Review of the offence of defensive homicide

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On behalf of:

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Victorian Women's Trust

Established in 1985, the Victorian Women's Trust is a completely independent body working to improve conditions for women and girls in practical and lasting ways – through a funding program, through special initiatives and projects, and through advocacy.

Domestic Violence Resource Centre Victoria [DVRCV]

DVRCV is a statewide service that provides information, training and resources to improve service and policy responses to family violence to a wide range of sectors and professional groups. DVRCV also provides commentary and advice on policy initiatives and law reform.

Domestic Violence Victoria [DV Vic] Inc

DV Vic is the peak body for family/domestic violence services in Victoria that provide support to women and children to live free from violence. With the central tenet of DV Vic being the safety and best interests of women and children, DV Vic provides leadership to change and enhance systems that prevent and respond to family/domestic violence.

The Federation of Community Legal Centres [FCLC]

The Federation of Community Legal Centres Victoria is the peak body for fifty one community legal centres, and leads and supports them to pursue social equity and to challenge injustice.

Koorie Women Mean Business [KWMB]

A proactive organisation supporting Aboriginal women living in regional, rural, and metropolitan Victoria. KWMB provides support to women and girls in their "business" at the community level.

Women's Health Victoria

Women's Health Victoria is a statewide women's health promotion, information and advocacy service. We are a non government organisation working with health professionals and policy makers to influence and inform policy and service delivery for women.

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'*In the transformation of the law of provocation, the past should not continue to influence the present in undesirable ways and the partial defence 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*' (Stewart & Freiberg 2009: vii; see also Stewart & Freiberg 2008: 2).

Executive Summary

We welcome this opportunity to provide a response to the Department of Justice's Discussion Paper Review of the Offence of Defensive Homicide, as part of the Department's 'first-step' in reviewing the offence introduced in 2005. We are keen to learn more about the review processes more broadly.

The Victorian Law Reform Commission [VLRC] recommended introducing defensive homicide because it would ensure there was a 'safety net' for women who killed violent partners, once provocation was abolished. To date, it is too early to tell if this 'safety net' is necessary because no female defendants have been to trial under the new laws in relation to a domestic homicide.

We cautiously recommend the offence of defensive homicide be retained at this stage – on the provision that homicide trials be monitored closely over the next 24 months to give stakeholders another opportunity to review more cases in order to determine whether the rationales for the 2005 reforms are being realised.

We recommend that the Department of Justice monitor women's use of self-defence in trials as they occur to ascertain whether, and to what extent, the legislative changes bring about justice for women.

Beyond our responses to the questions sought by the Discussion Paper, we believe it is timely to start a public and political debate about a more effective cut-through approach to the way family violence is addressed within the legal system.

Henrietta Dugdale helped form the first Victorian Women's Suffrage Society in 1884. In the same year, she wrote to the Melbourne *Herald* attacking the courts for not protecting women against violence. 'Women's anger,' she wrote, 'was compounded by the fact that those who inflicted the violence on women had a share in the making of the laws while their victims did not' (Oldfield, 1992).

The historical irony is not lost on us – that, over a century ago in the colony of Victoria, one of the main motivations for women agitating to gain the vote was to see reforms ushered in that might stem the incidence of violence against

women and provide better protection for women within the law. Yet here we are in 2010 witnessing a legal system that still does not adequately understand and recognise the vexed and multi-layered problem of family violence.

We think it is it time to declare family violence and domestic homicides a special area of expertise within the law.

Magistrates and Judges, trained in family violence and its relevance to homicide laws, would be placed on a List that would be used to hear all committal hearings, trials and sentencing hearings that involve a domestic homicide. This acknowledgement of specialist expertise would require judges presiding over cases to have specialist knowledge on the gendered realities of family violence and domestic homicide.

The creation of such a Special List would also have the desirable medium and long term consequence of ensuring that family violence was addressed more systematically and substantially within legal education.

Review Opportunity - 'First Step'

We welcome the opportunity to provide response to this Review. The Discussion Paper is described as a 'first step' in the Department of Justice's review of defensive homicide, which we believe is appropriate five years after its introduction.

More public information is needed on what the full review involves - the next steps of the review process, what the process of consultation will entail, and to what extent we can participate further. In addition, we would ask that further information be provided regarding the process of review once the Department of Justice receives all the submissions, who will be involved in the analysis of these documents, and with what purpose in mind? Will the submissions be used as the basis for a report and, if so, what is the anticipated timeline for the release of such a report.

In order to fully review defensive homicide we believe it is necessary to also review the application of the 2005 self-defence reforms. For instance, is statutory self-defence operating as intended by the reforms? Are the reforms to self-defence adequate in taking into account the experiences of women who kill violent partners, or will they have to rely on the 'safety net' of defensive homicide? Given that the Office of Public Prosecutions has accepted a plea of guilty in 10 of the 13 cases involving male offenders and male victims, we would be concerned if this will be the more likely outcome for women defendants who kill violent partners.

How is statutory self-defence currently operating for male defendants? What would be the likely outcome for male defendants currently utilizing defensive homicide if it were abolished? Would they be more likely to be acquitted of self-defence or would they be more likely to be convicted of murder?

