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Crimes Amendment (Abolition of Defensive Homicide) Bill 2014

Executive Summary

The Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 was [introduced](#) by the Hon. Edward O'Donohue, Minister for Corrections and Crime Prevention, in the Legislative Council on 25 June 2014. The Bill seeks to remove defensive homicide as an offence from the [Crimes Act 1958](#). The statutory defences for fatal offences are also removed, and the defences of self-defence, duress and sudden or extraordinary emergency are codified for all offences. The Bill also modifies the [Evidence Act 2008](#) in relation to evidence that may unnecessarily demean the deceased in a trial for a fatal offence, and the [Jury Directions Act 2013](#) in relation to directions to the jury in circumstances of family violence.

In 2005, homicide offences in Victoria underwent significant reform in response to the Victorian Law Reform Commission's inquiry into [Defences to Homicide](#). In August 2010, the Department of Justice commenced a review of the 2005 changes, and in 2013 it published a [consultation paper](#) with proposals for legislative reform. The current Bill largely undoes the major [2005 reforms](#), and reintroduces defence and family violence provisions to apply more broadly to all offences.

This Research Paper presents background material on defensive homicide and family violence including the current situation, the major findings of the Department of Justice reviews, and feedback from key stakeholders. The situation in other jurisdictions and how they legislate homicide defences is also considered. Details of government reviews prior to the Department of Justice consultations are provided at [Appendix A](#). Descriptions of domestic homicide convictions since the offence was introduced are provided at [Appendix B](#).

Introduced: 25 June 2014

House: Legislative Council

2nd Reading: 25 June 2014

Commencement: Earlier day of Day of Proclamation or 1 July 2015, except section 7(17) which does not commence before the commencement of the *Sentencing Amendment (Baseline Sentences) Act 2014*.

Links to key documents including the Bill, Explanatory Memorandum, Statement of Compatibility and Second Reading Speech can be found in the Library's [New Bills Information Links](#).

For further information on the progress of this Bill please visit the Victorian Legislation and Parliamentary Documents [website](#).

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I. Background

The Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 was introduced in the Legislative Council on 25 June 2014.¹ The Attorney-General, the Hon. Robert Clark, stated in a media release on 22 June 2014 that the reforms would abolish defensive homicide because it ‘allowed killers to avoid a conviction for murder ... when in fact there was no reasonable justification for the attack they inflicted on their victim’.² Further, he noted that the legislation would introduce a ‘clearer, simpler’ test for self-defence for all offences.³ He stated that jury directions would also be changed so that a judge can direct a jury on a range of factors about family violence in order to ‘help juries to better assess self-defence in a family violence context, so that where the actions of a family violence victim are genuine and reasonable in the circumstances as the victim sees them, they will be acquitted altogether’.⁴

In his second reading speech, the Minister for Corrections and Crime Prevention, the Hon. Edward O’Donohue, stated the benefits of the Bill as follows:

The Bill makes significant improvements to homicide laws. It will hold offenders to account. It will improve the operation of self-defence laws. It will enable common misconceptions about family violence to be proactively addressed at the start of a trial. The Bill also simplifies notoriously complicated complicity laws.⁵

In abolishing defensive homicide, the Minister stated that the offence has ‘predominantly been relied on by men who have killed other men in violent confrontations, often with the use of a weapon and often involving the infliction of horrific injuries’, which had led to ‘justifiable community concern that the law, like provocation once did, is allowing offenders to “get away with murder”’.⁶

Figure I. Defensive Homicide (s 9AD) in the Crimes Act

<p>9AD Defensive homicide</p> <p>A person who, by his or her conduct, kills another person in circumstances that, but for section 9AC, would constitute murder, is guilty of an indictable offence (defensive homicide) and liable to level 3 imprisonment (20 years maximum) if he or she did not have reasonable grounds for the belief referred to in that section.</p> <p>Note</p> <p>See section 9AH as to reasonable grounds for the belief in circumstances where family violence is alleged.</p>	<p>S. 9AD inserted by No. 77/2005 s. 6.</p>
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¹ Victoria, Legislative Council (2014) [Debates](#), Book 9, 25 June, pp. 2127-2130.

² R. Clark, Attorney-General (2014) [Defensive Homicide Abolition to Stop Killers Getting Away With Murder](#), Media Release, 22 June.

³ *ibid.*

⁴ *ibid.*

⁵ Victoria, Legislative Council (2014) *op. cit.*, p. 2130.

⁶ *ibid.*, p. 2128.

This section provides background on defensive homicide and family violence provisions, including the current situation and the major outcomes of government reviews, with a focus on defensive homicide and excessive self-defence, and consideration of circumstances of family violence within self-defence and evidence provisions. Stakeholder comment on the proposals for reform put forward by the Department of Justice in its 2013 consultation paper are also presented.

Current Situation

Victoria's approach to fatal offences against the person was reformed in 2005 by the *Crimes (Homicide) Act 2005*, which inserted Subdivision IAA of Division I of Part I into the *Crimes Act 1958* titled 'Exceptions to Homicide Offences'. Among other things, this new Subdivision codified the common law test of self-defence for fatal offences, created the new offence of defensive homicide, and included new provisions in relation to family violence and self-defence.

Self-Defence

The common law test of self-defence is set out in the High Court decision in *Zecevic v Director of Public Prosecutions (Vic)*, whereby:

It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.⁷

The two aspects of the *Zecevic* test—that the person subjectively believed their actions were necessary to defend themselves against unlawful behaviour, and that belief was objectively reasonable—are codified in section 9AC (murder self-defence) and 9AE (manslaughter self-defence). The threshold for threat of harm differs according to whether self-defence is being invoked against murder or manslaughter. The defence of self-defence for murder is only successful if the person reasonably believed they were defending themselves or another person from the infliction of 'death or really serious injury' (section 9AC); the same defence for manslaughter is successful if they reasonably believed their actions were necessary to defend themselves or another person, or to 'prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person' (section 9AE). Under common law, the threat of harm is not necessarily required to be 'imminent' and the response is not necessarily required to be 'proportionate', however these factors are relevant in assessing the reasonableness of the belief that self-defence was necessary.⁸

⁷ *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645 at 661.

⁸ *ibid.*, p. 662; See: Australian Law Reform Commission (2010) [Family Violence – A National Legal Response](#), Final Report 114, October, Sydney, p. 623.

Defensive Homicide

Defensive homicide (section 9AD) is an alternative offence to murder where a person fails on the second element of self-defence for murder, i.e., where they believed their actions were necessary in self-defence against the infliction of death or really serious injury, but had no reasonable grounds for holding that belief. Under section 4, a jury may acquit a person of murder (maximum life imprisonment) if they are not satisfied they meet the common law criteria for murder and alternatively find them guilty of the lesser crime of defensive homicide (maximum 20 years imprisonment) if the circumstances fit. In this way, defensive homicide acts as a partial defence to murder in much the same way that the previous common law defence of ‘excessive self-defence’ operated (before it was abolished by the decision in *Zecevic*).⁹

Under section 9AH, reasonable grounds for holding a belief that conduct is necessary for the defences of self-defence or duress are extended to circumstances of family violence so that reasonable grounds for believing that self-defence is necessary may be based on a history of physical, sexual, or psychological abuse by the deceased, even where a person is responding to harm that is not immediate, and uses force that is in excess of the harm or threatened harm, due to that history of family violence. Thus, the alternative offence of defensive homicide does not apply to situations where circumstances of family violence are clearly made out; rather, a person who held a reasonable belief that self-defence was necessary due to a history of family violence would be acquitted of murder or manslaughter. However, evidence of family violence can be led under section 9AH to reduce a person’s culpability for defensive homicide where the defence of self-defence is not raised, or where reasonable grounds for holding the belief cannot be made out, despite a history of family violence (for example, where the circumstances of family violence are not of such a nature that would suggest defence from the infliction of death or really serious injury was a reasonable belief).¹⁰

During the second reading of the Crimes (Homicide) Bill 2005, the then Attorney-General noted that ‘relatively few cases are likely to fall into the new defensive homicide category’ as a lack of reasonable grounds for a belief that self-defence was necessary could still point a jury to conclude that the person did not actually hold that belief at all (and therefore find the accused guilty of murder).¹¹ He noted that the offence would be most applicable to situations where ‘the accused person is not suffering a mental impairment within the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, but is suffering from a form of paranoia or distorted perception’.¹²

⁹ *Viro v The Queen* (1978) 141 CLR 88, 146–147. For further discussion on excessive self-defence see commentary in the below discussion on Government Reviews.

¹⁰ See, for example, *R v Black* [2011] VSC 152.

¹¹ Victoria, Legislative Assembly (2005) op. cit., p. 1351. Between November 2005 and August 2013, 28 people were convicted of defensive homicide in situations where the person believed they were acting in self-defence, but had no reasonable grounds for that belief. See Appendix B.

¹² *ibid.*

Other 2005 Reforms

Prior to the Crimes (Homicide) Act, there was a defence in Victoria for provocation, and all defences of self-defence existed only in common law. In addition to inserting Subdivision IAAA of Division I to Part I of the Crimes Act, the amending Act inserted section 3B which clearly states that the previous use of provocation as a partial defence to murder (reducing criminal liability from murder to manslaughter) is abolished. At the time, Attorney-General Hulls stated that ‘the partial defence is outdated now that provocation can simply be taken into account, if relevant, alongside a range of other factors in the sentencing process’.¹³ Further, such a defence ‘condones male aggression towards women and is often relied upon by men who kill partners or ex-partners out of jealousy or anger’.¹⁴

Other provisions inserted by the 2005 Act include: defences of duress (section 9AG) and sudden or extraordinary emergency (section 9AI) (which were not then available for murder at common law), exclusion of intoxication in assessing whether an accused’s actions are reasonable (section 9AJ), and the reformation of the offence of infanticide (section 6).

The 2005 Act was a product of a number of reviews at both the State and Federal level that inquired into how best to codify defences to homicide. The Victorian provisions have also been subject to reviews following their introduction. The current Bill removes the majority of the provisions inserted by the 2005 Act in relation to homicide, and replaces them with similar provisions that apply to all offences, upon recommendation by a review of the Department of Justice.

