – sparing the defendant, witnesses and society the costs involved in going to trial. In slightly less than half of these cases, it did so on the basis of one of the partial defences to murder.²²

In relation to Victorian cases, it should be noted that a significant number of these cases occurred before the 2005 reforms commenced. In one of the two murder convictions in the above table, the judge indicated that the case was essentially one of manslaughter and used this as a guide to sentencing, imposing a head sentence of nine years' imprisonment.²³

1.2 Scope of this paper

This paper picks up on issues raised by the department's Discussion Paper in 2010 and issues which have arisen since that time. This paper focuses primarily on the operation of defensive homicide and the operation of self-defence in the context of family violence. It is beyond the scope of this paper to conduct a comprehensive analysis of the prevalence of family violence generally within Victoria. The ALRC and NSWLRC report, *Family Violence – A National Legal Response* (2012) contains a comprehensive review of family violence and Australian laws, including homicide laws, in the context of family violence.²⁴

It is also beyond the scope of this paper to comprehensively review offences where men kill women. This is because the focus of the paper is on reviewing defensive homicide. In the 28 convictions for defensive homicide, only one has involved a man killing a woman. The focus of this paper does not suggest in any way that how the law applies in situations where men kill women is less important. While a comprehensive analysis of this situation is beyond the scope of this paper, a number of the proposals in this paper will also assist in addressing issues which have arisen where men kill women.

1.2.1 Overview of this paper

The Discussion Paper indicated that it was the first step in the department's review of defensive homicide. Informed by submissions from that paper, further cases and commentary about the operation of these laws, this paper presents proposals and questions for possible legislative reforms. The main Parts of the paper are as follows:

- ♦ Part 2 – contains a detailed analysis of defensive homicide from both a policy perspective and based on how it has operated in practice
- ♦ Part 3 – discusses how the test for self-defence should operate, and
- ♦ Part 4 – examines the issue of 'victim-blaming' and potential reforms to address this issue.

²² Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Battered Women Charged with Homicide in Australia, Canada and New Zealand: How Do They Fare?' (2012) 45(3) *Australian & New Zealand Journal of Criminology* 383, 388.

²³ Ibid 389.

²⁴ The department has also published an 11 year trend analysis (1999–2010) of family violence reports in Victoria. See Department of Justice, *Measuring Family Violence in Victoria: Victorian Family Violence Database Volume 5* (2012).

In examining these issues, it is essential to closely examine and comment upon recent cases. It would be inappropriate, and it is not the intention of this paper, to make any criticism of jury verdicts. Juries play a vital role in our criminal justice system. Further, it is not possible to second-guess a jury's factual conclusions. This paper also discusses some cases in which a decision was made to plead guilty to defensive homicide. These cases assist in explaining how the laws and the criminal justice system are working. It is not the intention of this paper to make any criticism of individual plea decisions.

2 Defensive Homicide

2.1 Introduction

The central question posed by the Discussion Paper was whether the offence of defensive homicide should be retained, limited or abolished. As outlined in the Discussion Paper, the primary focus of the law with regard to killing in response to family violence should be the laws of self-defence. Following the recommendations of the VLRC, the *Crimes (Homicide) Act* introduced important changes to these laws.

In this part, we examine more recent cases involving defensive homicide, consider whether defensive homicide can be simplified and examine the operation of defensive homicide where the accused is a woman and where the accused is a man.

2.2 The operation of defensive homicide since August 2010

The Discussion Paper identified that between November 2005 and August 2010, there had been 13 defensive homicide cases. All 13 offenders were male, and 12 of the victims were male. The majority of the cases involved a one-off violent confrontation between males, rather than a family violence or intimate partner context. The one notable exception arose in *Middendorp's* case.

Since 2010, there have been a further 15 defensive homicide convictions, three of which involved female offenders killing an intimate partner. A summary of the cases over these two time periods is set out in Appendices 2 and 3 respectively.

The additional three years of operation of defensive homicide have confirmed the conclusion reached in the Discussion Paper that most of 'these cases have involved one-off, violent confrontations between males of approximately equal strength'.²⁵

Including the additional cases means that since the commencement of defensive homicide:

- ♦ the overwhelming majority of offenders were men (25 out of 28)
- ♦ the overwhelming majority of victims were men (26 out of 27)
- ♦ the overwhelming majority of men killed another man (24 out of 25)
- ♦ all three female offenders killed a man (3 out of 3)
- ♦ a minority of offenders had a family relationship with the victim (7 out of 28)
- ♦ a majority of the family relationships involved intimate partners (4 out of 7)
- ♦ a majority of the intimate partner killings were by women (3 out of 4)
- ♦ the overwhelming majority of male offenders had prior convictions (19 out of 23)²⁶
- ♦ only one female offender had prior convictions (1 out of 3)
- ♦ a weapon was used in every offence (17 involved a knife, 2 involved a tomahawk, 3 involved a firearm and 6 involved some other blunt instrument)
- ♦ the majority of offenders pleaded guilty (19 out of 28), and
- ♦ the majority of female offenders pleaded guilty (2 out of 3).

²⁵ Department of Justice, *Defensive Homicide: Discussion Paper* (2010) 5.

²⁶ At the time of publication of this Consultation Paper, the reasons for sentence in the case involving the 13 year old offender (whose name is unknown) had not yet been published. Accordingly, it is not known whether the accused had any prior convictions.

This data helps to explain how the offence of defensive homicide is being used. Given that there were three female offenders, each of these cases warrants detailed discussion.

2.2.1 *R v Black* [2011] VSC 152

In October 2009, Karen Black had an ‘extended argument’ with her de facto husband, Wayne Clarke. The argument moved to the kitchen, where Mr Clarke pinned Ms Black into a corner by sticking his chest out and jabbing her body with his finger. Ms Black said that Mr Clarke was a lot taller than her. Ms Black grabbed a kitchen knife, Mr Clarke continued to corner her and ‘egg her on’, and she stabbed him twice in the chest. Ms Black surrendered herself to police soon after the stabbing and expressed immediate remorse for her actions.

The Crown charged Ms Black with murder but accepted her plea to defensive homicide. The Crown did not dispute that there had been a long history of family violence on the part of Mr Clarke towards Ms Black. There was evidence of frequent drunken verbal abuse and physical intimidation, unwanted sexual contact and bruises on Ms Black.

In relation to the killing, Ms Black said, ‘[h]e was then coming closer and closer to me and was pointing his finger at me, and I was thinking because he was so drunk he would probably want to force himself on me sexually and I was just thinking well what else could he do to me’.

The trial judge found Ms Black’s offending to be in the middle of the range for defensive homicide, and sentenced Ms Black to nine years’ imprisonment with a non-parole period of six years.

2.2.2 *R v Creamer* [2011] VSC 196

On the known facts, on 3 February 2008, Eileen Creamer struck her husband, David Creamer, with a blunt weapon on a number of occasions, both inside and outside their home, and stabbed him in the abdomen with a kitchen knife. Mr Creamer received a very severe beating and would have been disabled at the time he was stabbed.

These facts differ markedly from Ms Creamer’s account. Ms Creamer gave evidence of her belief that Mr Creamer was arranging for her to have sex with other men in his presence, and that she had seen him meet with two men for that purpose on 2 February. After an argument later that day, she said that she awoke to find Mr Creamer hitting her with a stick. The next day, Ms Creamer believed that Mr Creamer was going to attack her, and started hitting him with the stick that he had hit her with the day before. He was verbally abusing her, she ran out of the house, he dragged her back in and grabbed a kitchen knife. The struggle continued on the bed, where Mr Creamer said that he was going to ‘finish her off’ and then she stabbed Mr Creamer. Ms Creamer then said that when she ran out of the house to dispose of the stick, he followed her out and called for her to come back. When she returned to the house, she heard Mr Creamer in the shower. Ms Creamer then said that she found her husband dead the next morning.

Mr and Mrs Creamer had been married for 10 years. Their marriage was characterised by prolonged periods apart and extra marital affairs on both sides. In April 2006, Mr Creamer moved to Australia from New Zealand, with Ms Creamer following him at his request in May 2007. Ms Creamer indicated that throughout their marriage, Mr Creamer repeatedly pressured her to take part in group sex, which she refused to do. Ms Creamer also gave evidence that Mr Creamer was physically abusive, and forced her to have sex with him.

Ms Creamer was charged with murder. The Crown submitted that Ms Creamer murdered her husband when she became aware that he had reconciled with his first wife, and intended to end

their marriage. Ms Creamer offered to plead guilty to defensive homicide but the trial proceeded on the murder charge. The jury acquitted her of murder but convicted her of defensive homicide.

The trial judge queried some aspects of Ms Creamer's evidence, such as the alleged beating on 2 February, and did not accept several other aspects. For example, the trial judge did not accept that on 3 February, Mr Creamer had threatened to 'finish her off',²⁷ or that Mr Creamer would have been able to leave the house or have a shower after Ms Creamer stabbed him.

The trial judge also did not accept all the matters raised about family violence on Ms Creamer's behalf but noted that the jury must have regarded the family violence as real in order to reach its verdict. The trial judge sentenced Ms Creamer on the basis that she had been overwhelmed by the whole of the circumstances as they surrounded her, and in particular, by her concern that she was being forced into a sexual scenario that she did not want.

The trial judge noted that the objective circumstances of the case made it a serious example of defensive homicide. The judge indicated at [29] that Ms Creamer had inflicted 'a very severe beating, demonstrating that [she] was out of control', and sentenced Ms Creamer to 11 years' imprisonment, with a non-parole period of seven years. This is the second highest sentence imposed for defensive homicide (the highest being the 12 year sentence imposed in *Middendorp's* case²⁸). Two other cases since 2010 also involved head sentences of 11 years' imprisonment.²⁹

Ms Creamer appealed the sentence on the basis that it was manifestly excessive.³⁰ The appeal was dismissed. Weinberg JA (with whom Bongiorno JA and T Forrest AJA agreed) said at [48] that 'the sentencing judge was entitled to characterise this as a serious example of defensive homicide. Insofar as it fell outside the parameters of murder, it did so only by a narrow margin'. In discussing the requirement for an offender to believe that they were under threat of death or really serious injury, Weinberg JA went on to say at [50] that:

There are degrees by which a belief may be said that have been unreasonable. In some cases, the line is just barely crossed. In others, the belief is wholly unjustifiable, almost to the point of being fanciful. The present case strikes me as falling within the latter category.

2.2.3 *R v Edwards* [2012] VSC 138

In January 2011, Jemma Edwards stabbed her husband, James Edwards, more than 30 times in the upper body, right arm and left leg. Ms Edwards initially told police that Mr Edwards had been killed by two offenders. She was assessed as unfit to be interviewed and detained in a psychiatric unit for 13 days.

After her release, she confessed to killing Mr Edwards, but told police that she had acted in self-defence. Ms Edwards told police of a history of violence by Mr Edwards towards her and said that the night before the killing, Mr Edwards had been drinking heavily and had threatened her repeatedly. Ms Edwards said that on the day of the killing, Mr Edwards was still drunk. He punched her, and threatened to kill her, cut her eyes out and her ears off. She shot him with a spear gun. The spear bounced off him, and he came towards her with a kitchen knife. There was a struggle in which Mr Edwards fell, at which time she grabbed the knife and stabbed him. The trial judge expressed serious reservations about the account given by Ms Edwards and noted that some aspects of it were incompatible with the forensic and other evidence at the scene.

²⁷ Justice Coghlan said that the first time Mrs Creamer had said this was during the trial and he was not prepared to find that it was said: see *R v Creamer* [2011] VSC 196 [21].

²⁸ An appeal against sentence was dismissed in *Middendorp v The Queen* [2012] VSCA 47.

²⁹ *R v Svetina* [2011] VSC 392 and *DPP v McEwan* [2012] VSC 417. See Appendix 3 for a brief summary.

³⁰ *Creamer v The Queen* [2012] VSCA 182.

Ms Edwards was charged with murder and pleaded guilty to defensive homicide.

Ms Edwards had a prior conviction for assault occasioning actual bodily harm following an incident in 2005 in which she stabbed Mr Edwards four times with a corkscrew/knife. Ms Edwards had no visible injuries but claimed that she acted in self-defence after her husband had punched her repeatedly for 30 minutes and threatened to kill her.

Ms Edwards had a significant history of psychiatric illness, involving anxiety and bipolar disorder, but her counsel did not submit that her mental state at the time of the killing would require a consideration of the principles set out in *R v Verdins*.³¹

The trial judge found that Ms Edwards had suffered domestic violence at the hands of Mr Edwards on numerous occasions over the preceding 12 years, and that he had also been violent towards his mother and his daughter. At the time of his death, there was an intervention order protecting Ms Edwards from her husband.

The Crown acknowledged, and the trial judge agreed, that Ms Edwards' culpability was less than that of the offender in *Black's* case, discussed above. The trial judge sentenced Ms Edwards to seven years' imprisonment, with a non-parole period of four years and nine months.

2.3 Should defensive homicide be limited to situations involving serious family violence?

As discussed in the Discussion Paper, defensive homicide could either be retained, limited in some way (e.g. to situations involving family violence) or abolished.

There was little support for limiting defensive homicide to situations involving serious family violence. Victoria Police and the Crime Victims Support Association supported further consideration of this approach. However, this option was strongly criticised in many submissions (e.g. LIV, VLA, the former DPP, the joint submission by Tyson, Capper and Kirkwood, and the Union of Australian Women).

This opposition was both philosophical and practical. First, it was submitted that it is inappropriate for the law to apply in such an unequal manner where people who have the same state of mind are partially excused in one situation and not excused in another. The LIV said the following:

The LIV submits that fundamental objective of the Criminal Law [sic] is to establish a standard of conduct based on community values and expectations that ordinary men and women are to observe. For this purpose, the criminal law must be stated in a clear fashion, and must apply equally to all people.

Secondly, concerns were raised that it would be inappropriate to limit this offence to either:

- ♦ women, and thereby exclude children from raising it, or
- ♦ family violence, but not apply it to other situations where there are power imbalances and trusting relationships (e.g. carer relationships for the elderly or mentally impaired).

A number of submissions agreed with the criticism identified in the Discussion Paper that by limiting the application of defensive homicide to family violence, the law would treat those who act in excessive self-defence differently, depending on the reasons why, and the circumstances in which, they kill. If the law operates to excuse or partially excuse a person from criminal responsibility for a serious criminal offence, the law should apply equally to people who have the same state of mind. It

³¹ *R v Verdins* (2007) 16 VR 269.

should not apply differently to other people who are also vulnerable in some way and kill the person abusing them.

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'. As discussed later in this part, 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.

In addition to the VLRC, the Law Reform Commission of Western Australia³² and the New Zealand Law Commission³³ did not support the introduction of a specific defence for use in the context of family violence.

The department agrees with the views expressed in a number of submissions that defensive homicide should not be limited to killings in response to family violence.

These arguments focus on formal or procedural equality.³⁴ The challenge with self-defence is providing substantive equality in the manner in which self-defence operates for women who kill. The basis on which self-defence developed recognised that men may kill in self-defence where there is an immediate threat from another man of similar strength. The operation of self-defence therefore needs to be challenged to ensure that it similarly recognises the different situations in which women kill, which is often in response to family violence where the threat may not be immediate and the woman and man are not of similar strength.

2.4 Submissions concerning abolition or retention of defensive homicide

There are essentially two options to consider in detail:

- ♦ retaining defensive homicide and reviewing its operation again in a further two, three or five years, or
- ♦ abolishing defensive homicide.

In deciding between these two options, a range of issues and different perspectives need to be considered.

Submissions were mixed on whether defensive homicide should be retained or abolished. Most of the submissions that supported abolition of the offence expressed that view strongly. Many of the submissions supporting retention of the offence were more equivocal, with a number advocating a further review in two, three or five years time. In some instances, this qualification was because of the small number of cases up to August 2010. In other instances, it was because of concerns about how it was operating in practice (i.e. the cases in which men were convicted of defensive homicide).

Tyson, Capper and Kirkwood 'cautiously' recommended the retention of the offence on the basis that it was too early to know whether the 'safety-net' is necessary. Their submission acknowledges

³² Law Reform Commission of Western Australia, *A Review of the Law of Homicide*, Project No 94 (2007) 289.

³³ New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No 73 (2001) 29–30.

³⁴ For a discussion of why formal equality seems to have prevailed over substantive equality in Australia, see Reg Graycar and Jenny Morgan, 'Feminist Legal Theory and Understandings of Equality: One Step Forward or Two Steps Back?' (2005) 28 *Thomas Jefferson Law Review* 399.

problems with the offence, including that it allows men to use similar arguments in relation to their behaviour that occurred with provocation, and implying that it is not reasonable for a woman to kill a violent partner (particularly where there is no immediate assault).

Legal stakeholders such as Victoria Police, the former DPP and VLA, recommended retaining the offence on the basis that it fills a gap in the law.³⁵ The former DPP and Victoria Police specifically recommended a further review of the offence in three or three to five years time, respectively.

VLA wrote that it is ‘important and appropriate that the law recognise that there are cases of homicide which involve a lower degree of moral culpability than murder, while not satisfying all of the criteria for self-defence’. VLA indicated that more time may be required to assess whether a separate offence is warranted.

The majority of victims groups submitted that the offence should be abolished, as did some family violence stakeholders. A recurring theme was that in practice, the offence has not been used as it was intended to be used. For example, People Against Lenient Sentencing wrote that ‘although it may have had the right intentions when put into place ... (it is) used as a bartering tool to get a lesser sentence for what is fundamentally a murder charge’.

Fitz-Gibbon has expressed concern that the existence of the offence suggests that killing in response to family violence is not ‘reasonable’:

In relation to providing a safety net for battered women who kill...defensive homicide is not the appropriate categorisation for this type of killing as it would suggest that the offender did not have reasonable grounds for believing that they were defending themselves or another from death or really serious injury ... A conviction of defensive homicide in these circumstances sends a problematic message to the community that the actions of such persons were not reasonable.

Many of the submissions supporting abolition, including those from Ashton, Howe and the joint submission by Pickering, Maher and Segrave, consider that the focus of law reform in this area should be on the availability of self-defence.

2.5 Defensive homicide and complexity

The Discussion Paper considered whether the complexity in defensive homicide meant that, for that reason alone, it should be abolished. This included a discussion of the history of excessive self-defence as developed by the common law, which was overturned by the High Court in 1987, in *Zecevic v DPP*, because of its complexity.³⁶

This issue was discussed in a number of submissions and has been the subject of considerable discussion in academic journals and elsewhere.

2.5.1 Is defensive homicide complex?

After the Discussion Paper was released, the Court of Appeal considered the application of the law of defensive homicide in the case of *Babic v The Queen*.³⁷ Babic appealed against his conviction for murder and raised issues concerning the trial judge’s directions about defensive homicide.

³⁵ The ‘gap’ is not expressly identified, but probably concerns the fact that manslaughter does not apply where a person intends to kill or cause really serious injury to another person.

³⁶ *Zecevic v DPP (Vic)* (1987) 162 CLR 645.

³⁷ *Babic v The Queen* (2010) 28 VR 297.

The Court of Appeal identified a further level of complexity with the operation of the laws of defensive homicide.

The further complexity arises at the stage of the second test. The second test operates from the premise that the jury has reached the conclusion (at the first stage) that the accused *did believe* it was necessary to act in self-defence. However, the jury may be of the view that the prosecution has not proved beyond reasonable doubt that the accused held this view (i.e. it is possible that the accused believed it was necessary to act in self-defence) rather than having reached a positive conclusion that the accused did or did not hold that belief.

Where the jury is in doubt about the accused's belief, the jury must acquit the accused of murder and then consider whether there were reasonable grounds for the accused's belief. This is a very difficult intellectual task to perform when the jury has uncertainty about what belief the accused actually did hold. It is also necessarily complex for the judge to direct the jury about such matters.

In *Babic v The Queen*, Justices Neave and Harper sought to assist judges with the direction for defensive homicide and indicated that the direction 'would not need to be excessively complex':

You may find that the accused believed it was necessary to do what they did to defend him/herself or another person from death or really serious injury. If so you must acquit the accused of murder and go on to consider whether he/she is guilty of defensive homicide.

Or you may find the accused not guilty of murder because the prosecution has not proved beyond reasonable doubt that the accused did not believe it was necessary to do what he/she did to defend him/herself or another person from death or really serious injury. There again you must go on to consider whether he/she is guilty of defensive homicide.

