

# **IS IMMINENCE STILL NECESSARY? CURRENT APPROACHES TO IMMINENCE IN THE LAWS GOVERNING SELF- DEFENCE IN AUSTRALIA**

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## **ABSTRACT**

Imminence, usually understood to require a close temporal connection between an actual harm or threat of harm and a defensive response, has traditionally served as a key consideration in self-defence. Previously functioning as a rule of law, in more recent times imminence has served as an evidentiary matter going to the reasonableness and necessity of an accused's conduct. However, during the past two decades imminence has proven problematic in cases involving victims of chronic family violence who killed their abusers in non-confrontational circumstances and sought to plead self-defence. A number of jurisdictions in Australia responded to this by developing distinctive approaches to imminence. Five key approaches are discernible, with the most radical reform (in Queensland) seemingly substituting a history of domestic violence for a requirement of imminence. Other jurisdictions, including Victoria and Western Australia, have considerably relaxed imminence considerations. It now appears that while imminence previously may have operated as an independent temporal measure, its function as a proxy for necessity is now clear – at least in cases involving victims of family violence who kill their abusers. The absence of effective State protection for some of these individuals may justify an exception to the general rule that only the State can use force to protect in non-imminent circumstances. Consequently, for victims of family violence who kill their abusers, necessity rather than imminence may be the key consideration.

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## I INTRODUCTION

Tension exists in self-defence law between the need to safeguard the defence from unmeritorious defendants while ensuring its availability to deserving defendants. Historically, a key safeguard has been the requirement of imminence.

In self-defence, imminence refers to the period of time between an actual or threatened harm faced by the accused and the responsive action taken.<sup>1</sup> The longer this time period, it has been argued, the greater the possibility that responsive force could have been avoided through retreat or seeking assistance from the State.<sup>2</sup> Just how closely a defensive response has to follow an attack has been debated in Australia and elsewhere. Although imminence is ‘a somewhat elastic concept’,<sup>3</sup> a threat has traditionally been considered imminent if it is ‘about to occur’.<sup>4</sup> Some suggest that the terms ‘imminent’ and ‘immediate’ are distinct, with ‘immediate’ implying a considerably more urgent threat.<sup>5</sup> However, others use the terms interchangeably, seeing little significant difference between them.<sup>6</sup> The distinction is of little import for the matters discussed in this article because, while differing in the precise degree of temporal proximity required, these understandings of imminence have both presented considerable difficulty for those who claim to have acted in self-defence in non-confrontational circumstances.

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<sup>1</sup> Fiona Leverick, *Killing in self defence* (Oxford University Press, 2006) 87.

<sup>2</sup> Onder Bakircioglu, ‘The contours of the right to self-defence: Is the requirement of imminence merely a translator for the concept of necessity?’ (2008) 72 *Journal of Criminal Law* 131, 133.

<sup>3</sup> *Lujan v Defenders of Wildlife* (1992) 504 US 555, 564 n 2 per Scalia J.

<sup>4</sup> Kimberly K Ferzan, ‘Defending imminence: From battered women to Iraq’ (2004) 46 *Arizona Law Review* 213, 223.

<sup>5</sup> Law Reform Commission of Ireland, *Report on defences in criminal law*, Report 68 (2009) 46.

<sup>6</sup> *Collingburn* (1985) A Crim R 294. Both McGarvie J (298) and Ormiston J (299, 303) accepted that on the facts of the case a judicial direction in relation to ‘immediate’ danger was not inappropriate. Ormiston J, however, did not express a ‘final opinion’ on the issue of whether immediate and imminent were interchangeable terms (303); Whitley Kaufman, ‘Self-defence, imminence, and the battered woman’ (2007) 10 *New Criminal Law Review* 342, 345.

Non-confrontational homicides involve a defendant killing a person in circumstances where the killing was not prompted by violence either present or within a short period preceding the killing.<sup>7</sup> These cases include circumstances where the victim was watching television,<sup>8</sup> asleep,<sup>9</sup> sedated<sup>10</sup> or otherwise incapacitated.<sup>11</sup> Homicides that occur in non-confrontational situations are likely to involve victims of family violence who kill their abusers.<sup>12</sup> These defendants (mainly women) often kill in these circumstances due to the sheer danger in confronting a physically larger and stronger abuser while an assault is occurring. The implications of this with respect to imminence are obvious. If imminence requires a close temporal connection, then those who kill in such circumstances may appear to have acted unreasonably because of the apparent lack of urgency. Consequently, they may be deprived of the opportunity to plead self-defence.

Because non-confrontational cases lie outside the conventional self-defence paradigm of defending oneself against an imminent threat, this area of the law recently has attracted much analysis and criticism. The difficulties confronting victims of family violence who wish to claim self-defence have been repeatedly acknowledged.<sup>13</sup> Nevertheless, there has been some hesitation about

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<sup>7</sup> Victoria F Nourse, 'Self-defense and subjectivity' (2001) 68(4) *University of Chicago Law Review* 1235, 1250.

<sup>8</sup> *Collingburn* (1985) A Crim R 294.

<sup>9</sup> *R v Secretary* (1996) 107 NTR 1.

<sup>10</sup> *Osland v R* (1998) 159 ALR 170.

<sup>11</sup> See Holly Maguigan, 'Battered women and self-defense: Myths and misconceptions in current reform proposals' (1991) 140(2) *University of Pennsylvania Law Review* 379, 382.

<sup>12</sup> See Nourse, above n 7.

<sup>13</sup> See Stella Tarrant, 'Something is pushing them to the side of their own lives: A feminist critique of law and laws' (1990) 20(3) *University of Western Australia Law Review* 573, 604-605; Julia Tolmie, 'Provocation or self-defence for battered women who kill' in Stanley Yeo (ed), *Partial Excuses to Murder* (1990) 71; Nan Seuffert, 'Battered women and self-defence' (1997) 17 *New Zealand University Law Review* 292, 299-300; Rebecca Bradfield, 'Is near enough good enough? Why isn't self-defence appropriate for the battered

relaxing imminence in self-defence law to accommodate these defendants. There is fear that the relaxation of imminence may allow undeserving defendants – such as those who act unreasonably or who are motivated by malice or revenge and act under the pretence of necessity<sup>14</sup> - to utilise the defence successfully.<sup>15</sup> Consequently, there is some support for maintaining imminence as a temporal measure in self-defence.<sup>16</sup> However, other approaches have emerged in Australia and elsewhere in recent years. These vary from modifying imminence (by evolution of the common law or statutory reform),<sup>17</sup> replacing it by the notion of ‘inevitability’<sup>18</sup> and, most radically, creating a partial defence to murder that appears to make considerations of imminence otiose.<sup>19</sup>

This article will analyse the evolution and role of imminence in self-defence law and its relationship to necessity. The focus will be primarily on the situation of victims of family violence who kill their abusers because these cases frequently involve a divergence between imminence and necessity. The analysis begins by briefly reviewing the historical evolution of imminence, thereby confirming that

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woman?’ (1998) 5(1) *Psychiatry, Psychology and Law* 71; Julie Stubbs and Julia Tolmie, ‘Falling short of the challenge? A comparative assessment of the Australian use of expert evidence on the Battered Woman Syndrome’ (1999) 23 *Melbourne University Law Review* 709; Law Reform Commission of the Northern Territory, *Self-Defence and Provocation* (2000); Law Reform Commission of Western Australia, *Review of the Law of Homicide. Final Report* (2007); Victorian Law Reform Commission, *Defences To Homicide. Final Report* (2004); New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73 (2001); Law Commission of England and Wales, *Partial Defences to Murder. Final Report* (2004).

<sup>14</sup> See *R v McKay* [1957] VR 560, 562.

<sup>15</sup> Bakircioglu, above n 2, 133.

<sup>16</sup> See, eg, Leverick, above n 1.

<sup>17</sup> Statutory reforms: Victoria: *Crimes Act* 1958 ss 9AC-9AH; Western Australia: *Criminal Code Act Compilation Act* (1913) s 248(4); Queensland: *Criminal Code (Abusive Domestic Relationship and Another Matter) Amendment Act 2010* (Qld) s 3. Common law: *R v MacDonald* (Unreported, Supreme Court of Victoria, Nettle J, 1 March 2006).

<sup>18</sup> See the recommendations of the New Zealand Law Commission, above n 13.

<sup>19</sup> *Criminal Code (Abusive Domestic Relationship and Another Matter) Amendment Act 2010* (Qld) s 3.

imminence has traditionally required a close temporal relationship between a harm or threat of harm and a defensive response. The subsequent outline of contemporary approaches to imminence in the law of self-defence suggests that it continues to function in this way for most defendants. However, in relation to victims of family violence who kill their abusers, developments at common law and through statutory reform have relaxed considerations of imminence and focused on its underlying significance – necessity. An examination of the relationship between imminence and necessity in relation to victims of family violence suggests that the contemporary trend to subsume imminence under necessity in these cases is an appropriate development, but may prove problematic if extended to other abusive relationships and dangerous environments.

## II THE HISTORICAL BACKGROUND

Historically, the criminal law has regulated the extent of force that can be exercised in self-defence through outlining conduct and situations to which a person is legally permitted to respond with force or a threat of force. A right to physical security has become entrenched, with legal recognition of an individual's primary right of self-preservation.<sup>20</sup> Indeed, most people believe an individual's right to self-defence to be morally unquestionable in appropriate circumstances.<sup>21</sup> However, the legal regulation of self-defence has changed significantly from its origins at common law.

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<sup>20</sup> A.J. Ashworth, 'Self-defence and the right to life' (1975) 34(2) *Cambridge Law Journal* 282, 282.