Government Reviews

There have been a number of reviews that have shaped homicide laws in Victoria and Australia. In particular, the Model Criminal Code project commenced by the Standing Committee of Attorneys-General in the 1990s has provided a framework for reform for all criminal offences. In regard to homicide, the Victorian Law Reform Commission (VLRC) recommended reform in 2004 which directly fed into the 2005 changes to homicide defences. These reforms have been reviewed by the Department of Justice through a discussion paper and consultation paper in 2010 and 2013 respectively. Further, the Australian Law Reform Commission (ALRC) conducted a review of family violence in 2010 and provided useful feedback on the Victorian provisions. The key findings of the Department of Justice papers are provided below. Further detail on the other government reviews—including comparisons to the Model Criminal Code, the VLRC reasoning behind re-introducing a partial defence to murder, and the ALRC recommendation that other states follow Victoria’s lead in reforming homicide provisions—is provided at Appendix A.

¹³ Victoria, Legislative Assembly (2005) op. cit., p. 1349.

¹⁴ *ibid.*

Department of Justice: Defensive Homicide Discussion Paper

In August 2010, the Department of Justice published a discussion paper as part of its five-year review of defensive homicide, as recommended by the 2004 VLRC inquiry.¹⁵ In discussing the operation of the 2005 reforms, it was shown that the only two cases of women killing in response to a history of family violence that had occurred during the five-year period never went to trial because the cases for self-defence were so strong.¹⁶ While this is a positive development of the reforms, it also means that they had not been rigorously tested in court.¹⁷ Conversely, there had been 13 convictions of defensive homicide over the same period, ten of which were the result of a guilty plea and three of which had been determined by the jury as an alternative conviction to murder. All of the offenders were male, with 12 of the victims also male.¹⁸

In light of the operation of self-defence and defensive homicide following the 2005 reforms, the discussion paper put forward a number of questions for consultation, including whether:

- the offence of defensive homicide should be retained or abolished;
- the law would adequately deal with cases of long-term violence if defensive homicide was abolished;
- the application of defensive homicide should be limited to circumstances of serious family violence;
- the offence of attempted defensive homicide should be expressly abolished;
- sexual history evidence laws should be adapted to apply to homicide cases;
- there should be an express legislative statement about the kind of relationship evidence that may be admitted in the context of a claim of self-defence;
- the common law of self-defence should be expressly abrogated;
- the maximum penalty for defensive homicide should be increased to 25 years; and
- there should be more education and training on family violence for the legal profession.¹⁹

Department of Justice: Proposals for Legislative Reform

Following on from the above discussion paper, the Department of Justice published a consultation paper on proposals for legislative reform of defensive homicide in

¹⁵ Department of Justice (2010) [Defensive Homicide: Review of the Offence of Defensive Homicide](#), Discussion Paper, Melbourne, DoJ; see, VLRC (2004) *op. cit.*, Victorian Law Reform Commission (2004) [Defences to Homicide: Final Report](#), Melbourne, VLRC Recommendation 10, p. 105.

¹⁶ Department of Justice (2010) *op. cit.*, p. 28. Similar occurrences have been found in other studies prior to the 2005 changes: 'research that has investigated the processing of homicides at early stages in the criminal justice system demonstrates some historical and jurisdictional variation but suggests that attrition of cases at the pre-trial stage may be a significant issue in the processing of cases involving women who kill their partners', see M. McMahon (2013) 'Homicide, Self-Defence and the (Inchoate) Criminology of Battered Women', *Criminal Law Journal*, vol. 37, p. 95.

¹⁷ *ibid.*

¹⁸ *ibid.*, p. 33. A full summary of each of the defensive homicide convictions is available at Appendix B to the report, pp. 73–77. See also Appendix B to this brief.

¹⁹ *ibid.*, p. 7.

October 2013.²⁰ Since the 2010 discussion paper, a further 15 convictions for defensive homicide had been made, including three female offenders who killed intimate partners (two of which pleaded guilty) (see Appendix B). Of the total 28 convictions for defensive homicide since the offence had been created, seven had had a family relationship with the victim, with only one of those involving a man killing an intimate partner.²¹ In considering this application of the 2005 reforms, the Department put forward seven proposals in the areas of defensive homicide and family violence, self-defence, and evidence reforms (as well as a proposal that reforms continue to be reviewed every five years).

Defensive Homicide and Family Violence

The consultation paper found that ‘there is no clear evidence that defensive homicide is working in the way intended to support women who kill in response to family violence’.²² In presenting evidence as to whether defensive homicide should be abolished or retained it noted concerns that the alternative offence could be distorting the role of self-defence:

The VLRC always envisaged that the primary changes needed to be made to self-defence, with defensive homicide being a ‘safety-net’. The focus has disproportionately shifted to defensive homicide. This creates the risk that the community may see women who kill in response to family violence as acting unreasonably.²³

Further, the paper argued that the necessity of this ‘safety-net’ is reliant on the effectiveness of self-defence ‘which should be the primary focus of reforms for women who kill in response to family violence’.²⁴ In conjunction with self-defence reforms, the Department proposed that defensive homicide be abolished (proposal 1) and that excessive self-defence defences should not be re-introduced in any form (proposal 2).²⁵ The Bill implements these proposals.

Self-Defence

The consultation paper reviewed self-defence provisions in other jurisdictions and posed the question as to whether the current ‘reasonable grounds’ test should remain or whether a more subjective test (based on those in the Model Criminal Code) should be adopted whereby the reasonableness of a response is assessed on whether the accused’s actions were a ‘reasonable response in the circumstances as perceived by the accused’.²⁶ The Department proposed in the consultation paper that either way, the test for self-defence should be codified consistently for both fatal and non-fatal offences (proposal 4), and an express statement abolishing the common law test

²⁰ Department of Justice (2013) [Defensive Homicide: Proposals for Legislative Reform](#), Consultation Paper, August, Melbourne, DoJ.

²¹ *ibid.*, p. vii.

²² *ibid.*, p. 26.

²³ *ibid.*, p. 27.

²⁴ *ibid.*, p. 30.

²⁵ *ibid.*, p. 35.

²⁶ *ibid.*, pp. 38, 41.

should be included in the Crimes Act (proposal 5).²⁷ Further, in extending self-defence provisions to all offences against the person, section 9AH family violence provisions were also proposed to extend to all claims of self-defence (proposal 6).²⁸

Without defensive homicide, and with one test for self-defence for all offences against the person, the consultation paper proposed that the qualification that self-defence against murder only covers defence from death or really serious injury would no longer be necessary. Thus, the paper included a proposal that the first stage of the Zecevic test be completely reinstated so that self-defence covered actions where the ‘accused believed that it was necessary to do what he or she did to defend himself, herself or another’ (proposal 3).²⁹ It was argued that this would be particularly relevant to women who kill in response to family violence because the harm they are responding to is often difficult to categorise.³⁰

The draft provisions on self-defence proposed in the consultation paper have all been incorporated into the current Bill (including more subjective reasonable grounds akin to the Model Criminal Code; see Appendix A), although the Bill also includes a sub-clause in all three of the defences to continue the threshold of protection from death or really serious injury in circumstances that would otherwise constitute murder.³¹

Evidence Reforms

The consultation paper also posed the question as to whether new evidence laws should be introduced to avoid the potential for improper evidence to be used to blame a victim for their own death or effectively put the victim on trial in homicide cases.³² The consultation paper posed the question whether amendments to evidence laws should extend current sexual history provisions that apply to rape cases and go further to prohibit offensive, disrespectful or stereotyping questions about a victim in homicide cases unless they were necessary in the interests of justice.³³ The paper also proposed changes to character evidence laws so that the prosecution may adduce evidence of a victim’s good character where the accused has introduced evidence to demonstrate that the victim was not of good character.³⁴

These options are not taken up in the current Bill. Rather, the current Bill gives the court the discretion under the Evidence Act to exclude evidence if its probative value is substantially outweighed by the danger that the evidence might ‘unnecessarily demean the deceased in a criminal proceeding for a homicide offence’, while including a note that this ‘does not limit evidence of family violence that may be adduced’ under the new self-defence, duress and sudden emergency provisions.

²⁷ *ibid.*, p. 42.

²⁸ *ibid.*, p. 43.

²⁹ *ibid.*, p. 37.

³⁰ *ibid.*, p. 36.

³¹ *ibid.*, pp. 43–45.

³² *ibid.*, pp. 48–49.

³³ *ibid.*, p. 54.

³⁴ *ibid.*, p. 59.

Stakeholders

The above reviews of defensive homicide stimulated significant debate amongst the legal community, academic commentators and support services groups. This section outlines stakeholder views for and against the abolition of defensive homicide, as reported in responses to the 2013 Department of Justice consultation paper as well as in recent media following the introduction of the current Bill. Stakeholder comment on the proposed evidence reforms is also considered.

For the Abolition of Defensive Homicide

Some media commentary has expressed support for the abolition of defensive homicide.³⁵ The comments of stakeholders in support of abolition, such as Deakin University criminologist Dr Kate Fitz-Gibbon, former Federal Member of Parliament and anti-violence campaigner Phil Cleary, Crime Victims Support Association President Noel McNamara and Police Association Secretary Senior-Sargent Ron Iddles, are outlined in the following section.

Dr Kate Fitz-Gibbon, Deakin University

Dr Kate Fitz-Gibbon is an advocate for the abolition of defensive homicide³⁶ and responded to the 2013 consultation paper in an article in *The Conversation*.³⁷ Fitz-Gibbon emphasised the ‘unintended ways’ that the offence has operated, stating that the majority of defensive homicide convictions have involved male defendants and male victims outside the context of family violence.³⁸ Fitz-Gibbon argued that defensive homicide had been an ‘inappropriate and inadequate category of homicide’ in the context of family violence, and instead provided ‘an avenue away from murder for men who kill in circumstances more warranting of a conviction for murder’.³⁹

Fitz-Gibbon noted the concerns of domestic violence support groups that the abolition of defensive homicide would adversely affect female defendants, but she stated that these concerns are ‘potentially unwarranted’ because women who kill abusive partners may meet requirements for ‘reasonable grounds’ and would therefore be better addressed under self-defence laws, which are also strengthened by the proposed reforms.⁴⁰ Fitz-Gibbon viewed this as preferable, as a complete defence of self-defence leads to acquittal, whereas defensive homicide usually involves a jail term.⁴¹ Fitz-

³⁵ See Editorial (2014) ‘[Law Change Cold Comfort](#)’, *The Border Mail*, 25 June, p. 24; (2014) ‘[Closing Violence Loophole](#)’, *Shepparton News*, 23 June, p. 8; Editorial (2013) ‘[End Discount for Murders](#)’, *Herald Sun*, 7 October, p. 22; A. Petrie (2013) ‘[Killers Abusing Defence Law](#)’, *Sunday Age*, 16 June, p. 1.