He/she will be guilty of that crime only if the prosecution proves beyond reasonable doubt that the accused had no reasonable grounds for having the belief which you either found he/she held or alternatively which he/she said they held and the prosecution did not disprove. In that second case you should assume, when considering whether the prosecution has proved the accused is guilty of defensive homicide, that the accused did hold the asserted belief.³⁸

2.5.2 Is complexity a problem?

The LIV considered the direction in *Babic's* case in its submission:

The LIV disagrees with the Court of Appeal's assessment that this direction 'need not be excessively complex'. We forcefully submit that this direction is extremely complex and is difficult to understand for jurors, lawyers and laypeople alike.

The risk, we submit, is that a juror, when faced with this complex direction, may come to an anomalous result.

The further explanation in *Babic's* case is necessarily complex and will be challenging for a jury to understand and apply. Further, while it is necessary to make the test work, it involves the jury working from a fictional proposition. If the jury finds that the prosecution has 'not disproved' that the accused believed it was necessary to act in self-defence (but is not satisfied that the accused did believe this), in deciding whether the accused had reasonable grounds, the jury must act on the basis ('assume') that the accused did have that belief.

In a survey of Supreme Court and County Court judges, most judges considered that jury directions (which include the judge's explanation of the relevant laws the jury must apply) have become

³⁸ *Babic v The Queen* (2010) 28 VR 297, [95].

‘increasingly more complex, creating an “over-intellectualisation” of criminal law’.³⁹ The judges saw the complexity of the law as ‘a major impediment to effective communication with the jury’.⁴⁰ These comments could readily apply to defensive homicide.

In addition to the submissions provided to the department, comments about the complexity of defensive homicide have been made in other places.

Justice Weinberg discussed defensive homicide at the 2011 Peter Brett Memorial Lecture:

A colleague of mine who sits in the trial division of the Supreme Court, and who was recently obliged to direct a jury in accordance with the new statutory self-defence provisions, told me that, in his opinion, even the indescribably complicated *Viro* formulation of self-defence seemed to be much easier to apply than the current law. His lament spoke volumes.⁴¹

In 2010, Fitz-Gibbon and Pickering conducted research on defensive homicide by conducting interviews with members of the judiciary, prosecution and defence counsel concerning their experience with defensive homicide. A member of the judiciary said the following:

Our experience as judges is that there are lots of problems and that maybe we haven’t got the solution to the problem. I don’t think we are making it worse but it is very complicated, very, very complicated.⁴²

Fitz-Gibbon and Pickering went on to say:

The juror directions under the new legislation were also described by prosecutorial respondents as ‘mind-boggling’ and ‘unbelievably convoluted’, and by judicial respondents as ‘incomprehensible’, ‘too complex’ and ‘very complicated’.⁴³

In addition to these observations concerning the complexity of defensive homicide, these directions must be considered in the context of the other directions that the trial judge must give to a jury. The many complexities of jury directions in Victoria have been discussed in a number of reports.⁴⁴ The Victorian Coalition Government has introduced the *Jury Directions Act 2013* to address the complexities of jury directions. The Attorney-General said in his second reading speech that:

In recent years, there has been a substantial increase in the number and complexity of the directions given to juries. Directions have been described as inordinately long, in a sorry state, over-intellectualised, complex, voluminous, uncertain and excessive. The government made an election commitment to reduce the complexity of jury directions, and this Bill is a major part of delivering on that commitment.⁴⁵

A further problem may arise because the more complex the law is and the more alternatives that are available to juries, the more difficult it is for juries to reach a verdict of guilty of murder. Complexity can obfuscate the issues in a case. In a typical murder trial in which self-defence is raised, the jury will need to consider:

- ♦ the elements of the offence of murder
- ♦ the elements of self-defence

³⁹ Victorian Law Reform Commission, *Jury Directions: Final Report* (2009) 30 [2.35], citing Elizabeth Najdovski-Terziovski, Jonathan Clough and James R P Ogloff, ‘In Your Own Words: A Survey of Judicial Attitudes to Jury Communication’ (2008) 18 *Journal of Judicial Administration* 65, 80.

⁴⁰ Ibid.

⁴¹ Justice Mark Weinberg, ‘The Criminal Law – A “Mildly Vituperative” Critique’ (2012) 35 *Melbourne University Law Review* 1177, 1182.

⁴² Kate Fitz-Gibbon and Sharon Pickering, ‘Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond’ (2012) 52 *British Journal of Criminology* 158, 167.

⁴³ Ibid 168.

⁴⁴ For example, see the VLRC’s Report on *Jury Directions* (2009), Justice Weinberg’s report, the *Simplification of Jury Directions Project* (2012), and the department’s report, *Jury Directions: A New Approach* (2012).

⁴⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2012, 5556 (Robert Clark, Attorney-General). This Bill received Royal Assent on 12 March 2013.

- ♦ the elements of defensive homicide, and
- ♦ the elements of the offence of manslaughter.

The differences between the issues to be determined in relation to each offence and defence make the tasks of jurors particularly challenging. The VLRC acknowledged that with the introduction of excessive self-defence, '[w]here there is disagreement among jurors as to whether to acquit on the basis of self-defence, there is an added danger of compromise verdicts'.⁴⁶ A compromise verdict may result in a conviction for defensive homicide rather than murder. However, there is a lack of empirical data to indicate whether this is an issue and, if it is, the extent of the issue.

The complexity of defensive homicide also increases the risk of errors in directions by the trial judge. In turn, this increases the risk that the Court of Appeal will set aside a conviction and order a new trial. New trials take a heavy toll on the family members of the homicide victim and the accused and reduce community confidence in the criminal justice system. These considerations do not lead to the conclusion that all laws should be simple and appeal proof. However, it does mean that there need to be strong arguments in support of complex laws if the laws increase the risk of mistakes and retrials and require juries to make more fine-grained determinations of culpability.

As Justice Weinberg has said:

The doctrine of self-defence should never have been made so difficult to follow. That defence is, after all, perhaps the oldest, and most basic, of all excuses in the criminal law. It should be possible to explain its operation to a jury in just a few short sentences. In *Zecevic*, the High Court showed that this could be done.⁴⁷

2.5.3 Support for excessive self-defence

As discussed above, defensive homicide was introduced in Victoria following the VLRC's recommendation to introduce the partial defence of excessive self-defence. The VLRC's recommendation was based on its view that:

people who kill another person, genuinely believing their life is in danger, but who are unable to demonstrate the objective reasonableness of their actions, are deserving of a partial defence. In this case, the person intends to do something which is lawful, and is therefore in a very different position from someone who intends to kill unlawfully and intentionally due to provocation or a mental condition. This person's lower level of culpability, we believe, should be recognised in the crime for which he or she is convicted.⁴⁸

Excessive self-defence was first recognised in 1958 by the High Court in *Howe v The Queen*.⁴⁹ However, excessive self-defence was abolished by the Privy Council in 1971 in *Palmer v The Queen*.⁵⁰ The High Court considered this issue again in 1978, overturning the Privy Council's decision and reinstating excessive self-defence in *Viro v The Queen*.⁵¹ However, the High Court reconsidered its decision in *Viro's* case in 1987. In *Zecevic's* case, the High Court abolished excessive self-defence. This chequered history of excessive self-defence is limited to the common law states of Australia (Victoria, New South Wales and South Australia) and when it has applied, it has been limited to the offence of murder. Excessive self-defence has never applied in the code states of Australia (Queensland, Western Australia and Tasmania).

⁴⁶ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) 102–3 [3.109].

⁴⁷ Justice Mark Weinberg, 'The Criminal Law – A "Mildly Vituperative" Critique' (2012) 35 *Melbourne University Law Review* 1177, 1183.

⁴⁸ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) xxii.

⁴⁹ *Howe v The Queen* (1958) 100 CLR 448.

⁵⁰ *Palmer v The Queen* [1971] AC 814.

⁵¹ *Viro v The Queen* (1978) 141 CLR 88.

Yeo has identified considerable support for excessive self-defence from both a conceptual and policy perspective from High Court judges going back many decades in Australia.⁵² These ideas were reflected in the VLRC's recommendation to introduce excessive self-defence, and in explaining why it is conceptually different from provocation:

In recommending a partial excuse of excessive self-defence we wish to recognise that the circumstances of those who honestly believe that their actions are necessary to defend themselves but overstep the mark are qualitatively different from circumstances giving rise to issues of provocation or diminished responsibility.⁵³

The principle of 'fair labelling' may also support murder being reduced to manslaughter on the basis of excessive self-defence. While fair labelling may serve a number of functions, in this context its most important functions would be to:

- ♦ act as a check on sentencing discretion, in particular by reducing the maximum penalty (to that which applies to the offence of manslaughter), and
- ♦ 'symbolise the degree of condemnation that should be attributed to the offender and signals to society how that particular offender should be regarded'.⁵⁴

It is also important to remember that for much of the history of excessive self-defence, it operated as a partial defence to murder in the context that murder carried either a mandatory death penalty or a mandatory sentence of life imprisonment. Excessive self-defence provided a mechanism for avoiding such penalties.

While life imprisonment is the maximum penalty that may be imposed in Victoria for the offence of murder, it is not a mandatory sentence. Given the discretion in sentencing, from a sentencing perspective, the case for recognising excessive self-defence for the offence of murder but not any other offence, including attempted murder, is not persuasive. However, fair labelling remains an important consideration. Accordingly, it is worth exploring whether the practical issues with excessive self-defence can be addressed so that it is not overly complex.

2.5.4 Can excessive self-defence be simplified?

As indicated in the Discussion Paper, at common law, for a long time the courts grappled with whether the law should recognise excessive self-defence. In *Viro's* case, the High Court set out how the law of excessive self-defence should operate and how a trial judge should direct the jury about this law.⁵⁵ As the VLRC observed about this case:

The defence involved the jury being instructed about a complicated six-stage test, filled with difficult language and double negatives. Such a test was seen to be unnecessarily complex when weighed against the advantages of retaining the defence. It was also felt that if the jury believe there are reasonable grounds for the belief in the necessity to use the level of force used, or are in reasonable doubt about this issue, the accused would meet the test for self-defence. The possibility that this might result in a conviction for murder of a person lacking the moral culpability for murder was suggested by the majority of the High Court (in *Zecevic*) to be 'unlikely in practice'.⁵⁶

⁵² Stanley Yeo, 'Revisiting Excessive Self-Defence' (2000–2001) 12 *Current Issues in Criminal Justice* 39.

⁵³ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) 101.

⁵⁴ James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217, 226. The authors suggest that fair labelling may be either less important or important for different reasons when applied to a defence rather than an offence. For present purposes, and given that excessive self-defence results in a change of classification of an offence (from murder to manslaughter or defensive homicide) rather than full exculpation, any such differences are likely to be less important in the context of this partial excuse.

⁵⁵ *Viro v The Queen* (1978) 141 CLR 88.

⁵⁶ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) 92 [3.89]. See also Justice Mark Weinberg, 'The Criminal Law – A "Mildly Vituperative" Critique' (2012) 35 *Melbourne University Law Review* 1177, 1181 who described *Viro's* case as a 'disaster for the administration of criminal justice. The directions it required be given to the jury in relation to self-defence were expressed in language that was confusing at best, and incomprehensible at worst'.

The complexities of the High Court's approach to excessive self-defence led the High Court to revisit this decision in *Zecevic's* case. After this case in 1987, and before the introduction of defensive homicide in 2005, excessive self-defence was not recognised as a partial excuse to murder. The issue was simply whether the general common law test of self-defence applied.

In addition to recommending that provocation be abolished, the Model Criminal Code Officers Committee (MCCOC) said in its 1998 Discussion Paper on *Fatal Offences*:

On balance, the Committee is not in favour of re-introducing excessive self-defence, particularly in the context of abolishing provocation. As a concept, excessive self-defence is inherently vague. This aspect has to date resulted in no satisfactory test being promulgated.⁵⁷

Further, self-defence does not turn on very fine distinctions. As the High Court said in *Zecevic's* case:

It will often be desirable to remind the jury that in the context of self-defence it should approach its task in a practical manner and without undue nicety, giving proper weight to the predicament of the accused which may have afforded little, if any, opportunity for calm deliberation or detached reflection.⁵⁸

It is also important to remember that the prosecution bears the onus of proof and must prove beyond reasonable doubt that the accused did not believe it was necessary to act or that the accused did not believe on reasonable grounds that it was necessary to act as he or she did.

If self-defence does not turn on fine distinctions, this makes it even more difficult for excessive self-defence to operate as it depends upon a jury being able to draw reasonably fine distinctions about another person's mental state.

The VLRC's recommendations

The VLRC Report recommended that the partial defence of excessive self-defence should apply where:

- ♦ the conduct (using lethal force) is not a reasonable response in the circumstances as the person perceives them, but
- ♦ the person believes the conduct is necessary to defend himself or herself or another person, or to prevent or terminate the unlawful deprivation of liberty of any person.

The VLRC's recommendation focused on the reasonableness of the accused's response. In contrast, defensive homicide in section 9AD of the *Crimes Act 1958* focuses on the reasonableness of the grounds for the accused's belief that his or her conduct was necessary in self-defence.

Excessive self-defence in New South Wales

New South Wales introduced excessive self-defence in 2002. The test in New South Wales is very similar to that recommended by the VLRC and requires an assessment of whether the conduct of the accused was a 'reasonable response' in the circumstances as perceived by the accused.

The New South Wales version does not include a specific or additional element concerning proportionality. The direction to the jury also avoids explaining the complexity of the distinction

⁵⁷ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 5: Fatal Offences Against the Person*, Discussion Paper (1998) 113.

⁵⁸ *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 662–3. See also Lord Morris of Borth-y-Gest of the Privy Council who said in *Palmer v The Queen* [1971] AC 814 at 832, that if a person needs to act in self-defence, 'it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of defensive action'.

between self-defence and excessive self-defence by glossing over it. The trial judge will give directions about both self-defence and excessive self-defence. Accordingly, the jury is directed that:

- ♦ if the prosecution proves either that the accused did not believe it was necessary to act in self-defence or the accused's response was not a reasonable response, then self-defence does not apply (and the accused is guilty of murder), and
- ♦ if the prosecution proves that the accused did not believe it was necessary to act in self-defence but does not prove that the accused's response was not a reasonable response, then excessive self-defence applies (and the accused is guilty of manslaughter).

Excessive self-defence in South Australia

South Australia introduced a statutory form of excessive self-defence in 1991 and revised it in 1997. Murder is reduced to manslaughter if the accused believed his or her conduct to be 'necessary and reasonable for a defensive purpose', but the conduct was not 'reasonably proportionate' to the threat the accused believed existed.

The concept of 'proportionality' links self-defence to the notion of self-defence as a fight between two men of relatively equal strength and is a purely objective test. Yeo contends that this proportionality test is likely to be easier for juries to use because it is a fully objective test. Therefore, Yeo supports its use, despite the 'theoretical superiority' of the VLRC / NSW type tests.⁵⁹ However, a fully objective proportionality test may struggle to properly recognise the dynamics of family violence.

The VLRC observed that circumstances of family violence generally do not involve two equally powerful people in a one-off confrontation. It said that when women do fight back on 'equal terms' in the context of a confrontation, it is likely that most will be overpowered and may face increased violence as a result. In such situations, the use of a weapon against an unarmed man, while strictly speaking 'disproportionate' to the threat posed by him, may be reasonable. Similarly, in non-confrontational cases, attacking a man who is sleeping or has his back turned may appear excessive, but may be the only reasonable way for a victim of family violence to protect herself.

Former Justice of the Supreme Court of South Australia, Kevin Duggan, has discussed the complexity of the South Australian laws. In a murder trial, then Justice Duggan gave the jury a nine page handout summarising the elements of self-defence. He described the application of the law in some cases as 'frighteningly complex' and indicated that the law of self-defence in South Australia needed to be reformed.⁶⁰

For these reasons (among others), the VLRC rejected the South Australian test and instead recommended a test based on the 'reasonableness' of the accused's *response* in the circumstances as perceived by the accused. However, these directions remain complex.

2.5.5 Is there any other way of structuring excessive self-defence?

The following proposal seeks to incorporate the VLRC's test of excessive self-defence, based on whether the accused's response was a reasonable response.⁶¹

⁵⁹ Stanley Yeo, 'Revisiting Excessive Self-Defence' (2000–2001) 12 *Current Issues in Criminal Justice* 39, 49.

⁶⁰ 'Justice Kevin Duggan', Law Report, *ABC Radio National (Australia)*, 2 August 2011.

⁶¹ Whether or not self-defence should include a test of whether the accused's conduct was a reasonable response or was based on reasonable grounds is discussed in Part 3.

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).

This approach leads to the following outcomes:

- ♦ If the prosecution proves that A did not believe that it was necessary to act in self-defence, then self-defence fails and A is guilty of murder.
- ♦ If the prosecution does not prove that A did not believe that it was necessary to act in self-defence (or the jury considers that there is a reasonable possibility that A did believe it was necessary to act in self-defence), *but does prove* that A's conduct was not a reasonable response in the circumstances, then A is guilty of manslaughter by excessive self-defence.
- ♦ If the prosecution does not prove that A did not believe that it was necessary to act in self-defence, *and does not prove* that A's conduct was not a reasonable response in the circumstances (or there is a reasonable possibility that A's conduct was a reasonable response in the circumstances), then A is not guilty of murder or of manslaughter by excessive self-defence.

This approach is similar to defensive homicide in that it turns self-defence to murder into a two-step process for the jury. The first step requires consideration of whether the accused believed it was necessary to do what he or she did for a defensive purpose (this step involves no question of reasonableness). The second step requires the jury to consider whether the 'response' of the accused was reasonable.

However, the above approach differs from defensive homicide in the following ways:

- ♦ it does not create a separate offence of 'manslaughter by excessive self-defence', unlike defensive homicide which is a separate offence (therefore no issue arises as to whether this offence can be attempted)
- ♦ it refers to the reasonableness of the 'response' in the circumstances as perceived by the accused in contrast to defensive homicide which refers to the existence of reasonable grounds for the belief in the need to act in self-defence, and
- ♦ by setting out what the prosecution must prove, it is a clearer approach to excessive self-defence.

This approach is also similar to the approach outlined by Justice Deane in his dissent in *Zecevic's* case.⁶² The second limb of Justice Deane's test focused on whether the belief of the accused was not a reasonable response. Yeo argues that Justice Deane's approach is better in principle but the

⁶² *Zecevic v DPP* (1985) 162 CLR 645, 681.

test of a reasonable response is likely to be easier for juries to use, particularly if this is a fully objective test, as is the case in South Australia.⁶³

Nevertheless, this approach still raises a number of concerns.

First, treating self-defence as a two-step process sets a low bar for excusing a person who kills another person, because the first step (believing it is necessary to act in self-defence) is not qualified by any requirement of reasonableness. Having this low bar in defensive homicide means that the test is further restricted to situations in which the accused believes it is necessary to defend himself or herself from the infliction of death or really serious injury. Including this restriction would mean that self-defence would differ depending on the offence as is currently the case. This is undesirable. As discussed in Part 4 of this paper, if defensive homicide is abolished and common law self-defence is codified, there are significant benefits in simplifying the law and the directions the trial judge must give to a jury where murder and manslaughter offences are being considered together.

Secondly, although it is less complex than the VLRC draft provision, the South Australian and New South Wales provisions, and defensive homicide, the above model would still be difficult and likely to be confusing for the jury. Self-defence is necessarily general and involves proof that the accused did not have certain states of mind. The unavoidable degree of complexity arises from making available both a complete defence (self-defence) and a partial defence (excessive self-defence), which in part cover the same ground.⁶⁴ Recognising qualifications to parts of this test involves reasonably fine-grained distinctions. This is part of the irreducible level of complexity inherent in excessive self-defence tests. As the Model Criminal Code Officers Committee (MCCOC) said, in its 1998 Discussion Paper on *Fatal Offences*:

What is required is a test which sets out with some precision how the judge is to direct the jury on excessive self-defence. When this task is embarked upon, the result tends to be an unworkably complicated test more apt to confuse than assist.⁶⁵

Thirdly, all of the criticisms concerning the outcomes produced by defensive homicide (in terms of convictions) would still apply to this approach (see the discussion later in this part). The only difference with this approach is that it may be less complicated than defensive homicide.

Fourthly, while this approach is less complicated than defensive homicide, it fails to meet the standard set recently by Justice Weinberg when commenting on defensive homicide:

The doctrine of self-defence should never have been made so difficult to follow. That defence is, after all, perhaps the oldest, and most basic, of all excuses in the criminal law. It should be possible to explain its operation to a jury in just a few short sentences. In *Zecevic*, the High Court showed that this could be done.⁶⁶

2.5.6 Conclusion

While it is possible to reduce the level of complexity of defensive homicide, this reduction is one of degree rather than kind. The complexity of the law is a significant problem. It makes the task of the jury much more difficult in understanding and applying the law. It is more difficult for judges to

⁶³ Stanley Yeo, 'Revisiting Excessive Self-Defence' (2000–2001) 12 *Current Issues in Criminal Justice* 39, 47–8.

