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# Review of Defensive Homicide

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**To:** Review of Defensive Homicide: Submissions  
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## Introduction

The Law Institute of Victoria (LIV) is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 16,000 members.

This submission has been prepared by the LIV's Criminal Law Section, which is comprised of over 2,000 lawyers practising in Criminal Law.

Our members have a long history of contributing to, shaping and developing effective criminal legislation, and have undertaken extensive past advocacy relating to defensive homicide laws.

The LIV is grateful for the opportunity to provide the Department of Justice (the Department) with a submission in relation to the Consultation paper *Defensive Homicide – Proposals for Legislative Reform* (the Consultation Paper).

In September 2010, the LIV made a submission to the Department in relation to the Discussion paper *Defensive Homicide – Review of the offence of defensive homicide* (the Discussion Paper).

In June 2012, the LIV wrote to Attorney General, Mr Robert Clark, in relation to plea negotiations concerning defensive homicide.

We have attached both of these documents for your information.

The LIV agrees that family violence is a significant community safety issue and commends the Department's efforts in taking steps to address it as a key priority.

## Proposals

### **Proposal 1: The department proposes that the offence of defensive homicide should be abolished**

As expressed in previous submissions, the LIV supports the retention of defensive homicide, which we consider an important alternative when the prosecution is concerned that the necessarily high test for a murder conviction may not be met. We submit that defensive homicide provides an appropriate middle ground between murder and acquittal, accepting that there is a lower level of culpability that must be recognised in law.

The LIV refers to its submission of 2010, which identified the following benefits as being attached to the retention of defensive homicide law in the *Crimes Act 1958* (Vic):

- 1) Defensive homicide allows the jury to take into account the complex historical context of an offence when considering culpability, including family violence.
- 2) In the absence of the former partial defence of provocation, it allows the criminal law to recognise that there are differing levels of culpability in relation to homicide offences. The criminal law recognises human fallibility, and defensive homicide addresses this issue whilst at the same time indicating that killing another person, in the absence of reasonable grounds for the belief that it is necessary to do so, is a very serious offence.
- 3) It allows the offender, in circumstances reflecting a lesser degree of culpability, to avoid the label of "murderer", which should only be applied to the most serious type of offending, that is, unlawful killing done with the intent to kill or do grievous bodily harm.<sup>1</sup>
- 4) It allows a jury to indicate which factors they have taken into account when handing down a verdict, and therefore allows a judge to sentence more appropriately, taking those factors into

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<sup>1</sup> *Zecovic v DPP (Vic)* (1987) 162 CLR at 662.

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account. The sentencing Judge will know on a verdict of defensive homicide precisely on which basis the jury convicted.

- 5) It provides a safety-net for victims of family violence and others who fall between the absolute defence of self-defence and a murder conviction, where they have a real belief that what they did was necessary to defend themselves, but held no reasonable grounds for that belief.

The LIV notes the public concern surrounding the operation of defensive homicide laws, as canvassed in the Consultation Paper. We specifically note that of the 28 convictions which have occurred under the defensive homicide laws since their commencement in Victoria, the overwhelming majority of offenders and victims were male. We also note that of the 3 female offenders, all 3 victims were male. Further, data from the Australian Institute of Criminology indicates that during the period between 2008-2010, 88% of perpetrators and 68% of victims of domestic homicide were male.<sup>2</sup> These statistics clearly indicate that most homicides are committed by more men than women.<sup>3</sup> However, men are also much more likely to be the victims of homicide than women.<sup>4</sup>

The fact that more men than women have been convicted of defensive homicide does not, in our view, detract from the utility of the offence. Whilst noting concerns about the number of male offenders and victims of defensive homicide, we submit that the issue of the gender of the offender and the victim is irrelevant.

The LIV emphasises the need to ensure that the criminal law treats all people as equal; to the extent they have a similar state of mind and level of culpability.

The LIV also notes community concerns that the crime of defensive homicide represents the re-emergence of the partial defence of provocation.<sup>5</sup> The LIV submits that the defences of provocation and defensive homicide are two different concepts used in different ways. The partial defence of provocation did not necessarily involve a notion of self-defence or excessive self-defence, but rather, the result of a “sudden and temporary loss of control”.