³⁶ See S. Deery (2013) ‘[Hijacked Homicide Law Axed](#)’, *Herald Sun*, 4 October, p. 1; K. Fitz-Gibbon (2012) ‘[Defensive Homicide Law Akin to Getting Away With Murder](#)’, *The Australian*, 3 March, p. 21; K. Fitz-Gibbon (2011) ‘[An Argument for Abolition](#)’, *Law Institute Journal*, vol. 85, no. 5, May, p. 28.

³⁷ K. Fitz-Gibbon (2013) ‘[Abolishing Defensive Homicide Will Benefit Female Victims and Offenders](#)’, *The Conversation*, 4 October.

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ *ibid.*

Gibbons supported the proposals to reform self-defence laws, stating that they will ‘be important in ensuring women can access this complete defence where appropriate’.⁴²

Following the introduction of the Bill in June 2014, Fitz-Gibbon expressed support for the proposed Bill in a further article in *The Conversation*.⁴³ In addition to ending the unintended operation of defensive homicide, Fitz-Gibbon welcomed the Bill for having ‘multiple benefits’.⁴⁴ According to Fitz-Gibbon, the repeal of defensive homicide would ensure ‘a more accurate labelling of intentional lethal violence’ while maintaining discretion in sentencing to allow for differing levels of culpability.⁴⁵ Fitz-Gibbon stated that abolishing defensive homicide would also assist in reducing the complexity in homicide law in Victoria.⁴⁶ As another important part of the Bill’s reforms, Fitz-Gibbon pointed to new jury directions allowing family violence information to be given to enhance juries’ understanding of experiences of family violence.⁴⁷ According to Fitz-Gibbon, the Bill should be commended and implemented, as the reforms:

strike an important balance between ensuring that persons who commit an intentional act of lethal violence are convicted of murder while also introducing reforms to protect victims of family violence and to better support the jury in homicide trials.⁴⁸

Other Commentators in Support of Abolition

Other stakeholders in support of the abolition of defensive homicide include Phil Cleary, sports commentator, abuse victims advocate and former Federal Member of Parliament. Cleary described the law as ‘poorly conceived’ and a ‘total and absolute failure’,⁴⁹ arguing that defensive homicide had ‘been used by men to effectively get away with murder’.⁵⁰ He compared defensive homicide with the previously abolished partial defence of provocation, stating that defence barristers used defensive homicide laws to inappropriately reduce the culpability of male offenders.⁵¹ According to Cleary, the defensive homicide law ‘failed to grasp the fundamental question of what’s going wrong in the courts, which is we have courtroom narratives in which lawyers can belittle and blacken the names of the dead woman’.⁵²

⁴² *ibid.*

⁴³ K. Fitz-Gibbon (2014) ‘[Victorian Homicide Law Reforms Ensure Just Responses to Violence](#)’, *The Conversation*, 26 June.

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ (2014) ‘[Defensive Homicide Law to be Dumped in Victoria After Violent Men ‘Allowed to Get Away With Murder](#)’, *ABC News Online*, 22 June.

⁵⁰ M. Johnston (2014) ‘[Killer Blow](#)’, *Herald Sun*, 22 June, p. 7.

⁵¹ C. Crane (2012) ‘[Growing Calls for Defensive Homicide Review](#)’, *Herald Sun*, 13 February.

⁵² (2014) ‘[Defensive Homicide Law to be Dumped in Victoria](#)’, *ABC News Online*, op. cit.

The president of Crime Victims Support Association, Noel McNamara, also expressed his support for the abolition of defensive homicide, viewing the defensive homicide law as allowing violent offenders to inappropriately avoid a murder conviction.⁵³

Senior-Sargent Ron Iddles, Police Association secretary and former homicide detective, has made comments in support of the abolition of defensive homicide, noting the fact that the majority of defensive homicide cases involved male defendants and male victims outside the context of family violence. He stated: 'I think the intention of the original legislation was good, and that was around family violence, but quite clearly that's not how it worked out'.⁵⁴ Iddles expressed support for the proposed new laws, stating that they address family violence issues and enhance juries' understanding of self-defence.⁵⁵

Against the Abolition of Defensive Homicide

There has been opposition to the abolition of defensive homicide in some media commentary⁵⁶ and some stakeholders expressed their concerns in submissions to the 2013 consultation paper. The following section outlines views against the abolition of defensive homicide as expressed in a joint submission by several academic, legal and support service groups, as well as a submission by the Law Institute of Victoria, to the 2013 consultation paper.

Domestic Violence Resource Centre Victoria and Others: Joint Submission

In November 2013, 17 legal, academic and support service groups made a joint submission to the Department of Justice consultation paper, expressing their opposition to the proposed abolition of defensive homicide.⁵⁷ These groups included the Domestic Violence Resource Centre Victoria (DVRCV), the Federation of Community Legal Centres, Victorian Aboriginal Legal Service, Victorian Women's Trust and others.⁵⁸ The DVRCV et al. argued it is necessary to retain defensive

⁵³ Crane (2012) op. cit.

⁵⁴ Channel Nine News (2014) '[No Defence](#)', 22 June 2014.

⁵⁵ Crane (2012) op. cit.

⁵⁶ See J. Elder & J. Lee (2014) '[Battered Women Lose Out on Law](#)', *Sunday Age*, 29 June, p. 20; Editorial (2012) '[Defensive Homicide Warrants a Calm Review](#)', *The Age*, 27 June, p. 14.

⁵⁷ Domestic Violence Resource Centre Victoria et al. (2013) '[Submission on the Department of Justice's Defensive Homicide: Proposals for Legislative Reform – Consultation Paper \(2013\)](#)', submission to the *Defensive Homicide: Proposals for Legislative Reform Consultation Paper*, 27 November.

⁵⁸ The joint submission was endorsed by the Domestic Violence Resource Centre Victoria, Associate Professor Bronwyn Naylor (Faculty of Law, Monash University), Domestic Violence Victoria, The Victorian Women's Trust, Human Rights Law Centre, Victorian Women Lawyers, Women's Domestic Violence Crisis Service, Koorie Women Mean Business, inTouch Multicultural Centre Against Family Violence, the Federation of Community Legal Centres, Dr Danielle Tyson (Department of Criminology, School of Political & Social Inquiry, Monash University), No To Violence, Women's Health Victoria, Women's Legal Service Victoria, Victorian Aboriginal Legal Service, Women with Disabilities Victoria, and Peninsula Community Legal Centre.

homicide as this partial defence can provide a useful alternative or ‘backup’ for women who kill their abusive partners, rather than such women being convicted of murder.⁵⁹

The joint submission by the DVRCV et al. stated that the introduction of defensive homicide as a partial defence was based on ‘sound reasons’, following the VLRC review (see Appendix A).⁶⁰ The joint submission stated that there is little evidence to suggest self-defence will be a more effective defence for women who kill abusive partners once defensive homicide has been abolished.⁶¹ Citing a 2013 study by the DVRCV and Monash University,⁶² which examined cases of women who have killed their intimate partners (or ex-partners) since the 2005 reforms, the joint submission stated that there are several reasons why self-defence claims by women are not likely to be successful, including ‘entrenched gender biases and misconceptions about the nature and impact of family violence’, and ‘inadequate use of the family violence provisions’ in section 9AH of the Crimes Act.⁶³ The joint submission argued that this study demonstrated a ‘limited recognition of the nature and impact of family violence’, which:

leads us to conclude that it is currently unlikely that such women would successfully be able to claim self defence ... More extensive measures to address stereotypes and misunderstandings about women and family violence are required for women’s self-defence claims to be successful.⁶⁴

The joint submission also emphasised the barriers to justice faced by Indigenous women, such as gender and racial discrimination, poverty, alcohol and substance abuse, communication issues, cultural sensitivities surrounding speaking of a deceased person or particular matters in public, as well as the historical backdrop of ‘colonisation, dispossession and the disruption of family life through the government removal of children’.⁶⁵ The joint submission stated that these factors can create a sense of distrust towards the justice system amongst Indigenous women, and make it difficult for them to access good legal advice.⁶⁶ The joint submission cited a 2012 study by Sheehy, Stubbs and Tolmie which found that Indigenous women are over-represented among women who forgo their rights to trial and instead seek resolution through guilty pleas, a finding which raises questions about ‘whether they receive equal access to justice’.⁶⁷

⁵⁹ Domestic Violence Resource Centre Victoria et al. (2013) op. cit., p. 2.

⁶⁰ *ibid.*, p. 3.

⁶¹ *ibid.*, p. 5.

⁶² D. Kirkwood, M. McKenzie & D. Tyson (2013) [Justice or Judgement?: the Impact of Victorian Homicide Law Reforms on Responses to Women Who Kill Intimate Partners](#), Discussion Paper 9, DVRCV; cited in Domestic Violence Resource Centre Victoria et al. (2013) op. cit., p. 5.

⁶³ Domestic Violence Resource Centre Victoria et al. (2013) op. cit., p. 5.

⁶⁴ *ibid.*, p. 6.

⁶⁵ *ibid.*, p. 7.

⁶⁶ *ibid.*

⁶⁷ E. Sheehy, J. Stubbs & J. Tolmie (2012) [‘Battered Women Charged with Homicide in Australia, Canada and New Zealand: How Do They Fare?’](#), *Australian and New Zealand Journal of Criminology*, vol. 45, iss. 3, p. 396, as cited in Domestic Violence Resource Centre Victoria et al. (2013) op. cit., p. 7.

