Defensive Homicide

To: Greg Byrne, Director, Criminal Law – Justice Statement, Department of Justice

13 September 2010

Queries regarding this submission should be directed to:
Contact persons    Brigid Foster
Ph                (03) 9607 9374
Email             bfoster@liv.asn.au

© Law Institute of Victoria (LIV).
No part of this submission may be reproduced for any purpose without the prior permission of the LIV.
The LIV makes most of its submissions available on its website at www.liv.asn.au
# Table of Contents

<table>
<thead>
<tr>
<th>Questions</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Question 1: Should defensive homicide be retained or abolished?</td>
<td>4</td>
</tr>
<tr>
<td>Question 2: If defensive homicide should be abolished, will the law adequately deal with cases of long-term family violence, especially where there has been a reduction or cessation in family violence for a period before the perpetrator of the family violence is killed? Are any further changes required to deal with this situation?</td>
<td>5</td>
</tr>
<tr>
<td>Question 3: If defensive homicide should be retained, should the application of defensive homicide be limited to serious family violence? Are there practical or issues of principle that need to be considered with this approach? Would the law on this approach be too complicated to explain to juries or for juries to apply?</td>
<td>6</td>
</tr>
<tr>
<td>Question 4: If defensive homicide should be retained, should the offence of attempted defensive homicide be expressly abolished?</td>
<td>8</td>
</tr>
<tr>
<td>Question 5: If a party applies to adduce sexual history evidence in a criminal proceeding, should the sexual history evidence laws that apply in a sexual offence case be adapted to apply in a homicide case?</td>
<td>9</td>
</tr>
<tr>
<td>Question 6: Would an express legislative statement about the kind of relationship evidence that may be admitted in the context of a claim of self-defence expand the range of evidence that may be admitted in such circumstances? Would the benefits of this change outweigh any added complexity to this area of the law?</td>
<td>9</td>
</tr>
<tr>
<td>Question 7: Should the Crimes Act 1958 expressly abrogate the common law of self-defence so that it does not apply where statutory self-defence (sections 9AC and 9AE) applies to the offence?</td>
<td>10</td>
</tr>
<tr>
<td>Question 8: If defensive homicide should be retained, should the maximum penalty for defensive homicide be increased from 20 years imprisonment to 25 years imprisonment?</td>
<td>10</td>
</tr>
<tr>
<td>Question 9: Should there be more education and training for the legal profession and courts in relation to family violence? Should there be a change in the way existing education and training opportunities in relation to family violence are provided (eg to include a specific focus in relation to the occurrence of homicides in the context of family violence)?</td>
<td>10</td>
</tr>
</tbody>
</table>
Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to provide the Department of Justice with a submission in relation to the Discussion paper *Defensive Homicide – Review of the offence of defensive homicide* (the Discussion Paper).

The LIV submits that fundamental objective of the Criminal Law 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.

The LIV submits that paragraph 233 of the Discussion paper succinctly summarises the vital issue in relation to the review of defensive homicide, that:

“It is a fundamental principle of the criminal justice system that all people should be equal before the law, or in other words, not treated in a discriminatory manner. If society considers that the law should recognise excessive self-defence for the offence of murder, why should the law recognise this for some people and not others? In each situation, the accused has the same state of mind, namely that they believe it is necessary to respond but that belief is not reasonable in the circumstances”

For this reason, the LIV is strongly against any law that is targeted at, or tailored specifically to fit one gender. While we accept that most victims of family violence are women, not all victims of family violence are women. The case of *R v Spark* is a stark example of this.

Most homicides are committed by men, and fewer are committed by women. Men are also much more likely to be the victims of homicide than women. While the LIV accepts that the analysis in relation to these statistics is much more nuanced than this simple analysis would suggest, our argument is that it is not surprising that of the 13 convictions for defensive homicide since 2005, all of the 13 offenders were male. This, in combination with the fact that defence Counsel have a fiduciary duty to their clients to examine all options which will ultimately minimise the penalty to their clients, means that any available defence, or alternative offence to murder will be considered in each case. This will occur however the Crimes Act provisions are drafted, but this does not mean that defensive homicide should either be abolished, or targeted only to those victims of family violence.