⁶⁴ It is for this reason (among others) that self-defence and defensive homicide are currently structured the way they are in Victoria, as separate provisions which do not overlap.

⁶⁵ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 5: Fatal Offences Against the Person*, Discussion Paper (1998) 113.

⁶⁶ Justice Mark Weinberg, 'The Criminal Law – A "Mildly Vituperative" Critique' (2012) 35 *Melbourne University Law Review* 1177, 1183.

explain complex laws and complexity increases the risk of errors in jury directions. Further, issues of complexity must be considered in the context of the whole trial. For instance, when a person is charged with murder, the jury will often also need to consider the alternative offence of manslaughter. Any differences between self-defence as it applies to murder and manslaughter make the jury's task more difficult.

While complexity is a very important issue, it is not the only relevant consideration in determining what our laws should be. If there are strong arguments for the retention of the law on defensive homicide or excessive self-defence from other policy grounds, these could override concerns about complexity and the difficulties in applying this law.

2.6 Defensive homicide and women accused of murder

2.6.1 Are the situations in which defensive homicide is used likely to change?

We now have the benefit of over seven and a half years of operation of defensive homicide, which includes 28 convictions. These convictions and the circumstances in which they occur are not unexpected. It is highly likely that defensive homicide will continue to be applied in a way that is consistent with its use over the past seven and a half years. The statistical evidence concerning people who kill is very clear in Victoria, Australia and other similar jurisdictions; it is predominantly men. The Australian Institute of Criminology's National Homicide Monitoring Program shows that men commit approximately 88% of homicides. In 2008–09 and 2009–10, the Australian Institute of Criminology found that 66% of intimate partner homicides involve men killing their female partners.

As discussed in Part 1, women commit comparatively fewer homicides. Conclusive proof of the success or failure of defensive homicide based on the cases before the courts is likely to take many decades. This is because of a number of factors including:

- ♦ the low number of instances in which women kill in response to family violence
- ♦ of those women who are prosecuted, some will fall into the category of traditional self-defence where the woman is responding to an immediate threat
- ♦ some women will plead guilty to manslaughter or defensive homicide
- ♦ it is very difficult to know the full facts of the situation of a woman who kills in response to family violence if she pleads guilty, and
- ♦ there are different views about when it is necessary to use lethal force.

When the Discussion Paper was released in 2010, the offence had been in operation for five years. In that five year period, there was not one case in which a woman who had killed in response to family violence needed to rely on excessive self-defence laws. This included either as an alternative verdict before a jury to a charge of murder or as the result of a plea agreement.

As the Discussion Paper indicated, the two cases in that five year period where a woman killed in response to family violence, 'SB' and Freda Dimitrovski, were resolved without going to trial. In one case, the former DPP did not proceed with the charge and in another a Magistrate discharged the woman at a committal proceeding. Further, the ABC reported that the DPP's 'decision [in 'SB's case] also took into account new legal provisions in Victoria about self-defence and family violence'.⁶⁷ Tyson has said that these cases 'have been cautiously interpreted as a sign that the reforms are working'.⁶⁸

⁶⁷ ABC Local Radio, 'Charges Dropped against Teenager Who Killed Her Stepfather', *PM*, 27 March 2009 (Mark Colvin), cited in Kellie Toole, 'Self-Defence and the Reasonable Woman: Equality Before the New Victorian Law' (2012) 36 *Melbourne University Law Review* 250, 268.

⁶⁸ Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (2012) 128.

Since the publication of the Discussion Paper in 2010, there have been 15 more defensive homicide convictions. Three of these convictions have been of women who have killed an intimate partner – Eileen Creamer, Karen Black and Jemma Edwards. In all three cases, evidence of a history of family violence was present, consisting of ongoing intimidation, harassment, physical violence and, in the cases of Eileen Creamer and Karen Black, pressure to engage in unwanted sexual acts.⁶⁹

Of these three cases, Black and Edwards pleaded guilty to defensive homicide. The only defensive homicide conviction of a woman by a jury was in *Creamer's* case; this was also an unusual case. Although there was a history of family violence by the deceased towards Creamer, the difficulty with this case is in understanding why she needed to act in self-defence.

Creamer and the deceased had been separated for various periods during their marriage. The killing occurred several months after Creamer came back to the relationship (from New Zealand) after a 13 month separation. This is unlike many family violence cases where it is extremely dangerous for the woman to leave the relationship. In addition, the trial judge's finding that Creamer's evidence did 'not much accord with the known facts'⁷⁰ casts doubt on the reasonableness of the grounds for her belief that her actions were necessary to defend herself from the infliction of death or really serious injury. As noted above, the trial judge concluded that the severity of the wounds inflicted demonstrated that Ms Creamer was 'out of control', and the Court of Appeal took the view that 'insofar as it fell outside the parameters of murder, it did so only by a narrow margin'.

Black's case and *Edwards's* case seem to fit more easily into the scenarios that were intended to be covered by the defensive homicide laws. Both cases involved long term family violence, but the threat to them (and the severity of the family violence context) appeared less serious than in the cases of 'SB' and Freda Dimitrovski.⁷¹ Further, the judge in *Edwards's* case had serious reservations about the offender's account. However, in both cases, the court acknowledged that the women's response to the threat was affected by the long term family violence.

The kind of situation in which defensive homicide is likely to be relevant in a trial does not arise very often. If a further review was to be conducted in five years time, there may be several more relevant cases like *Creamer*, *Black* and *Edwards*. However, there are likely to be few cases where there is long term family violence which squarely raises the law of self-defence in the way envisaged. To date there have been two cases ('SB' and Freda Dimitrovski) where self-defence has been successfully relied on, though both cases involved an immediate threat of harm.

This is not to say that the unlikelihood of a law being used means that there should not be such a law. However, in this situation, the existence of the law has other consequences which need to be considered in determining the overall advantages and disadvantages of defensive homicide.

2.6.2 Is a 'safety-net' necessary for women who kill in response to family violence?

An important issue raised in a number of submissions concerns the adequacy of the law of self-defence. If the law of self-defence is adequate, there should not be any need for a 'safety-net' recognising excessive self-defence as a separate offence.

⁶⁹ See *R v Creamer* [2011] VSC 196 and *R v Black* [2011] VSC 152. Ongoing intimidation and harassment falls under the definition of 'family violence' under section 9AH of the *Crimes Act 1958*.

⁷⁰ *R v Creamer* [2011] VSC 196 [24].

⁷¹ These cases are discussed in Part 4 of the Discussion Paper.

The VLRC highlighted concerns that because the law of self-defence has traditionally been associated with one-off, violent confrontations between two, equally strong men (in which the threat of death or really serious injury was imminent), it is interpreted and applied in a way that disadvantages women.

As Toole writes:

A succession of Australian studies has found that a high proportion of women who kill an intimate partner are responding to long-term violence by the partner. In these situations, women typically do not respond during a violent attack, and as they are often smaller and less experienced in physical combat than their victims, frequently use a weapon when retaliating. The actions of abused women, therefore, often lack both immediacy and proportionality...

When an abused woman is convicted of murder on this basis, she has been denied the protection of self-defence because her actions do not conform to established patterns of male violence. This constitutes a gender bias in the interpretation and application (although not the framing) of the defence, which is inconsistent with the bedrock principle of equality before the law.⁷²

The *Crimes (Homicide) Act* introduced significant changes to the law of self-defence, particularly in the context of family violence. As discussed above, the cases of 'SB' and Freda Dimitrovski conducted under the new laws suggest that real improvements have been made in the way in which the law operates. Neither case proceeded to trial. The new self-defence laws and evidentiary provisions were cited by the DPP and the magistrate as being important in their decisions to end proceedings in each case.⁷³

However, one question posed in the Discussion Paper was whether the laws of self-defence would work adequately in the situation of a woman who kills in response to family violence where the family violence has reduced or ceased for some time before the killing occurs. In the cases of 'SB' and Freda Dimitrovski, the killings were immediately connected to family violence.

The fact that immediacy was not in issue in either case, means that these cases do not assist in advancing our understanding of how the laws might work in less traditional kinds of self-defence. This point was made in the submission from Tyson, Capper and Kirkwood.

Considering how self-defence laws might operate in the absence of an immediate threat is exceptionally difficult to answer in the abstract. How long had the family violence been going on for? What was the nature of the violence? What was the nature of the relationship and power or control of the deceased over the woman who killed? What level of cessation or reduction in violence was there? Did this matter in any event because the level of control or power was such that the only reason the violence reduced was because the woman had more successfully navigated around the deceased's behaviour? Most importantly, all of this depends on the question why the woman believed it was necessary to kill.

The way in which the laws of self-defence have operated mean that a jury may well acquit a woman of murder in this scenario because of the laws of self-defence and not need to rely on excessive self-defence. However, because the law sets the test and the test must be applied in a myriad of different situations, it is not possible to answer this question definitively. Further, to construct the law in such a way to guarantee the outcome in such a situation would create its own problems. It would be subject to similar criticism to those made of the proposal to limit defensive homicide to instances of serious family violence.

⁷² Kellie Toole, 'Self-Defence and the Reasonable Woman: Equality Before the New Victorian Law' (2012) 36 *Melbourne University Law Review* 250, 256–7.

⁷³ *Ibid* 267–71.

What is essential for these purposes is that it is well within the operation of the laws of self-defence that a woman could be acquitted on the basis of self-defence in this situation. Whether that is the case is a matter of fact that would need to be determined by a jury on a case by case basis.

While self-defence laws in Queensland are more restrictive than in Victoria because they require the identification of a specific assault and the imminence of a further assault or danger, they have been successfully used in two more recent cases by women who have killed in response to family violence. Douglas has described the two women (Falls and Irslinger) and their cases as follows:

Both were smaller than their partners, white, drug-free, monogamous and without a criminal record. They suffered fierce physical abuse over many years, actively protected their children from the abuser and the killing was, apparently, the first time they had physically fought back. Both had attempted to leave the relationship and both had sought assistance from the police in the past. In both cases the abuser had harmed animals and threatened their own children with violence. In both cases they were acquitted by the jury. In comparison, the other women whose cases I have reviewed in this article, fell short of the benchmark in some way. Ney, an Indigenous woman, was larger than the deceased; she had drug and alcohol issues, a criminal record and had been in a series of violent relationships. There was evidence she had fought back before.⁷⁴

These cases show the importance of social context evidence and that self-defence laws can work effectively for women who kill in response to family violence. However, as Douglas highlights, Falls and Irslinger fit more readily within stereotypes about 'battered women'.

Commenting on who falls within a defence and who does not is also difficult because legal categories can be stark compared with degrees of family violence and degrees of threats posed. Further, different views come into play. Killing in response to family violence does not provide immunity from homicide laws. However, what degree of threat must be posed, and the many ways in which that threat may arise, make it difficult to say whether a jury verdict rejecting a claim of self-defence is appropriate. While there are good reasons for concluding that the law of self-defence works (and is capable of working) reasonably well, when complemented by social context evidence laws, and that defensive homicide is unlikely to be necessary in a trial, there are no guarantees in relation to individual cases.

Sheehy, Stubbs and Tolmie's analysis of homicide prosecutions of battered women across Australia between 2000 and 2010 found that almost 50% of women who went to trial were acquitted on all charges:

This suggests that there is now some recognition, for the purposes of applying the law on self-defence, of both the dangerous nature of intimate partner violence and the limited resources available to some battered women to achieve safety.⁷⁵

Another factor to consider is whether the existence of defensive homicide has in some ways distorted the legal landscape. The focus of debate concerning women who kill in response to family violence has become about defensive homicide, not self-defence. It should be the other way around. It is almost as if the perception and analysis of the laws concerning family violence, and whether family violence is appropriately recognised by the law, is considered through the lens of defensive homicide, rather than through self-defence laws. For instance, Fitz-Gibbon and Pickering state that:

Our data analysis is informed by this principle in relation to the introduction of the offence of defensive homicide as a reform designed to bring women's stories into the courtroom, to

⁷⁴ Heather Douglas, 'A Consideration of the Merits of Specialised Homicide Offences and Defences for Battered Women' (2012) 45 *Australian & New Zealand Journal of Criminology* 367, 377.

⁷⁵ Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Battered Women Charged with Homicide in Australia, Canada and New Zealand: How Do They Fare?' (2012) 45(3) *Australian & New Zealand Journal of Criminology* 383, 388.

recognize the violence (including the threat of violence and abuse) perpetrated against them, particularly in relation to battered women who kill.⁷⁶

While defensive homicide is a reform that is relevant in this regard, the primary way in which women's stories (in this context) should enter the courtroom is through the operation of self-defence. It is only if these arguments are not successful that the safety-net of defensive homicide should consequentially be relevant to the proceedings.

In the context of changes to the operation of provocation in Queensland:

Douglas has recently argued that while this has allowed some recognition and contextualisation of women's experiences, it has produced a range of ambivalent results. One practical effect has been to direct battered women away from the complete defence of self-defence to the provocation defence instead.⁷⁷

A similar comment could be made about the operation of self-defence in Victoria. This is not to criticise the function of, and need for, contextualisation of women's experiences as part of the law of self-defence as currently occurs in Victoria through section 9AH of the *Crimes Act*. The issue is with defensive homicide and the way in which it removes or dilutes the relevance of contextualisation evidence from the primary issue of the complete defence of self-defence. As Fitz-Gibbon and Pickering say about defensive homicide:

What this defence provides is a half-way house or 'safety-net' for these women, when the law could instead be further reformed to accommodate their circumstances in terms of an arguably more accurate legal category of self-defence. Consequently, through the inclusion of stories of battered women who kill under the offence of defensive homicide, battered women have come to occupy a compromised legal category.⁷⁸

2.6.3 Conclusion

While there is some cause for believing that there have been improvements in the operation of self-defence and the social context evidentiary provisions which support them, there is no clear evidence that defensive homicide is working in the way intended to support women who kill in response to family violence. Further, there is some evidence to suggest that its existence may be counter-productive.

In over seven and a half years of operation, there has been one trial where a woman was convicted of defensive homicide and two women have pleaded guilty to defensive homicide. To obtain a small, but potentially sufficient, sample of defensive homicide trials involving women, there would need to be at least 10 trials. At the current rate, it would take 75 years before 10 women would be convicted of defensive homicide at trial. This is because women do not often kill. When they do kill it can be in a variety of different circumstances and only some of these may shed light on the operation of defensive homicide.

From a policy perspective, it should be remembered that the VLRC 'considered arguments for and against the reintroduction of excessive self-defence and *on balance* is in favour of its reintroduction in Victoria.'⁷⁹

⁷⁶ Kate Fitz-Gibbon and Sharon Pickering, 'Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond' (2012) 52 *British Journal of Criminology* 158, 160. The authors are referring to the 'principle of discursiveness' which is 'concerned with bringing inside the discursive circle of justice those who are excluded from it, and challenging the ways that legal claims can often only be acknowledged if they are "voiced in terms of the dominant group"'.
⁷⁷ Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (2012) 125.

⁷⁸ Kate Fitz-Gibbon and Sharon Pickering, 'Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond' (2012) 52 *British Journal of Criminology* 158, 177.

⁷⁹ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) 101 (emphasis added).

During its consultations, stakeholders expressed ‘mixed views’ about its reintroduction. The VLRC noted that three submissions specifically opposed the reintroduction of excessive self-defence, including one from the Federation of Community Legal Centres’ Violence Against Women and Children Working Group.⁸⁰

In practice, some concerns have arisen that defensive homicide may be operating to distort the role of self-defence and play a more important role than self-defence. The VLRC always envisaged that the primary changes needed to be made to self-defence, with defensive homicide being a ‘safety-net’. The focus has disproportionately shifted to defensive homicide. This creates the risk that the community may see women who kill in response to family violence as acting unreasonably.

2.7 Defensive homicide and men accused of murder

If defensive homicide was only available to women, there would be no clear evidence that it has had any negative effect on the operation of the criminal justice system. However, defensive homicide is also available to men and 25 of the 28 defensive homicide convictions have been of men.

The cases to date in Victoria, combined with data from other jurisdictions about the circumstances in which men kill, indicate that there is no reason to expect that defensive homicide will operate differently in the future. It will continue to be primarily relied upon by men and often in non-family violence situations. This is the very antithesis of the reason for introducing defensive homicide.

2.7.1 Is defensive homicide like provocation?

Some submissions referred to the similarities between provocation and defensive homicide.⁸¹ As Tyson has said, ‘it would certainly appear that in some of these cases, provocation-type arguments are being mobilised in the guise of defensive homicide’.⁸² It is therefore worth considering defensive homicide through the prism of analysis applied to provocation.

The VLRC recommended that provocation be repealed because it had failed to evolve sufficiently to keep pace with changing attitudes in society. By reducing murder to manslaughter, provocation was considered to condone male aggression towards women and it was often relied upon by men who killed their current or former partners. This, and the homosexual advance claim,⁸³ were the most egregious situations in which men relied on provocation to (partially) excuse their behaviour. However, men have also relied on provocation when they killed other men, where no homosexual advance was claimed.

The VLRC identified six key reasons for the repeal of provocation.⁸⁴ The practical application of defensive homicide as considered in the Discussion Paper reveals a similar history:

- a. a loss of self-control is evident in approximately half of the cases
- b. gender bias may be present because self-defence readily accommodates immediate responses to violence by men
- c. acting without reasonable grounds for doing so has in effect privileged a loss of self-control in some cases (a loss of self-control is evident in at least 10 of the 25 cases involving men (as discussed below))

⁸⁰ Ibid 98–9.

⁸¹ See, for example, submission by Kate Fitz-Gibbon and submission by Tyson, Capper and Kirkwood.

⁸² Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (2012) 131.

⁸³ The homosexual advance defence was a specific use of the partial defence of provocation to the offence of murder (i.e. reducing a charge of murder to manslaughter) in circumstances where a person has killed another person of the same sex who made an unwanted sexual advance.

⁸⁴ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) 26.

- d. a culture of blaming the victim has persisted with defensive homicide — this is evident in a number of cases such as *Middendorp* and *Smith* (who said the victim threatened him and said Smith was gay)⁸⁵
- e. excessive self-defence can be taken into account at sentencing (rather than being necessary as a partial defence to reduce a charge of murder to defensive homicide), and
- f. the test is complex and difficult.

From a legal perspective, there are differences between defensive homicide and provocation:

The LIV submits that, despite community concerns, defensive homicide is very different from the old partial defence of provocation. In the case of defensive homicide, the person intends to do something lawful, albeit with no reasonable grounds for the belief that what they did was necessary. With the abolished partial defence of provocation, the person intends to do something unlawful, but under a sudden and temporary loss of control. This distinction is vital, and the difference in culpability should continue to be recognised in the criminal law, through the offence of defensive homicide.⁸⁶

The VLRC applied this same reasoning to distinguish between provocation and excessive self-defence. However, while this distinction can be drawn in principle, the application of the offence of defensive homicide in practice indicates that in a number of cases it bears significant similarities to provocation.

The main point of difference between provocation and defensive homicide is that defensive homicide has been used in fewer cases to partially excuse violence by men towards women. *Middendorp's* case is the only defensive homicide conviction of a man for killing a woman. The 2010 conviction and sentencing of Luke Middendorp for the defensive homicide of his partner, Jade Bownds, led critics of defensive homicide to question the operation of the current law. In particular, whether rather than providing a half-way house for battered women, the offence instead provides an avenue of excuse for jealous men, similar to that of the now abolished provocation defence.⁸⁷

2.7.2 Does defensive homicide only apply to 'defensive' situations?

There are a number of defensive homicide cases where the defensive nature of the offender's conduct is difficult to identify or explain. Short summaries of defensive homicide cases are contained in Appendices 2 and 3.

Five of the 13 defensive homicide cases considered in the Discussion Paper involved the offender inflicting many injuries:

- ◆ Giammona stabbed the victim 16 times
- ◆ Smith stabbed the victim 50–60 times
- ◆ Baxter stabbed the victim 11 times
- ◆ Trezise stabbed the victim 36 times, and
- ◆ Parr stabbed the victim 20 times.

The above cases have been identified because they involved more than 10 stab wounds. Therefore, the defensive nature of the wounds inflicted is much more difficult to determine.

⁸⁵ *R v Smith* [2008] VSC 617 [9]. This issue is also discussed in Part 4 concerning evidentiary issues. However, (full) self-defence will also involve some examination of the victim's conduct as it is integral to the consideration of whether the accused believed that it was necessary to defend themselves.

⁸⁶ Submission by the Law Institute of Victoria.