The joint submission argued that the abolition of defensive homicide may particularly disadvantage Indigenous women by further limiting their legal options.⁶⁸

DVRCV et al. expressed the view that the benefits of abolishing defensive homicide to avoid unintended outcomes (such as claims of defensive homicide in cases where men kill men or men kill female partners) would not outweigh the risks of disadvantaging women defendants who kill abusive partners.⁶⁹ They state that 'It is unjust to remove a safety net for women who have suffered long-term family violence because of a perception that male offenders are inappropriately using it'.⁷⁰ DVCRV et al. argued that these two issues should be addressed by separate measures – measures to improve legal outcomes for women who kill abusive partners and measures to reduce the incidence of cases where men are perceived to be inappropriately let off for murdering other men.⁷¹

DVRCV et al. stated that additional measures were needed, as the understanding of family violence in the justice system is limited. Their suggested measures included:

- Amend section 9AH of the Crimes Act to align with the *Family Violence Protection Act 2008*, particularly regarding the definition of family violence in the Family Violence Protection Act and information about the nature of family violence;
- Amend section 9AH(3) of the Crimes Act to include information on the nature of family violence and the range of experiences of women, including:
 - the impact of past abuse
 - that evidence of past violence of accused or 'mutual' violence doesn't necessarily override a claim to self-defence
 - that it is common for victims of family violence to experience self-blame and shame
 - that there may be cultural, social or personal barriers that stop women reaching out for help
- Include a list of risk indicators for family violence (as introduced by Department of Human Services in 2007) in a Schedule to the Crimes Act;
- Reduce the incidence of prosecutors overcharging;
- Document plea negotiations to improve transparency;
- Allow a wider range of expert witnesses to give evidence regarding family violence (eg. counsellors, social workers, family violence workers and those with understanding of particular cultural communities);
- Include more professional development on family violence for legal professionals;
- Develop family violence as a special area of expertise within homicide law; and
- Enhance jury directions to include information on family violence (in both verbal and written forms).⁷²

⁶⁸ Domestic Violence Resource Centre Victoria et al. (2013) op. cit., p. 7.

⁶⁹ *ibid.*, p. 8.

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² *ibid.*, pp. 18-23.

Law Institute of Victoria

In their submission to the 2013 consultation paper, the Law Institute of Victoria (LIV) opposed the abolition of defensive homicide, stating: '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'.⁷³ The LIV supported the retention of defensive homicide, stating that it:

- allows the jury to take into account 'the complex historical context' of an offence;
- recognises different levels of culpability in homicide offences;
- allows offenders to avoid being labelled 'murderers' in circumstances of lesser degrees of culpability;
- allows juries to make clear which factors they have considered when handing down a verdict and thereby allowing the judge to sentence accordingly; and
- provides a 'safety-net' for family violence victims and others who are situated between the complete defence of self-defence and a conviction for murder, in cases where they had a genuine belief that they acted to defend themselves yet there were no reasonable grounds for that belief.⁷⁴

The LIV noted that more men have been convicted of defensive homicide than women, but argued that this does not diminish the usefulness of the offence.⁷⁵ They argued that gender is irrelevant, as criminal law must treat all people as equal, in the sense that their state of mind and level of culpability is similar.⁷⁶

Proposed Evidence Law Reforms

Stakeholders have expressed support for the reforms to evidence laws giving the court discretion in homicide cases to exclude evidence about the victim which might unnecessarily demean the victim.⁷⁷ These reforms do not go as far as those proposed in the consultation paper, however at the time the LIV preferred an approach similar to that proposed by the Bill, which emphasises the individual trial judges' discretion to ascertain whether the probative value of the evidence outweighs its prejudicial nature, and whether it would be in the interests of justice to admit the evidence.⁷⁸ Dr Kate Fitz-Gibbon has been supportive of the Bill, stating that 'protections against victim-blaming serve an important purpose', and that the reform 'positions Victoria as the first Australian jurisdiction to illustrate such a commitment to ensure the just treatment of homicide victims throughout the court process'.⁷⁹

⁷³ Law Institute of Victoria (2013) '[Review of Defensive Homicide](#)', submission to the *Defensive Homicide: Proposals for Legislative Reform Consultation Paper*, 26 November, p. 3.

⁷⁴ *ibid.*, pp. 3-4.

⁷⁵ *ibid.*, p. 4.

⁷⁶ *ibid.*

⁷⁷ See Johnston (2014) *op. cit.*

⁷⁸ Law Institute of Victoria (2013) *op. cit.*, p. 8.

⁷⁹ Fitz-Gibbon (2014) *op. cit.*

2. The Bill

This section of the Research Brief summarises the key provisions of the Bill. For an overview of the Bill in its entirety, readers are directed to the Explanatory Memorandum.

The Bill consists of five Parts: Part 1 sets out the purposes and commencement details of the Bill; Part 2 amends the Crimes Act to repeal the Subdivision on exceptions to homicide and insert new Part 1C; Part 3 amends the *Evidence Act 2008* in order to create the ability to exclude certain evidence in homicide proceedings; Part 4 replaces Part 7 of the *Jury Directions Act 2013* to modify jury directions in circumstances of family violence; and Part 5 repeals the Act on 1 July 2016 without affecting its continuing operation. This section of the Research Brief summarises the key provisions in relation to the amendments to the Crimes Act (Part 2), the Evidence Act (Part 3) and the Jury Directions Act (Part 4).

Part 2—Amendment of the Crimes Act 1958

The Bill repeals Subdivision 1AA of Division 1 of Part 1 of the Crimes Act, which was inserted in 2005 and sets out the exceptions to homicide offences, including the defence of self-defence for murder and manslaughter, the alternative offence of defensive homicide, the defences of duress and sudden or extraordinary emergency, and the consideration of circumstances of family violence for homicide offences (clause 3(b) of the Bill). Clause 3 also removes all references to defensive homicide from the Crimes Act.

Clause 4 of the Bill inserts a new ‘Part 1C—Self-Defence, Duress, Sudden or Extraordinary Emergency and Intoxication’ into the Crimes Act (after the offence provisions), to apply to any offence under statute or common law (proposed section 322G). The new Part consists of five Divisions.

Division 1 of new Part 1C: General

Under Division 1, new onus of proof provisions put the evidential onus of raising the defences of self-defence, duress or sudden or extraordinary emergency on the accused, and the legal onus on the prosecution to prove beyond reasonable doubt that the accused’s behaviour meets the circumstances of the defence (proposed section 322I). Proposed section 322J sets out what constitutes evidence of family violence, and is a re-enactment of sections 9AH(3) and (4), which are abolished with the rest of Subdivision 1AA of Division 1 of Part 1. Thus, there are no changes to the definitions or nature of family violence evidence.

Division 2 of new Part 1C: Self-Defence

The Bill creates one complete defence of self-defence for offences against the person, but includes a subclause to continue to apply the threshold of the threat of infliction of

death or really serious injury for self-defence for murder (proposed section 322K). The Minister for Corrections and Crime Prevention stated in his second reading speech that the threshold for murder reflects current law and ‘will ensure that self-defence is only relied upon in appropriate cases’.⁸⁰

The new self-defence provisions modify the *Zecevic* test so that a person is acting in self-defence if they believe that the conduct is necessary in self-defence and their conduct is a reasonable response in the circumstances as they perceive them, reflecting the self-defence provisions in the Model Criminal Code (see Appendix A) (proposed section 322K(2)). The second reading speech states that this will ‘be clearer and easier for juries to understand and apply’.⁸¹ Further, ‘this will better accommodate the experience of those who kill in the context of family violence when assessing whether self-defence applies’.⁸²

A note at the end of the section provides a non-exhaustive list of circumstances where a person may carry out conduct in self-defence, including the defence of the person or another person, the prevention or termination of the unlawful deprivation of liberty of the person or another person, or the protection of property. The Division also expressly states that common law self-defence is abolished (proposed section 322N).

A separate provision on family violence and self-defence (proposed section 322M) sets out that where self-defence in the context of family violence is ‘in issue’, a person’s response may still be reasonable in the circumstances as they perceive them even if they are responding to a harm that is not immediate and use force in excess of the force involved in the harm or threatened harm, and allows evidence of family violence to be adduced to determine whether someone held a belief that self-defence was necessary, and whether that belief was reasonable in the circumstances as they perceive them. This provision essentially re-enacts the remaining provisions in section 9AH abolished by clause 3 of the Bill so they apply to all offences. Notably, the new section applies to cases where family violence is ‘in issue’, as opposed to where family violence is ‘alleged’.

Divisions 3, 4 and 5 of new Part IC: Duress, Sudden or Extraordinary Emergency and Intoxication

Division 3 of new Part IC re-enacts slightly modified provisions of duress which currently sit in Division IAA of Part I and extends them to all offences. It also includes a new section on family violence and duress to expressly state that family violence evidence may be relevant for that defence. The common law defence of duress is expressly abolished (duress does not exist at common law for murder, but currently applies to other offences).

⁸⁰ Victoria, Legislative Council (2014) op. cit., p. 2129.

⁸¹ *ibid.*

⁸² *ibid.*

Division 4 of new Part IC sets out the defence of sudden or extraordinary emergency in the same way it is currently stated in section 9AI, however its inclusion in new Part IC means that it applies to all offences. Thus, the common law defence of necessity is abolished (proposed section 322S).

Division 5 sets out intoxication provisions in much the same way they are currently stated in section 9AJ (abolished by clause 3 of the Bill), however they only apply to elements of defences, as opposed to elements of offences and defences. Further, they are modified to reflect the new language of self-defence (i.e., reasonable belief instead of reasonable grounds for a belief).

New Subdivision (1) of Division I of Part II: Complicity

Clause 6 of the Bill replaces the current two subdivisions on complicity of abettors in the Crimes Act (sections 323 and 324) with a new subdivision encompassing five that largely codify common law principles of complicity. These reforms are in line with the recommendations and draft provisions in the *Simplification of Jury Directions Project* (the Weinberg Report) and, according to the second reading speech, largely reflect common law doctrines while ‘remove confusing and unhelpful distinctions between different types of complicity’.⁸³

Part 3—Amendment of the Evidence Act 2008

Clause 9 of the Bill amends section 135 of the Evidence Act to allow the court to refuse to admit evidence if the danger that it may unnecessarily demean the deceased in a criminal proceeding for a homicide offence outweighs its probative value. Currently, the only other types of evidence in this list is evidence that may be unfairly prejudicial to a party, be misleading or confusing, or cause or result in undue waste of time. In his second reading speech, the Attorney-General noted that this amendment was designed to reduce ‘victim blaming’ and unjustifiable attacks on the deceased, while simultaneously protecting ‘the rights of an accused to conduct a defence by adducing explanatory or contextual evidence if its probative value substantially outweighs the danger that the evidence might unnecessarily demean the deceased’.⁸⁴

Part 4—Amendment of the Jury Directions Act 2013

Part 4 of the Bill replaces Part 7 of the Jury Directions Act, which is currently dedicated to consequential and transitional provisions. New Part 7 sets out directions to the jury in criminal proceedings where self-defence or duress in the context of family violence is in issue. This requires a trial judge to give the jury a requested

⁸³ Victoria, Legislative Council (2014) op. cit., p. 2129. See, M. Weinberg (2012) [Simplification of Jury Directions Project: a Report to the Jury Directions Advisory Group August 2012](#), Melbourne, State Government of Victoria, Department of Justice, Supreme Court of Victoria and Judicial College of Victoria, pp. 70-95.