The Discussion Paper notes “with the exception of two cases, each of [the 13 defensive homicide cases] have involved young men in one-off violent confrontations”. In determining whether to retain or abolish defensive homicide, we believe there is a need to also look at the way manslaughter is operating in Victoria, and whether manslaughter would cover the sorts of cases involving male defendants who have relied on defensive homicide.

The Discussion Paper on page 46 considers a range of likely impacts of a decision to abolish the offence of defensive homicide. It seems to imply some confusion in relation to how cases would play out if defensive homicide were abolished. On the one hand, the paper speculates that with defensive homicide gone, juries would be more likely to acquit because they have no other option. The paper then states that the existence of defensive homicide provides the jury with a ‘catch-all’ option; that is, the existence of defensive homicide means that there is a compromise should they have some uncertainty about self-defence. Arguably, it would be more likely that if defensive homicide were no longer available, unlawful and dangerous act manslaughter will be used instead particularly as stated on p. 48 of the Discussion Paper, ‘that 10 of the 13 defensive homicide convictions to date have been the result of pleas of guilty’.

This point was made by the National Association for Women and the Law (NAWL) in a Position Paper, *Stop Excusing the Violence Against Women* (Côté, Majury and Sheehy 2000: 45), that was cited on page 98 of the VLRC’s *Final Report* (VLRC, 2004). The paper speculates that one of the possible consequences of a decision to abolish provocation may be the recasting of men’s anger and rage as a no intent defence. This is a reference to situations where a manslaughter plea is accepted by the Office of Public Prosecutions on the basis of a lack of intention to kill or cause serious injury in circumstances where there is some evidence to support a finding that the defendant acted in self-defence.

The authors conclude that ‘whereas the defence of provocation acknowledged the intention but excused it on “compassionate” grounds, the “defence” of lack of intention suggests that those people in a state of rage do not intend their actions’. They further note that should this outcome gain critical traction in the courts, then ‘it is arguable that the purpose of abolishing provocation would be undermined … [because] … such a reform would fail to properly address the issue of gender bias’ (Côté, Majury and Sheehy 2000:45; VLRC 2004: 98).

We hold similar concerns to those expressed by NAWL above particularly as the Office of Public Prosecutions has accepted a plea of guilty in 10 of the 13 cases involving male offenders and male victims. If defensive homicide were no longer available, we would be equally concerned if male defendants were still able to rely on provocation type arguments (eg. I ‘snapped’ due to anger from verbal abuse during an altercation with another male or due to stress in the context of a relationship breakdown) and be convicted of unlawful and dangerous act manslaughter (see, for example, McSherry, 2005).

How does the Department of Justice propose to review defences to homicide more broadly?

Should defensive homicide be retained or abolished?

The changes to *Crimes (Homicide) Act* 2005 came into effect on 23 November 2005. With the new law of defensive homicide applying to 13 cases over the period since introduction, and in the absence of a case testing the reforms to self-defence or the intended use of defensive homicide (eg. as a 'safety-net' for women who kill violent partners), it is difficult to provide a definitive answer to the question of whether the defence should be abolished.

At this stage, we cautiously recommend the offence of defensive homicide be retained on the provision that homicide trials and sentencing be closely monitored over the next 24 months to give key stakeholders another opportunity to review a greater number of cases in order to determine whether, and to what extent, the rationales for the 2005 reforms are being realised.

However, in the interim we recommend other measures be put in place – such as a specialist FV list for homicide committals and trials and FV specialist unit in OPP, as well as ongoing and comprehensive training for legal practitioners. See our response to Question 10 for more details.

Page 21 of the Discussion Paper lists the reasons identified by the VLRC for the repeal of provocation, including (1) a loss of self control, (2) provocation's gender bias, (3) the victim blaming culture of provocation, to name a few. Given the extent of the VLRC review, the good intentions behind its recommendation to repeal the partial defence of provocation (to avoid circumstances as listed above) and the need to tackle gender bias within criminal law, we would be loathe to see defensive homicide take provocation's place in continuing to excuse men's violence.

It is evident that there are problems with defensive homicide and that it has provided an avenue for men to use similar types of arguments in relation to their behaviour that occurred with the provocation defence. For instance, in only 5 of the 13 cases of defensive homicide thus far the offender argued that he was retaliating to an act or acts of physical force on the part of the victim (eg. a punch) and that this induced fear of death and or serious injury. Whereas in the remaining cases, the offender claimed that he retaliated with fatal violence upon hearing words spoken by the victim (eg. either an insult or threats to use violence). As noted on page 33 of the Discussion Paper, 'twelve of the thirteen males convicted of defensive homicide had prior convictions recorded against them. The vast majority of the convictions recorded were for violent crimes or drug abuse, or a combination of both'.

In a similar vein, in the case of *Middendorp*, the male defendant had a prior conviction for family violence recorded against him. As case law can often determine future precedents, it may be that *Middendorp* will lead the way for other male defendants who have killed women in the context of family

violence to have their culpability reduced from murder to defensive homicide or manslaughter.