⁸⁷ See submission from Tyson, Capper and Kirkwood, and Kate Fitz-Gibbon, 'Defensive Homicide Law Akin to Getting Away with Murder', *The Australian* (Melbourne) 3 March 2012.

Since the Discussion Paper, the following additional cases also involved the offender inflicting many injuries:

- ♦ Ghazlan stabbed the victim repeatedly (the number of times was not specified, but included stab wounds to the eye region, chin, neck and abdomen, as well as defensive wounds)
- ♦ Svetina caused 10 wounds to the victim with a tomahawk
- ♦ Edwards caused approximately 30 wounds to the victim with a knife
- ♦ Dambitis repeatedly hit the victim with an object
- ♦ Creamer inflicted a number of injuries with a blunt instrument and also stabbed the victim, and
- ♦ Chen stabbed the victim approximately 15 times.

These cases raise two issues. First, is this the type of conduct that should be partially excused? Secondly, if the answer to this question is yes, it raises issues with the name of the offence.

As discussed above, the loss of self-control in many of these cases has all the hallmarks of provocation cases. In his submission, the former DPP indicated that ‘as presently framed defensive homicide is conceptually capable of legitimising or diminishing the seriousness of some homicides’.

The department’s view is that there are a significant number of cases in which defensive homicide is being used to partially excuse conduct that should not be partially excused because of a loss of self-control, or certainly not to the extent that warrants a reduction in the maximum penalty of life imprisonment (murder) to 20 years’ imprisonment (defensive homicide).

In submissions and consultations in 2010, stakeholders expressed concern about the name of the offence. The Discussion Paper considered the importance of ‘fair labelling’ of offences. In consultations, the Coalition for Safer Communities expressed the view that many of the situations in which defensive homicide is used do not seem ‘defensive’ in any way.

The label ‘defensive homicide’ is apt for the ‘safety-net’ cases discussed by the VLRC. However, it is an inappropriate label for the most typical forms of defensive homicide in practice. If defensive homicide is to be retained, a new name for the offence is required.

2.7.3 What does defensive homicide say about killing by men?

Howe indicates in her submission that:

Centring a reform on the figure of the battered woman killer has the effect of disavowing the far more fundamental problem of the gender asymmetry of homicides, including sexual intimacy homicides. As countless empirical studies have shown, these homicides are overwhelmingly committed by men. It follows that any reform intended to assist the rare case of a woman who kills a male partner in the context of family violence will be used much more frequently by the far more numerous male defendants who kill using excessive force in a range of different contexts.

The evidence over many years and in similar jurisdictions consistently indicates that men kill women partners overwhelmingly more often than women kill men partners. The operation of defensive homicide in Victoria indicates that after seven and a half years, 25 men have been convicted of defensive homicide and three women have been convicted of defensive homicide. There is no reason to suspect that this trend will change significantly in the future as it generally reflects the fact that approximately 88% of homicides are committed by men.

In this way, the very existence of defensive homicide inappropriately condones or excuses male violence.

Defensive homicide supports a culture of blaming the victim

The operation of defensive homicide indicates that the culture of blaming the victim, which was at its strongest with the law of provocation, remains. As Howe puts it:

Off-setting the abolition of the provocation defence with the introduction of a new partial defence ... [ensured] that juries would continue to hear the kind of exculpatory victim-blaming legal argument and evidence that the abolition of provocation was designed to address.⁸⁸

The culture of blaming the victim also works significantly to the disadvantage of women as women are overwhelmingly more likely to be killed by men than they are to kill men.

Abolishing defensive homicide should reduce victim blaming as it will no longer partially excuse male violence. However, as self-defence involves an analysis of what the victim was doing, or had done over a long period of time, to determine whether the accused had reasonable grounds for believing that it was necessary to use lethal force, the abolition of defensive homicide will not totally remove the prospect of some victim blaming.⁸⁹

Abolishing defensive homicide does not preclude the development of other laws and practices to mitigate the risk of a woman who kills in response to family violence being inappropriately convicted of murder (e.g. see Part 4 which contains questions about possible reforms to the laws of evidence). 'Inappropriate' is used because it may be that a judge and jury and legal practitioners who fully understand the nature of family violence and all other relevant matters may conclude that it was not necessary to kill in self-defence. Whether that is the case is a matter for the jury to determine. It is not the objective of defensive homicide laws to provide immunity for killing in response to family violence. Each case must be assessed individually.

2.7.4 Conclusion

While the evidence concerning the outcomes of defensive homicide where women kill may be equivocal, that is not the case when it is applied to men who kill.

Because of the way in which it operates, it is apparent that defensive homicide will:

- ♦ if relevant, only be relevant in a small number of cases in which a woman kills a man
- ♦ be relevant in a significant number of cases in condoning or excusing male violence and continuing a culture of blaming the victim, and
- ♦ sometimes be relied upon by a man who kills a woman partner (e.g. *Middendorp's* case).

Retaining defensive homicide (even if subject to further review) gives primacy to the need to ensure that the law does everything possible to recognise the position of a woman who kills in response to family violence.

If defensive homicide has a role, it is in this limited safety-net role where the main processes have not worked to provide substantive equality to women who have acted in self-defence. The likelihood of this being necessary depends upon the effectiveness of self-defence which should be the primary focus of reforms for women who kill in response to family violence.

From a utilitarian perspective, the issue is whether this narrow (potential) role for defensive homicide outweighs the clear and substantial cost of defensive homicide operating to partially excuse or condone the violence of men who kill.

⁸⁸ Submission by Associate Professor Adrian Howe, Social Science, RMIT.

⁸⁹ This paper proposes a number of other changes to further reduce the risk of victim blaming (see Part 4).

2.8 What might happen if defensive homicide were abolished?

In 68% of defensive homicide cases to date, the conviction has been the result of a plea of guilty. In the remaining 32% of convictions, a jury reached the conclusion that the accused was not guilty of murder, but guilty of defensive homicide. If defensive homicide is abolished and other improvements are made to self-defence and evidence laws as proposed in the remainder of this paper, the potential role for a partial defence like defensive homicide is further limited.

With the removal of the partial excuse of defensive homicide, a person who believes it is necessary to kill in self-defence, but does not have reasonable grounds for that belief, will be guilty of murder. Does this mean that in practice all people who would have been convicted of defensive homicide will instead be convicted of murder?

In nine cases, a jury found the accused guilty of defensive homicide. The absence of this partial excuse should, in theory, mean that these cases result in murder convictions. However, as discussed above, there is some possibility of compromise verdicts and it cannot be said with absolute certainty that a jury would have returned a verdict of guilty of murder in these cases.

2.8.1 Defensive homicide and pleas of guilty

With all of the problems concerning defensive homicide, the question must be asked, why is it being used? Of the 28 convictions for defensive homicide, 19 convictions have been the result of a plea of guilty. The DPP does not normally publish reasons for accepting pleas of guilty. However, the DPP does publish reasons why in general a plea may be accepted. The DPP's reasons explain both why the DPP may decide not to proceed with a charge of murder and why a plea of guilty to defensive homicide may be chosen, rather than manslaughter.

The DPP may have formed the view that there was no reasonable prospect of a conviction for murder and therefore defensive homicide was the most serious charge that the DPP could reasonably proceed with. The DPP Prosecutions Policies identify a number of reasons why this may occur including:

- ♦ the lack of witnesses
- ♦ the lack of independent witnesses
- ♦ problems with the reliability of witnesses (e.g. because of their drug or alcohol consumption), and
- ♦ the evidence disproving the accused's claim of self-defence may not be strong.

The next issue is why a plea to defensive homicide was accepted rather than a plea to manslaughter. The most likely reason for this is that the offence of defensive homicide involves proof that the offender intended to cause death or really serious injury. There are two kinds of manslaughter (for present purposes).⁹⁰ Manslaughter may be committed by an unlawful and dangerous act or by criminal negligence.

When provocation existed, it was also a form of manslaughter. Like defensive homicide, it involved proof that the offender intended to cause death or really serious injury. Provocation manslaughter was regarded by the courts as the most serious kind of manslaughter and was therefore more likely to attract a higher sentence than would be imposed for other kinds of manslaughter; there were of course notable exceptions to this general rule. However, in recent years, sentences imposed for

⁹⁰ Culpable driving is also a form of manslaughter, as is child homicide. However, the particular factual situations in which those offences apply are not relevant in this discussion.

unlawful and dangerous act manslaughter have increased and are very similar to the sentences that were imposed when provocation manslaughter existed.⁹¹

Without provocation manslaughter, defensive homicide provides the only offence (equivalent to manslaughter) that involves proof that the offender intended to cause death or really serious injury. Without this element, it may be more difficult for the DPP to accept a plea in such cases because it may be more difficult to explain the case appropriately to the court. These complexities for the prosecution will then flow on to the judge in trying to sentence the accused for the offence.

However, some of these difficulties already exist in different situations with the offence of manslaughter.⁹² As noted by Tate JA in *Kells v The Queen*, ‘the offence of manslaughter by unlawful and dangerous act is subject to considerable variance in the conduct constituting the commission of the offence and, as such, its gravity’.⁹³ Sentencing for manslaughter (unlawful and dangerous act) encompasses instances of killing that appear to involve intention to cause death or serious injury, but resolve as manslaughter.⁹⁴ This may arise for a number of reasons including a jury verdict, a technical issue or guilty plea to the lesser offence.

2.8.2 The relevance of sentencing discretion

While it was the VLRC’s overarching view that the culpability of an offender should be dealt with at the time of sentencing, the VLRC Report recommended the reinstatement of the partial defence of excessive self-defence. Therefore, the VLRC proposed that excessive self-defence (defensive homicide) should be an exception to their general view that such matters concerning the level of culpability of an offender should be determined at the time of sentencing.

Abolishing defensive homicide would have the net effect of leaving issues of such degrees of culpability to the sentencing judge. This would be consistent with the VLRC’s general approach to matters which should be part of an offence and those matters that are more appropriately dealt with at the time of sentencing.

If a plea or conviction for manslaughter replaces defensive homicide, the same maximum penalty will apply, namely 20 years’ imprisonment. The highest penalty imposed for defensive homicide to date is 12 years’ imprisonment with a minimum of eight years’ imprisonment before being eligible for parole (*Middendorp*). The average maximum sentence imposed is 8.9 years’ imprisonment. For the offence of manslaughter between 2005–06 and 2009–10, five sentences of 12 years’ imprisonment or more were imposed.

If defensive homicide were abolished and a case arose in which a woman killed in response to family violence and was neither acquitted because of self-defence nor convicted of manslaughter but was instead convicted of murder, the court retains a discretion as to the maximum penalty that it imposes. As discussed above, only one woman in Australia was found guilty of murder between 2000 and 2010. Further, Victoria has better social context evidence laws than any other Australian

⁹¹ Sentencing Advisory Council, *Sentencing Snapshot: Sentencing trends in the higher courts of Victoria 2005–06 to 2009–10, Manslaughter* (May 2011).

⁹² For an offence of manslaughter committed in the context of long-term serious family violence, see also *R v Charles* [2013] VSC 470.

⁹³ *Kells v The Queen* [2013] VSCA 7 [48].

⁹⁴ In *R v AB* (No 2) (2008) 18 VR 391, the accused purchased a shotgun and lethal ammunition shortly before killing the victim. The jury found AB not guilty of murder but guilty of manslaughter. In *R v Kell & Dey* [2009] VSC 90, the jury found the two accused not guilty of murder, but guilty of manslaughter. The trial judge indicated that it appeared that the jury could not decide who had the knife; if they had, it was likely they would have convicted that accused of murder. In *Sherma v The Queen* [2011] VSCA 242, the accused strangled his wife with a dressing gown cord for three minutes until she died. He admitted thinking he wanted to kill her minutes before strangling her. The jury found Sherma not guilty of murder, but guilty of manslaughter. See also Richard G Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999) 892.

jurisdiction. While the risk of conviction for murder based on misconceptions and outdated or stereotypical views about family violence cannot be ignored, it is unlikely.

2.9 The department's proposals

It is often common ground between those who support the abolition of defensive homicide and those who wish it to be retained for a further period that the law:

- ♦ should not condone or excuse in some way male violence towards women or men
- ♦ should not permit a culture of focusing on blaming the victims, and
- ♦ should recognise the position of a woman who kills in response to family violence.

As the VLRC said, '[w]omen who kill abusive partners should not be automatically entitled to an acquittal on the basis of self-defence'.⁹⁵ The primary focus of the law in relation to women who kill in response to family violence should be through the law of self-defence. The principal objective of the VLRC was to make clear that a range of evidence is admissible to understand family violence and to ensure that self-defence clearly recognises that a person may act in self-defence even where the threat to their life is not immediate. The issue should be whether a person's conduct in self-defence is necessary even if the threat is not immediate.

Assessing whether a woman has acted in self-defence involves consideration of whether the woman believed it was necessary to use lethal force and whether there were reasonable grounds for that belief. This test involves an assessment of the threat faced by the woman. Laws designed to ensure that the jury is fully informed by social context evidence about the dynamics of family violence are essential to provide substantive equality for women through self-defence laws.

There is reason to believe that the social context evidence provisions have had some beneficial impact in cases such as 'SB' and Dimitrovski. However, as Toole writes, the improvements to self-defence laws are 'critically limited by the concurrent enactment of defensive homicide, which rests on the conception of the belief and behaviour of abused women as not being reasonable'.⁹⁶

When the VLRC recommended the introduction of excessive self-defence as a 'safety-net', it could not be certain about the ways in which self-defence and excessive self-defence laws would operate. While there are still a number of improvements that can be made (these are discussed below in this paper), there is no clear evidence of the need for a 'safety-net'.

Data concerning the outcomes in cases where women kill in response to family violence indicate that the risk of being convicted of murder is low. Across Australia during the period 2000–2010, two women were convicted of murder. One of these women pleaded guilty to murder, but the judge acknowledged that the case was more like manslaughter than murder.⁹⁷ This data includes jurisdictions that do not recognise excessive self-defence and no other jurisdiction during 2000–2010 had a social context evidentiary provision equivalent to Victoria's (in section 9AH of the *Crimes Act*).

Further, it is not at all clear that, in any of the Victorian cases in which a woman has relied on defensive homicide, the primary self-defence laws failed to appropriately recognise that the woman acted in self-defence. It is also important to remember that the High Court said in *Zecevic's* case

⁹⁵ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) xxvi.

⁹⁶ Kellie Toole, 'Self-Defence and the Reasonable Woman: Equality before the New Victorian Law' (2012) 36 *Melbourne University Law Review* 250, 286.

⁹⁷ Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Battered Women Charged with Homicide in Australia, Canada and New Zealand: How Do They Fare?' (2012) 45(3) *Australian & New Zealand Journal of Criminology* 383, 389.

that the jury must approach its task of determining self-defence in a practical manner, without undue nicety and giving proper weight to the predicament of the accused.⁹⁸

Creamer's case is the only case in which a jury convicted a woman of defensive homicide. As Toole says:

Creamer indicates that the new provisions can also activate those pre-existing stereotypes in a way that stretches the protection of defensive homicide beyond its intended boundaries, to circumstances where conviction for murder might be more in line with community expectations and standards.⁹⁹

Further, the operation of defensive homicide has significant problems in itself because:

- ◆ a significant number of defensive homicide cases do not seem to be 'defensive'; instead they reflect a loss of self-control
- ◆ a significant number of defensive homicide cases are quite similar to provocation
- ◆ defensive homicide is very complex
- ◆ defensive homicide may increase the risk of compromise verdicts, and
- ◆ defensive homicide condones or partially excuses male violence.

The significant disadvantages with recognising defensive homicide (excessive self-defence) outweigh the benefits, should they ever be needed, of a 'safety-net'.

The department agrees with the VRLC's framing of these challenging issues:

Different legal systems take account of levels of blameworthiness in different ways. When law reform bodies have reviewed defences and partial defences to homicide, they have frequently reached different conclusions on how factors which affect the culpability of the accused should be taken into account by the criminal law. While there is no 'right' approach to these complex moral and legal issues, the Commission believes there is a need for greater consistency in how issues of culpability are dealt with in the Victorian criminal law. The legal framework in which defences to homicide operate in Victoria, including the existence of a flexible sentencing regime for murder, has influenced our approach, as has the symbolic function of the criminal law in setting the limits of acceptable and unacceptable behaviour, and the likely practical implications of our recommendations.¹⁰⁰

However, the department now has the benefit of considering over seven and a half years of practical operation of defensive homicide. As a result, the department considers that defensive homicide (excessive self-defence) does not appropriately set limits on acceptable and unacceptable behaviour. Accordingly, the department proposes that defensive homicide be abolished. Further, while some improvements could be made to the operation of excessive self-defence, it is highly likely to produce very similar outcomes to defensive homicide. Accordingly, the department proposes that excessive self-defence, even in a simplified form, should not be introduced in Victoria.

The department considers that this will achieve greater consistency in dealing with issues of culpability in Victoria and will more appropriately set the limits of acceptable and unacceptable behaviour.

⁹⁸ *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 662–3.

⁹⁹ Kellie Toole, 'Self-Defence and the Reasonable Woman: Equality before the New Victorian Law' (2012) 36 *Melbourne University Law Review* 250, 286.

¹⁰⁰ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) xx.

2.9.1 Related issues

These proposals shift the need for reform from defensive homicide to other matters such as further improvements to self-defence and evidence laws. These issues are discussed in Parts 3 and 4 of this paper.

In more than half of manslaughter convictions across Australia, the jury returned a verdict of manslaughter on the basis of an unlawful and dangerous act for women who kill in response to family violence. This category of manslaughter involves a finding that the woman did not intend to kill or cause a really serious injury.

From both the prosecution and defence perspectives, this may be unsatisfactory where it does not accurately recognise the intent of the woman. In discussing the offence of murder in England and Wales, Quick and Wells have said that one of the two major difficulties has been the challenge and difficulty of ‘capturing culpability in a nuanced way through the mechanics of the element of “intention to cause death or serious bodily harm”’.¹⁰¹ The former DPP indicated that one reason for retaining defensive homicide is that it ‘fills an important gap in the law’, concerning the elements of the offences of murder and manslaughter.

This view also underpinned some other submissions that provided some support for defensive homicide, while acknowledging its significant problems. Important offences like murder and manslaughter only exist at common law. This makes the task of identifying, or refining in any way, the elements of these offences very difficult. If the proposal to abolish defensive homicide is accepted, it will be important to review the elements of the offences of murder and manslaughter to determine whether murder and other fatal offences can be structured in a way that better reflects different kinds of culpability and allowing courts to impose appropriate sentences for those offences.

Proposal 1 – Defensive homicide
The department proposes that the offence of defensive homicide be abolished.
Proposal 2 – Excessive self-defence
The department proposes that excessive self-defence (in any form) should not be introduced.

¹⁰¹ Oliver Quick and Celia Wells, ‘Partial Reform of Partial Defences: Developments in England and Wales’ (2012) 45(3) *Australian & New Zealand Journal of Criminology* 337, 338. The authors also refer to the other major difficulty in England and Wales being the commitment to a mandatory penalty of life imprisonment. As the maximum penalty of life imprisonment in Victoria is discretionary rather than mandatory, this problem does not arise in Victoria.

3 Self-Defence

If defensive homicide (excessive self-defence) is abolished, how should self-defence operate? The discussion in Part 2 of this paper highlighted the importance of social context evidence in addressing misconceptions about family violence and the need to address complexities in the law.

While defensive homicide (excessive self-defence) separates the accused's belief that their actions were necessary in self-defence from the issue of whether they had reasonable grounds for that belief, abolishing defensive homicide will have the effect of bringing the two limbs back together.

The test for self-defence has two limbs:

- ♦ the person carried out their conduct believing that it was necessary to defend himself, herself or another person (from the infliction of death or really serious injury), and
- ♦ the person had reasonable grounds for that belief.

The words in brackets in the first limb apply only to the offence of murder.

In this Part, we consider ways of improving self-defence and address necessary consequential issues that will arise if defensive homicide is abolished.

3.1 Should the limitation on self-defence for the offence of murder remain?

Because defensive homicide separates the two limbs of the common law test for self-defence, some further qualification of the first limb was necessary to avoid people inappropriately escaping liability for murder, based purely on a belief that it was necessary to use lethal force in self-defence, no matter how unreasonable that belief may be. Accordingly, when defensive homicide was introduced, it included a qualification to the first limb of self-defence. To be not guilty of murder, a person must believe that it is necessary to defend themselves or another from *death or really serious injury*.