<sup>21</sup> *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 675 per Deane J: 'The defence of self-defence is embedded deeply in ordinary standards of what is fair and just. It sounds as readily in the voice of the schoolchild who protests that he or she was only defending himself or herself from the attack of another child as it does in that of the sovereign state which claims that it was but protecting its citizens or its territory against the aggression of another state.'

### A *The Origins of Self-defence*

Self-defence is one of the most established criminal defences,<sup>22</sup> traced back in English law to at least the thirteenth century.<sup>23</sup> The modern form of self-defence originated from two concepts, the excuse of *se defendendo* and the justification of felony prevention.<sup>24</sup>

*Se defendendo* operated as an excuse to homicide, with some fault attributed to the accused and his or her property liable to be forfeited to the Crown. An accused who succeeded in a claim of *se defendendo* would still be liable to capital punishment unless the monarch's pardon was obtained.<sup>25</sup> By the seventeenth century, the granting of pardons had become routine and the forfeiture of goods obsolete. This defence required that a killing in self-defence occur in response to a direct, urgent threat to life with no possibility of retreat, in the context of a 'chance medley' situation.<sup>26</sup> Consequently, by implication, imminence of threat was critical for this defence.<sup>27</sup> In contrast, the law governing the defence of prevention of felony only required that the action was necessary to prevent a felony or capture a felon, with a full acquittal resulting from a successful plea. There was no requirement of either imminent danger to life or retreat.

Over time, the distinction between the two defences blurred. The practical distinction between excusable and justifiable homicide was finally removed in 1828<sup>28</sup> and Sir James Fitzjames Stephen observed in 1883 that these distinctions no longer had any consequence in

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<sup>22</sup> Leverick, above n 1, 1.

<sup>23</sup> Robert de Herthale (1203) in B Brown, 'Self-defence in homicide from strict liability to complete exculpation' (1958) *Criminal Law Review* 583, 584.

<sup>24</sup> Richard Rosen, 'On self-defense, imminence, and women who kill their batterers' (1992-1993) 71 *North Carolina Law Review* 371, 382.

<sup>25</sup> R.D. Yadav, *Law of crime and self-defence* (Mittal Publications, 1993) 3.

<sup>26</sup> Rosen, above n 24, 382.

<sup>27</sup> *Ibid.*

<sup>28</sup> The forfeiture of goods had fallen into disuse but was not formally abolished until 1828: Statute 9 Geo. IV, c.31, §10.

English law.<sup>29</sup> The unified self-defence doctrine that emerged combined the strict necessity requirements of *se defendendo* with the broadened application and full acquittal elements of felony prevention.<sup>30</sup> The right to self-defence developed slowly at common law and, as Joseph Beale noted, ‘is a doctrine of modern rather than medieval law’.<sup>31</sup>

While these two defences were merging, three rules of law evolved and underpinned self-defence at common law: proportionality, retreat, and imminence.<sup>32</sup> Of these traditional elements of self-defence, none has generated more controversy in recent years than imminence.

### 1 *The origins of imminence*

The ancient Romans permitted self-defence in response to a violent immediate attack, yet considered such an action following delay to be culpable.<sup>33</sup> The underlying rationale focused on distinguishing justified conduct from revenge, with vengeance considered the domain of the court system.<sup>34</sup> The political disunity that persisted until the late Middle Ages made the notion of an effective centralised State as the protector of citizens a desirable goal rather than an accurate description of actual practice. However, following the formation of modern Europe in the sixteenth and seventeenth centuries the restriction of lawful self-defence to circumstances of actual violence became crucial for eliminating private war and consolidating the State’s monopoly on violence.<sup>35</sup>

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<sup>29</sup> James F Stephens, *History of the Criminal Law of England* (1883), vol 1, 56.

<sup>30</sup> Rosen, above n 24, 382.

<sup>31</sup> Joseph H Beale, ‘Retreat From Murderous Assault’ (1903) 16 *Harvard Law Review* 567, 568.

<sup>32</sup> Jeffrey Murdoch, ‘Is imminence really necessity? Reconciling traditional self-defence doctrine with the Battered Woman Syndrome’ (2000) 20 *Northern Illinois University Law Review* 192, 194.

<sup>33</sup> Frederick H. Russell, *The just war in the Middle Ages* (Routledge, 1979) 42.

<sup>34</sup> Kaufman, above n 6, 355.

<sup>35</sup> Russell, above n 33.

By the eighteenth century, William Blackstone emphasised the requirements of a sudden attack and the absence of the opportunity of escape in self-defence at common law:

This right of natural defense does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only to have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defense, but in sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defense, it must appear that the slayer had no other possible means of escaping from his assailant.<sup>36</sup>

After Blackstone, it became clear that there was no legal requirement in self-defence that an attack be in progress; it was sufficient if an attack was imminent.<sup>37</sup> Imminence remained relatively entrenched in the common law until relatively recently.

#### B *Self-defence and imminence in Australian law from the mid-Twentieth century*

In 1958 the High Court decision in *R v Howe*<sup>38</sup> began the modern line of authority on self-defence. Dixon J referred to self-defence and an ‘attack...made or threatened’<sup>39</sup>, thereby endorsing a close temporal requirement of imminence. Although the general test for self-defence was subsequently modified by the High Court in *Viro v R*,<sup>40</sup> the requirement of a close temporal connection remained. *Viro*’s complex six-step test to determine whether an accused acted in self-defence began with the first step requiring:

the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack

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<sup>36</sup> William Blackstone, *Commentaries on the law of England* (Clarendon Press, 2<sup>nd</sup> ed, 1765 – 1769) 184 (emphasis added).

<sup>37</sup> *Lane* [1983] 2 VR 449, 456.

<sup>38</sup> (1958) 100 CLR 448.

<sup>39</sup> (1958) 100 CLR 448, 460.

<sup>40</sup> (1978) 141 CLR 88.

which threatened him with death or serious bodily harm was being or was about to be made upon him.<sup>41</sup>

This suggests that imminence was indeed a key component in self-defence, given the short timeframe permissible between the threat and the response.

The South Australian case *R v R* (1981)<sup>42</sup> demonstrates how imminence restricted the availability of self-defence for those who killed in non-confrontational circumstances during this period. The defendant killed her sleeping husband with an axe after enduring years of abuse and learning that he had sexually assaulted their daughters. There was some evidence that she feared that he would continue his abusive conduct in the future. The defendant had wished to argue the partial defence of provocation but this defence was removed from the jury by the trial judge. His Honour also dismissed the possibility of a claim of self-defence to prevent anticipated future harm ('Self-defence is...not in question in this case')<sup>43</sup> on the basis that:

...society (cannot) countenance killing as a means of averting some apprehended harm in the future. The law...permits the use by a person of force...if that is necessary to defend that person against immediately threatened harm. But the law has always and must always set its face against killing by way of prevention of harm which is merely feared for the future. Other measures which are peaceful and lawful must be resorted to in order to deal with threats of future harm.<sup>44</sup>

The defendant succeeded in an appeal based on the claim that provocation should have been left to the jury. In a subsequent retrial she asserted the defence of provocation. Although the verdicts open to the jury were convictions for murder or manslaughter (on the basis of provocation), the jury returned a verdict of outright acquittal.

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<sup>41</sup> (1978) 141 CLR 88, 146-147 (emphasis added).

<sup>42</sup> (1981) 28 SASR 321.

<sup>43</sup> (1981) 28 SASR 321, 325-326.

<sup>44</sup> (1981) 28 SASR 321, 325.

The complex nature of the test in *Viro* ultimately resulted in its perceived ‘unworkability’<sup>45</sup> in practice, leading to a new approach by the High Court in *Zecevic v DPP*.<sup>46</sup> In that case the Court abandoned the partial defence of excessive self-defence and greatly simplified the common law, stating:

The question to be asked is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had the belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he (or she) is entitled to an acquittal.<sup>47</sup>

Under this approach, imminence is not an express requirement of self-defence, although it may still be taken into account as an evidentiary matter going to the reasonableness of the accused’s act in self-defence.<sup>48</sup> The flexibility inherent in this approach was manifest in *R v Kontinnen*,<sup>49</sup> a South Australian case where a woman killed her abusive partner in non-confrontational circumstances and successfully claimed self-defence.

Erica Kontinnen shot and killed her *de facto* partner (George Hill) as he slept. Extensive evidence was given of Hill’s previous violence towards Kontinnen and his other *de facto* partner. Before falling asleep, Hill had threatened that he would kill the accused, his other *de facto* partner and their son upon waking. The trial judge allowed self-defence to go to the jury on the basis that although Hill was sleeping, the threat he issued was imminent as it still continued to have effect at the time of the killing.<sup>50</sup>

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<sup>45</sup> Andreas Schloenhardt, *Queensland Criminal Law* (Oxford University Press, 2008) 369.

<sup>46</sup> (1987) 162 CLR 645.

<sup>47</sup> (1987) 162 CLR 645, 661.

<sup>48</sup> See Gleeson CJ in *R v Rogers* (1996) 86 A Crim R 542, 545, *R v Smith* [2008] VSC at [87].

<sup>49</sup> (Unreported, Supreme Court of South Australia, 30 March 1992).

<sup>50</sup> Rebecca Bradfield, ‘Is near enough good enough? Why isn’t self-defence appropriate for the battered woman?’ (1998) 5(1) *Psychiatry, Psychology and Law* 71, 76.