⁸⁴ Victoria, Legislative Council (2014) op. cit., p. 2129.

direction on family violence unless there are good reasons for not doing so. Such a direction may be requested by the defence counsel; if the accused is unrepresented, the accused may request directions be given to the jury, or the trial judge may choose to give directions they consider it is in the interests of justice to do so.

In addition to directions as to how family violence evidence is relevant to certain offences (proposed section 32(6)), the trial judge must, if requested, direct the jury that family violence is not limited to physical abuse and may involve the factors set out in proposed section 322J of the Crimes Act (currently within section 9AH of the Crimes Act). The trial judge may also inform the jury that experience shows that (proposed section 32(7)(b)):

- (i) people may react differently to family violence and there is no typical, proper or normal response to family violence;
- (ii) it is not uncommon for a person who has been subjected to family violence—
 - (A) to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;
 - (B) not to report family violence to police or seek assistance to stop family violence;
- (iii) decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by—
 - (A) family violence itself;
 - (B) cultural, social, economic and personal factors;

Further, evidence that the accused has previously assaulted the victim does not negate self-defence in relation to the offence charged. The Minister for Corrections and Crime Prevention stated that these reforms will ‘provide greater context for assessing claims of self-defence and assist to ensure that jurors in relevant cases have a better understanding of the dynamics of family violence’, and further ‘assist to educate the community and legal profession about family violence’.⁸⁵

⁸⁵ *ibid.*

3. Other Jurisdictions

Australian jurisdictions have taken divergent approaches to dealing with defences to intimate partner homicide in the context of family violence. Concern about the gender bias of provocation as a partial defence to murder is widespread, and the defence of provocation has been subject to review and reform in each Australian state and territory in the last 11 years except in South Australia (which retains the partial defence of provocation under its common law).⁸⁶

In addition to Victoria, Tasmania and Western Australia have repealed the partial defence of provocation. Queensland and New South Wales have retained the partial defence of provocation but have restricted the way it operates. The territories have retained the partial defence of provocation but have amended it so that it does not apply in the context of non-violent same-sex sexual advances.⁸⁷ In addition to Victoria, Queensland is the only other state which specifically references family violence in its homicide provisions. This paper limits its discussion of other jurisdictions to the Australian states of Tasmania, Western Australia, Queensland, and New South Wales.

Tasmania

Tasmania was the first Australian jurisdiction to repeal provocation as a partial defence to murder in 2003. The *Criminal Code (Abolition of the Defence of Provocation) Act 2003* (Tas) repealed section 160 of the Tasmanian Criminal Code which made provocation a defence. There are now no partial defences to homicide in Tasmania.⁸⁸ The then Tasmanian Minister for Justice, the Hon. Judy Jackson, stated that the defence of provocation was 'gender-biased' and an 'outdated and inappropriate defence to murder' that 'should not be retained in the twenty-first century'.⁸⁹ Provocation is now considered as a mitigating factor during sentencing in Tasmania.

In the 2005 case *Tyne v Tasmania*, the Tasmanian Court of Criminal Appeal held that the repealed section 160 should be disregarded and that a sentencing judge should take any provocation into account when determining a sentence by giving it

⁸⁶ In regard to movement towards review and potential reform of the defence of provocation in SA: On 1 May 2013, SA Greens MLC, the Hon. Tammy Franks, introduced the Criminal Law Consolidation (Provocation) Amendment Bill 2013 which effectively proposed to remove the 'homosexual advance test' as an expression of the defence of provocation. On 30 October 2013, the Bill was withdrawn and sent to the SA Legislative Review Committee for consideration. See South Australia, Legislative Council (2013) *Debates*, 30 October, p. 5431.

⁸⁷ The amendments were made in the ACT in 2004 and in the NT in 2006. See L. Roth & L. Blayden (2012) '[Provocation and Self-defences in Intimate Partner and Sexual Advance Homicides](#)', *Briefing Paper No. 5/2012*, NSW Parliamentary Research Service, p. 23.

⁸⁸ K. Fitz-Gibbon & J. Stubbs (2012) 'Divergent Directions in Reforming Legal Responses to Lethal Violence', *Australian & New Zealand Journal of Criminology*, vol. 45, iss. 3, p. 320.

⁸⁹ Tasmania, Legislative Assembly (2003) *Debates*, 20 March.

appropriate weight according to the individual circumstances.⁹⁰ Then Tasmanian Chief Justice, the Hon. Peter Underwood, found that:

There is no longer any reason to impose a sentence for manslaughter instead of murder because of provocation. Provocation is taken into account in the exercise of the sentencing discretion for murder. The degree of provocation is just an aspect of the sentencing discretion.⁹¹

Hence, if the facts concerning provocation are disputed, the accused now bears the burden of proving mitigating circumstances on the balance of probabilities (as the onus and burden of proof are governed by common law). Prior to 2003, under the provocation provisions of section 160, the Crown had to disprove provocation beyond reasonable doubt.

Western Australia

Western Australia has repealed the partial defence of provocation and reintroduced the partial defence of excessive self-defence.

In 2005, the Western Australian Attorney-General, the Hon. Jim McGinty, asked the Law Reform Commission of Western Australia to undertake a comprehensive review of the law of homicide. The final report was published in 2007.⁹²

In 2008, the Western Australian Government made a number of changes to the state's homicide laws in response to the Commission's recommendations. The provisions of the *Criminal Law Amendment (Homicide) Act 2008* included: abolishing mandatory life imprisonment for murder; repealing the defence of provocation; clarifying the defence of self-defence and expressly providing that there does not need to be an immediate threat of harm to rely on self-defence; and introducing the partial defence of excessive self-defence.⁹³

The partial defence of excessive self-defence is provided for in section 248(3) of the Schedule to Western Australia's *Criminal Code Act 1913*:

(3) If — (a) a person unlawfully kills another person in circumstances which, but for this section, would constitute murder; and (b) the person's act that causes the other person's death would be an act done in self-defence under subsection (4) but for the fact that the act is not a reasonable response by the person in the circumstances as the person believes them to be, the person is guilty of manslaughter and not murder.

⁹⁰ *Tyne v Tasmania* [2005] TASSC 119.

⁹¹ *Tyne v Tasmania* [2005] TASSC 119 at para 18; Roth & Blayden (2012) op. cit., p. 21.

⁹² Law Reform Commission of Western Australia (2007) [Final Report: Review of the Law of Homicide](#), Project 97, Perth, LRCWA.

⁹³ Law Reform Commission of Western Australia (2007) '[Publications: Project 97- A Review of the Law of Homicide](#)', LRCWA website; Roth & Blayden (2012) op. cit., pp. 24, 45.

Section 248(4) provides that an act of self-defence no longer has to be in response to a harmful act that is 'imminent'. It provides that a person's harmful act is done in self-defence if —

- (a) the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and
- (b) the person's harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and
- (c) there are reasonable grounds for those beliefs.

The Western Australian Attorney-General noted – in the second reading speech to the *Criminal Law Amendment (Homicide) Act 2008* – that the concept of imminence was a barrier for female victims of domestic violence.⁹⁴ The Attorney-General stated that the removal of the imminence requirement of self-defence would mean that the defence would 'more readily apply to women who are the victims of domestic violence in the so-called 'battered spouse' situation'.⁹⁵

Queensland

Queensland retains the partial defence of provocation but restricts its application to exclude those who kill when a domestic relationship changes or ends. Queensland also provides for a partial defence to murder entitled 'killing for preservation in an abusive domestic relationship'. Notably, Queensland has a mandatory life sentence for murder.⁹⁶

In April 2008, the Queensland Attorney-General, the Hon. Kerry Shine, asked the Queensland Law Reform Commission to conduct a review of the excuse of accident and the defence of provocation. The final report was published in August 2008.⁹⁷ In 2009, in response to a recommendation of the Commission, the Queensland Government created a new partial defence to homicide by inserting new section 304B into Schedule I to the *Criminal Code Act 1889* (Qld):

304B Killing for preservation in an abusive domestic relationship

(1) A person who unlawfully kills another (the *deceased*) under circumstances that, but for the provisions of this section, would constitute murder, is guilty of manslaughter only, if—

- (a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and
- (b) the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and

⁹⁴ Western Australia, Legislative Assembly (2008) [Debates](#), 19 March, p. 1212.

⁹⁵ *ibid.*

⁹⁶ Roth & Blayden (2012) *op. cit.*, p. 25.

⁹⁷ See Queensland Law Reform Commission (2008) [A Review of the Excuse of Accident and the Defence of Provocation: Report](#), No. 64, QLRC.

- (c) the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.
- (2) An *abusive domestic relationship* is a domestic relationship existing between 2 persons in which there is a history of acts of serious domestic violence committed by either person against the other.
- (3) A history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation.
- (4) Subsection (1) may apply even if the act or omission causing the death (the *response*) was done or made in response to a particular act of domestic violence committed by the deceased that would not, if the history of acts of serious domestic violence were disregarded, warrant the response.
- (5) Subsection (1)(a) may apply even if the person has sometimes committed acts of domestic violence in the relationship.
- (6) For subsection (1)(c), without limiting the circumstances to which regard may be had for the purposes of the subsection, those circumstances include acts of the deceased that were not acts of domestic violence.⁹⁸

In 2011, the Queensland Government implemented more of the Commission's recommendations so as to retain the defence of provocation but restrict its scope to try to exclude those who kill in the context of a domestic relationship when the deceased had tried to end or change the relationship. The *Criminal Code and Other Legislation Amendment Act 2011* (Qld) amended section 304 of Queensland's Criminal Code which provides the defence of provocation. The existing section 304(1) states that:

- (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.

The 2011 Act inserted new subsections to restrict the scope of the defence so that the section now continues on to read:

- (2) Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character.
- (3) Also, subsection (1) does not apply, other than in circumstances of a most extreme and exceptional character, if—
 - (a) a domestic relationship exists between 2 persons; and
 - (b) one person unlawfully kills the other person (the *deceased*); and
 - (c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done—
 - (i) to end the relationship; or
 - (ii) to change the nature of the relationship; or
 - (iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.

⁹⁸ Section 304B(7) reads that 'In this section—domestic violence see the Domestic and Family Violence Protection Act 2012, section 8'. Note: the new section 304B was inserted by the [Criminal Code \(Abusive Domestic Relationship Defence and Another Matter\) Amendment Act 2010](#) (Qld).