While the common law did not contain such a restriction, it would be rare for a person to have believed on reasonable grounds that it was necessary to defend themselves or another by using lethal force while not believing that they were protecting themselves or another from death or really serious injury. The High Court considered this issue in *Zecevic's* case:

A threat does not ordinarily call for that response [killing or doing serious bodily harm] unless it causes a reasonable apprehension on the part of that person of death or serious bodily harm. If the response of an accused goes beyond what he believed to be necessary to defend himself or if there were no reasonable grounds for belief on his part that the response was necessary in defence of himself, then the occasion will not have been one which would support a plea of self-defence.¹⁰²

The common law test appropriately dealt with this issue because it combined the two limbs of self-defence. No other jurisdiction in Australia has included a qualification of the kind included in defensive homicide, in its self-defence laws.

However, narrowing the first limb of the test is relevant in cases of women who kill in response to family violence. This is because some threats are difficult to categorise. For instance in *Black's*

¹⁰² *Zecevic v DPP (Vic)* (1987) 162 CLR 645 at 662 (Wilson, Dawson and Toohey JJ).

case, in which the accused pleaded guilty to defensive homicide, Black said that Clarke (her partner and the person she killed):

- ♦ was never physically violent towards her (even though he would jab her in the head and chest)
- ♦ would sometimes force himself upon her sexually, and
- ♦ one time left a knife and gold coin on her pillow after she had been out with friends (Black did not elaborate on the meaning of this act).

How should these threats be categorised? The advantage of the common law test is that it focuses on what the accused believed these threats and actions meant, and then whether the accused believed it was necessary to defend themselves, rather than whether they also specifically believed it was necessary to defend themselves from the infliction of death or really serious injury. As Toole says, the 'narrowing of the range of possible threats that can sustain a self-defence argument might prove detrimental to improving their [abused women] position'.¹⁰³

Accordingly, the department proposes that this qualification be removed.

This will have a significant consequential benefit in that it will mean that one test for self-defence applies to all offences to which it is relevant. A jury will often have to consider whether an accused is guilty of murder or manslaughter. Where self-defence is in issue, the proposed new test would mean that the trial judge only needs to explain self-defence to the jury in one way. It would no longer be necessary to explain the differences between self-defence for the offences of murder and manslaughter.

This issue also arises in the context of attempted murder. When the DPP charges a person with attempted murder, the DPP almost invariably charges the alternative offence of intentionally causing serious injury. As the judge will need to direct the jury about self-defence in relation to both attempted murder and intentionally causing serious injury, having the same test for self-defence for both offences would be easier for the judge to explain to the jury and easier for the jury to understand.¹⁰⁴

Proposal 3 – Self-defence

The department proposes that the first limb of the common law test of self-defence should be reinstated, namely, whether the accused believed that it was necessary to do what he or she did to defend himself, herself or another.

3.2 Should the test for self-defence be 'reasonable grounds' or 'reasonable response'?

Before the introduction of the *Crimes (Homicide) Act* in 2005, the Victorian law of self-defence was governed solely by the common law test as stated by the High Court in *Zecevic's* case. In this case, the High Court set out the following test for self-defence:

¹⁰³ Kellie Toole, 'Self-Defence and the Reasonable Woman: Equality Before the New Victorian Law' (2012) 36 *Melbourne University Law Review* 250, 264.

¹⁰⁴ In *Babic v The Queen* (2010) 28 VR 297 [96], Justices Neave and Harper indicated that a question which remained 'unresolved at the appellate level include[d] the relevance of statutory self-defence to attempted murder'. This proposal will resolve this question.

It is whether the accused believed on reasonable grounds that it was necessary in self-defence to do what he [or she] did. If he or she had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he [or she] is entitled to an acquittal.¹⁰⁵

In *Babic's* case, Justice Ashley indicated that:

Self-defence post-Zecevic, though not without all difficulties, was satisfactorily explained to juries; and that is still the situation with respect to non-homicide offences.¹⁰⁶

Further, as Justice Weinberg has indicated, self-defence is an important and long-standing part of the law. It should be able to be easily expressed.¹⁰⁷

A number of jurisdictions (including New South Wales, Commonwealth, Northern Territory, South Australia and Western Australia) have modified this second limb of the test. In those jurisdictions, the test is whether what the accused did was a 'reasonable response in the circumstances as perceived by the accused'. The VLRC also recommended that this formulation be used.

While the VLRC / NSW test specifies that the test must be applied 'in the circumstances as perceived by the accused', this is essentially the same as the common law test. The JCV's Criminal Charge Book discusses this aspect of the common law test:

This is not a test about what the hypothetical 'reasonable person' might have believed in the circumstances, but about whether the accused had no reasonable grounds for his or her belief, in the circumstances as he or she perceived them to be (*R v Portelli* (2004) 148 A Crim R 282 (Vic CA); *Viro v R* (1978) 141 CLR 88). ...

In determining whether the accused's belief was not based on reasonable grounds, the jury may take into account the following matters:

- The surrounding circumstances
- All of the facts within the accused's knowledge
- The relationship between the parties involved
- The prior conduct of the victim
- Circumstances of family violence
- The personal characteristics of the accused, such as:
 - Any deluded beliefs he or she held
 - Any excitement, affront or distress he or she was experiencing
- The proportionality of the accused's response
- The accused's failure to retreat.¹⁰⁸

In Australia, the 'reasonable response' test was derived from the recommendations of the Criminal Law Officers Committee (CLOC). CLOC argued that its formulation was similar to the common law *Zecevic* test but would simplify the law:

The test as to necessity is subjective, but the test as to proportion is objective. It requires the response of the accused to be objectively proportionate to the situation which the accused subjectively believed she or he faced (the words 'as perceived by him or her' were added to make this clear).¹⁰⁹

¹⁰⁵ *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 661 (Wilson, Dawson and Toohey JJ).

¹⁰⁶ *Babic v The Queen* (2010) 28 VR 297 [18].

¹⁰⁷ Justice Mark Weinberg, 'The Criminal Law – A "Mildly Vituperative" Critique' (2012) 35 *Melbourne University Law Review* 1177, 1183. See also Justice Kevin Duggan, Law Report, *ABC Radio National (Australia)*, 2 August 2011.

¹⁰⁸ Judicial College of Victoria, *Victorian Criminal Charge Book* [8.9.2.1].

¹⁰⁹ Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapters 1 and 2: General Principles of Criminal Responsibility*, Report (1992) 69.

The differences between the common law and the 'reasonable response' test were considered by the New South Wales Court of Criminal Appeal in *R v Trevenna* where the court said that the statutory '[c]odification of what constitutes "self-defence" thereby refines and elaborates on the common law elements, but without introducing any major change'.¹¹⁰ Based on this, the VLRC considered that there was not likely to be much difference between the two tests and there were advantages in uniformity in adopting the same test that most other jurisdictions have adopted.¹¹¹ Further, the VLRC supported the view of Bronitt and McSherry that:

Generally, if an offence requires a particular mental state as part of its definition, then a subjective test can be applied. However, a mental state forming part of a defence requires an objective test. This distinction is based on societal values. That is, before a society decides to exercise compassion by exculpating an accused from criminal liability, it is entitled to demand that the accused lacked any blameworthiness in relation to the plea relied on. As Stanley Yeo ... has pointed out '[a]n unreasonable or negligently held belief would constitute blameworthiness denying the accused the excuse'.¹¹²

The tests for reasonable grounds for a belief and reasonableness of response have traditionally been viewed as relating to the separate issues of necessity and proportionality. This is reflected by the statement in Fairall and Yeo that 'the elements of threat perception and excessive force are sometimes merged; although closely connected, they are separable and should be separated'.¹¹³

The test under the common law focuses on whether the accused had reasonable grounds for the belief that it was necessary to act in the circumstances as perceived by the accused.¹¹⁴ The test does not involve consideration of whether a reasonable person would have believed it was necessary to act. On the VLRC / NSW approach, the test is whether the accused's response is a reasonable response (determined objectively) in the circumstances that the accused perceived (determined subjectively).¹¹⁵

In *Crawford, Neal Andrew v The Queen*, the New South Wales Court of Criminal Appeal considered the failure of the trial judge to direct the jury in relation to a mistaken but genuine belief in the necessity of self-defence, even where the complainant's conduct was lawful.¹¹⁶ In the leading judgment, Fullerton J noted:

In *R v Katarzynski* [2002] NSWSC 613, Howie J considered the effect of Pt 11 Div 3 of the *Crimes Act* on the issue of self-defence at common law. His Honour emphasised that s 418(2) is concerned not with the state of mind of a reasonable person but with the reasonableness of the conduct of the accused having regard to his or her state of mind. As applied to the facts of this case, it was sufficient if the appellant satisfied the jury that there was a reasonable possibility that he believed his conduct was necessary in order to defend himself, and a reasonable possibility that what he did was a reasonable response to the circumstances as he perceived them.¹¹⁷

In the context of a woman who kills in response to family violence, this would mean that in considering self-defence:

- ♦ the jury would need to consider whether the woman believed that it was necessary to act in self-defence, and
- ♦ based on the circumstances as she perceived them to be, whether her response (in killing a partner) was a reasonable response.

¹¹⁰ *R v Trevenna* [2004] NSWCCA 43, [38].

¹¹¹ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) 88.

¹¹² Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001) 305–6, citing Stanley Yeo, *Compulsion and the Criminal Law* (1990) 200.

¹¹³ Paul A Fairall and Stanley Yeo, *Criminal Defences in Australia* (4th ed, 2005) 174.

¹¹⁴ *R v Portelli* (2004) 10 VR 259 and *R v Hawes* (1994) 35 NSWLR 294, 306.

¹¹⁵ See *R v Burgess* (2005) 152 A Crim R 100 and *R v Katarzynski* [2002] NSWSC 613.

¹¹⁶ *Crawford, Neal Andrew v The Queen* [2008] NSWCCA 166.

¹¹⁷ *Ibid* [22].

As Howe points out in her submission, a potential advantage of this second test in the context of family violence is that it changes the focus to assessing the reasonableness of the woman's response, rather than the grounds for her belief, in the circumstances that she perceived them to be.

Similar provisions in Tasmania have highlighted aspects of this objective test grounded in the accused's perceptions. For example, if the accused believes that a person is going to attack them and has a loaded pistol, evidence that the pistol was not loaded is not relevant to the test. The issue must be determined in the light of the circumstances as perceived by the accused.

In the case of *R v Walsh*, Steer J of the Supreme Court of Tasmania said that:

In this case, if the jury found that Mr Walsh believed that for some reason his friend was attacking him, then they would consider the surrounding circumstances, i.e. place, darkness, relative sizes of the two men, and as part of that process, take into account the fact that he was a war veteran who had been badly injured, and a man who had been severely injured following an attack by a group of youths. The jury may pay regard to the evidence that a person with the experiences of the accused would be more susceptible to fear of consequences and be more likely to perceive a necessity for immediate and drastic action.¹¹⁸

Expert evidence could also be given, as provided for in section 9AH of the *Crimes Act*, concerning matters including the psychological effect of violence on people who have been in a relationship affected by family violence.

The VLRC / NSW test does not render whether the accused had reasonable grounds for believing it was necessary to use the force used irrelevant. While not part of the test, the absence of reasonable grounds for a belief means that a person is less likely to have actually held the belief that it was necessary to act. Because this constitutes the second limb of the common law test, it is not necessary to explain this to a jury. However, because it is not part of the VLRC / NSW test, a judge will often need to explain to a jury that the absence of reasonable grounds means that a person is less likely to hold a belief that action is necessary.

Self-defence in Canada

The most recent changes to self-defence have occurred in Canada. In 2012, in the House of Commons, Mr Goguen MP, Parliamentary Secretary to the Minister of Justice, discussed the new self-defence laws saying:

The necessity to reform these defences stems from the fact that they are currently worded in an extremely complex and convoluted manner. In particular, our self-defence laws have been subject to decades of criticism by the judiciary, including the Supreme Court of Canada, trial counsel, criminal law academics, bar associations and the law reform bodies. Criticism has focused on the fact that the existing law is confusing and difficult to apply in practice. It is fair to say that the reform in this area is long overdue.¹¹⁹

The *Citizen's Arrest and Self-defence Act 2012* (Can) sets out the three components of self-defence:

- ♦ a person must believe on reasonable grounds that force is being used against them
- ♦ the act constituting the offence is committed for the purpose of defending themselves from that force, and
- ♦ the act committed is reasonable in the circumstances.

¹¹⁸ *R v Walsh* (1991) 60 A Crim R 419.

¹¹⁹ Canada, *Parliamentary Debates*, House of Commons, 24 April 2012, 1035.

The important difference with Canadian law when compared with tests in Australia is that the third element is fully objective in nature. It does not limit consideration of whether the act was reasonable to the circumstances as perceived by the accused. Where there are differences between the circumstances as the accused perceives them and as a reasonable person (independently) would perceive the circumstances, it will usually be easier for the prosecution to prove that the accused was not acting in self-defence.

Limiting the objective assessment to the circumstances as perceived by the accused is particularly important in the context where a person kills in response to family violence. Given this difference, changing self-defence to the Canadian model would depart from all other jurisdictions in Australia and is not proposed by this paper.

Conclusion

The common law test for self-defence and the VLRC / NSW test substantially overlap. Accordingly, in most cases the result will be the same no matter which test is applied. A person who has reasonable grounds for believing it is necessary to defend themselves, and does so, will be responding in a way that is reasonable.

The principal advantage with the common law test is that it has a recent history in Victoria for homicide offences and it is still used for non-homicide offences. It is relatively straightforward for judges and juries to apply.

The principal advantages with the VLRC / NSW test is that it involves a (small) readjustment in focus to more objective features of whether a *response* was reasonable, in the circumstances as perceived by the person. This is probably closer to the kind of test that a juror would apply intuitively. The common law test sounds more like a test that lawyers would use. Further, it may make a small difference in cases involving violence by men against men, by virtue of the extent to which it focuses on objective features (the predominant kind of defensive homicide case).

It is possible that the increased focus on objective features may also assist a woman who kills in response to family violence by shifting the focus from whether her belief was reasonable to whether her conduct was reasonable.

It is possible that the VLRC / NSW test may also make a difference when men kill, by changing the focus to whether their response *was reasonable* in the circumstances as perceived by them. However, these changes are not likely to be substantial as the New South Wales Court of Appeal indicated that there are many similarities between the tests and as discussed in Part 2, a person acting in self-defence cannot 'weigh to a nicety the exact measure of defensive action'.¹²⁰

Whichever test for self-defence is adopted, it would be essential that the test apply to all offences rather than have different tests for self-defence depending upon the offence charged, especially where both tests may need to be applied in the one trial.

Question 1 – Self-defence

Should the test for self-defence be that the accused believed that it was necessary to do what he or she did to defend himself, herself or another, and

- a) had reasonable grounds for that belief (the common law test), or
- b) the accused's response was a reasonable response in the circumstances as perceived by the accused (the VLRC / NSW test)?

¹²⁰ *Palmer v The Queen* [1971] AC 814, 832.

3.3 Should self-defence be codified or the common law reinstated?

In *Babic's* case, the Victorian Court of Appeal clarified that the *Crimes (Homicide) Act* abolished common law self-defence in relation to murder and manslaughter. Common law self-defence continues to apply to non-fatal offences such as causing injury and causing serious injury offences.

Accordingly, whichever test for self-defence is introduced, it will be necessary to expressly state that test in the *Crimes Act*. The same test for self-defence should apply to fatal and non-fatal offences alike. Restoring the consistency in the laws of self-defence that existed prior to the 2005 reforms will significantly:

- ♦ simplify the trial judge's task in explaining self-defence to the jury, and
- ♦ assist the jury in understanding and applying self-defence.

To ensure there is only one law of self-defence, it will also be necessary to expressly abolish the common law of self-defence wherever the statutory self-defence provisions apply.

Proposal 4 – A consistent test for self-defence

The department proposes that the test for self-defence should be set out in the *Crimes Act 1958* and should apply consistently to fatal and non-fatal offences.

Proposal 5 – Abolition of the common law test for self-defence

The department proposes that the common law test for self-defence be expressly abolished, wherever the new statutory test for self-defence applies.

3.4 Self-defence and family violence provisions

It is important that the test for self-defence does not affect the operation of other important changes introduced following the VLRC Report. Accordingly, the new test for self-defence (whichever test is chosen for the second limb) will still need to be linked to section 9AH of the *Crimes Act* which specifically applies to cases involving family violence. Section 9AH makes clear the types of evidence that are admissible in a family violence case and emphasises that a person may believe, and have reasonable grounds for believing, that their conduct is necessary:

- ♦ where she or he is responding to a harm that is not immediate, and
- ♦ where her or his response involves the use of force in excess of the force involved in the harm or threatened harm.¹²¹

This provision is central to improvements to the way in which the law of self-defence operates in homicides which occur in the context of ongoing family violence.

The VLRC indicated that its proposals concerning evidentiary laws were limited to the offences of murder and manslaughter because the terms of its reference were limited to homicide offences. However, the VLRC 'urge[d] the Victorian Government to consider extending the operation of these provisions beyond the context of these two offences'.¹²²

¹²¹ These aspects of self-defence are currently set out in s 9AH(1)(c) and (d) of the *Crimes Act 1958*.

¹²² Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) 157.

The VLRC indicated that if the provisions were not extended to other offences, this would create anomalies when the issue of self-defence arose in relation to other offences where family violence evidence was relevant. A clear example would arise in relation to a charge of attempted murder or causing serious injury intentionally. These are serious offences where the maximum penalties are equal to or higher than the maximum penalty for manslaughter. The evidence that is relevant to a claim of self-defence should not depend simply upon whether a person dies or does not die as a result of the accused's conduct.

These evidentiary provisions are important and should be extended to other provisions where self-defence arises. Greater use of social context evidence in relation to a number of offences should result in the legal profession and the courts:

- ♦ being more familiar with the laws governing this kind of evidence, and
- ♦ better understanding the ways in which this kind of evidence may be relevant.

In turn, this should improve the effectiveness of social context evidence laws when used in homicide cases.

Proposal 6 – Social context evidentiary laws

The department proposes that the social context evidence laws contained in section 9AH of the *Crimes Act 1958* be extended to apply to any claim of self-defence and not be limited to where the offence charged is murder or manslaughter.

3.5 Draft provisions

The following draft provisions give effect to Proposals 1 to 6 in legislative form, as amendments to the *Crimes Act 1958*.

New Part IC ('self defence') inserted into *Crimes Act 1958*

Section A(1): Section 9AD of the Crimes Act 1958 is repealed.

PART IC—SELF-DEFENCE

322G Application of Part

This Part applies to any offence, whether against any enactment or at common law.

322H Onus of proof

In any criminal proceeding in which self-defence is raised by the accused, the prosecution has the onus of proving beyond reasonable doubt that the person did not carry out the conduct in self-defence.

322I Self-defence

- 1 A person is not guilty of an offence if the person carries out the conduct constituting the offence in self-defence.
- 2 A person carries out conduct in self-defence if—
 - a) the person believes the conduct is necessary to defend himself or herself or another person; and
 - b) the person has reasonable grounds for that belief.

Note, See section 322K as to belief in circumstances where family violence is alleged.

New Part IC ('self defence') inserted into *Crimes Act 1958*

[Alternative test]

2 A person carries out conduct in self-defence if—

- a) the person believes the conduct is necessary to defend himself or herself or another person; and
- b) the conduct is a reasonable response in the circumstances as the person perceives them.

322J Self-defence does not apply to a response to lawful conduct

Section 322I does not apply if—

- a) the person is responding to lawful conduct; and
- b) at the time of his or her response, the person knows that the conduct is lawful.

322K Family violence

1 Without limiting section 322I, in circumstances where family violence is alleged, a person may believe, and may have reasonable grounds for believing, that his or her conduct is necessary to defend himself or herself or another person even if—

- a) he or she is responding to a harm that is not immediate; or
- b) his or her response involves the use of force in excess of the force involved in the harm or threatened harm.

2 Without limiting the evidence that may be adduced, in circumstances where family violence is alleged, evidence of a kind referred to in subsection (3) may be relevant in determining whether—

- a) a person has carried out conduct while believing it to be necessary to defend himself or herself or another person; or
- b) a person has reasonable grounds for that belief.

3 Evidence of—

- a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;
- b) the cumulative effect, including psychological effect, on the person or a family member of that violence;
- c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
- d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;
- e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;
- f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

4 In this section—

child means a person who is under the age of 18 years;

family member, in relation to a person, includes—

- a) a person who is or has been married to the person; or
- b) a person who has or has had an intimate personal relationship with the person; or
- c) a person who is or has been the father, mother, step-father or step-mother of the person; or
- d) a child who normally or regularly resides with the person; or
- e) a guardian of the person; or
- f) another person who is or has been ordinarily a member of the household of the person;

New Part IC ('self defence') inserted into *Crimes Act 1958*

family violence, in relation to a person, means violence against that person by a family member;
violence means—

- a) physical abuse;
- b) sexual abuse;
- c) psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to—
 - i intimidation;
 - ii harassment;
 - iii damage to property;
 - iv threats of physical abuse, sexual abuse or psychological abuse;
 - v in relation to a child—
 - (A) causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or
 - (B) putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.