It is therefore crucial that future cases of defensive homicide and manslaughter be closely monitored to ascertain if this will be the case otherwise the politics and intentions behind the abolition of provocation run the risk of being undermined.

If this occurs, there should be the swift opportunity to readdress this question of whether the offence should be retained at a future stage. Again, this requires close monitoring and analysis of the offences and the defences to homicide more generally. (Plus, see our responses to Question 10).

The law and domestic homicides – law reform intentions

The VLRC review took place primarily due to concerns about inadequacies in the legal system's treatment of domestic homicides that occur in the context of family violence. The review was initially recommended in order to address the widespread concern about the conviction and sentence of Heather Osland. This is evident in Department of Justice memorandums regarding Heather's petition of mercy, as well as being noted in the VLRC reports. Attorney-General Rob Hulls announced the review soon after rejecting Heather's petition of mercy.

The review also addressed widespread concern about the way in which men who killed their partners were able to successfully argue provocation.

The VLRC recommended introducing defensive homicide because it would ensure there was a 'safety net' for women who killed violent partners, once provocation was abolished. To date, it is too early to tell if this 'safety net' is necessary because no female defendants have been to trial under the new laws in relation to a domestic homicide.

The Discussion Paper claims that the decisions to not proceed to trial in two cases involving women who killed violent abusers (Shepparton woman and Ms Dimitrovski) are evidence that the reforms are working. It may be that the reforms produced a better understanding of the impact of family violence and its relation to the law for magistrates, judges, the OPP and barristers involved in these decision-making processes.

It must be noted, however, that the offenders in both cases were also responding to an 'immediate' threat (the Shepparton woman was immediately responding to being sexually assaulted (after a long history of such assaults which police/prosecution could document with substantial evidence), while Mrs Dimitrovski also responded to being immediately assaulted (and in front of other witnesses).

Statutory self-defence now recognises that a person may have reasonable grounds for believing his or her conduct is necessary even if 'he or she is

responding to a harm that is not immediate; or his or her response involves the use of force in excess of the force involved in the harm of threatened harm'. Arguably, the reason these two cases did not proceed to trial is because they fit into traditional notions of self-defence. It does not necessarily follow, however, that other women defendants who kill a violent abuser will receive a similar outcome.

Page 4 of the Discussion Paper notes "any changes to defensive homicide need to consider the situation of a woman who kills in response to long-term family violence when this violence has significantly reduced or ceased before the killing".

Without such a case testing existing laws (and changes to the rules of evidence), we are reluctant to conclude at this early stage in the review process that defensive homicide is not working for women defendants or to support the abolition of the 'safety-net' offence of defensive homicide.

As a comparison to the two cases involving women who killed since the reforms were introduced, the Discussion Paper describes the case involving Claire Macdonald – the timing of which occurred when the reforms were being implemented (but did not apply to her case).

Page 28 notes, "the prosecution opposed the case for self-defence and submitted that the fact that the killing was premeditated indicated that the intention to kill was punitive rather than defensive". While Macdonald was ultimately successful in arguing self-defence, the prosecution's treatment of her case demonstrates a real reluctance to acknowledge that when some women kill following prolonged family violence, they take steps or make plans in order to protect their lives.

On the other hand, the outcomes of the two cases involving women defendants since the reforms are a positive sign the reforms are sending a more appropriate symbolic message to the legal community about the need to take men's violence against women seriously as it is they who are making an assessment as to what finding juries in these situations are likely to make.

However, it is still too soon to predict with confidence that in the event a woman who kills her violent partner goes to trial under the new laws, she will be dealt with in the spirit of the reforms. Only then will it be possible to speculate as to whether the reforms are achieving real justice for women. In the interim, there is still the need for ongoing and comprehensive training of judges, the OPP, legal professionals and police, particularly as the momentum of the reforms can dissipate.

We recommend that the Department of Justice monitor women's use of self-defence in trials as they occur to ascertain whether, and to what extent, the legislative changes bring about justice for women.

Problems with defensive homicide

1. The element of belief in defensive homicide

The Discussion paper states on page 24 that "[t]he development of this new offence recognised that, where a person acts genuinely in the belief that his or her conduct was necessary, but has no reasonable grounds for forming that belief, they should not be guilty of murder, but should still be guilty of a serious crime". It also states that "the development of an alternative offence provided a jury and sentencing judge with more options than the 'all or nothing' choice in self-defence cases between a murder conviction or acquittal".

A key issue left unexplored in the Discussion Paper, however, is what we might term, following feminist critiques of sexual assault cases, the 'honest, but mistaken, belief defence' problem. This would appear to be best illustrated by the *Middendorp* conviction, where Luke Middendorp was convicted of defensive homicide because the jury found that he believed that it was necessary to defend himself against the deceased, even though his belief was not reasonable.

Even a cursory reading of the facts in that case, coupled with reading between the lines in the judge's sentencing remarks, suggests that there must come a point where a defendant's belief becomes so unreasonable that you should begin to question whether in fact they genuinely held that belief. If Middendorp had been found not to have held that belief, he would have been convicted of murder.