This approach was also manifest some years later in *R v Osland* when the Victorian Court of Criminal Appeal considered common law self-defence, imminence and non-confrontational circumstances and observed:

We do not consider that the victim being asleep or unconscious must always exclude self-defence<sup>51</sup>

While self-defence at common law was becoming more flexible, requirements in the Code States of the Northern Territory, Queensland and Western Australia were slightly more complex.<sup>52</sup>

Although the current provision generally governing self-defence in section 29 of the *Criminal Code* of the Northern Territory is similar to the common law test in *Zecevic*, earlier versions of the *Code* were more restrictive. In *R v Secretary*,<sup>53</sup> self-defence under section 28(f) of the *Code* appeared to require actual violence or immediately impending violence before self-defence could be lawful. This case also involved a long-term victim of domestic violence who shot and killed her *de facto* partner while he slept.

The deceased had assaulted the accused prior to falling asleep and had threatened to continue the assault upon awakening.<sup>54</sup> The trial judge ruled self-defence could not be raised. He held that the wording of section 28 stipulated that a threat had to be occurring at the time that the act in self-defence was performed and that a sleeping person could not present the requisite threat. This interpretation was overturned on appeal. The majority of the Court of Criminal Appeal held that an assault 'is a continuing one so long as the threat remains and the factors relevant to the apparent authority to carry out the threat...have not changed'.<sup>55</sup> The court

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<sup>51</sup> *R v Osland* (1998) 2 VR 636, 668.

<sup>52</sup> Schloenhardt, above n 45, 369.

<sup>53</sup> (1996) 107 NTR 1.

<sup>54</sup> (1996) 107 NTR 1.

<sup>55</sup> (1996) 107 NTR 1, 9.

decided that, in the particular circumstances, the deceased's threat of harm had not been withdrawn and his ability to carry out the threat continued to have effect while he slept. Consequently, the court held that self-defence should have been available to the accused.

Examination of Western Australia and Queensland law suggests that the requirement of imminence persisted in these jurisdictions for much longer than at common law. The relevant statutory provisions governing self-defence in both jurisdictions required that self-defence was reasonably necessary and the response was reasonable<sup>56</sup> and varied depending on whether the attack was provoked or unprovoked.<sup>57</sup> The provisions had no specific requirements of imminence<sup>58</sup> but began: 'when a person is unlawfully assaulted...'<sup>59</sup> These provisions have been interpreted as requiring an actual or imminent harm before self-defence could be claimed.<sup>60</sup>

The law of self-defence was reformed in Western Australia in 2008. Prior to that time, the provisions that operated in Western Australia and Queensland (and which continue to operate in Queensland) were criticised for their complexity and obscurity and generated many calls for reform.<sup>61</sup> In particular, these provisions were perceived to be problematic for defendants who killed abusive partners in circumstances of chronic family violence.<sup>62</sup> However, in

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<sup>56</sup> Schloenhardt, above n 45, 371.

<sup>57</sup> Schloenhardt, above n 45, 370.

<sup>58</sup> *Criminal Code* (Qld) s 271; post-2008 the reformulated statutory version of self-defence in Western Australia no longer has this requirement: *Criminal Code* (WA) s 248.

<sup>59</sup> Western Australia reformed self-defence in 2008, inserting a new provision enabling self-defence to be utilised in circumstances where there is a belief on reasonable grounds in the necessity of their defensive actions against a non-imminent harmful act: *Criminal Code Act Compilation Act 1913* s 248.

<sup>60</sup> Zoe Rathus, *There Was Something Different About Him That Day: The Criminal Justice System's Response to Women Who Kill Their Partners* (Women's legal Service, Brisbane, 2002), 11.

<sup>61</sup> Geraldine Mackenzie and Eric Colvin, *Homicide in abusive relationships: A report on defences* (Brisbane, Department of Justice and Attorney-General, 2009) 26.

<sup>62</sup> *Ibid.*

a small number of cases in Queensland involving victims of chronic domestic violence who killed their abusive partners, a more relaxed approach to imminence was manifest:

- *In R v Sternquist*,<sup>63</sup> a woman fatally shot her abusive husband in the back after he had assaulted her and then started to walk away.<sup>64</sup> An extensive history of violence by the deceased towards the accused was presented to the jury as an overall and continuing threat that she had endured.<sup>65</sup> The accused succeeded in her claim of self-defence.<sup>66</sup>
- In *R v MacKenzie*<sup>67</sup> the appellant appealed her conviction for the murder of her abusive husband. While the appeal addressed matters relating to the withdrawal of her earlier plea of guilty, the Queensland Court of Appeal made it clear that a history of domestic violence was sufficient to raise self-defence:

The history of domestic violence given on this appeal would have been sufficient to raise the defence of self-defence in that the appellant may have had reason to believe she was at risk of assault from the deceased and could not effectively defend herself against the assault otherwise than by arming herself with a gun.<sup>68</sup>

Furthermore, this case explicitly raised the issue of whether the defendant's lawyers had incorrectly advised her when they had previously informed her that a successful claim of self-defence would have required that she was under an immediate threat of injury from her husband.<sup>69</sup> The court stressed that it would be a

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<sup>63</sup> (Unreported, Cairns Circuit Court, Derrington J, 18 June 1996).

<sup>64</sup> (Unreported, Cairns Circuit Court, Derrington J, 18 June 1996).

<sup>65</sup> (Unreported, Cairns Circuit Court, Derrington J, 18 June 1996).

<sup>66</sup> *Battered Woman Syndrome Evidence: An outline* (2002) Legal Aid Queensland,  
<<https://elo.legalaid.qld.gov.au/webdocs/dbtextdocs/internal/irregseries/cle/2002/BatteredWomanSyndromEvidence.pdf>>.

<sup>67</sup> [2000] QCA 324.

<sup>68</sup> [2000] QCA 324, [3].

<sup>69</sup> [2000] QCA 324, [44].

mistake in law to believe that self-defence was only available in response to an immediate physical threat.<sup>70</sup>

These cases suggest that some flexibility existed in relation to imminence in self-defence under section 271 of the *Criminal Code* (Qld) and that it may not necessarily have been as difficult for battered defendants to plead this defence as has otherwise been suggested.<sup>71</sup>

However, difficulties were still encountered in all jurisdictions by victims of family violence where no specific threat had been made or presented by the deceased prior to the act in self-defence. For example, in *R v Bradley*,<sup>72</sup> the defendant had unsuccessfully attempted to escape from her violent husband on a number of occasions following horrific incidents of abuse. She eventually shot and killed him while he slept. In the week prior to the killing, the deceased had told her that he had hidden gun cartridges around the house.<sup>73</sup> His conduct had also become increasingly irrational.<sup>74</sup> While the trial judge described the accused as ‘effectively a prisoner of the deceased’<sup>75</sup> and accepted that the defendant perceived her own ‘imminent death’, he characterised her mental state as involving a loss of ‘the dam of self-control’ rather than a foundation for a plea of self-defence.<sup>76</sup> He directed the jury on provocation only. She was subsequently convicted of manslaughter. The decision generated much criticism from commentators who believed that a strict requirement of imminence made self-defence effectively unavailable to many battered women (particularly those who killed in non-confrontational circumstances).<sup>77</sup>

<sup>70</sup> [2000] QCA 324, [46].

<sup>71</sup> Mackenzie and Colvin, n 61, 26.

<sup>72</sup> (Unreported, Supreme Court of Victoria, Coldrey J, 14 December 1994).

<sup>73</sup> (Unreported, Supreme Court of Victoria, Coldrey J, 14 December 1994) 4.

<sup>74</sup> (Unreported, Supreme Court of Victoria, Coldrey J, 14 December 1994) 4.

<sup>75</sup> (Unreported, Supreme Court of Victoria, Coldrey J, 14 December 1994).

<sup>76</sup> (Unreported, Supreme Court of Victoria, Coldrey J, 14 December 1994).

<sup>77</sup> See also, *Cornick v The Queen* (Unreported, Supreme Court of Tasmania, Nease, Cox and Underwood JJ, 28 July 1987); Therese McCarthy, “‘Battered Woman Syndrome’: Some reflections on the invisibility of the battering man in legal discourse, drawing on *R v Raby*’ (1995) 4 *The Australian Feminist*

### C *Calls to Reform Self-Defence*

From the 1980s onwards, feminist writers and other legal commentators increasingly questioned the fairness of convictions for murder and manslaughter of battered women who killed their abusive partners in non-confrontational circumstances. Even in common law states, where imminence was no longer expressly required by *Zecevic*, some argued that imminence (in conjunction with the other traditional elements of self-defence, proportionality and retreat) continued to act as a yardstick for measuring the reasonableness of a battered woman's response to chronic violence.<sup>78</sup> Therese McCarthy expressed a desire for a law that did 'not contort women's experiences to conform to legal categories constructed on masculinist premises'.<sup>79</sup> A key focus in criminal law reform was to make existing defences, especially self-defence, more accommodating of women who killed in circumstances of family violence.<sup>80</sup> Imminence became a key matter of controversy.

With increasing awareness of the effects of chronic domestic violence, many challenged the assumption that the lack of a specific, imminent threat indicated that a defensive response by an accused was unreasonable and unnecessary. The linking of imminence with retreat also underwent critical examination. In particular, the assumption that non-imminent threats necessarily provided an opportunity for effective retreat or avoidance<sup>81</sup> was increasingly recognised to be of questionable validity in circumstances of family violence. The availability and effectiveness of alternatives to violence – such as recourse to the police and the courts – began to be

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*Law Journal* 141; Julie Stubbs and Julia Tolmie, 'Falling short of the challenge? A comparative assessment of the Australian use of expert evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709.