5 Without limiting the definition of violence in subsection (4)—

- a) a single act may amount to abuse for the purposes of that definition;
- b) a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

...

322M Abolition of self-defence at common law

Self-defence at common law is abolished.

Abolition of defensive homicide

Proposed new section A(1) repeals the partial defence of defensive homicide in section 9AD of the *Crimes Act 1958*.

Consequential references to defensive homicide in the *Crimes Act* and other Victorian statutes will also need to be removed.

Self-defence

Proposed new section 322G ensures that there is one test for self-defence, which will apply to all offences, whether the offence is in the *Crimes Act 1958*, or another Act or a common law offence.

To ensure that there is only one law of self-defence, proposed new section 322M abolishes self-defence at common law. This aims to avoid uncertainty similar to the confusion created with the introduction of defensive homicide regarding whether common law self-defence had been abolished, which was unresolved for five years until the decision in *Babic's* case.

Proposed new section 322G is in the same terms as common law self-defence and is intended to operate in the same way. At common law, self-defence applies to (among other things) conduct carried out in defence of property or to prevent unlawful deprivation of liberty.¹²³

Accordingly, it is unnecessary for section 322G to expressly specify that self-defence is available in these (and other) circumstances. In the department's view, expanding upon the circumstances in which self-defence is available (which currently occurs in Victoria and some

¹²³ See, e.g., the Judicial College of Victoria's Criminal Charge Book, which cites *R v McKay* [1957] VR 560, in which the Court of Appeal said that homicide is lawful if committed in reasonable self-defence of property.

other Australian jurisdictions) unnecessarily complicates the law and will make jury directions more complex.

Further, as at common law, the proportionality of an accused's response to the harm threatened will continue to be relevant under proposed new section 322G as a factor for the jury to take into account in determining whether the accused believed that his or her actions were necessary, and whether that belief was based on reasonable grounds. Following the common law, proportionality is not to be assessed by the jury as a separate consideration.

Alternative second limb

The draft provisions contain an alternative test for self-defence, which is based on the VLRC / NSW test for self-defence, as discussed in relation to Question 1. Like the common law approach to self-defence, this approach is intended to apply in a range of different situations including where a person is acting in reasonable defence of property or to prevent unlawful deprivation of liberty. As discussed in Part 3.2, this alternative test focuses on whether a person's response was reasonable, rather than whether the person's belief was reasonable.

Family violence

Section 9AH of the *Crimes Act 1958* sets out the types of evidence that are admissible where family violence is raised in a charge of murder, manslaughter or defensive homicide. Proposed new section 322K extends section 9AH to all claims of self-defence (and is not limited to homicide offences).

4 Evidence about Homicide Victims

4.1 Introduction

In accordance with the VLRC Report's recommendations, the *Crimes (Homicide) Act* inserted a new section 9AH(2) and (3) into the *Crimes Act* which highlights the kinds of relationship and social context evidence that may be relevant to help a jury understand the complexity of family violence and the realities faced by a woman who kills in response to family violence.

Section 9AH(3) sets out the kinds of evidence that may be adduced in circumstances where family violence is alleged. This section provides that relevant evidence may be evidence of:

- ♦ the history of the relationship between the accused person and a family member, including violence by the family member towards the accused person or by the accused person towards the family member or by the family member or the accused person in relation to any other family member
- ♦ the cumulative effect, including psychological effect, on the accused person or a family member of that violence
- ♦ social, cultural or economic factors that impact on the accused person or a family member who has been affected by family violence
- ♦ the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser
- ♦ the psychological effect of violence on people who are or have been in a relationship affected by family violence, and
- ♦ social or economic factors that impact on people who are or have been in a relationship affected by family violence.

Evidence that may be adduced as to the cumulative effect of violence can include expert evidence from psychologists and other professionals. Expert evidence may be relevant to both the objective and subjective elements of self-defence. Easteal has commented on the importance of allowing expert evidence to illustrate the cumulative effects of family violence:

Without experts, jurors are left with their own preconceived notions of reasonable behaviour for a battered woman. Thus, the objective standard is worthless if the jury is not equipped to understand what is indeed reasonable behaviour for a woman who has experienced long-term battering.¹²⁴

Section 9AH of the *Crimes Act* implemented the VLRC's recommendations to ensure that during homicide proceedings, the jury hears evidence of family violence and the impact of that violence. This evidence is essential for assisting juries to understand the realities of family violence and enabling them to appreciate how a person may believe that her or his actions are necessary in self-defence, including where she or he is responding to a threat that is not immediate.

In their comprehensive review of family violence, the ALRC and NSWLRC made the following recommendation in their Report *Family Violence – A National Legal Response* (2010):

Recommendation 14–5 State and territory criminal legislation should provide guidance about the potential relevance of family-violence related evidence in the context of a defence to homicide. Section 9AH of the *Crimes Act 1958* (Vic) is an instructive model in this regard.

¹²⁴ Patricia Easteal, 'Battered Women Who Kill: A Plea of Self-Defence', Australian Institute of Criminology, cited in Andrew Hale, Corinne Borg and Paul McClure, 'Battered Women's Syndrome and Self-Defence' (2006) 80(4) *Law Institute Journal* 58, 61.

These laws are central to changing the law and culture of the criminal justice system. As discussed in Part 2, the cases of ‘SB’ and Freda Dimitrovski suggest that these social context evidence laws are having some positive impact. As discussed in Part 3, the department proposes that these laws be extended so that they are available wherever self-defence may be raised.

In the light of the cases since the introduction of defensive homicide, it is also timely to consider whether there are other ways in which the laws of evidence could be improved in homicide cases.

4.1.1 Summary of issue

A major concern with the defence of provocation was its gender bias. Men claimed that they had killed their partner because they suspected infidelity or because she was threatening to leave the relationship and this amounted to provocation.

However, even after the abolition of the defence of provocation, there may be homicide cases where sexual history evidence may be relevant. The Discussion Paper discusses these issues (at pages 56–7) and asked whether the sexual history evidence laws that apply to sexual offence cases should be adapted to apply in homicide cases. This would mean that such evidence would have to have ‘substantial relevance’ to a fact in issue and it must be in ‘the interests of justice’ to allow the questioning.

The Discussion Paper (at pages 58–61) also discusses whether there should be changes to the laws governing relationship evidence. Relationship evidence may assist in explaining the context in which violence occurred.

4.1.2 Submissions and consultations

Sexual history evidence

Most of the submissions that addressed this question supported adapting the laws that apply in sexual offence cases to homicide cases. As Ashton writes, ‘the sexual history of a female victim has historically been used to demean the character of the deceased and to mitigate or explain away the behaviour of the accused’. The submission from the Union of Australian Women also considers that specific safeguards are required given the underlying assumptions about male and female infidelity and gender bias common in society.

On the other hand, some submissions do not consider that it is necessary to adapt the sexual history evidence laws to homicide cases. For example, VLA argues that the abolition of the provocation defence has greatly reduced the circumstances in which the deceased’s sexual history might be relevant, and that the current ‘relevance’ threshold is appropriate. The former DPP submitted that since the abolition of provocation, ‘[t]he sexual history of the victim of homicide is irrelevant and, to that extent, laws of evidence that apply in cases of sexual offences should not be adapted to apply in homicide’ cases.

A number of submissions went beyond sexual history evidence to discuss concerns regarding the admissibility of evidence more generally. Ashton writes that:

In rape cases, not allowing sexual history, affords the victim some protection from character assassination. However in homicide cases, sexual history is only one of many behaviours which may be called upon to demean the character of the victim. Historically it has been the easiest and most obvious trait for defence barristers to bring to the attention of the jury. I would suggest, that removing the tip of the iceberg, doesn’t remove the iceberg, and that there are a myriad of other behaviour traits which the defence will also use, should sexual history be excluded. So where would you draw the line... the woman may have had drug and alcohol issues, may have had children from various partners, may

have her parenting skills called into question, may have had mental health issues, might have been a liar, may have been a nag. So the issue is more about how to balance evidence which is relevant to the circumstances of the homicide with evidence which is purely demeaning of the deceased.

Howe also writes that there should be a focus on what evidence is admitted and excluded in homicides involving family violence, including separation killings. Howe suggests that legislation should provide an express statement about evidence that is admissible (such as evidence concerning a well-founded fear of violence or previous serious assaults by the deceased) as well as evidence that is not admissible (such as evidence about infidelities, 'mere words' or insults, or once off, non-violent sexual advances).

The joint submission by Tyson, Capper and Kirkwood also expresses concern that defensive homicide has 'provided an avenue for men to use similar types of arguments in relation to their behaviour that occurred with the provocation defence'.

Fitz-Gibbon writes that:

A key concern of the previously abolished partial defence of provocation was that it provided a mechanism through which a victim of homicide could be blamed for their own death. It is a concern that similar narratives of victim blame are emerging through the operation of the offence of defensive homicide... [A]ny defence or offence...that allows the words or actions of the victim to be put on trial is problematic given the inability of a victim of homicide to contradict the version of events as given by the offender.

Other submissions express the view that the law should protect the reputation of victims from inappropriate attack, particularly given that homicide victims cannot defend themselves in court. For example, the Crimes Victims Support Association writes that every care must be taken to prevent inappropriate or baseless attacks being made against the victim or victims.

Relationship evidence

The Discussion Paper (at pages 58–61) notes the current complexity of this area of the law, and that there are strong reasons for not changing the laws governing admissibility of relationship evidence in the context of only homicide cases.

Many submissions do not address this issue. The former DPP and VLA did not support any changes to this area of the law. The former DPP indicated that an express legislative statement is unnecessary and should be avoided. VLA agrees that there are strong reasons for not changing the laws governing the admissibility of relationship evidence in homicide cases and considers that a legislative statement would not add any value.

4.1.3 Conclusion

The department agrees with the views expressed in a number of submissions that focusing on sexual history evidence is likely to be of limited benefit. There is a risk that specifically recognising this kind of evidence as potentially relevant in a homicide case may encourage its use and therefore be counterproductive. The department also agrees that the laws concerning relationship evidence should not be changed for the reasons expressed by the former DPP and VLA.

The difficulty with these categories of evidence is that they primarily relate to excuses for conduct that recognise provocation or loss of self-control. The abolition of defensive homicide should build upon the abolition of provocation to further reduce the likelihood and strength of such claims.

However, even with the offence of manslaughter, similar kinds of issues arose in *Sherna's* case, in which the accused was convicted of the manslaughter of his de facto partner Susanne Wild. Sherna's counsel described the case to the jury as 'entirely spontaneous. It was a sudden eruption as a result of the cumulative effect of many, many years of abuse'.¹²⁵ Sherna said that Susanne had been:

'yelling and screaming' about a mobile phone bill. Sherna described Susanne as 'a mouth – really mouthy, none of the neighbours liked us at all. None of the neighbours would talk to us because she was always mouthing off at them... So for me, it was – just every day was a pressure-cooker day'.¹²⁶

The comments were such that the prosecution commented upon this in his closing address to the jury, as described by Tyson:

If we consider that in his closing address to the jury in the *Sherna* case, the prosecuting counsel saw fit to comment on how the accused had either 'personally or through his counsel ... complained mercilessly about Susanne Wild'. He said the court had 'been absolutely awash with criticisms of her'. He intimated this was a tactic on the part of the accused and/or his lawyer, who deliberately sought to say 'something, anything, however small, [but] negative about Susanne Wild'. Thus, the prosecuting counsel was critical that this had been 'quite a one-sided process'. While he conceded the practice of resorting to defence tactics that blame the victim was linked to the nature of the adversarial process, he said it was not one in which the victim was the one on 'trial as to her character'. This led him to conclude the process 'may have had a tendency to obscure the reality of what it actually was that this man did to his wife'.¹²⁷

As *Sherna's* case shows, simply changing evidence laws in the context of sexual history would be insufficient. Accordingly, the department proposes changes to the laws of evidence which would have broader application in improving the way in which the law deals with evidence concerning the victim in a homicide case. As discussed above, a number of submissions indicated that something broader than bolstering restrictions on sexual history evidence laws is required.

The proposed approach is aimed at protecting the rights and reputation of homicide victims, in a way that is consistent with the fair trial rights of the accused. It will also assist in providing balance to the evidence which is provided in court. The current system means that in some cases the accused has an unfair advantage in being able to present a picture of the victim. The department's proposals aim to prevent inappropriate, unnecessary or unwarranted criticisms of the victim's character and in some situations, permit the prosecution to lead evidence to rebut claims about the victim.

The existence of such laws of evidence may:

- ♦ discourage the accused from leading such evidence unless it is clearly relevant to their case, and
- ♦ where the accused leads such evidence and it is disputed,¹²⁸ enable the prosecution to rebut this evidence so that the jury is presented with all of the evidence to resolve these issues.

While some jurisdictions exclude specific types of evidence (e.g. evidence of infidelities, or 'mere' words), this is in the context of a defence of provocation or loss of self-control. These evidentiary rules aim to limit use of these defences in situations which are not considered appropriate. Because

¹²⁵ *DPP v Sherna* [2009] VSC 494, trial transcript, Supreme Court of Victoria, 26–8, cited in Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (2012) 135.

¹²⁶ *Ibid* 135.

¹²⁷ Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (2012) 136–7.

¹²⁸ Such evidence may not be disputed, for instance, some aspects of Herman Rockefeller's sexual history may have been relevant to the accused's cases, if there had been a trial. By contrast, some evidence in the *Ramage* case may well have been disputed.

Victoria does not recognise the partial excuse of provocation, these approaches to excluding evidence are of limited value.

4.2 Limits to questions about homicide victims

The law already recognises that there are limits to questions that can be put to a witness. The court has a general power to control the conduct of proceedings, including control over the questioning of a witness.¹²⁹ The court also has a specific power to stop cross-examination of a witness that is unduly annoying, harassing, intimidating, offensive, humiliating or oppressive.¹³⁰ This extends to questioning a witness 'in a manner or tone that is belittling, insulting or otherwise inappropriate'.

The courts have observed that this power is consistent with the requirements of a fair trial, which: 'do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance'.¹³¹

However, former DPP of the ACT, Richard Refshauge, says that judicial officers are sometimes reluctant to intervene to stop such cross-examination even when it is harassing.¹³² This is usually because the judge will not want to deny an accused an opportunity to show that they are not guilty of the offence charged.

The purpose of these provisions is to balance the right, in an adversarial system, to test an opposing witness's account against the distress experienced by a witness, or improper attacks on their character. If the victim is alive they are normally called as a witness and they are cross-examined and accusations about their character need to be put to them. They have a chance to respond to comments about their character, tendencies and what they have or have not done.

In homicide cases, the absence of the victim makes it easier for direct and indirect attacks about the victim. The lack of evidence from and about the victim can lead to a blank or very limited picture of the person that is then filled in by the evidence or impressions from the evidence. This is quite different from where a victim gives evidence and the jury can make their own assessment of the victim.

The department proposes modifying laws about questions which can be put under cross-examination under section 41 of the *Evidence Act 2008*.

4.2.1 Application of possible reform

The possible new power should apply to any criminal proceeding (which includes a committal hearing, trial and sentencing hearing) concerning a homicide offence. The issues arise in homicide cases because the victim is not able to give evidence.

Section 41 of the *Evidence Act* is limited to cross-examination. The department proposes that improper questions not be asked, whether as evidence-in-chief, cross-examination or re-examination. A broader approach is preferred because the issue is the nature of the information being sought rather than the nature of the question itself.

¹²⁹ *Evidence Act 2008*, ss11, 26.

¹³⁰ *Ibid* s 41.

¹³¹ *R v TA* (2003) 57 NSWLR 444 [8], [13] (Spigelman CJ).

¹³² Richard Refshauge, 'The Prosecution Role in Upholding the Right to a Fair Trial and Responding to Victims/Witnesses' (Paper presented at Victims Rights in a Human Rights Framework, National Forum on the 20th Anniversary of the UN Declaration of Basic Principles of Justice for Victims of Crime & Abuse of Power, Canberra, 21 December 2005).

4.2.2 Presumption that improper question cannot be asked

Section 41 of the *Evidence Act* has two different approaches to improper questions. First, the court *may* disallow an improper question. This power is of general application. A specific power applies in relation to vulnerable witnesses. The department proposes that this special power should apply to improper questions about homicide victims.

The analogy with vulnerable witnesses is appropriate given that homicide victims are not able to speak for themselves. The VLRC recommended the approach of prohibiting questions in relation to vulnerable witnesses under section 41 of the *Evidence Act* because it was ‘convinced that a specific duty in relation to vulnerable witnesses offers the best prospect of changing the culture of judicial non-intervention’.¹³³ The same reasoning applies equally to homicide victims under this proposed new provision.

The specific power for vulnerable witnesses provides a presumption that such questions be prohibited. However, like section 41(2) of the *Evidence Act*, it is proposed that the court may allow such questions if it is necessary to ask them in the interests of justice.

In some instances, there may be a need to ask questions that are on the face of it improper in the interests of ensuring a fair trial. For instance, as the LIV points out:

The recent case of *R v Schembri & Anor* illustrates that in some unusual cases, the sexual history of the victim is highly relevant, not to excuse or mitigate the actions of the accused, but to put the offending in context. In the *Schembri* case, the sexual history of the accused was relevant to the general background as to how the victim came to be in the presence of the accused, and afford the accused the opportunity to commit the offence.¹³⁴

While such exceptions are important and necessary, the presumption that improper questions are prohibited will assist in generating a different approach to such questions; normally, they should not be asked.

4.2.3 What is an ‘improper’ question?

The accused should not be able to ask questions about a homicide victim that they could not ask if the victim was alive. Further, some questions are inappropriate because they are disparaging or critical of the victim’s reputation or dignity. Other questions may be offensive or disrespectful if they were asked of the victim while the victim was alive.

Accordingly, the department proposes that an improper question be defined as one that:

- ♦ is offensive, humiliating or demeaning to the victim
- ♦ treats the victim without respect or without respect for the victim’s reputation, or
- ♦ has no basis other than a stereotype (e.g. a stereotype based on the victim’s sex, race, culture, ethnicity, age or mental, intellectual or physical disability (when they were alive)).

In determining these issues, the court would need to consider the issue from the perspective that the victim is alive and giving evidence in court. In this way, issues of being demeaning, offensive, treating the victim without respect or without respect for the victim’s reputation can be readily determined.

¹³³ Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) [5.123].

¹³⁴ This case involved Mario Schembri and Bernadette Denny killing Herman Rockefeller. See *R v Schembri & Anor* [2010] VSC 402 and Hilary Bonney, *The Double Life of Herman Rockefeller* (2012).

This definition is adapted from the tests in section 41 of the *Evidence Act*. Some of the tests from that Act have been omitted because they relate specifically to a witness in court rather than questions about a victim (e.g. questions that are confusing).

The test draws from principles of courtesy, respect and dignity for persons adversely affected by crime in the *Victims' Charter Act 2006*, which reflects international standards dealing with the treatment of victims.¹³⁵ The test also draws from United States' state legislation which provides for constitutional protections for victims and treatment with respect, dignity and fairness.¹³⁶ This definition would cover gratuitous questions about a homicide victim's sexual history.

As section 41(5) of the *Evidence Act* provides, it will also be important to specify that a question is not an improper question merely because:

- ♦ the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness about the victim, or
- ♦ the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness about the victim.

This will clarify that it is the subject matter that may be improper rather than the fact that a person is being asked questions about a particular topic or subject matter.

4.2.4 How would this provision work with social context evidence provisions?

Some evidence which may be admitted under social context evidence, in the context of a woman who kills in response to family violence, will include questions that may be considered to be offensive, humiliating or treating the victim without respect, because they will often involve allegations of serious assaults including sexual assaults.

The proposed restrictions will not prevent this kind of social context evidence from being adduced. This is because the questions will be necessary to ask as part of the issues the jury must determine in the case. However, for the avoidance of doubt, it is proposed that legislation specifically provide that this proposed new process does not limit the questions which may be asked, and evidence which may be adduced under section 9AH of the *Crimes Act* (the social context evidence provisions).

4.2.5 The potential reform

This potential reform will sometimes deal with sexual history evidence, but it is not limited to that kind of evidence. There are many kinds of offensive questions that could be asked in a case. This potential reform seeks to address the range of questions that could be asked by reference to the subject matter of the question more generally, and by reference to the effect of the question (e.g. that it is humiliating or treats the victim with a lack of respect).