The sexual assault analogy is at least partly apt because, particularly (although not exclusively) in the recent past, accused rapists have been able to argue that they mistakenly believed that the other person, usually a woman, was consenting. This is a relatively risky defence to run – because the accused is conceding that although at the time he believed that she was consenting, he now knows that she wasn't consenting – the problem here, as noted by McSherry (1998), is that an accused's belief in consent need only be honest and therefore it allows males accused of rape to adhere to outdated notions about sexual behaviour and female sexuality.

Whereas if an accused's belief need be both honest and reasonable, it would be tested according to an objective, rather than a subjective, standard.

This analogy with the problem of the 'honest, but mistaken, belief' defence in sexual assault cases is illustrated by the judge's remarks in the case of *R v Evans* [2009] VSC 593 where he said that this offence is one that, but for the defendant's subjective, but mistaken, belief that it was necessary to him to carry out such conduct to defend himself from the infliction of death or really serious injury, this would be a crime of murder. In our view, just as the principle in *Morgan* that an accused's belief in consent need only be honest is one that allows men to adhere to outdated notions about sexual behaviour and female sexuality, the principle in defensive homicide that an accused's

belief that it was necessary to defend himself against the deceased, even though his belief was unreasonable, is one, that at least in *Middendorp*, has allowed social prejudice and ignorance about the realities of family violence to go unchallenged.

2. Defensive homicide as a 'safety-net' for women defendants

The Discussion paper recalls on page 50 how "the VLRC recommended that excessive self-defence should be reintroduced for people who believe that they need to defend themselves because their life is in danger, but who do not have reasonable grounds for that belief. In these circumstances, the application of the partial defence of 'excessive self-defence' would mean that the accused would be convicted of manslaughter, rather than murder."

The paper also states, as outlined above, that excessive self-defence (defensive homicide) was needed as a 'safety net' for women who kill violent partners.

It is our view that it is a problematic assumption that excessive self-defence (defensive homicide) is targeted at women who kill in the context of family violence. The logical implication is that it is not reasonable for a woman to kill a violent partner (particularly where there is no immediate assault against her).

Consider, for instance, the point made in the Discussion Paper that a decision to abolish defensive homicide ought to take into account the principle of 'fair labelling', which is described by Andrew Ashworth as a way of ensuring that offenders are labelled and punished in proportion to their wrongdoing'. We are in agreement with this notion that an offence label should reflect an offender's wrongdoing.

As noted in the Discussion Paper, such a 'label 'is important both for public communication and, within the criminal justice system' (p. 46). On page 47, however, there appears to be an assumption that if defensive homicide were to be abolished, women who kill in response to family violence would be more likely to be convicted of murder rather than manslaughter. We would argue that the most appropriate label for women who kill in this context is self-defence not murder.

It is our view that if a women kills to protect her life and or the lives of her children, she should be able to rely on the full defence of self-defence and be acquitted.

For this reason, we cannot support the option explored in the Discussion Paper of limiting the defence to cases involving family violence (Question 3). By doing so we feel there is a risk that would see women offenders being encouraged away from proceeding to trial and seeking to rely on the full defence of self-defence, and have a real chance of an acquittal, a trend that could lead to the offence of

defensive homicide ultimately being mislabelled the 'family violence' defence.

The aims of the reforms were to ensure that there was a better fit between legal categories and women's experiences. We do not advocate that defensive homicide be limited to serious family violence because, like the 'catch-all' defence of provocation, it may end up becoming 'over-inclusive' in cases where women kill violent partners (see Morgan, 2002: 2); it may end up including situations that should not amount to an alternative to murder.

It was inevitable that defensive homicide would be used by men who kill other men and by men who kill women. Without intervention (see our responses to Question 10) it is highly likely that there will be more men who kill women resorting to the offence.

The decision by a Victorian Supreme Court jury to convict Luke Middendorp of defensive homicide is of particular concern. The killing of Jade Bownds wasn't the result of a spontaneous act of extreme violence, rather it was committed in the context of a previous history of abuse surrounding family violence.

The trial judge described the relationship between Middendorp and his ex-partner, Jade Bownds, as 'tempestuous' and 'volatile' with the implication both had equally resorted to the use of violence against one another in the past, and that the killing was the inevitable culmination of that relationship.

However some facts remain; nine months prior to killing his girlfriend, Middendorp had a Family Violence Order placed against him. There was a huge disparity in their sizes (Luke Middendorp was more than 186 cm tall and weighed 90kg, whereas Jade Bownds weighed just 50kg, half his size). There was evidence adduced at the trial that Jade Bownds had apparently told her mother about the fear she lived with in this relationship: 'that the Accused had kicked and punched her. In February 2008 the Deceased told her that she was afraid that the Accused would kill her. In July the Deceased told her that the Accused said he would kill her if she tried to leave him' (*R v Middendorp* [2010] VSC 147 at p. 3).

The Discussion Paper also notes that while both parties were involved in frequent fights and arguments, on the day in question, Jade Bownds had arrived at the house with a male companion (possibly for protection, the companion was 'chased away' by Middendorp), and that witnesses heard Middendorp threaten to stab her.