<sup>78</sup> Bradfield, above n 50, 76.

<sup>79</sup> McCarthy, above n 77, 145.

<sup>80</sup> Gail Hubble, 'Feminism and the battered woman: The limits of self-defence in the context of domestic violence' (1997) 9(2) *Current Issues in Criminal Justice* 113, 113.

<sup>81</sup> Leverick, above n 1, 87.

more closely and critically examined. While distinguishing self-defence from aggression or revenge might prove difficult,<sup>82</sup> it became apparent that requiring a close temporal connection between a threat and a defensive response could result in problematic outcomes for victims of long-term abusive relationships (usually women) who killed their abuser in non-confrontational situations.<sup>83</sup> Law reform bodies in Victoria, Queensland and Western Australia began to investigate these issues.

### 1 *The Response by Law Reform Bodies*

Following an investigation by New Zealand Law Commission into the availability of criminal defences for battered defendants, Victoria was the first Australian jurisdiction to investigate problems with self-defence in the context of family violence. In an issues paper distributed in 2002, the Victorian Law Reform Commission (VLRC) acknowledged that considerations of imminence in self-defence at common law had relaxed in recent years. However, the Commission believed that battered women who killed their abusive partners still had difficulty successfully arguing self-defence.<sup>84</sup> The VLRC suggested that juries often had problems understanding the context of such homicides and that the common strategy of tendering expert evidence that an accused had ‘battered woman syndrome’ was not sufficient to address this problem.<sup>85</sup>

Significant changes to the law of self-defence in relation to homicide were eventually proposed by the VLRC, including a relaxation of imminence in cases involving family violence.<sup>86</sup> In 2005 the government of Victoria acted on many of these recommendations (although the reforms in relation to self-defence did not precisely follow the recommendations of the VLRC) when it

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<sup>82</sup> Leverick, above n 1, 87.

<sup>83</sup> Stubbs and Tolmie, above n 13; Bradfield, above n 50.

<sup>84</sup> Victorian Law Reform Commission, *Defences to homicide: Issues paper* (2002) 54.

<sup>85</sup> VLRC, above n 84, 57.

<sup>86</sup> Victorian Law Reform Commission, *Defences to homicide: Final report* (2004).

enacted the *Crimes (Homicide) Act*. The Attorney General stated that the intention of the reforms was to amend the laws of self-defence to align them with community standards, especially with respect to family violence.<sup>87</sup> He noted that the provision in relation to imminence (section 9AH) was included to affirm earlier court decisions that, in cases involving family violence, a lack of immediacy did not necessarily mean that an accused did not believe that his or her actions were necessary and based on reasonable grounds.<sup>88</sup>

In Queensland, law reform took a different approach. In 2008, the Queensland Law Reform Commission (QLRC) reviewed, *inter alia*, the operation of the law of self-defence. In relation to imminence, the QLRC noted that the provisions in the *Code* governing self-defence required the existence of an assault to which the defender was responding. Accordingly, self-defence was deemed not to be available in non-imminent circumstances (thereby making unlawful a pre-emptive strike).<sup>89</sup> The QLRC concluded that ‘the battered person receives no assistance from the law of self-defence, which requires an assault’.<sup>90</sup>

The QLRC recommended the development of a separate defence for victims of abusive relationships who killed their abusers.<sup>91</sup> Subsequently, two academics, Geraldine Mackenzie and Eric Colvin, prepared a report on this issue for the Attorney General. Their report concluded that potential defences for battered defendants, including self-defence, were subject to restrictive requirements that limited their availability.<sup>92</sup> It was considered that

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<sup>87</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1349 (Robert Hulls).

<sup>88</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1350 (Robert Hulls).

<sup>89</sup> Mackenzie and Colvin, above n 61, 26. Cf the discussion of *Sternquist* and *MacKenzie* earlier in this article.

<sup>90</sup> Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, Report No 64 (2008) 490.

<sup>91</sup> Mackenzie and Colvin, above n 61, 4.

<sup>92</sup> Mackenzie and Colvin, above n 61, 9.

the killing of an abusive partner, perpetrated by a long-term victim of domestic violence, warranted a reduction in criminal culpability. In particular, where such a defendant failed to establish self-defence, a murder conviction was deemed to be unjust.<sup>93</sup> Consequently, following the recommendation of the QLRC and the report by Mackenzie and Colvin, in 2010 the government of Queensland enacted the *Criminal Code (Abusive Domestic Relationship and Another Matter) Amendment Act 2010* which establishes a partial defence for victims of domestic violence who kill their abuser. The defence reduces murder to manslaughter and makes no reference to the imminence of harm. The Explanatory Notes state that the reform:

represents a balance between necessarily punishing those who would otherwise be guilty of murder, and providing some legal protections for victims of serious abuse.<sup>94</sup>

Finally, the West Australian Law Reform Commission (WALRC) considered the operation of self-defence under the *Criminal Code* in that State.<sup>95</sup> The Commission identified restrictive requirements in provisions governing self-defence that made the defence difficult to access for victims of family violence. A number of significant reforms were recommended, including a relaxation of a strict requirement of imminence.<sup>96</sup> In 2008 the government of Western Australia acted on many of these recommendations and reformed the law of self-defence. Included in the reforms was a provision that self-defence could apply when a person was responding to a harm that was 'not imminent'.<sup>97</sup>

The reforms introduced in these jurisdictions collectively constituted a significant re-thinking of the role of imminence in self-defence and contributed to the emergence of distinctive and diverse contemporary approaches in Australia.

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<sup>93</sup> Mackenzie and Colvin, above n 61, 6.

<sup>94</sup> Explanatory Notes, *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009*, 3.

<sup>95</sup> LRCWA, above n 13.

<sup>96</sup> Ibid.

<sup>97</sup> *Criminal Code Act 1913 (WA)* s 248(4)(a).

### III CURRENT APPROACHES TO IMMINENCE

Neither at contemporary common law nor in any of the current statutory formulations of self-defence is there an express requirement that a person acting in self-defence must be responding to a harm or threat of harm that is imminent. However, the common approach of requiring that a claim of self-defence be based on reasonable necessity allows imminence to function as a powerful factor going to the reasonableness of the accused's belief in the necessity of acting in self-defence.

Recent reviews of the laws of self-defence in Australia identified common concerns in relation to imminence. A requirement of imminent harm may suggest that delayed or anticipatory use of defensive force is unreasonable. This may lead to injustice for victims of chronic violence who kill in non-confrontational circumstances. However, disregarding imminence may make it difficult to distinguish an attack motivated by revenge from legitimate self-defence. It also raises the possibility of self-defence being appropriated by other groups claiming the right to a pre-emptive strike in anticipation of a future harm, such as prisoners<sup>98</sup> or gang members.<sup>99</sup> Consequently, there has been considerable concern that imminence be reformed while confining self-defence to deserving circumstances.

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<sup>98</sup> Martin Veinsreideris, 'The prospective effects of modifying existing law to accommodate pre-emptive self-defense by battered women' (2000-2001) 149 *University of Pennsylvania Law Review* 613. The recent trial of Matthew Johnson for the murder of Carl Williams while both were inmates of a maximum security prison in Victoria provides a local example of this type of case. Johnson claimed to have been acting in self-defence when he killed Williams in non-confrontational circumstances. Johnson essentially argued that in the dangerous environment of a prison he was in a 'kill or be killed' situation. The prosecution argued that the killing was motivated by revenge and that Johnson had killed Williams because Williams had provided information to police. See *PM- Inmate Found Guilty of Murdering Gangland Boss Carl Williams*, <[www.abc.net.au/pm/content/2011/s3329008.htm](http://www.abc.net.au/pm/content/2011/s3329008.htm)>.

<sup>99</sup> AP Simester, JR Spencer, GR Sullivan and GJ Virgo, *Simester and Sullivan's criminal law: Theory and doctrine* (Hart Publishing, 2010) 775.

Governments and courts in Australia struggled to balance these competing considerations and formulate adequate solutions. Although most jurisdictions continue to base self-defence on the principle of reasonable necessity, there are varying approaches to the role of imminence. Five different contemporary approaches can be identified. These are:

- Keeping imminence as a close temporal connection
- Replacing imminence with ‘inevitability’
- Using imminence as an evidentiary matter that goes to the reasonableness of the accused’s conduct
- Emphasising necessity rather than imminence through statutory reform, and
- Eliminating imminence through the creation of a special partial defence.

Each of these approaches will now be reviewed.

#### A *Keeping Imminence as a Close Temporal Connection*

A conservative, traditional approach to self-defence requires imminence as a close temporal connection between force or the threat of force and the defensive response. This approach is common in the United States, where criminal statutes often require defensive force to be in response to an ‘immediate’ or ‘imminent’ threat.<sup>100</sup>

In Australia, courts have tended to retain this approach to imminence in cases *not* involving victims of family violence. For example, in *Taikato v The Queen*<sup>101</sup> the High Court interpreted New South Wales legislation pertaining to possession of a prohibited

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<sup>100</sup> Michael Dowd, ‘Dispelling the myths about the ‘battered woman’s defense’: Towards a new understanding (1991) 19(3) *Fordham University Law Journal*, 567, 580-581; Christine Belew, ‘Killing one’s abuser: Premeditation, pathology or provocation?’ (2010) 59 *Emory Law Journal* 769, 773-775.