Additionally, new subsection (7) works to reverse the onus of proof in relation to the defence of provocation. It states that ‘On a charge of murder it is for the defence to prove that the person charged, is under this section, liable to be convicted of manslaughter only’.

New South Wales

In New South Wales, the partial defence of excessive self-defence was reintroduced in 2001. The partial defence of provocation was recently reviewed and retained, but with its operation restricted to circumstances in which a person kills in response to ‘extreme provocation’.

New South Wales reintroduced the partial defence of excessive self-defence through the *Crimes Amendment (Self-Defence) Act 2001*.⁹⁹ The partial defence of excessive self-defence is now set out in section 421 of the *Crimes Act 1900* (NSW) as follows:

421 Self-defence—excessive force that inflicts death

- (1) This section applies if:
 - (a) the person uses force that involves the infliction of death, and
 - (b) the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person believes the conduct is necessary:
 - (c) to defend himself or herself or another person, or
 - (d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.
- (2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

In regard to the defence of provocation, the New South Wales Legislative Council Select Committee on the Partial Defence of Provocation was established in June 2012. The Committee released its final report in April 2013 and recommended retaining a restricted form of the partial defence of provocation.¹⁰⁰

In March 2014, the leader of the Christian Democrats, the Hon. Fred Nile—who had chaired the Committee on the Partial Defence of Provocation—introduced the Crimes Amendment (Provocation) Bill 2014 to the NSW Parliament.¹⁰¹ It passed both houses

⁹⁹ Roth & Blyden (2012) *op. cit.*, p. 34.

¹⁰⁰ New South Wales Legislative Council Select Committee on the Partial Defence of Provocation (2013) [The Partial Defence of Provocation](#), Parliament of New South Wales, pp. xii-xiii. Note: The NSW Government stated in its response to the report that it supported the Committee’s policy position and the ‘intent behind the recommendations’ but that, in some respects, it took a different view as to the best means to achieve the policy intent. In October 2013, the NSW Government released an Exposure Draft of the Crimes Amendment (Provocation) Bill and an accompanying Discussion Paper for public comment. See: G. Smith (NSW Attorney-General & Minister for Justice) (2013), [Government Response to the Report of the Legislative Council Select Committee on the Partial Defence of Provocation](#), Parliament of New South Wales.

¹⁰¹ See: [Crimes Amendment \(Provocation\) Bill 2014](#) (NSW).

in May 2014 and will commence on a day to be proclaimed. The Bill repeals section 23 of the *Crimes Act 1900* (NSW) which provided for the partial defence of provocation, and replaces it with a new section 23 that provides a more limited partial defence of 'extreme provocation'.¹⁰² The Explanatory Memorandum to the Bill states that:

The substituted section provides that an accused acts in response to extreme provocation only if the provocative conduct of the deceased:

- (a) was a serious indictable offence (that is, an offence punishable by imprisonment for life or for 5 years or more), and
- (b) caused the accused to lose self-control (a subjective test), and
- (c) could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased (an objective test).¹⁰³

The Explanatory Memorandum further states that the new section 23 excludes certain conduct from being considered provocative:

The substituted section specifically excludes certain conduct from being provocative conduct (namely, non-violent sexual advances and conduct incited by the accused in order to provide an excuse to use violence against the deceased). It also excludes evidence of self-induced intoxication from being taken into account in determining whether the accused acted in response to extreme provocation. As with the existing section, the substituted section provides that the killing of the deceased need not occur immediately after the provocative conduct.¹⁰⁴

¹⁰² The Explanatory Memorandum to the Bill explains that the existing section 23 'makes the partial defence available if the accused loses self-control because of the words or other conduct of the deceased and that conduct could have caused an ordinary person in the position of the accused to have lost self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased'. See: Explanatory Memorandum, Crimes Amendment (Provocation) Bill 2014 (NSW), p. 2.

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*, p. 3.

Appendix A: Government Reviews of Homicide and Family Violence

This section provides further information on government reviews that have influenced the current Bill including, the Standing Committee of Attorneys-General Model Criminal Code project, the VLRC 2004 report on Defences to Homicide, and the Australian Law Reform Commission (ALRC) review of Family Violence.

Model Criminal Code

In 1990, the Standing Committee of Attorneys-General¹⁰⁵ formed a Committee to develop a national Model Criminal Code for all Australian jurisdictions. In 1992, it published the *Model Criminal Code: Chapters 1 and 2, General Principles of Criminal Responsibility Report*, which recommended a legislative definition of self-defence, as well as a statutory defence for sudden or extraordinary emergency.¹⁰⁶ In particular, the model provisions preferred a two stage test for self-defence where the person believed that the conduct was necessary and that the person's conduct was a reasonable response in the circumstances as perceived by that person.¹⁰⁷

In separate reports in 1998, the Committee also recommended the abolition of provocation as a partial defence to both non-fatal offences against the person¹⁰⁸ and homicide offences,¹⁰⁹ with the consideration of provocation to be confined to the sentencing process. The Committee argued that a gender bias was ingrained in the defence of provocation, and any tweaking to limit the application of provocation in domestic violence situations 'does not redress the injustice as any discrimination against women will probably stem from the very structure of the provocation partial defence'.¹¹⁰

In addition, the Committee considered the issue of excessive self-defence as a replacement partial defence, which could apply where the person believed self-defence was necessary although the belief was unreasonable as to the need for or degree of

¹⁰⁵ The Standing Committee of Attorneys-General (SCAG) became the Standing Council on Law and Justice (SCLJ), and was replaced with the Law, Crime and Community Safety Council (LCCSC) in December 2013; see LCCSC (2014) '[About the Law, Crime and Community Safety Council](#)', LCCSC website.

¹⁰⁶ The MCCOC indicated that the legislative definition would simplify the law, while retaining the subjective and objective elements of the Zecevic test. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (1998) [Model Criminal Code Report: Chapters 1 and 2, General Principles of Criminal Responsibility](#), December, Canberra, SCAG, pp. 68, 71.

¹⁰⁷ *ibid.*, p. 70. The circumstances where self-defence may be raised are expressly listed in the draft provision.

¹⁰⁸ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (1998) [Model Criminal Code Report: Chapter 5, Non Fatal Offences Against the Person](#), September, Canberra, SCAG, p. 141.

¹⁰⁹ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (1998) [Model Criminal Code Discussion Paper: Chapter 5, Fatal Offences Against the Person](#), June, Canberra, SCAG, pp. 103, 105.

¹¹⁰ *ibid.*, p. 91.

force. It argued excessive self-defence should not be re-introduced—either as a defence or as an alternative offence of ‘culpable homicide’ as recommended by the Victorian Law Reform Commission (VLRC) at the time.¹¹¹ In particular, the Committee noted that the concept of excessive self-defence was inherently vague and there were no satisfactory tests for its application that could justify codification.¹¹²

Victorian Law Reform Commission: Defences to Homicide

The VLRC was given terms of reference by Attorney-General Hulls in 2001 and published a series of issues and discussion papers before presenting its final report in November 2004.¹¹³ The final report *Defences to Homicide* consisted of 56 recommendations, including the abolition of provocation as a partial defence; the codification of self-defence, duress and sudden or extraordinary emergency as defences to homicide in the Crimes Act; the inclusion of a separate provision on evidence relating to a person acting in self-defence in circumstances of family violence; and, the re-introduction of excessive self-defence as a partial defence.¹¹⁴

Excessive Self-Defence

In putting forward these recommendations, the review preferred an approach that reduced the use of partial defences to homicide and instead addressed differing levels of culpability at the sentencing stage. The exception to this approach was the re-introduction of excessive self-defence as a partial defence: ‘In the Commission’s view, people who kill another person, genuinely believing their life is in danger, but who are unable to demonstrate the objective reasonableness of their actions, are deserving of a partial defence’.¹¹⁵ The difference between the abolished partial defence of provocation and excessive self-defence was enough for the VLRC to consider that a person acting in excessive self-defence should be convicted of a crime that reflects that lower culpability, as opposed to merely receiving a mitigated sentence.¹¹⁶

Gender Bias

The VLRC report considered the social context of defences to homicide in detail, noting that provocation and self-defence, in particular, can operate in a gender biased way. The VLRC put forward evidence that men who killed their female partners often argued provocation where their partner threatened to leave them or start a new relationship, while the smaller proportion of women who killed their male partners were more likely to raise the provocation defence in response to serious sexual and physical assaults by the male partner.¹¹⁷ Further, they found that women often faced barriers to establishing defences because the ongoing threat of family violence and their often physically weaker stature meant they armed themselves and waited to take

¹¹¹ *ibid.*, p. 113.

¹¹² *ibid.*

¹¹³ Victorian Law Reform Commission (2014) ‘[Defences to Homicide](#)’, VLRC website.

¹¹⁴ Victorian Law Reform Commission (2014) ‘[Defences to Homicide – Recommendations](#)’, VLRC website.

¹¹⁵ Victorian Law Reform Commission (2004) *op. cit.*, Appendix 4, p. xxii.

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*, p. xxv.

action until their partner's defences were down, and thus provocation was not an available partial defence and the reasonableness of their actions in self-defence was questioned. The VLRC stated:

Women who kill abusive partners should not be automatically entitled to an acquittal on the basis of self-defence. However, we believe it is important for defences to take proper account of men's and women's experiences of violence, and the different circumstances in which men and women may genuinely believe they need to act to protect themselves from serious injury.¹¹⁸

The VLRC argued that excessive self-defence was a more appropriate 'halfway house' for women who kill in response to family violence, where they cannot make out self-defence, than the partial defences of provocation or diminished responsibility.¹¹⁹ They also noted that women often plead guilty to manslaughter due to a reluctance to run the risk of a conviction of murder, and the availability of excessive self-defence as a partial defence to murder may give them more confidence in going to trial for self-defence.¹²⁰

Draft Bill

The report put forward a draft Bill which fed directly in to the Crimes (Homicide) Act.¹²¹ Self-defence was codified in the VLRC's draft Bill, modelled on the Model Criminal Code provisions; it was not separated for murder and manslaughter offences, as is currently the case.¹²² The draft Bill self-defence provisions included a subsection that replaced the common law consideration of the *immediacy* of the threatened harm being defended against, with a need for the harm to be perceived as *inevitable* by the accused (proposed section 322I).