It does not logically follow from the fact that, as only men have been convicted of defensive homicide, that the creation of the offence of defensive homicide by the *Crimes (Homicide) Act 2005* was an inappropriate response to the issue of offenders who commit homicide as a result of situations of family violence, or that female victims of family violence would not benefit from it in appropriate cases.

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.

The concern that:

---

1 Department of Justice, Victoria *Defensive Homicide – Review of the offence of defensive homicide*, 52.
2 [2009] VSC 374
“In the absence of provocation as a defence, is defensive homicide becoming its replacement?”

is, in our view, misplaced. Provocation and defensive homicide are two entirely different concepts and are used in different ways. The partial defence of provocation never involved any concept of self-defence or excessive self-defence, but was rather the result of a “sudden and temporary loss of control”. The LIV accepts that it was used, in some cases, to reduce the penalty for some men who killed their female partners in jealous rage.

In our submission, jurors in Victoria do an excellent job of applying the directions given by the Court (as to the elements the Crown must prove) to the evidence they have heard. There is no reason to suppose that jurors will be any less capable of doing so when given the directions applicable to defensive homicide, than when they are directed in respect of other offences. Defensive homicide allows a juror to take account of varying degrees of culpability in relation to the evidence, and convict, accordingly.

Questions

Question 1: Should defensive homicide be retained or abolished?

The Law Institute of Victoria strongly supports the retention of defensive homicide in the Crimes Act 1958.

We submit that, in the absence of the partial defence of provocation, defensive homicide provides an appropriate middle ground between murder and an acquittal, accepting that there is a lower level of culpability that must be recognised in law.

Defensive homicide is still a very serious offence, and the maximum penalty of 20 years, as with manslaughter, reflects this.

The retention of defensive homicide has a number of benefits:

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 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 infallibility, 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.

4) It allows a jury to indicate precisely 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 account. The sentencing Judge will know on a verdict of defensive homicide precisely on which basis the jury convicted.

Sarah Capper and Mary Crookes, “New homicide laws have proved indefensible”, The Sunday Age (Melbourne), 23 May 2010, 21.

Zecevic v DPP (Vic) (1987) 162 CLR at 662.
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 do is necessary to defend themselves, but no reasonable grounds for that belief.

The LIV submits that the lack of convictions of defensive homicide for women should not mean that defensive homicide should be abolished or that the addition of defensive homicide to the Crimes Act 1958 was an inappropriate addition to the criminal law. Indeed, the case of *R v Spark*7 is evidence that defensive homicide does work in the context for which it was initially intended. The LIV is also aware of other cases currently proceeding through the courts, where persons have been charged with murder, in the context of historical family violence.

The issue of the gender of the offender, in our view, is irrelevant. The criminal law necessarily treats all people as equal, who have a similar state of mind and level of culpability.

**Question 2: If defensive homicide should be abolished, will the law adequately deal with cases of long-term family violence, especially where there has been a reduction or cessation in family violence for a period before the perpetrator of the family violence is killed? Are any further changes required to deal with this situation?**

The LIV does not believe that defensive homicide should be abolished.

In our submission, the codification of self-defence by the *Crimes (Homicide) Act 2005* has assisted victims of family violence by clearly setting out that lack of immediacy or proportionality of force is not fatal to the “reasonable grounds for belief” component of self-defence. This is evidenced by the two cases outlined in the Discussion paper9, one of which did not proceed, and the other which was discharged at the committal.

However, the codification of self-defence has also limited the defence to some degree, in that the relevant belief must be that the conduct was necessary to “defend himself or herself or another person from the infliction of death or really serious injury”10. The defence therefore will not apply where the belief of necessity for action is in relation to a less serious threat.

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 juries 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.

Take, for example, the following situation:

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.

---

7 [2009] VSC 374
8 s9AH(1)(c) and (d) Crimes Act 1958
9 Department of Justice, Victoria Defensive Homicide – Review of the offence of defensive homicide, 29, 30.
10 S9AC Crimes Act 1958
Despite the reforms to the Crimes Act, namely the s9AH Family violence provisions dealing with immediacy and proportionality, 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 would be appropriately open to the jury.

Another example, outside of the family violence context, also supports the retention of defensive homicide:

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 provisions of s9AH are not open to the young man, as the situation does not take place in the context of family violence. So the jury will be faced with inevitable issues of immediacy and proportionality when considering the question of whether the young man’s belief was reasonable.

In the circumstances, the 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.