The LIV submits that defensive homicide must be considered in the context for which it was originally intended, noting, by way of example, the case of *R v Spark*<sup>6</sup> and other matters where persons have been charged with murder in the context of historical family violence, as discussed in our 2010 submission.

## **Proposal 2: The department proposes that excessive self-defence (in any form) should not be introduced**

The LIV reiterates its position that defensive homicide laws should be retained.

In considering whether excessive self-defence laws should exist, the LIV refers to the various benefits of retaining defensive homicide law, as listed in our above response to Proposal 1. If this were to occur, we note that there would be no need to introduce new excessive self-defence laws.

We particularly emphasise the importance of such laws as a means of recognising when the culpability of the accused is lessened by their circumstances, and when it is inappropriate for them to be labelled as “murderers”.

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<sup>2</sup> page 5 of Consultation Paper, at footnote 21

<sup>3</sup> Jack Dearden and Warwick Jones, Australian Institute of Criminology, “Homicide in Australia: 2006-2007 National Homicide Monitoring Program Annual Report” (2008) *Australian Institute of Criminology Monitoring Reports*, 8.

<sup>4</sup> *Ibid*, 13.

<sup>5</sup> page 4, of the Consultation paper, at footnote 16

<sup>6</sup> [2009] VSC 374

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The LIV also notes that the Victorian Law Reform Commission (VLRC) who have proposed the introduction of this offence, have also acknowledged that the creation of a new defence of excessive self-defence, may lead to compromised verdicts where there is disagreement among jurors as to whether to acquit on the basis of self-defence. Retention of defensive homicide would enable the jury to consider conviction for that offence as an appropriate alternative.

The main difference between defensive homicide and excessive self-defence is that while excessive self-defence takes into account the force and immediacy of the offence, defensive homicide recognises the background of the circumstances (including instances of historical family violence) to ascertain the reasonableness of the offence.

We submit that that defensive homicide plays an important part in allowing Judges and Jurors to recognise differing degrees of culpability in homicide cases.

**Proposal 3: The department proposes that the first limb of 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.**

As the Department notes in page 6 of the Consultation paper, defensive homicide separates the two limbs of the common law test for self-defence. This has necessarily led to the need for further qualification of the first limb in order 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, to be found not guilty of murder, a person must believe that it is necessary to defend themselves or another from *death or really serious injury*.

***Question 1: 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)***

The LIV agrees with the Department in that the principal advantage with the common law test is that it has had a substantial history in Victoria for homicide offences and is still used for non-homicide offences. We also note that it is a straightforward test for both judges and juries to apply. However, in our 2010 submission, we stated that the common law test (i.e. that the accused had reasonable grounds for the belief that it was necessary to do what he or she did to defend himself/herself/another) is too narrow, and by discounting the frame of mind that the accused was in at the time of the offence, the requirement fails to allow for an accurate assessment as to the true nature of certain offences.

Defensive homicide 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. Accordingly, a person who has reasonable grounds for believing it is necessary to defend him or herself (or another), and does so, will be responding in a way that is reasonable.

Situations of family violence give rise to a specific set of circumstances and a special state of mind of the accused. Victims of family violence are often aware of the danger of attempting to leave their abusive family member, or may 'sense' that a violent act is about to occur despite a lengthy space of time before the last act of violence. This 'sense' goes towards the jury's understanding of the reasonable grounds for belief. For example, there may be a great length of time between the last act of violence and the current act of homicide.

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In our 2010 submission to the Department, the LIV considered the following two scenarios:

**Scenario 1**

*An alcoholic man is abusive to his partner while under the influence of alcohol. There has been a long history of violence which has escalated. However, the man has, in the last six months, managed to abstain from alcohol and has made progress towards rehabilitation.*

*Yesterday, the man started drinking again. His partner “senses” that the violence will resume despite the long period since he last had a drink. She therefore kills the man on the grounds that she felt it was necessary to defend herself from death or very serious injury.*

A jury might have difficulty coming to the conclusion that the woman had reasonable grounds for belief, due to the man’s lengthy abstinence and progress towards rehabilitation. But the jury also accepts that the woman’s culpability is reduced by her circumstances, and she should not be convicted of murder. The jury may accept that although the woman did have a belief in the necessity to do what she did, she had no reasonable grounds for that belief.