<sup>101</sup> (1996) 139 ALR 386, 386.

article in a public place. Mrs Taikato was charged with an offence under section 545E of the *Crimes Act 1900* for carrying a canister of formaldehyde in her handbag. She carried the canister for the purpose of defending herself if anyone attacked her.<sup>102</sup> A question arose as to whether self-defence was a 'lawful purpose' in defending a charge under this legislation. The High Court held that self-defence was not a lawful purpose because the existence of self-defence could not be determined until after an attack had commenced or been threatened.<sup>103</sup>

...Self defence may only amount to a lawful purpose for possessing a weapon where an imminent attack is anticipated. That is because the occasion for self-defence only arises when an attack is imminent.<sup>104</sup>

In *Police v Hailemariam*<sup>105</sup> the respondent had been assaulted by a group of people. He then armed himself with some knives and returned to walk in the same area the next morning. He stated that his intention was to find the people who had previously attacked him, call the police and only use the weapons if he was attacked again.<sup>106</sup> The South Australian Supreme Court rejected his defence of lawful excuse (self-defence), stating:

...The necessary conditions for self-defence had not been fulfilled. When the respondent set off armed with the knives, there was no attack upon him in existence or imminent.<sup>107</sup>

Similarly, in *Huggins v Police*<sup>108</sup> the appellant appealed his conviction for possession of an offensive weapon. He had previously been a victim of assault and burglary. He argued that he was entitled to carry a machete for self-defence.<sup>109</sup> His appeal was dismissed by

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<sup>102</sup> (1996) 139 ALR 386, 388.

<sup>103</sup> (1996) 139 ALR 386, 386.

<sup>104</sup> (1996) 139 ALR 386, 397.

<sup>105</sup> [1998] SASC 96.

<sup>106</sup> [1998] SASC 96.

<sup>107</sup> [1998] SASC 96, [24].

<sup>108</sup> [2001] SASC 394.

<sup>109</sup> [2001] SASC 394.

the Supreme Court of South Australia, which held that ‘self defence can only be a lawful excuse where there is an imminent danger of attack, not merely the possibility of an attack.’<sup>110</sup>

The accused in *Taikato*, *Hailemariam* and *Higgins* had all been victims of previous assaults.<sup>111</sup> Each indicated that they had become fearful of further violence and carried a weapon to protect themselves. But courts are reluctant to allow claims of self-defence (‘lawful purpose’) in these circumstances. In the absence of chronic violence in the context of a familial relationship, it appears that imminence is interpreted restrictively; a general fear of attack, even if well founded, will not constitute the apprehension of imminent attack that is required for lawful self-defence.

Courts have also indicated their willingness to employ traditional notions of imminence to distinguish revenge from self-defence. In *R v PRFN*<sup>112</sup> there was evidence that when the appellant was 14 years old he was anally raped by the deceased. He subsequently experienced post-traumatic stress disorder and major depression.<sup>113</sup> Eighteen months after the assault, he lured the deceased to his parents’ property with the promise of more sexual activity and then killed him. The trial judge withheld self-defence from the jury on the ground that ‘there was nothing on the evidence which could give rise

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<sup>110</sup> [2001] SASC 394. [15].

<sup>111</sup> Each accused claimed to have experienced a prior assault. While it could be argued that the experience of a single assault might be insufficient to constitute the development of a defensive mental state, it should be noted that in Victoria the provisions in relation to family violence and homicide allow that an accused can claim to have been a victim of family violence by the deceased on the basis of a single instance of abuse: *Crimes Act 1958 (Vic)* s 9AH(5)(a)

<sup>112</sup> [2000] NSWCCA 230.

<sup>113</sup> On one construction, however, PRFN could have been considered a victim of chronic violence as he had been a prior victim of rape by the deceased and there had been subsequent intermittent contact between them. This argument was seemingly rejected by the trial judge and the appeal court, on the basis that PRFN’s fear of the deceased was ‘nothing beyond a generalised apprehension’ and it had been some months since he had seen the deceased: *R v PRFN* [2000] NSWCCA 230, [42].

to a realistic belief than an attack was about to be made on the deceased on the subject night or...in the immediate future.’<sup>114</sup> An appeal to the New South Wales Court of Appeal was unsuccessful. Giles JA observed:

While the appellant may have been, in his eyes, protecting himself from perceived future harm, I do not think that the matters on which he relied in the appeal could have supported a reasonable belief that what he did was defending himself and others. The appellant was not being attacked or anything like it, and...the critical element of imminence was missing.<sup>115</sup>

The appeal court also found that ‘...there was (no) error in his Honour finding partial motivation of a desire for revenge.’<sup>116</sup> Special leave to appeal to the High Court of Australia was refused.<sup>117</sup>

Those who favour retaining imminence as a close temporal connection between force or the threat of force and a defensive response fear that expanding self-defence law to justify killing in non-confrontational circumstances may lead to a loosening of moral values pertaining to human life and may condone vengeance killing.<sup>118</sup> They frequently contend that a reasonable temporal requirement is crucial because the more expansive the time period between actual or threatened violence and the responsive force, the greater the risk that the force was unnecessary.<sup>119</sup> Commentators like Dressler, Bakircioglu<sup>120</sup> and Leverick<sup>121</sup> recognise that employing a strict temporal requirement of imminence will impede successful claims of self-defence in non-confrontational circumstances. They acknowledge that the claims of many battered women who kill abusive spouses will be adversely affected and propose other

<sup>114</sup> *R v PRFN* [2000] NSWCCA 230, at [25] quoted by Giles JA.

<sup>115</sup> *R v PRFN* [2000] NSWCCA 230 at [42].

<sup>116</sup> *R v PRFN* [2000] NSWCCA 230 at [52].

<sup>117</sup> *PFFN v The Queen* [2001] HCA Trans 277 (22 June 2001). The case title incorrectly cites PFFN but the case is listed as PRFN.

<sup>118</sup> Joshua Dressler, ‘Battered woman and sleeping abusers: Some reflections’ (2006) 3 *Ohio State Journal of Criminal Law* 457, 458.

<sup>119</sup> Dressler, above n 118, 467; Kaufman, above n 6.

<sup>120</sup> Bakircioglu, above, n 2.

<sup>121</sup> Leverick, above, n 1.

remedies. They suggest that these defendants should rely on other defences (such as duress) where appropriate<sup>122</sup> and advocate strengthening State programs and institutions to reduce domestic violence.<sup>123</sup>

However, the prospect of unfair outcomes for victims of chronic violence who kill in non-confrontational circumstances generated dissatisfaction with traditional notions of imminence in Australia and New Zealand and fuelled the search for alternatives.

### B *Replacing Imminence with 'Inevitability'*

In New Zealand, considerations of imminence of harm and alternatives to violence are both relevant in determining whether the force used by a defendant in self-defence is reasonable.<sup>124</sup> The application of this standard to victims of family violence has generated discussion. For example, in *R v Wang*<sup>125</sup>, the defendant's husband threatened to kill her and her sister (who lived with them). He then fell asleep in an intoxicated state. While he slept, the defendant stabbed and killed him. She claimed to have acted in self-defence. The trial judge did not allow self-defence to go to the jury and she was convicted of murder. The Court of Appeal dismissed a subsequent appeal against conviction and sentence, holding that where a person is subject to a non-imminent threat, a pre-emptive strike is not reasonable when alternative courses of action exist.<sup>126</sup>

The New Zealand Law Commission ('the Law Commission') noted that imminence was only an evidentiary presumption and not a rule of law; its importance lay in its relationship with necessity.<sup>127</sup>

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<sup>122</sup> Dressler, above n 118, 470.

<sup>123</sup> Bakircioglu, above n 2, 133; Leverick, above n 1, 10.

<sup>124</sup> New Zealand Law Commission (NZLC), *Battered defendants: Victims of domestic violence who offend – A discussion paper*, Preliminary paper 41 (2000) 12.

<sup>125</sup> [1990] 2 NZLR 529 (affirmed in *R v Kneale* [1998] 2 NZLR 169).

<sup>126</sup> [1990] 2 NZLR 529, 536.

<sup>127</sup> NZLC, above n 124, 15.

Moreover, the Law Commission suggested that necessity could exist independently of imminence when a threat was unavoidable.<sup>128</sup> Concerned about the absence of realistic alternatives for battered women and the focus on one-off attacks inherent in traditional conceptions of imminence,<sup>129</sup> the Law Commission recommended that the law of self-defence be amended:

to make it clear that there can be fact situations in which the use of force is reasonable when the threat is not imminent but is inevitable<sup>130</sup>

Inevitability implies that the person acting in self-defence perceives that harm will occur at some time in the future and that the harm is unavoidable. The Law Commission believed that a requirement of perceived inevitability (rather than imminence) would better accommodate the experiences of victims of chronic family violence.<sup>131</sup> The Law Commission ultimately recommended statutory amendment to acknowledge that situations exist where the use of force is reasonable in response to inevitable danger.<sup>132</sup>

The government of New Zealand has not given effect to the reforms recommended by the Law Commission. Indeed, inevitability is a problematic standard with which to replace imminence. The Law Commission did not specify the standard of certainty that must be satisfied for a defensive response to an 'inevitable' harm to be lawful.<sup>133</sup> Questions would no doubt be raised in appellate courts about exactly how 'inevitable' a threat would have to be to justify self-defence if a threat was not imminent. Moreover, the speculativeness inherent in an inevitability standard may dangerously raise the level of error when predicting inevitable

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<sup>128</sup> NZLC, above n 124, 15.

<sup>129</sup> New Zealand Law Commission (NZLC), *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No 73 (2001) 10.