Family violence provisions were included as evidentiary provisions so that a history of family violence could be relevant for self-defence or the new defence of duress (proposed section 322P). The VLRC argued against including a specific defence or an alternative offence for persons who kill in response to family violence, preferring an approach that accommodated women's experiences of violence into reformed self-defence provisions.¹²³

The draft Bill also included a partial defence to homicide which focussed on excessive force, whereby if a person believed self-defence was necessary but their use of force was not a reasonable response they could be found guilty of manslaughter rather than murder (proposed section 322J).¹²⁴ Instead, the 2005 Act introduced the alternative offence of defensive homicide to cover such circumstances.

¹¹⁸ *ibid.*, p. xxvi.

¹¹⁹ *ibid.*, p. 102.

¹²⁰ *ibid.*

¹²¹ *ibid.*, pp. 314–335.

¹²² *ibid.*, p. 327.

¹²³ *ibid.*, p. 68.

¹²⁴ This reflects the common law position in *Viro v The Queen* (1978) 141 CLR 88, 146–147.

Australian Law Reform Commission: Family Violence

In October 2010, the ALRC published a report on a national legal response to family violence. In chapter 14, the report considered the extent to which the criminal law should recognise family violence as relevant to a defence to homicide and whether current homicide defences for victims in family relationships are adequate.¹²⁵ In particular, family violence considerations for self-defence and the ability to lead evidence about family violence in the context of a defence to homicide, as set out in section 9AH of the Victorian Crimes Act, were recommended as ‘an instructive model’.¹²⁶ However, the report also noted concern about the ‘unintended consequences’ of defensive homicide provisions in Victoria and their use by aggressors of family violence.¹²⁷

Recognising Family Violence in Homicide Provisions

The report supported recognising circumstances of family violence in homicide defences, but noted that there was not a consensus among commentators as to whether it should be incorporated into self-defence provisions or whether a specific family violence defence should be created.¹²⁸ Arguments against a separate defence included that self-defence in circumstances of family violence should not be considered atypical and that incorporating recognition into self-defence provisions supported the notion that such killings were “‘rational or reasonable” responses to serious threats, rather than products of the “‘extraordinary psychology of battered women””.¹²⁹ The ALRC considered that existing defences were capable of accommodating the diverse experiences of family violence victims and preferred this approach, going so far as to recommend that state and territory governments consider extending family violence considerations to defences to non-fatal offences against the person.¹³⁰

¹²⁵ Australian Law Reform Commission (2010) op. cit., pp. 621–663.

¹²⁶ *ibid.*, pp. 643, 654.

¹²⁷ *ibid.*, pp. 645, 648; For example, see *R v Middendorp* [2010] VSC 202.

¹²⁸ *ibid.*, p. 645.

¹²⁹ *ibid.*, p. 646.

¹³⁰ *ibid.*, pp. 649-650.

Appendix B: Defensive Homicide Convictions

November 2005 – August 2013

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
<i>R v Smith (Michael Paul)</i> [2008] VSC 87	Offender: male, 34 Victim: male, 34	None, attended same gathering in St Kilda.	Knife-stabbing (5 stab wounds)	Conflict at gathering. Victim left and returned in aggressive state. Fight ensued and offender stabbed victim. Victim was also using knife against offender.	Offender intoxicated and drug affected at time of offence. Offender had substance abuse problems for many years. Number of prior convictions for violence.	Plea	7 years imprisonment and non-parole of 5 years. Note: sentence reduction for guilty plea not specified.
<i>R v Edwards</i> [2008] VSC 297 <i>DPP v Edwards</i> [2009] VSCA 232	Offender: male, 43 Victim: male (age not specified)	Partner of victim was former partner of offender. Offender and victim's partner share a son.	Table leg, bottle (and other implements) used to beat victim and repeated kicking.	Victim initially threatened to hit offender with table leg. Note: offender's attack continued after victim unconscious and occurred in presence of offender's son and victim's partner.	Trial Judge described offender's criminal history as 'shocking' – 23 of 28 years of his adult life spent in custody.	Plea	9.5 years imprisonment and non-parole of 7.5 years [but for guilty plea, 10 years and non-parole of 8].
<i>R v Giammona</i> [2008] VSC 376	Offender: male, 31 Victim: male, 29	Both in custody in the Scarborough North Unit, Port Phillip Prison.	Makeshift knife-stabbing (16 stab wounds)	Offender entered victim's cell, fight ensued (offender said at victim's instigation) and offender stabbed victim.	Significant criminal history (113 prior convictions, only 1 for unlawful assault).	Plea	8 years imprisonment and non-parole of 6 years [but for guilty plea, 9 years imprisonment and non-parole of 7 years].
<i>R v Smith (Callum-Zane)</i> [2008] VSC 617	Offender: male, 19 Victim: male 31	Offender and victim had been friends for a few weeks.	Knife-stabbing (50–60 stab wounds)	Fight between victim and offender. Offender said victim threatened him and said he was gay.	Offender had deteriorating mental state due to drug use. Was diagnosed with drug induced psychosis (2 prior offences relating to drug use)	Plea	7 years imprisonment and non-parole of 4.5 years (sentenced as youthful offender). Note: sentence reduction for guilty plea not specified.
<i>R v Taiba</i> [2008] VSC 589	Offender: male, 32 Victim: male (age not specified)	Acquaintances of 20 years. Offender was friends with victim's brothers.	Knife-stabbing (3 stab wounds to chest)	Offender owed victim \$2000 for the drug ice. Offender was armed with knife and tried to steal ice from victim. Victim	Ward of State from age 10–11. Addicted to ice, large number of prior convictions	Plea	9 years imprisonment and non-parole of 7 years [but for guilty plea, 11 years imprisonment and non-

	specified)			woke during robbery. Offender thought victim was getting gun (knew victim owned semi-automatic weapon) and stabbed victim.	(91) including intentionally causing injury and recklessly causing injury.		parole of 9 years].
<i>R v Baxter</i> [2009] VSC 178	Offender: male, 25 Victim: male (age not specified)	No relationship (offender residing in victim's previous residence)	Knife-stabbing (11 stab wounds).	Fight between offender and victim (unarmed). Victim confronted offender and threw first punch, offender stabbed and punched victim. Fight continued.	Offender had been using drugs prior to offence (had used drugs since 12 years old). Troubled upbringing (father convicted of double murder, subjected to and witnessed violence, placed in state care). Had a number of prior convictions (3 for violence).	Plea	8.5 years imprisonment and non-parole of 5.6 years [but for guilty plea, 10 years imprisonment and non-parole of 7 years].
<i>R v Trezise</i> [2009] VSC 520	Offender: male, 21 Victim: male (age not specified)	Friends through a mutual friend of the offender's father.	Knife-stabbing (36 stab wounds to almost all parts of body)	Several inconsistent versions of events provided by offender. Sentencing judge noted offender should be sentenced on basis that victim did not do anything of substance that merited attack, but that in offender's alcohol fuelled state he had reasoned that he was under threat.	Highly intoxicated at time of offence. Very difficult upbringing, very low IQ (76). Diagnosed as suffering chronic adjustment disorder with mixed disturbance of emotions and conduct.	Plea	8 years imprisonment and non-parole of 4 years [but for guilty plea, 10 years and non-parole of 6].
<i>R v Spark</i> [2009] VSC 374	Offender: male, 39 Victim: male (likely in 60s)	Victim was uncle of offender	Baseball bat used to beat victim, also punching.	Altercation between victim and offender. Victim threatened to treat offender's children in same way he had treated offender (this was a reference to fact the victim had sexually abused offender when he was aged 8–14).	Offender had been subjected to sexual abused by victim during his childhood. Offender had 5 prior convictions (1 for unlawful assault and 1 for breaching an intervention order, others relate to driving).	Plea	7 years imprisonment and non-parole of 4 years and 9 months [but for guilty plea, 9 years and non-parole of 7].
<i>R v Wilson</i> [2009] VSC 431	Offender: male, 26 Victim: male, 32	Victim known to offender. Victim lived in same boarding house as a friend of the offender (St Kilda).	Knife-stabbing (7 stab wounds)	Victim struck offender earlier in day causing offender to bleed profusely. Offender returned to boarding house later in day to confront the victim. Victim produced knife which offender wrestled from victim and subsequently stabbed victim repeatedly in the course of a wrestle.	Offender was highly intoxicated at time of offence. Suffered severe drug and alcohol addiction and diagnosed as paranoid schizophrenic. Number of prior convictions and at the time of the offence was on, or had just	Plea	10 years imprisonment and non-parole of 7 years [but for guilty plea, 12 years imprisonment and non-parole of 10 years]. Appeal on sentence dismissed. <i>Wilson v The Queen</i> [2011] VSCA 12

					completed, a Community Based Order.		
<i>R v Parr</i> [2009] VSC 468	Offender: male, 29 Victim: male (age not specified)	Victim known to offender, lived in same boarding house (Frankston).	Knife-stabbing (20 stab wounds)	Fight ensued between offender and victim. Victim was stabbed with kitchen knife. No account given by offender to police but made admissions to others that he had stabbed following attack from victim.	History of serious drug use (chronic poly-drug user), large number of prior convictions (including for violent offences).	Verdict	10 years imprisonment and non-parole of 8 years.
<i>R v Croxford/ Doubleday</i> [2009] VSC 516	Offender: (Croxford) male, 22 (Co-offender male, mid-30s) Victim: male, early 20s	Offenders loosely knew victim (from the same regional community).	Garden stake used to beat victim	Victim produced knife and belt (as weapon) in response to comment from offender. Croxford reacted and fight ensued between victim and Croxford and Doubleday attempted to break up fight. Croxford and Doubleday armed themselves with garden stakes as weapons. Croxford, Doubleday and victim fought. Victim approached Croxford and Doubleday with knife, Croxford struck victim with garden stake, Doubleday subsequently struck victim again and killed him.	Offender had addiction to cannabis and was affected by alcohol at time of offence. Prior convictions dating back to when he was 16 (none of which involved violent offending).	Verdict	9 years imprisonment and non-parole of 6 years. (co-offender convicted of manslaughter).
<i>R v Evans</i> [2009] VSC 593	Offender: male, 25 Victim: male, 37	Victim known to offender, lived next door in same boarding house (St. Kilda)	Knife-stabbing (single stab injury to chest)	Confrontation between victim and offender in relation to money and stolen goods. Victim punched offender in face, offender retaliated. Fight ensued and offender stabbed victim and punched him.	Significant number of prior convictions, including a number that relate to causing injury. Has a history of serious drug and alcohol abuse.	Plea	10 years imprisonment and non-parole of 7 years [but for guilty plea, 11.5 years imprisonment and non-parole of 8.5 years].
<i>R v Middendorp</i> [2010] VSC 202.	Offender: male, 26 Victim: female, 22	Offender and victim were in relationship and had lived together (intermittently) since late 2007	Knife-stabbing (4 stab wounds to back)	Victim arrived at the house she shared with offender in Brunswick with a male companion. Offender was armed with a knife and chased male companion away. Offender said that victim came at him with knife and, in the struggle that ensued, offender stabbed the victim over her shoulder, in the back 4 times	Offender was affected by alcohol at time of offence. Troubled upbringing with history of drug abuse and a number of prior convictions. Evidence was led at trial as to the violent nature of the relationship between the victim and the offender. At time of victim's death the offender was under a Family Violence Order (requiring	Verdict	12 years imprisonment and non-parole period of 8 years [624 days already served in pre-sentence detention]. Appeal against conviction and sentence dismissed. <i>Middendorp v The Queen</i> [2012] VSCA 47