The LIV wishes to reiterate that defensive homicide is still a very serious offence which attracts a lengthy term of imprisonment akin to that which manslaughter attracts. However, we submit in both examples, above, the culpability of the accused is lessened by their circumstances, and they should not be labelled as “murderers”. The sentencing judge in both cases would be able to determine precisely on what facts the jury came to their verdict, and sentence accordingly.

**Question 3: If defensive homicide should be retained, should the application of defensive homicide be limited to serious family violence? Are there practical or issues of principle that need to be considered with this approach? Would the law on this approach be too complicated to explain to juries or for juries to apply?**

While accepting that the context of family violence gives rise to a specific and unusual state of mind in an offender who acts in self-defence, the LIV does not believe that defensive homicide should be limited to situations of family violence.

All people should be equal before the criminal law, and all similar states of mind should be dealt with similarly. This is a fundamental principle of criminal law which must be preserved.
The defensive homicide convictions to date illustrate that there are cases where people have believed it necessary to kill to defend themselves from death or really serious injury, but in the absence of reasonable grounds for that belief. They have been convicted of defensive homicide, rather than murder, accordingly.

The LIV submits that to limit defensive homicide to family violence cases would be to discriminate against those with a similar state of mind. If the law is to recognise excessive self-defence by way of defensive homicide, it should recognise it in all cases.

The LIV further submits that the present jury directions in relation to defensive homicide are extremely complex. As pointed out by Justice Ashley in the case of Babic v The Queen:

“Read literally, s9AC could suggest that it is now for an accused to establish that he/she held the asserted belief; and, read literally, s9AD could suggest that an accused must prove that he/she had reasonable grounds for in fact holding that belief”

However, Justice Ashley goes on to say that:

“I do not accept that the sections should be read in such a way. So to construe them would involve radical changes in the criminal law to the disadvantage of accused persons; disadvantages, moreover, in the case of only one defence, and that only with respect to very few offences”

The complexity therefore arises from the fact that the onus of proof, when a defence of self-defence is raised, rests with the prosecution. In other words, to exclude self-defence, the onus is on the prosecution to prove beyond reasonable doubt that the accused did not have the belief that it was necessary to defend him or herself. If the prosecution does prove that the accused did not have the belief that it was necessary, the accused is guilty of murder.

If, however, the prosecution cannot prove that the accused did not have this belief then the second part of the test arises, whether the accused had reasonable grounds for that belief.

If the accused did have reasonable grounds for the belief, or the prosecution did not prove that the accused did not have reasonable grounds for the belief, then the accused is guilty of defensive homicide.

The direction to the jury, therefore, is complex and involves necessary and confusing double negatives.

The Court of Appeal in the recent case of Babic has attempted to clarify how a jury direction, where self-defence is relied upon, should be worded:

“You may find that the accused believed it was necessary to do what they did to defend themselves or another person from death or really serious injury. If so you must acquit the accused of murder and go on to consider whether they are 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 they did to defend themselves or another person from death or really serious injury. There again you must go on to consider whether they are guilty of defensive homicide.

They 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 they held.

11 [2010] VSCA 198 at 203
12 Ibid note 8 at 204.
13 Above note 8
14 For clarity, we have removed the reference to “he/she” and inserted “they”
or alternatively which they 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.”

The LIV disagrees with the Court of Appeals 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 LIV in no way wishes to criticise the jury system or the decisions of individual juries. However, we submit that the complexity of the direction in relation to defensive homicide could explain the anomaly in the case of R v Middendorp\textsuperscript{15}, where the physical difference in size between offender and victim, along with evidence of tendency of violence which was ruled admissible at the trial, would have mitigated against a verdict of defensive homicide.

We further and strongly submit, that limiting defensive homicide to cases of family violence would require adding an extra element to an already complicated and confusing direction. The juror would first have to decide whether the killing was in response to family violence. The jury would therefore need to be directed that, to exclude defensive homicide, the prosecution would have to prove that the killing was not in response to family violence.

We submit that for all these reasons, defensive homicide should not be limited to family violence cases.

**Question 4: If defensive homicide should be retained, should the offence of attempted defensive homicide be expressly abolished?**

It is difficult to conceive of a case where an accused would be charged with, plead guilty to or be found guilty of a charge of attempted defensive homicide.