<sup>130</sup> NZLC, above n 129, 12.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> Law Reform Commission of Ireland, above n 5, 117.

violence at some future but unspecified time.<sup>134</sup> ‘Inevitability’ could set the self-defence threshold too low, allowing cases of uncertain merit to succeed.<sup>135</sup> For example, considering the dangerous nature of prison environments or gang subcultures, changing from imminence to inevitability might allow prisoners and gang members to justify pre-emptive strikes on the basis of inevitable future harm from other prisoners or rival gang members.<sup>136</sup> Whether such circumstances are deserving of the protection of claims of self-defence is a matter of controversy.<sup>137</sup>

### C *Using Imminence as an Evidentiary Matter Going to the Reasonableness of the Accused’s Conduct*

Retaining imminence as an evidentiary matter going to the reasonableness of the accused’s conduct is the approach taken by the common law in Australia. The common law of self-defence continues to operate in Victoria in relation to non-fatal offences.<sup>138</sup>

Since *Zecevic v DPP*,<sup>139</sup> imminence is not a separate requirement but may be an important evidentiary matter pertaining to the accused’s actual belief and the reasonableness of that belief.<sup>140</sup> As Gleeson CJ held in *R v Rogers*:

Since the decision of the High Court in *Zecevic*, juries are instructed that the ultimate question is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. However, the imminence and

<sup>134</sup> Joshua Dressler, ‘Battered women who kill their sleeping tormentors: Reflections on maintaining respect for human life while killing moral monsters’ in Stephen Shute and A.P. Simester (eds), *Criminal law theory: Doctrines of the general part* (Oxford University Press, 2002) 259, 268.

<sup>135</sup> Law Reform Commission of Ireland, above n 5, 117.

<sup>136</sup> Veinsreideris, above n 98, 629.

<sup>137</sup> Simester, Spencer, Sullivan and Virgo, above n 99, 775.

<sup>138</sup> As discussed subsequently in section 3D part 1 (page 110), a statutory form of self-defence operates in relation to murder and manslaughter and the new offence of defensive homicide.

<sup>139</sup> (1987) 162 CLR 645.

<sup>140</sup> *R v Rogers* (1996) 86 A Crim R 542, 545.

seriousness of the threat to which the accused was supposedly responding are important, and often critical, factual considerations going to the accused's supposed belief, and the reasonableness of his belief.<sup>141</sup>

A similar approach is taken under some of the statutory formulations of self-defence.<sup>142</sup> The flexibility of this approach to imminence is demonstrated in two cases where victims of chronic domestic violence killed their abusive partners in non-confrontational circumstances and succeeded in their pleas of self-defence: *R v MacDonald* and *R v Falls*.

### 1 *Victoria – Common Law: R v MacDonald (2006)*

Although the law of self-defence for homicide had been statutorily reformed in Victoria some months before the trial of Claire MacDonald, as she had killed her husband before the reforms came into force the relevant standard for self-defence was the common law test for self-defence established in *Zecevic*.<sup>143</sup> Her case demonstrates a move away from the traditional role of imminence and suggests that an extended history of domestic violence may constitute an ever-present threat.<sup>144</sup>

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<sup>141</sup> (1996) 86 A Crim R 542, 545.

<sup>142</sup> For example, in Victoria consideration of 'reasonable grounds' in self-defence for the offences of manslaughter and defensive homicide in circumstances other than those of family violence would appear to involve a *Zecevic* approach: reference to reasonable grounds is from the perspective of the accused in the circumstances as she/he believed them to be: *R v Smith* [2008] VSC at [87]. In circumstances of family violence, s 9AH of the *Crimes Act 1958* (Vic) must also be taken into consideration.

<sup>143</sup> Claire MacDonald killed her husband before the *Crimes (Homicide) Act* came into force in November 2005.

<sup>144</sup> *R v MacDonald* (Unreported, Supreme Court of Victoria, Nettle J, 1 March 2006).

Claire MacDonald claimed to have experienced extensive physical, sexual and psychological abuse from her husband.<sup>145</sup> He had threatened to ‘hunt her down and shoot her and bury her’ if she ever left him.<sup>146</sup> She testified that on the night before she killed him, he had raped her.<sup>147</sup> The next day she set up a car with a supposed flat battery, armed herself with her husband’s rifle, donned camouflage gear and lay in wait until her husband arrived to inspect the car.<sup>148</sup> She then shot and killed him.<sup>149</sup> She claimed to have acted in self-defence; the jury acquitted her of all charges.<sup>150</sup>

The circumstances of the killing clearly raised the issue of how imminence was conceptualised in this case. The trial judge (Nettle J) noted in a *voir dire* that self-defence was problematic in large part due to the lack of an ‘explicit, immediate or continuing’ threat.<sup>151</sup> He stated ‘...this is not a case in which the accused, even less her children, were under immediate attack. To the contrary, she lay in wait, in ambush so the deceased would search for her...’<sup>152</sup> He considered that the most the evidence showed was ‘that the accused may have had grounds to fear that she would at some time in future be subjected to more of the...relatively low level violence and sexual practices which had occurred in the past’.<sup>153</sup>

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<sup>145</sup> Peter Gregory, ‘Woman killed husband from ‘sniper’s nest’’, *The Age* (online) 21 February 2006 <<http://www.theage.com.au/news/national/woman-killed-husband-from-snipers-nest/2006/02/20/1140284007956.html>>.

<sup>146</sup> Transcript of proceedings, *R v MacDonald* (Supreme Court of Victoria, Nettle, J 1 March 2006) 388. This threat had been made years earlier and was a conditional threat (i.e. he would only kill her if she left him).

<sup>147</sup> Kate Uebergang, ‘Sniper mum goes free’, *Herald Sun* (online) 4 March 2006 <[http://www.heraldsun.news.com.au/common/story\\_page/0,5478,18340240%255E661.00.html](http://www.heraldsun.news.com.au/common/story_page/0,5478,18340240%255E661.00.html)>.

<sup>148</sup> Gregory, above n 145.

<sup>149</sup> Transcript of proceedings, *R v MacDonald* (Supreme Court of Victoria, Nettle J, 1 March 2006) 381.

<sup>150</sup> Uebergang, above n 147.

<sup>151</sup> Transcript of proceedings, *R v MacDonald* (Supreme Court of Victoria, Nettle J, 1 March 2006) 247.

<sup>152</sup> Transcript of proceedings, *R v MacDonald* (Supreme Court of Victoria, Nettle J, 1 March 2006) 362.

<sup>153</sup> Transcript of proceedings, *R v MacDonald* (Supreme Court of Victoria, Nettle J, 1 March 2006) 362.

The prosecution argued that self-defence should be withdrawn from the jury because there was no significant violent act immediately preceding the fatal event. The absence of an explicit, specific threat of future violence shortly before the killing was used to distinguish this case from other cases (such as *R v Kontinnen* and *R v Secretary*) where claims of self-defence had succeeded in non-confrontational circumstances.<sup>154</sup> Despite ‘the weakness of the case for self-defence’<sup>155</sup> and the strength of the prosecution argument, Nettle J considered expert psychiatric evidence describing Ms MacDonald’s prior experiences of violence in the relationship and her consequent heightened perception of threat could lead a jury to consider that her actions were subjectively and objectively necessary.<sup>156</sup> For this reason, self-defence was not withdrawn from the jury.<sup>157</sup>

Senior defence counsel conceptualised imminence in a distinctive, subjectivised manner. He acknowledged that the killing was an intentional, premeditated ambush. He argued that the defendant’s perception of, and response to, the threat that she was facing must be seen against the extensive background of abuse, the preceding rape and expert psychiatric evidence about her mental state.<sup>158</sup> (A psychiatrist called by the defence testified that Ms MacDonald had been suffering from ‘learned helplessness’).<sup>159</sup> Defence counsel submitted that a ‘...heightened state of arousal and awareness of risk, the result of past abuse and the ‘learned helplessness’ condition...(meant) that the accused truly perceived that she was in imminent risk of death or really serious injury and

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<sup>154</sup> Transcript of proceedings, *R v MacDonald* (Supreme Court of Victoria, Nettle J, 1 March 2006) 249.

<sup>155</sup> Transcript of proceedings, *R v MacDonald* (Supreme Court of Victoria, Nettle J, 1 March 2006) 250.

<sup>156</sup> Transcript of proceedings, *R v MacDonald* (Supreme Court of Victoria, Nettle J, 1 March 2006) 250.

<sup>157</sup> Transcript of proceedings, *R v MacDonald* (Supreme Court of Victoria, Nettle J, 1 March 2006) 250.

<sup>158</sup> Transcript of proceedings, *R v MacDonald* (Supreme Court of Victoria, Nettle J, 1 March 2006) 377.

<sup>159</sup> Transcript of proceedings, *R v MacDonald* (Supreme Court of Victoria, Nettle J, 1 March 2006) 446.

truly believed that the only way in which she could avoid that was by laying in wait and killing the deceased as she did.<sup>160</sup>

It appears that in this case the jury accepted that the accused's prior experience of domestic violence caused her to experience an 'ever present' threat of harm rather a more limited 'imminent harm' as traditionally understood in the law of self-defence.

## 2 *Queensland - Criminal Code s 271: R v Falls (2010)*

A recent Queensland case, *R v Falls*,<sup>161</sup> also provides an interesting illustration of a successful claim of self-defence by a woman who killed her abusive husband in non-confrontational circumstances. Susan Falls gave evidence of countless injuries sustained by being repeatedly assaulted, raped and psychologically abused by her husband of 20 years.<sup>162</sup> Ultimately, she acted following a cruel game he devised. He forced her to write down the names of their children and told her to choose one, informing her that he would kill that child on a future date.<sup>163</sup> As that date approached, he would remind her of his threat. Following two weeks of planning (and four days before the date set for the killing of the child),<sup>164</sup> after having sent her teenage daughter to purchase a gun,<sup>165</sup> she sedated her husband, shot him in the head, then returned and shot him again two hours

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<sup>160</sup> Transcript of proceedings, *R v MacDonald* (Supreme Court of Victoria, Nettle J, 1 March 2006) 378.