If we add to this to what Luke Middendorp was heard by witnesses to have said after he killed her (that she was a 'filthy slut' and that she got what she deserved), these circumstances point to a critical difference between women and men's experiences of violence. Women who experience violence against them, often live in 'fear' of their lives; and with good reason. Pages 13-16 of the Discussion Paper notes the prevalence of separation assaults on women, and how "women who attempt to terminate their relationship are exposed to a relatively high risk of homicide, with the period immediately after the

estrangement associated with particularly high risk" (Mouzos quoted on Page 16).

By contrast, men do not live in such fear of their own lives, especially in the process of leaving a relationship (and homicide statistics support this). "In a significant number of cases when women have killed in the context of an intimate relationship, there is a history of violence used against the women" (VLRC, quoted in the Discussion Paper, 16).

The high prevalence of separation assault killings of women, and the history of violence link with women who kill, point to a need for family violence to be understood and responded to as an area requiring special expertise within homicide law. This requires judicial education across the Justice system, including training and information about the nature and dynamics of family violence, and the different outcomes for men and women experiencing assault by a partner.

We note that the Victorian Department of Justice is in negotiations with their counterparts in Canada in relation to judicial education resources in the form of the Canadian family violence bench book showcased at the Australian Institute of Judicial Administration conference held in Brisbane in October 2009 (L. Neilson, Domestic Violence and Family Law in Canada: A Handbook for Judges, 2009).

The social context information in that bench book is comprehensive, interactive and sets an extremely high standard. If adapted for the Victorian context, it could provide the basis for development of shared understandings across the continuum of responses in the justice system to family violence cases, including homicide cases.

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?

As outlined above, it is our view that women who believe that they will be killed or seriously injured by their partners and act to protect themselves should be availed of self-defence and a full acquittal. There should be no requirement for an immediate and proportional response because of the power dynamics and reality of family violence which makes this impossible for many women in these circumstances.

On Page 11 of the Discussion Paper it is noted that "it is beyond the scope of this review to conduct a comprehensive analysis of the prevalence of family violence generally within Victoria". We believe it's certainly possibly to provide and overview of such analysis (and note the Department of Justice's own work in this area with the 'Victorian Family Violence Database: Nine Year Report'). For instance:

- One in five Victorian women report being physically or sexually abused by an intimate partner at some time in their adult lives[1]

- In 2007/08 there were 31,666 aggrieved family members in family violence incidents recorded by police in Victoria[2]. (We note a report in last week's Age newspaper showed family violence reports rising sharply – "the rate of assaults arising from family incidents increased 7.9%" (35,720 incidents last year), the Age, 7 September 2010).

- In 2007-08 there were 2,367 children recorded as victims of family violence by police in Victoria and a further 21,846 children reported present at family violence incidents[3]. An estimated one in four children and young people have witnessed violence against their mother or step-mother[4].

- Violence against women is the leading contributor to death, disability and illness in Victorian women aged 15-44, being responsible for more of the disease burden than many well-known factors such as high blood pressure, smoking and obesity[5]

- Violence against Women and their Children costs the Victorian economy $3.4 billion per annum and the Australian economy $13.6 billion per annum[6]?

- Just over 20 per cent of homicides involve intimate partners. Males commit homicide seven times more frequently than women[7]

The dynamics of family violence are such that women can be in danger even where there has been a cessation of violence. Men can use prior episodes of violence or threats to instil long-term fear and they have the physical strength and experience with using violence.

Page 23 of the Discussion Paper notes how "the *Crimes (Homicide) Act* 2005 did not alter the previous position at common law, which was that the immediacy of the threat and the proportionality of the response are not separate tests to be considered … However, the Act does affirm the court decisions that have acknowledged that in some cases, particularly those involving family violence, a lack of immediacy will not necessarily mean that the accused did not believe his or her actions were necessary and based on reasonable grounds".

This submission recommends that in cases where a woman kills a violent partner that the jury needs to be instructed that immediacy and

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[1] VicHealth (2004) The Health Costs of Violence: Measuring the Burden of Disease caused by Intimate Partner Violence, VicHealth, Melbourne

[2] Department of Justice (2009) Victorian Family Violence Database Volume 4: Nine year Trend Analysis (1999 - 2008) Victorian Government, Melbourne

[3] ibid

[4]

[5] VicHealth op cit p.10

[6] National Council to reduce Violence against Women and their Children (2009) The Cost of Violence against Women and Their Children, Australian Government, Canberra

[7] Mouzos J (2000) Homicidal encounters : a study of homicide in Australia 1989-1999, Australian Institute of Criminology, Canberra

proportionality are not necessary requirements in context of family violence (eg. as per s9AH of the Crimes Act (1958)).

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?

We acknowledge the potential benefits in applying the sexual history evidence laws within homicide cases, particularly because such a move would send an important message to the wider legal community that this kind of evidence is irrelevant.

The now-abolished defence of provocation highlighted the abuse of irrelevant sexual history evidence, particularly in cases involving sexual jealousy (and the tendency to victim-blame). Sexual history evidence should never be used to excuse violence.