The department has not been able to find another jurisdiction that has developed this kind of approach. However, it involves an extension of established laws governing the questioning of witnesses. These potential reforms, like the established laws, are designed to strike an appropriate

¹³⁵ *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 29 November 1985, UN Doc A/RES/40/34, article 6(b) which provides that victims 'should be treated with compassion and respect for their dignity'. Also see European Union, *Framework Decision on the Standing of Victims in the Criminal Proceedings in the Member States of the European Union* (2001) article 2(1) requiring member states to ensure that 'victims are treated with due respect for the dignity of the individual during proceedings'.

¹³⁶ *Crimes Victims Rights Act of 2004* 18 USC § 3771 providing that a crime victim has the 'right to be treated with fairness and with respect for the victim's dignity and privacy'.

balance between the ability of a person to conduct their defence and ensuring that the proceeding is conducted fairly and with respect to the interests of the victim and their family.

It may also prevent the accused from gaining an unfair advantage in that they can ask questions of witnesses about the victim (deceased) that they could not ask of the victim in an attempted murder charge where the victim is called to give evidence.

Question 2 – Improper questions about homicide victims

Should new evidence laws be introduced to prohibit questions in a homicide case about the victim (unless necessary in the interests of justice) where, if the victim was alive and giving evidence in court, the question would:

- ◆ be offensive, humiliating or demeaning to the victim
- ◆ treat the victim without respect
- ◆ fail to respect the victim's reputation, or
- ◆ have no basis other than a stereotype (e.g. a stereotype based on the victim's sex, race, culture, ethnicity, age or mental, intellectual or physical disability)?

4.3 Evidence in rebuttal about homicide victims

What the discussion of the *Middendorp* and *Sherina* 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.¹³⁷

While the above potential reform would limit improper questions, such questions would still be permissible where they are necessary to enable the accused to properly conduct his or her defence. Where this occurs, a further problem concerns the restrictions on the prosecution from leading evidence which may counteract this evidence or provide a more complete picture to the jury.

In the absence of the victim being able to respond as a witness, the department proposes modification of the laws regulating character evidence to allow the prosecution to adduce evidence in rebuttal about the victim's character.

4.3.1 Can evidence about a homicide victim's character be admitted as character evidence?

Character evidence concerns a person's inherent moral qualities or disposition. The *Evidence Act* regulates the admission of evidence about an accused's character, and the character of others, including victims and witnesses. A number of provisions regulate character evidence.

Character evidence about a victim must first be relevant and must also be admissible under the rules governing hearsay, opinion, tendency, coincidence and credibility evidence.

Character evidence about the accused's bad character must meet these same tests and some further protections. These protections operate as additional exclusionary rules applying to evidence about the accused, and aim to prevent the admission of unduly prejudicial evidence. For example,

¹³⁷ Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (2012) 140.

additional rules apply to tendency or coincidence evidence adduced by the prosecution about the accused.

However, different rules apply where the defence adduces evidence of the accused's 'good character'. In this situation, the accused's evidence does not have to comply with the rules of hearsay, opinion, tendency and credibility.¹³⁸ The defence can use this evidence to show that:

- ♦ the accused is less likely to have committed an offence (tendency reasoning), and
- ♦ it is more likely that the accused's evidence is credible (credibility evidence).

If the accused chooses to adduce good character evidence, it acts as a trigger for the prosecution or a co-accused to adduce evidence in rebuttal to show that the accused is not a person of good character.¹³⁹ The rules of hearsay, opinion, tendency and credibility evidence do not apply to evidence adduced in rebuttal. Consequently, while the exclusion of these rules in relation to evidence of an accused's good character is of benefit to the accused, the trade-off is that it may allow the prosecution or a co-accused to adduce evidence of 'bad character' that may otherwise have been excluded.

However, the trade-off is not completely equal, as a number of further protections apply to the accused:

- ♦ The use to which evidence of bad character may be put is more limited than good character evidence. Bad character evidence can only be used to rebut evidence of good character (that is, to assess an accused's credibility). It cannot be used to infer guilt (that is, to support tendency reasoning).¹⁴⁰
- ♦ An accused must not be cross-examined about character evidence unless the court gives leave to do so (s 112). Further restrictions may apply to cross-examining an accused about credibility evidence (s 104).¹⁴¹
- ♦ Evidence of bad character may be limited or excluded under the discretionary and mandatory exclusions in Part 3.11. In particular, section 137 provides that 'the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused'.

The *Evidence Act* does not include an equivalent Part regulating the admission of evidence of a homicide victim's good character to rebut any allegations of bad character the accused may make. In the absence of the victim appearing as a witness, the opportunity to introduce evidence of good character may be limited by other rules of evidence, such as relevance and the hearsay, credibility and opinion rules.

4.3.2 Can the prosecution challenge the credibility of evidence attacking a homicide victim's character?

Character evidence is linked to the assessment of the credibility of a witness. As noted above, one of the permitted uses for evidence of good or bad character in Part 3.8 is to show that the evidence of the accused is more or less likely to be credible.

¹³⁸ *Evidence Act 2008* s 110(1).

¹³⁹ *Ibid* s 110(2), (3).

¹⁴⁰ This is the approach at common law, which the New South Wales Court of Appeal has applied to the Uniform Evidence Act. The Victorian Criminal Charge Book directs judges to follow the New South Wales approach. However, the issue of tendency reasoning in relation to evidence of 'bad character' is not settled in Victoria.

¹⁴¹ There is some debate about the intersection between the rules in Part 3.7 concerning cross-examination of an accused on matters relevant to the assessment of credibility (s 104) and the rules in Part 3.8 concerning character evidence. This is because section 110 only exempts character evidence from the application of the 'credibility rule' in section 102, but does not refer to the further protections for the accused in section 104. See the discussion in: Stephen Odgers SC, *Uniform Evidence Law* (10th ed, 2012) [1.3.9160] and Jeremy Gans and Andrew Palmer, *Uniform Evidence* (2010) 245.

Part 3.7 of the *Evidence Act* regulates the admission of credibility evidence. The credibility rule provides that '[c]redibility evidence about a witness is not admissible'. Evidence used to assess credibility is subject to the credibility rule if it falls within the definition of 'credibility evidence'.¹⁴²

'Credibility evidence' is evidence relevant to the credibility of a witness or another person that is only relevant because:

- ♦ it affects the assessment of the credibility of the witness or person, or
- ♦ it affects the assessment of the credibility of the witness or person *and* is also relevant for another purpose for which it is not admissible under Parts 3.2 to 3.6 of the *Evidence Act*.¹⁴³

Therefore, the credibility rule does not apply to evidence that is relevant to credibility if that evidence is also relevant and admissible for another purpose. In this situation, the evidence may be used to assess credibility, as well as being used for the other admissible purpose.

The credibility rule is subject to a number of exceptions set out in Part 3.7. These exceptions provide only limited scope for the admission of evidence in rebuttal about a homicide victim's character. Depending on the circumstances of a particular case, evidence of a victim's good character adduced to challenge the credibility of evidence adverse to the victim may fall within the following exceptions:

- ♦ evidence which is relevant to both credibility and for another purpose for which it is admissible¹⁴⁴
- ♦ evidence adduced in cross-examination of an accused or another witness if the evidence could substantially affect the assessment of the accused or other witness's credibility¹⁴⁵
- ♦ evidence to rebut denials of, or a failure to admit or agree to, evidence about the victim put to a witness in cross-examination,¹⁴⁶ and
- ♦ evidence that either discredits a previous negative representation about a victim made by the accused or another person, or that supports the credibility of a previous positive representation made by or about the victim.¹⁴⁷

The restrictions that apply to the use of credibility evidence in these circumstances are significant hurdles to the admission of evidence concerning the victim's good character. Admission of such evidence is also subject to other rules of evidence that may render the evidence inadmissible, such as the hearsay and opinion rules. These are significant impediments when the victim is not able to be called as a witness. Unlike the character evidence provisions in Part 3.8, discussed above, the exceptions to the credibility rule do not exempt the evidence from most other rules of evidence.¹⁴⁸ The discretionary and mandatory exclusion provisions in Part 3.11 may also limit or exclude the admission of credibility evidence.

4.3.3 Evidence of the homicide victim's character may be adduced in rebuttal

To enable the prosecution to adduce evidence of a homicide victim's good character in rebuttal, the department considers that the character evidence provisions in Part 3.8 are the most appropriate focus for reform.

¹⁴² *Evidence Act 2008* s 102.

¹⁴³ *Ibid* s 101A.

¹⁴⁴ *Ibid*.

¹⁴⁵ *Ibid* s 103. Cross-examination of the accused on matters concerning credibility is subject to further restrictions (s 104). These restrictions significantly narrow the scope for the prosecution to challenge the accused in cross-examination about evidence concerning the victim's character.

¹⁴⁶ *Ibid* s 106. The restrictions on cross-examining an accused on matters concerning credibility noted above limit the extent to which the prosecution may put such matters to an accused.

¹⁴⁷ *Ibid* s 108A.

¹⁴⁸ The rules on tendency and coincidence in Part 3.6 do not apply to evidence that relates only to the credibility of a witness: *Evidence Act 2008* s 94(1).

Expanding the application of Part 3.8 beyond the character of the accused is a significant step. Part 3.8 provides an accused with an opportunity to introduce evidence of good character that may otherwise be inadmissible. It places the onus on the accused to determine whether to put his or her character in issue. The accused's right to adduce this evidence is balanced against the prosecution or co-accused's right to adduce evidence in rebuttal that may otherwise be inadmissible.

The balancing approach in Part 3.8 reflects the broader balancing approach of the rules of evidence that weigh probative value against prejudicial effect to ensure a fair trial. Any amendment to Part 3.8 to enable the admission of evidence about the victim's character must maintain an appropriate balance between probative value and prejudicial effect.

The department's proposed reforms will work in a similar way to the existing provisions in Part 3.8. Currently, the defence may adduce evidence about the victim's character generally or in a particular respect, if it passes the threshold test of relevance. Under the department's potential reforms, this evidence would remain subject to all rules of evidence, including the rules governing hearsay, opinion, tendency and credibility evidence, and to the proposed limit on improper questions. The continued application of these rules to this evidence is in contrast to the treatment of good character evidence about the accused under section 110(1). This difference is appropriate because the reforms should not increase the scope for the defence to introduce evidence about the victim's character.

The department proposes to reform Part 3.8 as follows:

- ◆ If the accused introduces evidence to show that a homicide victim was not a person of good character, the prosecution may adduce evidence about the victim to show that the victim was a person of good character, either generally or in a particular respect.
- ◆ The rules of hearsay, opinion, tendency and credibility evidence will not apply to this evidence.
- ◆ The prosecution may not use the evidence to infer guilt (tendency reasoning).

The proposed exemption is consistent with the approach taken to evidence in rebuttal in sections 110(2) and 110(3). The rules of hearsay, opinion, tendency and credibility evidence should not apply to this evidence because the victim is unable to give evidence in person.

The prosecution may use this evidence in different ways. For instance, it may rely on the evidence:

- ◆ to show that the accused's evidence about the victim's character is less likely to be credible, or
- ◆ to explain, qualify or contradict the accused's evidence about the victim's character.

The department considers that this proposed reform will deter the defence from introducing evidence attacking a victim's character unless it has real probative value for the defence. If it has real probative value then this is relevant to the issues that the jury must determine.

To maintain the accused's right to a fair trial, existing safeguards will apply to the admission of evidence of the victim's good character. These include:

- ◆ the requirement that the court give leave to cross-examine the accused about matters arising from character evidence¹⁴⁹
- ◆ the discretionary and mandatory exclusions in Part 3.11, particularly section 137, and
- ◆ the limitations on the way in which the evidence may be used.

¹⁴⁹ Ibid s 112.

It may be argued that there is a risk that if the *Evidence Act* provides a formal mechanism for adducing evidence in rebuttal about a homicide victim's character, the trial may become a trial of the victim's character, rather than a trial focused on the alleged actions of the accused. However, if the accused introduces evidence of the victim's character, the focus of the trial may shift to the victim's character anyway, and in an unbalanced way.

The department anticipates that the proposed reforms concerning improper questions will limit the instances in which evidence adverse to the victim's character is adduced at trial. The proposed reforms to character evidence should act as a further deterrent in cases in which the defence may otherwise attempt to inappropriately direct blame towards the victim, because the accused's evidence may be effectively challenged and countered. Consequently, the reforms should assist in maintaining the focus of the trial on the alleged actions of the accused rather than on the victim's character.

4.3.4 Should the credibility rule be reformed?

Another approach would be to modify the exceptions to the credibility rule in Part 3.7 to allow the prosecution to adduce evidence of the victim's character in rebuttal. However, the difficulty with this approach is that the current exceptions to the credibility rule operate as exceptions to that rule only. The exceptions do not exempt the evidence from the application of other exclusionary rules, such as hearsay. These rules may capture evidence about the victim's character, particularly as the victim is unable to give evidence in person.

This issue could be addressed by amending the exceptions to the credibility rule so that if an exception applies, the evidence would also be exempt from the application of other exclusionary rules (similar to the character evidence provisions in Part 3.8). However, extending the operation of the exceptions to the credibility rule in this way is unwarranted and would apply to far more evidence than intended.

A single specific exception targeted at credibility evidence about the character of homicide victims could be created to which other rules of evidence, such as hearsay, do not apply. It is arguable that a specific exception is appropriate because unlike most other victims or witnesses, homicide victims are not able to respond in person and these exclusionary rules often block evidence about them from other people. However, given that no other exceptions to the credibility rule exempt the application of other rules of evidence, this possible reform does not fit well within the scheme of the credibility rule.

Further, the issue of the victim's character is not simply about the accused's credibility. It concerns the victim, how he or she is portrayed in court, and providing the jury with relevant evidence to determine the issues in dispute. As discussed above, the victim's absence in homicide cases may provide increased scope to demean the victim's reputation. Such attacks may be inappropriate and without foundation. It can have the effect of shifting the blame for the victim's death onto the victim. It may be used to evoke sympathy for the accused or to support their account of the circumstances of the alleged offence.

The potential reforms to limit improper questions about a victim aims to protect the victim's character from inappropriate attack when the victim is unable to respond in person. Reforms to the credibility rule would only address one aspect of attacks on the victim's character by focusing on the accused's credibility, rather than directly restoring the victim's reputation. Given these concerns, the department does not propose any amendment to the credibility rule.

4.3.5 The potential reform

Currently, the opportunities for the prosecution to adduce evidence about a homicide victim's character to rebut attacks by the defence are limited. In the absence of the victim, the defence is able to portray the victim in a negative way, and engage in victim blaming.

The department proposes to amend the character evidence provisions in Part 3.8 of the *Evidence Act* to redress the current imbalance. The proposed reforms will operate in a similar way to the existing provisions, but rather than focusing on the accused's character, will instead focus on the victim's character. Existing safeguards, together with the limits on the use to which evidence of the victim's good character may be put, will maintain the right to a fair trial.

The proposed reforms to character evidence will operate in tandem with the proposed limits on improper questions. The latter will act as an initial hurdle to prevent the admission of evidence which is adverse to a homicide victim, unless the questions are necessary given the issues in the case. If such evidence is admitted, the proposed reforms to character evidence will enable the prosecution to challenge the credibility of that evidence by introducing evidence in rebuttal about the victim's character. This reform will help to redress the imbalance that currently exists because homicide victims are unable to respond in person to character attacks.

These reforms will be particularly important in homicides involving intimate partners. As discussed in Part 2 of this paper, men commit 88% of all homicides and women comprise 32% of all victims of homicides. This evidence will be primarily relevant in cases where men kill.

If, for example, a woman is charged with murder and wishes to lead social context evidence (under section 9AH of the *Crimes Act*), this evidence will often show that the victim was not a person of good character. The prosecution may already call evidence to show that the victim was of good character if it has evidence which differs from the accused's evidence. The proposed new provision would not provide any limit on the social context evidence which the accused could adduce.

This evidence will primarily assist in cases where the accused and victim are (or have recently been) intimate partners. It is possible that, in a case where women kill in response to family violence, it might slightly increase the prosecution's ability to adduce evidence that differs from the accused's evidence. However, if it did, it would be because there is evidence of that nature that is available. This is consistent with the purpose of the reforms, namely, to make trials fairer.

Question 3 – Evidence in rebuttal about homicide victims

Should new evidence laws be introduced to provide that in a criminal proceeding for a homicide offence, if the accused introduces evidence to show that the victim was not a person of good character, either generally or in a particular respect, the prosecution:

- ◆ may adduce evidence about the victim to show that the victim was a person of good character, either generally or in a particular respect, but
- ◆ may not use the evidence to infer guilt (tendency reasoning)?

The rules governing hearsay, opinion, tendency and credibility evidence would not apply to this evidence.

4.4 Draft provisions

To facilitate consideration of Questions 2 and 3 above, possible draft provisions for inclusion in the *Evidence Act 2008* are set out below.

Proposed new section 41A provides that the court must disallow an ‘improper question’ about the victim of a homicide offence unless the court is satisfied that the question is necessary.

The draft provisions define ‘homicide offence’ broadly to include any offence where causing the death of another person is an element of the offence. The draft definition of ‘improper question’ draws on section 41(3) of the *Evidence Act* and provides that the court must consider the issue as if the victim were alive and giving evidence in court. In this way, issues of being demeaning, offensive, treating the victim without respect or without respect for the victim’s reputation can be more readily determined (as discussed above).

Proposed new section 112A sets out circumstances in which the prosecution can adduce good character evidence about the victim of a homicide offence.

New sections inserted into the *Evidence Act 2008*

41A Improper questions about victim of homicide offence

1 In this section—

homicide offence means any offence where causing the death of another person is an element of the offence and includes—

- a) murder contrary to common law;
- b) manslaughter contrary to common law;
- c) an offence against section 3A of the Crimes Act 1958 (Unintentional killing in the course or furtherance of a crime of violence);
- d) an offence against section 5A of the Crimes Act 1958 (Child homicide);
- e) an offence against section 318 of the Crimes Act 1958 (Culpable driving causing death);
- f) an offence against section 319(1) of the Crimes Act 1958 (Dangerous driving causing death);

improper question means a question about the victim of a homicide offence that—

- a) is offensive, humiliating or demeaning about the victim; or
 - b) treats the victim without respect; or
 - c) fails to respect the reputation of the victim; or
 - d) has no basis other than a stereotype (for example, a stereotype based on the victim’s sex, race, culture, ethnicity, age or mental, intellectual or physical disability)
- or would be if the victim were alive and giving evidence in court.

2 In a criminal proceeding in respect of a homicide offence, the court must disallow an improper question put to a witness unless the court is satisfied that, in all the relevant circumstances of the case, it is necessary for the question to be put.

3 A question is not an improper question merely because—

- a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness about the victim; or
- b) the question requires the witness to discuss a subject about the victim that could be considered distasteful to, or private by, the witness.

New sections inserted into the *Evidence Act 2008*

- 4 This section applies to a question put during evidence-in-chief, cross-examination or re-examination.

112A Evidence about character of victim of homicide offence

- 1 In this section homicide offence has the same meaning as in section 41A.
- 2 In a criminal proceeding in respect of a homicide offence, if the accused adduces evidence to show that the victim of the homicide offence was not a person of good character, either generally or in a particular respect, the prosecution—
- a) may adduce evidence about the victim to show that the victim was a person of good character, either generally or in a particular respect; and
 - b) must not use that evidence to infer guilt.
- 3 The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced under subsection (2).

5 Monitoring and reviewing

The department described the Discussion Paper as the first step in the review of defensive homicide. This Consultation Paper provides a further opportunity to consider the operation of defensive homicide and related issues after more than seven and a half years of operation.

Victoria has progressed reform of homicide laws further than other Australian jurisdictions by abolishing provocation and specifying that in the context of family violence, a person may be acting in self-defence even if she or he is responding to a harm that is not immediate or uses force in excess of the force used in the harm or threatened harm. Victoria also has social context evidence provisions to assist the jury in understanding how family violence is relevant to self-defence.

The proposals in this paper involve further significant reforms. While this review has focused primarily on defensive homicide, we have also examined self-defence more generally and victim blaming (through evidence laws). If the department's proposals (as informed by comments on this paper) are enacted by the government, they should be reviewed to see if they achieve the intended outcomes.

As discussed in this paper, generating cultural change is essential for reforms to work. Change can be difficult to achieve. One way of promoting cultural change is to continue the review of our laws, practices, attitudes and knowledge in homicide cases.