<sup>161</sup> (Unreported, Supreme Court of Queensland, Applegarth J, 1 June 2010).

<sup>162</sup> Kim Sweetman and Trent Dalton, 'What pushed Susan Falls to kill her husband?' *The Courier Mail* (online) 4 June 2010 <<http://www.couriermail.com.au/news/queensland/what-pushed-susan-falls-to-kill-her-husband/story-e6freoof-1225875687657>>.

<sup>163</sup> Amelia Bentley, 'Driven to kill, but not guilty of murder', *The Border Mail* (online) 4 June 2010 <<http://www.bordermail.com.au/news/national/national/general/driven-to-kill-but-not-guilty-of-murder/1849657.aspx?storypage=2>>.

<sup>164</sup> Sweetman, above n 162.

<sup>165</sup> Bentley, above n 163.

later.<sup>166</sup> Falls stated that she acted to protect her infant son (the target of her husband's threat to kill).

Applegarth J stressed in his charge to the jury<sup>167</sup> that section 271(2) of the *Criminal Code* did 'not require the threat to be one of an immediate physical threat'<sup>168</sup> nor did the threat have to be one of imminent danger.<sup>169</sup> He outlined two issues for the jury to consider under this section of the *Code*:

1. Was the nature of the assault such as to cause reasonable apprehension of death or grievous bodily harm?
2. Did the accused believe on reasonable grounds that she could not otherwise save herself (or another) from death or grievous bodily harm?<sup>170</sup>

In considering these two questions, Applegarth J emphasised that the jury was entitled to consider the history of the relationship and evidence of previous assaults and threats.<sup>171</sup>

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<sup>166</sup> Tristan Swanwick, 'Susan Falls not guilty', *The Courier Mail* (Brisbane) 3 June 2010 <<http://www.couriermail.com.au/news/queensland/jury-out-in-susan-falls-trial/story-e6freoof-1225875100672>>.

<sup>167</sup> Applegarth J also directed the jury on the partial defence in s 304B of the *Criminal Code*. He emphasised that self-defence could be raised with the partial defence (Transcript of proceedings, *R v Susan Falls* (Supreme Court of Queensland, Applegarth J, 1 June 2010) 11). The advantage that s 304B seemingly had over self-defence is that it did not require the deadly act to be in response to a particular threat or assault (13). A person's belief in the necessity of their action could be based on a range of circumstances, including the relationship history (3).

<sup>168</sup> Transcript of proceedings, *R v Susan Falls* (Supreme Court of Queensland, Applegarth J, 1 June 2010) 3.

<sup>169</sup> Transcript of proceedings, *R v Susan Falls* (Supreme Court of Queensland, Applegarth J, 1 June 2010) 4.

<sup>170</sup> Transcript of proceedings, *R v Susan Falls* (Supreme Court of Queensland, Applegarth J, 1 June 2010) 6.

<sup>171</sup> Transcript of proceedings, *R v Susan Falls* (Supreme Court of Queensland, Applegarth J, 1 June 2010) 6.

The jury required less than two hours to find Ms Falls not guilty of murder and manslaughter.<sup>172</sup> As with *R v MacDonald*, the decision in *Falls*' case indicates that where imminence functions as an evidentiary matter going to the reasonableness of an accused's conduct, contemporary juries may be increasingly willing to accommodate the self-defence claims of victims of chronic violence who kill in non-confrontational circumstances.

However, before the outcomes of these two cases were known, legislatures in both jurisdictions had already acted on the recommendations of law reform bodies and enacted reforms to imminence in self-defence in circumstances of family violence.

#### D *Emphasising Necessity Rather Than Imminence Through Legislative Reform*

Victoria, and subsequently Western Australia, addressed the issue of imminence in self-defence through statutory reform. In both jurisdictions imminence has not been eliminated but its relationship to necessity has been clarified in circumstances where a defensive response is to a harm that is not immediate or imminent.<sup>173</sup>

##### 1 *Victoria*

In 2005, Victoria codified self-defence in relation to the offences of murder and manslaughter and introduced the offence of defensive homicide.<sup>174</sup> The legislation followed the Victorian Law Reform Commission's report recommending that self-defence should be made more accessible to women who killed in response to family violence.

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<sup>172</sup> Swanwick, above n 166.

<sup>173</sup> The Victorian reform uses the term 'immediate'; in Western Australia the reference is to a harm that is not 'imminent'.

<sup>174</sup> *Crimes (Homicide) Act 2005* (Vic) s 3. Although there was initially some uncertainty as to whether the reforms codified the law of self-defence for these offences, the Court of Appeal of Victoria confirmed that the 2005 reforms actually codified this area of the law: *Babic v R* [2010] VSCA 198.

Under section 9AC of the *Crimes Act 1958* (Vic) self-defence to murder simply requires a subjective belief in the necessity of force when faced with a threat of death or really serious injury. Self-defence to manslaughter (section 9AE) requires both a subjective belief in the necessity to defend oneself or another and reasonable grounds for that belief. The offence of ‘defensive homicide’ is introduced in section 9AD of the Act:

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.

Significant reforms were also enacted in relation to the admission of evidence of family violence. In relation to imminence, section 9AH provides that, in circumstances where family violence is alleged, a person may have reasonable grounds for believing his/her conduct is necessary to defend themselves even if they are ‘responding to a harm that is not immediate’.<sup>175</sup> The reforms in relation to imminence replicated developments that had already occurred at common law.

Thus far, four cases have proceeded to trial involving defendants who alleged that they killed their victims in circumstances of family violence.<sup>176</sup> All cases proceeded as cases of defensive homicide and did not generate significant discussion of imminence. In a further two cases involving family violence, proceedings were discontinued by the Director of Public Prosecutions on the basis that a jury would be highly unlikely to convict on the evidence.<sup>177</sup> One of those cases raised an issue of imminence: a teenage girl killed her stepfather by shooting him in the back of the head after he had threatened her with

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<sup>175</sup> *Crimes Act 1958* (Vic) s 9AH(1)(c).

<sup>176</sup> *R v Spark* [2009] VSC 374; *R v Middendorp* [2010] VSC 202; *R v Black* [2011] VSC 152; *R v Creamer* [2011] VSC 196.

<sup>177</sup> Department of Justice, *Defensive Homicide: Review of the offence of defensive homicide – Discussion paper* (2010) 27, 29.

a shotgun and had forced her to commit a sexual act.<sup>178</sup> There was an extensive history of prior sexual abuse.

Generally, in cases where family violence is alleged, the reforms appear to have de-emphasised the significance of imminence, highlighted considerations of necessity and contextualised these matters by facilitating the admission of extensive evidence about prior violence in the relationship.

## 2 *Western Australia*

Reforms were enacted in Western Australia in 2008 to give effect to recommendations of the Western Australian Law Reform Commission.<sup>179</sup> Section 248(4) of the *Criminal Code Act 1913* (WA) now states that an 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.

Section 248(3) provides for a partial defence that reduces murder to manslaughter where the defensive response is not a reasonable response in the circumstances as the defendant believed them to be.

Unlike the reforms in Victoria, the provision in section 248 relating to imminence is not restricted to defendants who act in circumstances of family violence.<sup>180</sup> Instead, the relaxation of imminence is linked to reasonableness – a person who believes that

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<sup>178</sup> Department of Justice, above n 177, 29.

<sup>179</sup> Law Reform Commission of Western Australia, above n 13.

<sup>180</sup> However, in Victoria family violence does not have to be chronic – it may be constituted by a single episode of violence: *Crimes Act 1958* (Vic) s 9AH(5)(a). Hence, the difference in the practical operation of the provisions may be slight.

it is necessary to act in self-defence in circumstances of non-imminent harm must have reasonable grounds for that belief. Consequently, in this respect the West Australian reform has broader application and is more akin to the position at common law. Academic commentators have endorsed the reforms, arguing that they ‘better provide for victims of abuse because the harmful act [to which they respond] need not be imminent’<sup>181</sup> but have not yet considered the implications for other types of defendants.

The approach manifest in the reforms in Victoria and Western Australia demonstrates a relaxation of imminence as a requirement in self-defence and a focus on necessity. The reforms shift discretion in favour of jurors, who are granted more leeway in determining whether a defendant’s act in self-defence was reasonable and necessary.

#### E *Eliminating Imminence in Self-Defence to Murder Through the Creation of a Special Defence*

The availability of self-defence for victims of chronic violence who kill their abusers was a subject of considerable discussion in Queensland. The Queensland Law Reform Commission issued a report in 2008, followed by a more specific exploration of self-defence in a report commissioned by the Department of Justice.<sup>182</sup> Features of self-defence provisions in the *Criminal Code* were identified as problematic for defendants responding in the context of chronic domestic violence<sup>183</sup>

However, there was strong opposition in Queensland to the direction of law reform in other states such as Victoria and Western Australia.<sup>184</sup> Widening self-defence by relaxing considerations of

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<sup>181</sup> Thomas Crofts and Kelley Burton, *The Criminal Codes: Commentary and Materials* (Lawbook Co, Sydney, 2009) 433-434.

<sup>182</sup> Mackenzie and Colvin, above n 61, 26.

<sup>183</sup> Ibid.