In these circumstances, the alternative verdict of defensive homicide should remain appropriately open to the jury.

**Scenario 2**

*A vulnerable young man is in an altercation with another man, who tells him that “next time I see you, I will kill you”. The experience leaves the young man in fear for his life.*

*Six months passes and the young man still lives in fear. The altercation with the other man dwells on his mind. One day he sees the other man walking down the road towards his house, and the young man, believing that he is about to be killed, kills the man in self-defence.*

Whilst the offender’s belief that his actions were necessary to defend himself may not be assessed by a jury as reasonable, under the circumstances, a jury may accept that the young man was less culpable than otherwise, and may wish to avoid a verdict of murder and instead wish to convict the young man of defensive homicide.

**Proposal 4: 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.**

We agree with the Department’s proposal in ensuring consistency with the laws of self-defence in order to simplify jury directions.

**Proposal 5: The department proposes that the common law test for self-defence should be expressly abolished, wherever the new statutory test for self-defence applies.**

The LIV agrees with the Department’s proposal that to ensure there is only one law of self-defence, it is necessary to expressly abolish the common law of self-defence wherever the statutory self-defence provisions apply.

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**Proposal 6: 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.**

The LIV refers to the second scenario outlined in our above response to Proposal 3, Question 1:

*A vulnerable young man is in an altercation with another man, who tells him that “next time I see you, I will kill you”. The experience leaves the young man in fear for his life.*

*Six months passes and the young man still lives in fear. The altercation with the other man dwells on his mind. One day he sees the other man walking down the road towards his house, and the young man, believing that he is about to be killed, kills the man in self-defence.*

The LIV notes that if the provisions of section 9AH were extended such that they applied to any claim of self-defence, then a jury would not need to assess issues of immediacy and proportionality when considering the question of whether the young man’s belief was reasonable. If the section 9AH was amended in this way, then it would be open to a jury to deliver a verdict of self-defence.

The LIV submits that this would be appropriate in certain circumstances, and supports the proposal to expand section 9AH such that it applies to any claim of self-defence.

**Question 2: 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)?***

Whilst the LIV appreciates the need to ensure that the nature of questions asked in homicide cases do not unnecessarily present the victim(s) in an offensive, humiliating, disrespectful or demeaning light, we are generally opposed to the proposal to introduce new evidence laws for this purpose. We submit that the test of relevance should always apply, on a case by case basis, and that leave should be sought by counsel where it is deemed necessary to adduce or admit relevant evidence.

In light of the abolition of the partial defence of provocation, it is difficult to conceive of how the sexual history of the victim could be relevant in a typical homicide trial. However, the case of *R v Schembri & Anor*<sup>7</sup> 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. In many cases, relationship evidence will be highly prejudicial to the accused, and we stress that the relevance test should be strictly applied. The individual trial judge will always be in the best position to ascertain the probative value of the evidence and whether the prejudicial nature of that evidence outweighs its probative value.

The LIV believes that the criminal law has an important educative function in dispelling gender biases and myths about sexually experienced women. Our proposed approach would allow the Court to grant leave if it was satisfied that the evidence had substantial relevance to the fact in issue, that its probative value outweighed its prejudicial effect, and that it was in the best interests

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<sup>7</sup> [2010] VSC 402

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of justice to do so. This would ensure that the accused receives a fair trial whilst also providing protection to the reputation of the victim and the victim's family, while at the same time educating the public at large that sexual promiscuity is rarely a relevant factor in homicide.

***Question 3: 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.***

The LIV submits that the test of relevance should always apply, on a case by case basis, and that leave should be sought by both defense and prosecution counsel where they think it necessary to adduce or admit relevant evidence.

The individual trial judge will always be in the best position to ascertain the probative value of the evidence and whether the prejudicial nature of that evidence outweighs its probative value.

**Proposal 7: The department proposes that there be a review of the operation of reforms arising from this review five years after the reforms commence operation.**

The LIV agrees that if the government introduces further changes in this area, that there be a review of the operation of reforms arising from this review five years after any reforms commence operation and would be grateful for the opportunity to participate in a further consultation with the Department at that time.