The Discussion Paper does not go into detail about how these changes to evidence in self-defence are working or not working and whether further reforms are required. While we do not believe sexual history evidence is relevant, and lean towards supporting the adoption of the new sexual history evidence laws in homicide cases, without evidence of how it is or is not working in relation to sexual offence cases, and without evidence of the success of the changes to the rules of self-defence evidence, we are unable to comment further at this stage.

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?

Again, this question requires a response that is beyond our areas of expertise and the scope of the review does not go into how the changes to the *Evidence Act 2008* have been or have not been working.

7. Should the Crimes Act *1958* expressly abrogate the common law of self-defence so that it does not apply where statutory self-defence applies to the offence?

It is the understanding of this submission that the recent decision by the Victorian Supreme Court of Appeal in *Babic v The Queen* [2010] VSCA 198 expressly abrogated the common law of self-defence so that it does not apply where statutory self-defence applies to the offence and we have no further comment on this at this stage.

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)?

Yes. While there has been a significant increase in training and education for the legal profession (including magistrates, judges, OPP and Defense counsel) we note that much of this education appears to be delivered in a one-off, non-compulsory way and often without a focus on homicide law.

Training needs to be ongoing and should include a specific focus on family violence in the context of domestic homicides.

The Discussion Paper outlines various efforts around educating legal practitioners about family violence. Point 337 of the Discussion Paper notes how the DPP met with representatives from DV Vic, DVRCV and Women's Legal Service Victoria [WLSV] "to discuss the development of a Director's Policy on family violence cases" in May of this year and that this policy is still being developed.

It's important to note the background of this meeting was following a case involving Deanne Bridgland.

Deanne Bridgland's story was featured on the 7:30 Report on ABC TV on 9 March 2010. In March 2010 she was found guilty of conspiracy and attempting to pervert the course of justice, following a five week trial. She was sentenced in the County Court of Victoria to a two year suspended sentence.

Deane Bridgland experienced horrific family violence at the hands of her partner, described by one psychologist as some of the worst that she had ever come into contact with. Her partner—Nicholas Pasinas—had repeatedly bashed her—on two occasions he snapped her arms. He had also repeatedly raped her and locked in the garage with her mouth taped shut. The police officer who laid the charges reportedly testified that she thought Deanne Bridgland would be killed if she did not escape the relationship.

Assault charges were laid against him and while he was on remand he was in consistent contact with her (up to twelve times per day) despite the presence of an intervention order. The police recorded his phone calls to her in which he persuaded her to withdraw her statement against him.

He arranged through a friend of his (Paul Coralis) to have her followed and he picked her up one day, drove her to the police station where she filed a statement of non-complaint. She also wrote a letter supporting his application for bail as per his instructions to her. During her trial, evidence was led that she had no choice but to give the statement.

The case against him was therefore weakened and dropped by the Office of Public Prosecutions. Nick Pasinas, Paul Coralis and Deanne Bridgland were all subsequently charged with Conspiracy to Pervert the Course of Justice.

Nick Pasinas pleaded guilty to the conspiracy charge and helped the prosecution in its case against Ms Bridgland, for which he received a discount on his sentence— which was reduced in half to two and years imprisonment with a 15 month non-parole period. Paul Coralis was found not guilty.

In being charged with Conspiracy to Pervert the Course of Justice, Deanne was charged with agreeing with assisting Pasinas in either having him released from prison or reducing or mitigating his culpability. Her lawyers requested the prosecution not to proceed with the charges on the basis that there was no public interest in prosecuting her. The prosecution refused. She was found guilty of conspiring and attempting to pervert the course of justice and received a two-year jail sentence – wholly suspended.

The case against her was that she was undermining the system that was designed to protect her – despite experts providing evidence during her trial that that she was suffering from 'battered woman syndrome' and learned helplessness. A psychologist commented that Deanne Bridgland did what she did in order to survive.

Both Fiona McCormack from DV Vic and Zione Walker-Nthenda form WLSV were featured in the 7:30 Report piece. Their respective agencies plus DVRCV and the Federation of Community Legal Centres [FCLC] met soon after the report went to air and decided on an advocacy strategy that would highlight the gaps in the justice system that this case exposed and would make recommendations about ways to address these gaps.

This work is ongoing and as Deanne Bridgland has filed an appeal to her sentence, the Victorian Government is limited in the comments that it will make about the case specifically. So far the group has met with the Director of Public Prosecutions and the Police Commissioner, has tabled the case at the Statewide Family Violence Advisory Committee [FVSAC] and the Perpetrator Accountability subgroup of the FVSAC.

The OPP have committed to working with the group on the development of policies to guide the prosecution of cases featuring domestic violence. The Police Commissioner has as a result of our first meeting with him committed to meeting with FV sector representatives on a quarterly basis.

The Federation of Community Legal Centres is following up with the Office of Police Integrity to examine how to feed in to their strategic plan to ensure that VicPol complies with the Charter of Human Rights (using this case to highlight that argument).

It is clearly unfortunate that it has taken a case like this to highlight the need for developing protocols around handling family violence cases within the courts.