					offender not to assault, harass, threaten or intimidate victim).		
<i>R v Black</i> [2011] VSC 152	Offender: female, 53 Victim: male, 56	Offender was the de-facto partner of the victim.	Knife-stabbing (2 stab wounds to the chest)	Offender and victim had an argument and victim was verbally harassing offender and acting in a physically intimidating manner. Offender grabbed knife and stabbed victim. Offender had been subject to long term family violence by victim.	Moderate depression, mild anxiety. No prior convictions.	Plea	9 years imprisonment and non-parole of 6 years [but for guilty plea, 11 years and non-parole of 8]. Appeal against sentence dismissed. <i>Black v The Queen</i> [2012] VSCA 75
<i>R v Ghazlan</i> [2011] VSC 178	Offender: male, 58 Victim: male, over 55 (age not specified)	Offender and victim lived in the same building.	Knife – repeated stabbing	Offender was tripped by victim causing offender to stumble (but not fall). Offender immediately produced knife and stabbed victim repeatedly.	Long term psychiatric illness (paranoid schizophrenia). Past criminal history of violent crimes (2 prior convictions).	Plea	10.5 years imprisonment and non-parole of 7 years and 6 months [but for guilty plea, 12 years imprisonment and non-parole of 9 years and 6 months].
<i>R v Creamer</i> [2011] VSC 196	Offender: female, 53 Victim: male, 52	Offender was the wife of the victim.	South African weapon and knife (repeated beating and stab wound to the abdomen)	Victim repeatedly pressured (but did not force) offender to engage in unwanted sex acts and had previously hit offender. Trial judge did not accept offender's account of the incident. Trial judge found that there was a struggle between the offender and victim, and that offender beat and stabbed victim.	Depression. No prior convictions.	Verdict	11 years imprisonment and non-parole of 7 years. Appeal against sentence dismissed. <i>Creamer v The Queen</i> [2012] VSCA 182
<i>R v Dennis James Martin</i> [2011] VSC 217	Offender: male, 29 Victim: male, 79	Victim and offender became friends (for 6 months).	Knife-stabbing (7 stab wounds), repeated punching and kicking.	The offender and victim watched TV and drank for some hours. The victim allegedly made repeated sexual advances on offender and tried to rape offender. Offender proceeded to beat and stab victim.	Intellectual disability and alcohol intoxication (and dependency). 13 prior convictions, including for assault.	Plea	8 years imprisonment and non-parole of 5 years [but for guilty plea, 10 years imprisonment and non-parole of 7 years].
<i>R v Svetina</i> [2011] VSC 392	Offender: male, 52 Victim: male, 74	Victim was the father of offender.	Tomahawk (10 wounds)	Victim hated offender and had told others that if offender came to his home he would cut him with a tomahawk. Offender went to victim's home, struggled with victim (who carried a tomahawk) and hit victim with the tomahawk.	Depressive mood disorder. No prior convictions.	Verdict	11 years imprisonment and non-parole of 7 years.

<i>R v Scott Roy Jewell</i> [2011] VSC 483	Offender: male, 22 Victim: male (age not specified)	Victim and offender attended the same party.	Knife-stabbing (2 stab wounds)	Fight between offender, victim, victim's father and others occurred after the party due to property damage. Offender believed victim hit offender's father and stabbed the victim (even though offender's father said that the victim had not hit him). Victim was unarmed.	None.	Plea	8 years imprisonment and non-parole of 5 years [but for guilty plea, 10 years imprisonment and non-parole of 7 years].
<i>R v Monks</i> [2011] VSC 626	Offender: male, 22 Victim: male, 42	Victim was the uncle of the offender.	Tomahawk – 2 blows to the head	Victim had been violent towards offender on numerous occasions since offender was a child. Victim initiated the assault that ended in his death, resulting in a fight involving the victim (who had a hammer), the victim's brother and the offender, all of whom had been drinking alcohol.	Family violence, borderline personality disorder, PTSD, depression, polysubstance dependence. Prior convictions including burglary, theft and false imprisonment.	Plea	8 years imprisonment and non-parole period of 5 years [but for guilty plea, 9 years imprisonment and non-parole of 6 years].
<i>R v Edwards</i> [2012] VSC 138	Offender: female, 44 Victim: male (age not specified)	Victim was the husband of the offender.	Knife – multiple stabbing (around 30 injuries)	Offender alleged that the victim attacked offender and threatened to inflict serious harm on offender (including burning and cutting offender's eyes/ears). Offender alleged that the victim came at offender with knife. Offender stabbed victim multiple times killing him. Trial judge had serious reservations about the accuracy of the offender's account. Long history of domestic violence towards offender by victim. At the time of the victim's death, an intervention order was in place protecting the offender from the victim.	Significant history of psychiatric illness (diagnosed as bipolar and manic depressive). 1 prior conviction – offender stabbed victim with corkscrew/knife.	Plea	7 years imprisonment and non-parole of 4 years, 9 months [but for guilty plea, 9 years and non-parole of 6 years].
<i>R v Talatonu</i> [2012] VSC 270	Offender: male, 50 Victim: male, 33	The offender was friends with/known to the victim.	Knife – multiple stab wounds	Victim initiated argument by making remarks to offender, smashing bottles over offender's car and brandishing broken beer bottle in direction of the offender. Victim then punched offender in face three times. Victim	None	Plea	8 years imprisonment and non-parole of 5 years, 3 months [but for guilty plea, 10 years and non-parole of 6 years and 6 months]. Note: sentence also

				then started to walk home and offender stabbed victim.			reduced due to forced isolation of prisoner as only Samoan speaking prisoner.
<i>DPP v McEwan, Robb and Dambitis</i> (Sentence) [2012] VSC 417	Offender (Dambitis): male, 40 Victim: male, 24	No previous relationship	Repeated beating with weapons (offender with lump of wood) and fists	Victim had machete and, with a friend, was intimidating a group of teenagers. Offender and 2 co-offenders intervened. There were various altercations between victim and offenders, and victim and innocent bystanders. Victim also caused property damage with machete. One of the co-offenders disarmed victim, and offender and co-offenders assaulted victim repeatedly around body and head.	Prior convictions in Latvia (not taken into account). Previous convictions in Victoria including assault. Severe depression, PTSD, suicide attempts. Offending in this case occurred 2 days after release from prison.	Verdict	11 years imprisonment and non-parole of 8 years.
<i>R v Vazquez</i> [2012] VSC 593	Offender: male, approx 25 Victim: male (age not specified)	Offender and victim had been friends, but had fallen out over a drug debt.	Shotgun – one shot to the head	Victim came to offender's father's office to discuss damage to the victim's car. Argument between victim and offender's father. Offender was waiting in next room, where the sawn-off shotgun had been hidden. Offender heard raised voices, entered the room and shot victim. Victim was unarmed.	PTSD resulting from kidnapping and torture in 2009 (note: this did not reduce his moral culpability to a significant degree given the planning involved in the offence). No prior convictions.	Plea	10 years imprisonment and non-parole of 7 years [but for guilty plea, 12 years and non-parole of 9 (note: sentence also reduced due to serious liver disease)].
<i>R v [unknown]</i> Reasons not published	Offender: male, 14 Victim: male, 37	<i>Unknown</i>	Pole or machete	Fist fight between offender's father and victim outside home. Offender intervened and struck victim repeatedly in the head with [a weapon].	Offender 14 years old at time of offence.	Plea	3 years detention in youth justice centre
<i>DPP v Chen</i> [2013] VSC 296	Offender: male, 28 Victim: male, 27	Offender bought a car from the victim one week before his death.	Knife (15 stab wounds)	Victim intimidated offender into buying car from him. A week later, offender approached victim at train station and stabbed him repeatedly.	Cognitive impairment caused by previous brain injury, which was linked to offending. No prior convictions. No remorse but unlikely to reoffend.	Verdict	8 years imprisonment (and non parole period of 5 years)
<i>R v Moustafa and Kassab</i>	Offender (Moustafa):	Offender (Moustafa) was the	Revolver	Moustafa believed Mohamad (who was his cousin) had stolen from him.	Kassab: previously pleaded guilty to possessing	Verdict	8.5 years imprisonment and non-parole period of 5

[2013] VSC 379	male, 20 Offender (Kassab): male, 25 Victim (Taha): male, 34	cousin of the victim's friend (Mohamad).		Victim owned a panelbeaters business and was friends with Mohamad. Moustafa and Kassab confronted Mohamad at the victim's shop. Mohamad and the victim were both shot in a subsequent gunfight. Offenders were acquitted of Mohamad's murder.	prohibited weapon without approval and possessing dangerous article, 'very good' prospects for rehabilitation Moustafa: 'significant criminal history' (e.g. conviction for recklessly causing serious injury, various driving and drug offences)		years and 6 months
Total cases:	Total offender/victim by gender:	Relationships – family v non family:	Weapon type:	NA	Total number of offenders with prior convictions:	Total:	Average sentence:
28	Offenders M: 25, F: 3 Victim M: 26, F: 1	Family – 7 <i>Black</i> : victim was male de facto <i>Creamer</i> : victim was husband <i>Svetina</i> : victim was father <i>Monks</i> : victim was uncle <i>Edwards</i> : victim was husband <i>Spark</i> : victim was uncle <i>Middendorp</i> : victim was girlfriend Non-family – 21	Knife – 17 Tomahawk – 2 Other – 9		19 (not including case involving 13 year old offender)	Plea: 19 Verdict: 9	Head sentence: 8.6 years Non-parole: 5.9 years

Source: A combination of Appendix 2 and 3 in Department of Justice (2013) op. cit., pp. 64-72.

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