This is because, in order to be guilty of defensive homicide, the accused must believe that what they did was necessary to prevent death or really serious injury, but have no reasonable grounds for that belief. A charge of attempted defensive homicide would therefore require the unsuccessful but attempted killing of a person based on a real belief that what they did was necessary to prevent death or really serious injury, but on no reasonable grounds. A more appropriate charge would be attempted murder, or intentionally causing serious injury, both of which are open to the common law defence of self-defence.

To be guilty of attempted defensive homicide, a person must be proved to have intended to commit the elements of the original offence\textsuperscript{16}, but to have ultimately failed in their attempt to commit that offence. It is almost impossible to conceive of a situation where a person would appropriately be convicted of attempted defensive homicide on the basis that they intended to commit and act, albeit unsuccessfully, where they had no reasonable grounds for believing that what they did was necessary.

In light of the unlikelihood of attempted defensive homicide ever being appropriately or sensibly applied in Victorian criminal law, the LIV submits that the offence of attempted defensive homicide should be expressly abolished. This would also avoid the unfortunate situation of a Judge having to

\textsuperscript{15} [2010] VSC 202.
\textsuperscript{16} s321N(2)(1) Crimes Act 1958
direct a jury on the complex nature of an attempt, plus the elements of self-defence and defensive homicide, along with the common law elements of self-defence.

Question 5: If a party applies to adduce sexual history evidence in a criminal proceeding, should the sexual history evidence laws that apply in a sexual offence case be adapted to apply in a homicide case?

The LIV submits that the laws relating to sexual history evidence that apply in sexual offences cases should be adapted to apply to homicide cases.

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 recent case of *R v Schembri & Anor* [17] 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.

The LIV agrees with the Discussion paper that the criminal law has an important educative function in dispelling gender biases and myths about sexually experienced women.

For this reason, the LIV submits that, only where relevant, the accused should seek leave to adduce evidence as to the sexual history of the victim. The court may then grant leave if it is satisfied that the evidence has substantial relevance to the fact in issue, that its probative value outweighs its prejudicial effect, and that it is in the best interests of justice to do so.

This process 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 6: Would an express legislative statement about the kind of relationship evidence that may be admitted in the context of a claim of self-defence expand the range of evidence that may be admitted in such circumstances? Would the benefits of this change outweigh any added complexity to this area of the law?

The LIV does not believe that there needs to be an express legislative statement about the kind of relationship evidence that may be admitted in the context of a claim of self-defence.

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 they think it necessary to adduce or admit relevant evidence.

It would then be up to the individual judge to decide, when leave was sought, as to whether the probative value of the evidence outweighed the prejudicial nature of the evidence sought to be admitted or adduced.

---

17 [2010] VSC 402
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.

**Question 7:** Should the *Crimes Act 1958* expressly abrogate the common law of self-defence so that it does not apply where statutory self-defence (sections 9AC and 9AE) applies to the offence?

The Court of Appeal in the case of *Babic v The Queen* expressly states that “common law self-defence has not survived the enactment of Subdivision 1AA in cases of murder or manslaughter”.  

For this reason it is not necessary to expressly abrogate the common law defence of self-defence, although for purposes of absolute clarity, the LIV submits that such an express abrogation would be helpful.

**Question 8:** If defensive homicide should be retained, should the maximum penalty for defensive homicide be increased from 20 years imprisonment to 25 years imprisonment?

In line with our submission that defensive homicide plays an important part in allowing Judges and Jurors to recognise differing degrees of culpability in homicide cases, we submit that the current maximum of 20 years, in line with manslaughter, should be retained.

**Question 9:** Should there be more education and training for the legal profession and courts in relation to family violence? Should there be a change in the way existing education and training opportunities in relation to family violence are provided (eg to include a specific focus in relation to the occurrence of homicides in the context of family violence)?

The LIV is strongly supportive of further training and educational opportunities for members of the legal profession, judicial officers, and the community.

We submit that legal profession and judicial officer training should go beyond how to procedurally deal with family violence cases, and extend to an examination of the state of mind and psychological framework of victims of family violence.

Considering that juries are made up of ordinary members of the community, broad education campaigns focusing on an analysis of the occurrence of homicide in family violence situations would

---

18 [2010] VSCA 198
be extremely useful. This is especially important in light of the fact that community understanding of family violence dynamics has deteriorated over time, especially amongst younger respondents.\textsuperscript{19}