In many respects, Victoria is seen as 'leading the way' in terms of policies and strategies to combat family violence (in particular with Victoria's whole-of-government response to addressing family violence). However cases like

Deanne Brigland's highlight the need for more co-operation between law enforcement, the legal sector and family violence agencies – recognising the need for consistency in dealing with the continuum of family violence (from protective responses through to homicide cases). The sectors need to work together in taking into account the impact of violence against women, and in building shared understandings in how to respond to the issue.

The community attitudes study referred to on page 17 of the Discussion Paper demonstrates the importance of education and training. Community attitudes to indigenous family violence remain uncertain and yet Aboriginal women are estimated to be 10 times more likely to die as a result of homicide than non-aboriginal women (Strong, 1992).

The community attitudes survey also raises the question of education for juries about family violence, given myths and misconceptions about family violence still remain. While directions to juries could be improved by the introduction of a Specialist Magistrates and Supreme Court Domestic Homicides list (see below), an analysis of juries in homicide cases should be included in a wider review.

10. Do you have other proposals for reform for the Victorian Government to consider?

Specialist Magistrates and Supreme Court domestic homicide list

On page 12 of the Discussion Paper it states that 'it is beyond the scope of the review to conduct a comprehensive analysis of … homicides which occur in the context of family violence'.

As noted above, there is a need for more co-operation and consistency in recognising and dealing with the continuum of family violence.

There are specialist family violence courts in nearly every jurisdiction in Australia, as well as specialist Koori courts, specialist drug courts. In a similar regard, we see the need for a specialist domestic homicide unit within the Office of Public Prosecutions to be the logical next step.

The recent developments of specialist family violence lists in Magistrates court could provide a model for similar development in the Magistrate's Court for committal hearings and the Supreme Court for murder trials and sentencing hearings. Magistrates and Judges who are trained in family violence and its relevance to homicide laws could be placed on a list that would be used to hear all committal hearings, trials and sentencing hearings that involve a domestic homicide.

Given the prevalence of separation assault killings, and the fact that many women who kill have experienced a history of violence, combined with the misconceptions that remain in the community (and on the part of juries) about

family violence, we believe that domestic homicides should be declared a special area of expertise within law.

Acknowledging domestic homicides as an area of expertise would require judges presiding over such cases to be experts in this area (with particular knowledge on the gendered realities of family violence and domestic homicides). Training should be ongoing and include specialist understanding of indigenous context (ie. complexity of kin relationships).

We note the judge who presided over the *Middendorp* case was the Supreme Court's (now retired) Deputy Chief Justice David Byrne QC. Celebrated as "one of Australia's foremost authorities on building and construction law" ('Taking the Long Road', *The Age*, 29/5/10), Byrne has been the Principal Judge of the Supreme Court's commercial and equity division (specialising in hearing technology, engineering and construction cases). After joining the bar, Byrne "dabbled briefly in criminal law, handling "some piffling stuff" in the Magistrates Court, then commercial cases and eventually specialised in building and construction litigation" (*The Age*, as above).

In contrast, the Judge who presided over the case involving Soltan Azizi, who was found guilty of murder for strangling his wife with her headscarf and sentenced to 22 years, was Supreme Court Justice Betty King. King's background is in criminal law working as a barrister, followed by working as a prosecutor for Victoria and the Commonwealth. Many media reports on the Azizi case included strong comments from Justice King on the violence and control that took place within the relationship leading up to the murder. "It is clear you were unable to accept that your wife had rights, which rights included the ability to leave you if that was what she desired," Justice King said during sentencing.

The development of a specialist Magistrate's and Supreme Court domestic homicide list would ensure judges who preside over such cases have expert knowledge in the area. Such a step would be an important development in tackling the continuation of the prevalence of family violence and the associated costs (in 2009, the total cost of domestic violence on the Australian economy was $13.6 billion (KPMG update of Access Economics 2004 survey)). It would also send a critical message to the wider community about how seriously the legal community is in dealing with the issue.

We recommend that family violence a special area of expertise within homicide law and that this be achieved with the implementation of a specialist domestic homicide unit within the OPP and specialist Magistrate's and Supreme Court domestic homicide list.

Monitoring and review

There is a need for systematic and on-going data collection and analysis of domestic homicides in Victoria and on the way they are dealt with in the courts following the reforms. The *Systemic Review of Family Violence Deaths* being developed in the Coroners Prevention Unit at the Coroners Court needs to be linked into this process to ensure that there is an examination of systems once the death has occurred, not just risk factors and responses prior to a family violence death occurring. Again, this is part of acknowledging the continuum of violence and in developing more co-ordinated responses.

There is also a need for in-depth analysis of trial, plea and sentencing transcripts post the 2005 reforms to explore the ways in which the changes to Victoria's homicide laws are operating in practice, and the impact they are having on the way men's and women's actions, particularly in the context of family violence, are understood and interpreted by the courts.

Collection of data also needs to be more comprehensive (eg. collection on indigenous family violence and on the incidence of indigenous domestic homicides is not mandatory (or publicly available) and could be improved to better inform future policy).