The VLRC recommended that the department review the operation of excessive self-defence five years after its commencement. This was an appropriate time frame for reviewing this significant change.

If the government introduces further changes in this area, the department proposes that any new laws be reviewed five years after their commencement.

Proposal 7 – Review of the operation of reforms

The department proposes that there be a review of the operation of reforms arising from this review five years after the reforms commence operation.

Appendix 1 List of submissions received

No.	Name	Organisation
1	Ms Jane Ashton	Communications Coordinator Women's Domestic Violence Crisis Service Victoria
2	Mr Graham Ashton	Director, Corporate Strategy and Governance Victoria Police
3	Mr Frank Chen	Crime Victims Support Association Inc
4	Coalition for Safer Communities	Coalition for Safer Communities
5	Ms Allie Dawe	Union of Australian Women – Victorian Branch
6	Ms Kate Fitz-Gibbon	Department of Criminology School of Political and Social Inquiry Monash University
7	Ms Brigid Foster	Law Institute of Victoria
8	Ms Julia Gibby	School of Law La Trobe University
9	Mr Saul Holt	Director, Criminal Law Services Victoria Legal Aid
10	Micki Horton	
11	Associate Professor Adrian Howe	Social Science RMIT
12	Ms Marilyn McMahon	School of Law Latrobe University
13	Mr Steve Medcraft	President People Against Lenient Sentencing
14	Associate Professor Sharon Pickering Dr JaneMaree Maher Dr Marie Segrave	Head, Criminology, Monash University Director, Centre for Women's Studies and Gender Research, Monash University Senior Lecturer, Criminology, Monash University
15	Mr Phillip Priest QC	Former member of the Victorian Bar
16	Mr Jeremy Rapke QC	Director of Public Prosecutions Victoria (former)
17	Dr Danielle Tyson Sarah Capper Dr Debbie Kirkwood	On behalf of: Dr Tyson, the Victorian Women's Trust, the Domestic Violence Resource Centre Victoria, Domestic Violence Victoria, the Federation of Community Legal Centres, Koorie Women Mean Business and Women's Health Victoria
18	Associate Professor John Willis	School of Law La Trobe University
19	Mr David Woods	

Appendix 2 Summary of defensive homicide cases, November 2005 – August 2010

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
<i>R v Smith (Michael Paul)</i> [2008] VSC 87	Offender: male, 34 Victim: male, 34	None, attended same gathering in St Kilda.	Knife-stabbing (5 stab wounds)	Conflict at gathering. Victim left and returned in aggressive state. Fight ensued and offender stabbed victim. Victim was also using knife against offender.	Offender intoxicated and drug affected at time of offence. Offender had substance abuse problems for many years. Number of prior convictions for violence.	Plea	7 years imprisonment and non-parole of 5 years. Note: sentence reduction for guilty plea not specified.
<i>R v Edwards</i> [2008] VSC 297 <i>DPP v Edwards</i> [2009] VSCA 232	Offender: male, 43 Victim: male (age not specified)	Partner of victim was former partner of offender. Offender and victim's partner share a son.	Table leg, bottle (and other implements) used to beat victim and repeated kicking.	Victim initially threatened to hit offender with table leg. Note: offender's attack continued after victim unconscious and occurred in presence of offender's son and victim's partner.	Trial Judge described offender's criminal history as 'shocking' – 23 of 28 years of his adult life spent in custody.	Plea	9.5 years imprisonment and non-parole of 7.5 years [but for guilty plea, 10 years and non-parole of 8].
<i>R v Giammona</i> [2008] VSC 376	Offender: male, 31 Victim: male, 29	Both in custody in the Scarborough North Unit, Port Phillip Prison.	Makeshift knife-stabbing (16 stab wounds)	Offender entered victim's cell, fight ensued (offender said at victim's instigation) and offender stabbed victim.	Significant criminal history (113 prior convictions, only 1 for unlawful assault).	Plea	8 years imprisonment and non-parole of 6 years [but for guilty plea, 9 years imprisonment and non-parole of 7 years].
<i>R v Smith (Callum-Zane)</i> [2008] VSC 617	Offender: male, 19 Victim: male 31	Offender and victim had been friends for a few weeks.	Knife-stabbing (50–60 stab wounds)	Fight between victim and offender. Offender said victim threatened him and said he was gay.	Offender had deteriorating mental state due to drug use. Was diagnosed with drug induced psychosis (2 prior offences relating to drug use)	Plea	7 years imprisonment and non-parole of 4.5 years (sentenced as youthful offender). Note: sentence

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
							reduction for guilty plea not specified.
<i>R v Taiba</i> [2008] VSC 589	Offender: male, 32 Victim: male (age not specified)	Acquaintances of 20 years. Offender was friends with victim's brothers.	Knife-stabbing (3 stab wounds to chest)	Offender owed victim \$2000 for the drug ice. Offender was armed with knife and tried to steal ice from victim. Victim woke during robbery. Offender thought victim was getting gun (knew victim owned semi-automatic weapon) and stabbed victim.	Ward of State from age 10–11. Addicted to ice, large number of prior convictions (91) including intentionally causing injury and recklessly causing injury.	Plea	9 years imprisonment and non-parole of 7 years [but for guilty plea, 11 years imprisonment and non-parole of 9 years].
<i>R v Baxter</i> [2009] VSC 178	Offender: male, 25 Victim: male (age not specified)	No relationship (offender residing in victim's previous residence)	Knife-stabbing (11 stab wounds).	Fight between offender and victim (unarmed). Victim confronted offender and threw first punch, offender stabbed and punched victim. Fight continued.	Offender had been using drugs prior to offence (had used drugs since 12 years old). Troubled upbringing (father convicted of double murder, subjected to and witnessed violence, placed in state care). Had a number of prior convictions (3 for violence).	Plea	8.5 years imprisonment and non-parole of 5.6 years [but for guilty plea, 10 years imprisonment and non-parole of 7 years].
<i>R v Trezise</i> [2009] VSC 520	Offender: male, 21 Victim: male (age not specified)	Friends through a mutual friend of the offender's father.	Knife-stabbing (36 stab wounds to almost all parts of body)	Several inconsistent versions of events provided by offender. Sentencing judge noted offender should be sentenced on basis that victim did not do anything of substance that merited attack, but that in offender's alcohol fuelled state he had reasoned that he was under threat.	Highly intoxicated at time of offence. Very difficult upbringing, very low IQ (76). Diagnosed as suffering chronic adjustment disorder with mixed disturbance of emotions and conduct.	Plea	8 years imprisonment and non-parole of 4 years [but for guilty plea, 10 years and non-parole of 6].
<i>R v Spark</i> [2009] VSC 374	Offender: male, 39 Victim: male (likely in 60s)	Victim was uncle of offender	Baseball bat used to beat victim, also punching.	Altercation between victim and offender. Victim threatened to treat offender's children in same way he had treated offender (this was a reference to fact the victim had	Offender had been subjected to sexual abused by victim during his childhood. Offender had 5 prior convictions (1 for unlawful	Plea	7 years imprisonment and non-parole of 4 years and 9 months [but for

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
				sexually abused offender when he was aged 8–14).	assault and 1 for breaching an intervention order, others relate to driving).		guilty plea, 9 years and non-parole of 7].
<i>R v Wilson</i> [2009] VSC 431	Offender: male, 26 Victim: male, 32	Victim known to offender. Victim lived in same boarding house as a friend of the offender (St Kilda).	Knife-stabbing (7 stab wounds)	Victim struck offender earlier in day causing offender to bleed profusely. Offender returned to boarding house later in day to confront the victim. Victim produced knife which offender wrestled from victim and subsequently stabbed victim repeatedly in the course of a wrestle.	Offender was highly intoxicated at time of offence. Suffered severe drug and alcohol addiction and diagnosed as paranoid schizophrenic. Number of prior convictions and at the time of the offence was on, or had just completed, a Community Based Order.	Plea	10 years imprisonment and non-parole of 7 years [but for guilty plea, 12 years imprisonment and non-parole of 10 years]. Appeal on sentence dismissed. <i>Wilson v The Queen</i> [2011] VSCA 12
<i>R v Parr</i> [2009] VSC 468	Offender: male, 29 Victim: male (age not specified)	Victim known to offender, lived in same boarding house (Frankston).	Knife-stabbing (20 stab wounds)	Fight ensued between offender and victim. Victim was stabbed with kitchen knife. No account given by offender to police but made admissions to others that he had stabbed following attack from victim.	History of serious drug use (chronic poly-drug user), large number of prior convictions (including for violent offences).	Verdict	10 years imprisonment and non-parole of 8 years.
<i>R v Croxford/ Doubleday</i> [2009] VSC 516	Offender: (Croxford) male, 22 (Co-offender male, mid-30s) Victim: male, early 20s	Offenders loosely knew victim (from the same regional community).	Garden stake used to beat victim	Victim produced knife and belt (as weapon) in response to comment from offender. Croxford reacted and fight ensued between victim and Croxford and Doubleday attempted to break up fight. Croxford and Doubleday armed themselves with garden stakes as weapons. Croxford, Doubleday and victim fought. Victim approached Croxford and Doubleday with knife, Croxford struck victim with garden stake,	Offender had addiction to cannabis and was affected by alcohol at time of offence. Prior convictions dating back to when he was 16 (none of which involved violent offending).	Verdict	9 years imprisonment and non-parole of 6 years. (co-offender convicted of manslaughter).

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
				Doubleday subsequently struck victim again and killed him.			
<i>R v Evans</i> [2009] VSC 593	Offender: male, 25 Victim: male, 37	Victim known to offender, lived next door in same boarding house (St. Kilda)	Knife-stabbing (single stab injury to chest)	Confrontation between victim and offender in relation to money and stolen goods. Victim punched offender in face, offender retaliated. Fight ensued and offender stabbed victim and punched him.	Significant number of prior convictions, including a number that relate to causing injury. Has a history of serious drug and alcohol abuse.	Plea	10 years imprisonment and non-parole of 7 years [but for guilty plea, 11.5 years imprisonment and non-parole of 8.5 years].
<i>R v Middendorp</i> [2010] VSC 202.	Offender: male, 26 Victim: female, 22	Offender and victim were in relationship and had lived together (intermittently) since late 2007	Knife-stabbing (4 stab wounds to back)	Victim arrived at the house she shared with offender in Brunswick with a male companion. Offender was armed with a knife and chased male companion away. Offender said that victim came at him with knife and, in the struggle that ensued, offender stabbed the victim over her shoulder, in the back 4 times	Offender was affected by alcohol at time of offence. Troubled upbringing with history of drug abuse and a number of prior convictions. Evidence was led at trial as to the violent nature of the relationship between the victim and the offender. At time of victim's death the offender was under a Family Violence Order (requiring offender not to assault, harass, threaten or intimidate victim).	Verdict	12 years imprisonment and non-parole period of 8 years [624 days already served in pre-sentence detention]. Appeal against conviction and sentence dismissed. <i>Middendorp v The Queen</i> [2012] VSCA 47
Total cases:	Total offender/victim by gender:	Relationships – family v non family:	Weapon type:	NA	Total number of offenders with prior convictions:	Total:	Average head sentence:
13	Offender M:13, F: 0 Victim M:12, F:1	Family – 2 (<i>R v Spark</i> : victim was uncle of offender; <i>R v Middendorp</i> : victim was girlfriend of offender) Non-family – 11	Knife – 10 Other – 3		12	Plea: 10 Verdict: 3	8.8 years

Appendix 3 Summary of defensive homicide cases, September 2010 – August 2013

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/ serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
<i>R v Black</i> [2011] VSC 152	Offender: female, 53 Victim: male, 56	Offender was the de-facto partner of the victim.	Knife-stabbing (2 stab wounds to the chest)	Offender and victim had an argument and victim was verbally harassing offender and acting in a physically intimidating manner. Offender grabbed knife and stabbed victim. Offender had been subject to long term family violence by victim.	Moderate depression, mild anxiety. No prior convictions.	Plea	9 years imprisonment and non-parole of 6 years [but for guilty plea, 11 years and non-parole of 8]. Appeal against sentence dismissed. <i>Black v The Queen</i> [2012] VSCA 75
<i>R v Ghazlan</i> [2011] VSC 178	Offender: male, 58 Victim: male, over 55 (age not specified)	Offender and victim lived in the same building.	Knife – repeated stabbing	Offender was tripped by victim causing offender to stumble (but not fall). Offender immediately produced knife and stabbed victim repeatedly.	Long term psychiatric illness (paranoid schizophrenia). Past criminal history of violent crimes (2 prior convictions).	Plea	10.5 years imprisonment and non-parole of 7 years and 6 months [but for guilty plea, 12 years imprisonment and non-parole of 9 years and 6 months].
<i>R v Creamer</i> [2011] VSC 196	Offender: female, 53 Victim: male, 52	Offender was the wife of the victim.	South African weapon and knife (repeated beating and stab wound to the abdomen)	Victim repeatedly pressured (but did not force) offender to engage in unwanted sex acts and had previously hit offender. Trial judge did not accept offender's account of the incident. Trial judge found that there was a struggle between the offender and victim, and that offender beat and stabbed victim.	Depression. No prior convictions.	Verdict	11 years imprisonment and non-parole of 7 years. Appeal against sentence dismissed. <i>Creamer v The</i>

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/ serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
							<i>Queen</i> [2012] VSCA 182
<i>R v Dennis James Martin</i> [2011] VSC 217	Offender: male, 29 Victim: male, 79	Victim and offender became friends (for 6 months).	Knife-stabbing (7 stab wounds), repeated punching and kicking.	The offender and victim watched TV and drank for some hours. The victim allegedly made repeated sexual advances on offender and tried to rape offender. Offender proceeded to beat and stab victim.	Intellectual disability and alcohol intoxication (and dependency). 13 prior convictions, including for assault.	Plea	8 years imprisonment and non-parole of 5 years [but for guilty plea, 10 years imprisonment and non-parole of 7 years].
<i>R v Svetina</i> [2011] VSC 392	Offender: male, 52 Victim: male, 74	Victim was the father of offender.	Tomahawk (10 wounds)	Victim hated offender and had told others that if offender came to his home he would cut him with a tomahawk. Offender went to victim's home, struggled with victim (who carried a tomahawk) and hit victim with the tomahawk.	Depressive mood disorder. No prior convictions.	Verdict	11 years imprisonment and non-parole of 7 years.
<i>R v Scott Roy Jewell</i> [2011] VSC 483	Offender: male, 22 Victim: male (age not specified)	Victim and offender attended the same party.	Knife-stabbing (2 stab wounds)	Fight between offender, victim, victim's father and others occurred after the party due to property damage. Offender believed victim hit offender's father and stabbed the victim (even though offender's father said that the victim had not hit him). Victim was unarmed.	None.	Plea	8 years imprisonment and non-parole of 5 years [but for guilty plea, 10 years imprisonment and non-parole of 7 years].
<i>R v Monks</i> [2011] VSC 626	Offender: male, 22 Victim: male, 42	Victim was the uncle of the offender.	Tomahawk – 2 blows to the head	Victim had been violent towards offender on numerous occasions since offender was a child. Victim initiated the assault that ended in his death, resulting in a fight involving the victim (who had a hammer), the victim's brother and	Family violence, borderline personality disorder, PTSD, depression, polysubstance dependence. Prior convictions including burglary, theft and false imprisonment.	Plea	8 years imprisonment and non-parole period of 5 years [but for guilty plea, 9 years imprisonment and

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/ serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
				the offender, all of whom had been drinking alcohol.			non-parole of 6 years].
<i>R v Edwards</i> [2012] VSC 138	Offender: female, 44 Victim: male (age not specified)	Victim was the husband of the offender.	Knife – multiple stabbing (around 30 injuries)	Offender alleged that the victim attacked offender and threatened to inflict serious harm on offender (including burning and cutting offender's eyes/ears). Offender alleged that the victim came at offender with knife. Offender stabbed victim multiple times killing him. Trial judge had serious reservations about the accuracy of the offender's account. Long history of domestic violence towards offender by victim. At the time of the victim's death, an intervention order was in place protecting the offender from the victim.	Significant history of psychiatric illness (diagnosed as bipolar and manic depressive). 1 prior conviction – offender stabbed victim with corkscrew/knife.	Plea	7 years imprisonment and non-parole of 4 years, 9 months [but for guilty plea, 9 years and non-parole of 6 years].
<i>R v Talatou</i> [2012] VSC 270	Offender: male, 50 Victim: male, 33	The offender was friends with/known to the victim.	Knife – multiple stab wounds	Victim initiated argument by making remarks to offender, smashing bottles over offender's car and brandishing broken beer bottle in direction of the offender. Victim then punched offender in face three times. Victim then started to walk home and offender stabbed victim.	None	Plea	8 years imprisonment and non-parole of 5 years, 3 months [but for guilty plea, 10 years and non-parole of 6 years and 6 months]. Note: sentence also reduced due to forced isolation of prisoner as only Samoan speaking prisoner.

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/ serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
<i>DPP v McEwan, Robb and Dambitis</i> (Sentence) [2012] VSC 417	Offender (Dambitis): male, 40 Victim: male, 24	No previous relationship	Repeated beating with weapons (offender with lump of wood) and fists	Victim had machete and, with a friend, was intimidating a group of teenagers. Offender and 2 co-offenders intervened. There were various altercations between victim and offenders, and victim and innocent bystanders. Victim also caused property damage with machete. One of the co-offenders disarmed victim, and offender and co-offenders assaulted victim repeatedly around body and head.	Prior convictions in Latvia (not taken into account). Previous convictions in Victoria including assault. Severe depression, PTSD, suicide attempts. Offending in this case occurred 2 days after release from prison.	Verdict	11 years imprisonment and non-parole of 8 years.
<i>R v Vazquez</i> [2012] VSC 593	Offender: male, approx 25 Victim: male (age not specified)	Offender and victim had been friends, but had fallen out over a drug debt.	Shotgun – one shot to the head	Victim came to offender's father's office to discuss damage to the victim's car. Argument between victim and offender's father. Offender was waiting in next room, where the sawn-off shotgun had been hidden. Offender heard raised voices, entered the room and shot victim. Victim was unarmed.	PTSD resulting from kidnapping and torture in 2009 (note: this did not reduce his moral culpability to a significant degree given the planning involved in the offence). No prior convictions.	Plea	10 years imprisonment and non-parole of 7 years [but for guilty plea, 12 years and non-parole of 9 (note: sentence also reduced due to serious liver disease)].
<i>R v [unknown]</i> Reasons not published	Offender: male, 14 Victim: male, 37	<i>Unknown</i>	Pole or machete	Fist fight between offender's father and victim outside home. Offender intervened and struck victim repeatedly in the head with [a weapon].	Offender 14 years old at time of offence.	Plea	3 years detention in youth justice centre
<i>DPP v Chen</i> [2013] VSC 296	Offender: male, 28 Victim: male, 27	Offender bought a car from the victim one week before his death.	Knife (15 stab wounds)	Victim intimidated offender into buying car from him. A week later, offender approached victim at train station and stabbed him repeatedly.	Cognitive impairment caused by previous brain injury, which was linked to offending. No prior convictions. No remorse but unlikely to reoffend.	Verdict	8 years imprisonment (and non parole period of 5 years)

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/ serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
<i>R v Moustafa and Kassab</i> [2013] VSC 379	Offender (Moustafa): male, 20 Offender (Kassab): male, 25 Victim (Taha): male, 34	Offender (Moustafa) was the cousin of the victim's friend (Mohamad).	Revolver	Moustafa believed Mohamad (who was his cousin) had stolen from him. Victim owned a panelbeaters business and was friends with Mohamad. Moustafa and Kassab confronted Mohamad at the victim's shop. Mohamad and the victim were both shot in a subsequent gunfight. Offenders were acquitted of Mohamad's murder.	Kassab: previously pleaded guilty to possessing prohibited weapon without approval and possessing dangerous article, 'very good' prospects for rehabilitation Moustafa: 'significant criminal history' (e.g. conviction for recklessly causing serious injury, various driving and drug offences)	Verdict	8.5 years imprisonment and non-parole period of 5 years and 6 months
Total cases: 15	Total offender/victim by gender: Offender M: 12, F: 3 Victim M: 14, F: 0	Relationships – family v non family: Family – 5 <i>Black</i> : victim was male de facto <i>Creamer</i> : victim was husband <i>Svetina</i> : victim was father <i>Monks</i> : victim was uncle <i>Edwards</i> : victim was husband Non-family – 10	Weapon type: Knife – 7 Tomahawk – 2 Other – 6	NA	Total number of offenders with prior convictions: 7 (not including case involving 13 year old offender)	Total: Plea: 9 Verdict: 6	Average head sentence: 8.4 years

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