Homicide data is collected by the National Homicide Monitoring Program at the Australian Institute of Criminology [AIC] but there is little reporting on domestic homicides in Victoria. The reports referred to in the Discussion Paper such as the Mouzos and Rushford paper from the AIC are important but they are 7 years old and it would be useful if the AIC would provide a comprehensive update on domestic homicide. The Sentencing Advisory Council collects data on homicide sentences and the Coroners Court now investigates family violence related deaths. There is a need for some collection and meaningful analysis of all this data and a sharing of the information with the public so that they can be informed and have input into reviews and reform.

Victim blame and the culture of the criminal justice system

On page 3 of the Discussion Paper is a reference to how the reforms recognised 'that change was required to the law and to the culture of the criminal justice system'. As identified by the VLRC, a key reason for the repeal of provocation was due to a long history of feminist criticisms of the ways in which cases involving men's claims to have killed in circumstances constituting 'provocation' rest on a construction of the words and or behaviour of the deceased, usually a woman, as 'provocative' and as partially to blame for her own death (2004: 69).

The VLRC noted that the cultural message that these cases sent to the legal community and general public is that the deceased woman 'asked for it' and, hence, is deserving of what she got (VLRC 2004: 69; see also Howe 1997, 1998; Morgan, 1997; Tyson 1999; De Pasquale 2002). It is imperative therefore that future cases do not operate in a similar way to how these cases played out prior to the implementation of the reforms, and that every effort is made to challenge and subvert the 'cultural habit' of perpetuating damaging

myths and stereotypes about ‘unchaste’ women and or women who ‘ask for it’ within the trial and or sentencing context.

Moreover, there is an urgent need to challenge and subvert a culture within the criminal justice system that permits defence tactics that minimize and or trivialise family violence and blames the victim. The problem, as Ruth Busch points out, is when ‘such tactics’ are ‘used by members of the justice system and serve to legitimise abusers’ perspectives of violence’. This, she explains, ‘often leads to the further victimisation of those who look to the justice system for protection, and has been referred to as “the cultural facilitation of violence” (1994: 105).

The view, for example, taken by the trial judge in the *Middendorp* case is but one recent example. In this case, the judge’s description of the defendant’s act in killing his ex-partner as a ‘foolish lapse’ leads him to minimise the significance of the death threats and prior history of domestic violence perpetrated against the victim. As Ruth Busch points out, there is little or no sense that threats of this kind may represent criminal behaviour and the implicit assumption is that she is an unworthy victim (1994: 110).

Another recent example can be found in the case of Anthony Sherna. In his closing address to the jury in the *Sherna* case, the prosecuting counsel, Mr. Tinney, remarked how the accused had either ‘personally or through his counsel … complained mercilessly about Susanne Wild’. He said that the court had ‘been absolutely awash with criticisms of her’. He intimated that 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’. The prosecuting counsel further remarked how this had been ‘quite a one-sided process’. While he conceded that 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 lead him to conclude that the process ‘may have had a tendency to obscure the reality of what it actually was that this man did to his wife’ (*Supreme Court Trial Transcript of Anthony Sherna*, 28/10/09, Address by Mr Tinney at p. 767).

Arguably, there is also a culture in courts of extreme denigration and bullying of witnesses and victim/witnesses. This has been well documented in relation to both adult and child sexual assault victims (see, for example, Young, 1999; Taylor, 2004). Many barristers excel in this regard. For instance recently a witness in the re-trial of Robert Farqharson, Dawn Waite, was grilled to the point of tears for hours by defence barrister Peter Morrissey. The judge (Justice Lasry) did little to intervene, nor did it appear that the OPP sought much intervention. This witness was simply giving evidence about passing Farquharson in his car on the day he killed his sons. The efforts of barristers to annihilate and discredit witnesses is a problem for justice (why would anyone voluntarily come forward to assist the police if this is what they will be subjected to?). It also creates significant problems in homicide trials where witnesses give evidence about family violence. The impact of family violence becomes trivialized and ridiculed.

We would like to see an investigation and review into the treatment of witnesses in homicide trials and consideration given to ways to improve this situation.

Plea Bargaining

The unusually high number of guilty pleas to defensive homicide thus far raises the question whether there should be legislation and formal guidelines regulating plea bargaining as there are in other Australian states. As Asher Flynn has noted, the benefits of plea bargaining for the justice system include reducing court costs and delays and sparing victims and witnesses from the trauma of testifying' (2007-2008: 120). She also notes, however, that in Victoria it remains a hidden process devoid of public or judicial scrutiny. Flynn also emphasises how '[s]ecrecy leads to lack of understanding on the part of the public who may be swayed by sensationalistic media reporting (2007-2008, 122).

Advocates argue that plea bargaining should be transparent and that the disclosure of plea bargains and reasons behind their acceptance by the OPP would provide a level of scrutiny that already exists in the trial system, which is seemingly missing from this popular method of case disposition (Flynn, 2007-2008: 123). In Victoria, it would also increase the public's understanding and awareness of the plea bargaining process – one of the reasons for the current levels of concern surrounding the new offence of defensive homicide undoubtedly stems from the fact that 10 out of 13 cases were the result of a guilty plea.

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