<sup>184</sup> Mackenzie and Colvin, above n 61, 25.

imminence, even if confined to victims of serious domestic violence,<sup>185</sup> raised concerns about the risk of unmeritorious defendants succeeding.<sup>186</sup> The legal profession generally appeared to prefer the introduction of a partial defence that would result in some criminal liability remaining rather than a complete acquittal.<sup>187</sup>

The QLRC recommended the introduction of a partial defence that would make a form of self-defence available to victims of chronic violence. A subsequent report commissioned by the Queensland government endorsed the introduction of a distinct, separate partial defence, concluding that those who experience domestic violence and who kill in fear and desperation do not warrant a conviction for murder.<sup>188</sup>

In 2010 the government of Queensland enacted the ‘abusive relationships’ defence. Section 304B of the *Criminal Code (Abusive Domestic Relationship and Another Matter) Amendment Act 2010* provides:

- (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
  - (c) The person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.

The partial defence is available where

- The accused killed a person;

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<sup>185</sup> Mackenzie and Colvin, above n 61, 31.

<sup>186</sup> Submission by the Office of the Director of Public Prosecutions, cited in Mackenzie and Colvin, above n 61, 32.

<sup>187</sup> Ibid.

<sup>188</sup> Mackenzie and Colvin, above n 61, 35.

- The person killed was in an abusive domestic relationship with the accused and had committed acts of serious domestic violence against the accused in the course of that relationship;
- At the time of the killing, the accused believed his or her acts were necessary for the person's preservation from death or grievous bodily harm;
- There were reasonable grounds for this belief, having regard to the abusive relationship and all the circumstances of the case.

An 'abusive domestic relationship' is defined as a domestic relationship existing between two persons in which there is a history of serious domestic violence<sup>189</sup> committed by either person against the other. The partial defence reduces what would otherwise be murder to manslaughter.<sup>190</sup>

The partial defence may apply even where the defensive response appears disproportionate to a particular act of domestic violence.<sup>191</sup> However, the requirement of a history of 'serious' domestic violence introduces some consideration of proportionality. In relation to imminence, it is possible that the requirement of 'reasonable grounds' for the belief in the necessity of violence will allow imminence to be considered as an element of reasonableness. But this appears unlikely. 'Reasonable grounds for the belief' is to be assessed with reference to the abusive domestic relationship and all the circumstances of the case. Consequently, the partial defence appears to emphasise the history of violence in the relationship and contextual matters rather than imminence.

It remains to be seen how this defence will be interpreted in future cases, given its recent introduction. In a jurisdiction that retains a mandatory life sentence upon conviction for murder, the partial defence may be attractive because, when successfully

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<sup>189</sup> References to the existence of a domestic relationship and domestic violence are to be interpreted in the same way as they are interpreted under the *Domestic and Family Violence Protection Act 1989* (Qld).

<sup>190</sup> *Criminal Code (Abusive Domestic Relationship and Another Matter) Amendment Act 2010* (Qld) s 3.

<sup>191</sup> *Criminal Code* (Qld) s 304B(5).

asserted, it brings an accused within the wide sentencing discretion available in relation to sentencing for manslaughter.

The partial defence has distinct similarity to the common law of self-defence as outlined in *Zecevic*. A notable dissimilarity also exists: a successful claim of self-defence at common law results in an acquittal, whereas a successful plea under section 304B leaves the accused liable to be sentenced for manslaughter. More relevantly, a successful assertion of self-defence under the general provisions of section 271 of the *Criminal Code* – the general standard for self-defence in Queensland – also results in complete acquittal. Consequently, although the introduction of section 304B provides a further defence for those who kill in the context of an abusive domestic relationship, it may be that – as demonstrated in *R v Falls* – developments in relation to imminence and the more general provision governing self-defence established in section 271 of the *Code* may make the partial defence less appealing.

#### IV IMMINENCE AND NECESSITY

The reforms to imminence enacted in Victoria, Western Australia and Queensland, taken in conjunction with developments at common law in relation to non-confrontational cases, raise questions about the function of imminence. Shorn from its mooring as an independent temporal measure, it may be asked what function imminence serves in these new regimes. A key issue is whether imminence is distinct from necessity.

##### *A Is Imminence Merely a Proxy for Necessity?*

Academic commentators have been divided on the issue of whether imminence is distinct from, or is merely a proxy for, the larger concept of necessity. If imminence is merely a proxy for necessity, the lack of a close temporal connection between a harm or threat of harm and a defensive response should not exclusively determine whether such force was necessary.

Many legal commentators argue that imminence has no significance independent of necessity: it functions only to provide assurance that the defensive action is necessary to avoid the harm.<sup>192</sup> In a conflict between imminence and necessity (such as where a victim of chronic violence kills in non-confrontational circumstances), they argue that necessity must prevail.<sup>193</sup>

On the other hand, many argue for the separation of imminence from necessity. Bakircioglu argues that retaining imminence is necessary to prevent the abuse of self-defence: it provides an objective standard by which we can assess the necessity of defensive force.<sup>194</sup> In a powerful analysis, Whitley Kaufman acknowledges that there is often a close factual connection between imminence and necessity (ordinarily when a threat is not yet imminent it will not be necessary to act in self-defence) but argues that they are distinct.<sup>195</sup> He defines imminence in the context of State protection. In essence, a requirement of imminence has the key political function of establishing a strict division between citizen and State of the right to use force. When a threat is imminent and there is no opportunity for the State to intervene, an individual may act in private defence.<sup>196</sup> In all other circumstances the State retains a monopoly on the use of force to protect citizens.

However, there is an important corollary of Kaufman's thesis.<sup>197</sup> If the State is unable to provide protection against violence, it follows that the imminence requirement is suspended and an individual is permitted to act in self-defence. On this issue, the lack of effective State protection for victims of domestic violence has been a matter of concern since at least the 1970s. However, Kaufman argues that battered women cannot escape the requirement

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<sup>192</sup> See, eg, Rosen, above n 24, 380; Alafair Burke, 'Rational actors, self-defense, and duress: Making sense, not syndromes, out of the battered woman (2002) 81 *New Criminal Law Review* 211.

<sup>193</sup> Rosen, above n 24, 380; Burke, above n 192, 271.

<sup>194</sup> Bakircioglu, above n 2, 161.

<sup>195</sup> Kaufman, above n 6, 350.

<sup>196</sup> Kaufman, above n 6, 360.

<sup>197</sup> Kaufman, above n 6, 360-361.

of imminence on this ground. He argues that their situation is not analogous to those who might successfully establish such a claim, such as victims of kidnappers (who can lawfully act against their captors at any time) and members of groups who are systematically discriminated against by the State (such as Jews in Nazi Germany).<sup>198</sup> Kaufman also dismisses claims based on the ineffectiveness of State protection, arguing that uncertainty as to what constitutes effective protection would ‘exceedingly complicate jury trials.’<sup>199</sup>

While Kaufman’s analysis is persuasive it is not determinative. His dismissal of the view that the State does not protect battered women is inconsistent with the reality depicted in many cases where battered women have killed abusive partners.

These cases are replete with histories of inadequate police responses to complaints of violence and failed court interventions. For example, in *Secretary v The Queen*<sup>200</sup> the defendant (who was charged with the murder of her *de facto husband*) provided evidence that police had been called to her house on many previous occasions when her husband had assaulted her. Although police seized some of his guns on one occasion, at other times they took no action. Furthermore, the deceased breached a restraining order that the accused had taken out against him. The day before she killed him he cut the telephone line to their house so that she could not call the police. In *R v Melrose* the accused pled guilty to the manslaughter of her abusive husband. She had been attacked by him in the hours preceding the killing. She had sought assistance from the local police but, as McClennan J observed: ‘Tragically, for it is likely that the events which followed would not have occurred if it had been otherwise, the police station was unattended.’<sup>201</sup> She later made an unsuccessful attempt to go to a refuge.<sup>202</sup>

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<sup>198</sup> Kaufman, above n 6.

<sup>199</sup> Kaufman, above n 6, 363.

<sup>200</sup> [1996] 5 NTLR 96

<sup>201</sup> *R v Melrose* [2001] NSWSC 847 [12].

<sup>202</sup> The accused managed to telephone police and tell them she wished to go to a refuge. The constable who received the call tried to contact another police

In relation to court orders, the ubiquity, but dubious effectiveness, of intervention orders (apprehended violence orders and similar) in decreasing violence and harassment has been repeatedly noted.<sup>203</sup> This was illustrated in *R v Kennedy*.<sup>204</sup> Sharon Kennedy had taken out at least four apprehended domestic violence orders against her abusive husband; the last order was still in force on the night she killed him.<sup>205</sup> Police had been notified on several earlier occasions after he had assaulted her. Barr J observed that ‘in a practical sense the prisoner probably did all she could to protect herself from the abuse of the deceased.’<sup>206</sup>

Furthermore, in relation to whether battered women are in an analogous position to those who are being held hostage (a group for whom Kaufman suspends the requirement of imminence), it can be argued that some victims of chronic family violence *are* in this position. For example, the trial judge in *R v Bradley*<sup>207</sup> described the accused (a victim of chronic and extreme domestic violence who killed her abusive partner) as ‘effectively a prisoner of the deceased.’<sup>208</sup>

Victims of family violence are not a coherent, homogenous group; their experiences of violence, resilience, relationship to the

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station in relation to her request. When he attempted to return the accused’s call, the line had dropped out: *R v Melrose* [2001] NSWSC 847 [13].

<sup>203</sup> Generally see Rosemary Wearing, *Policing and family violence victims*. <[http://aic.gov.au/en/events/aic%20upcoming%20events/1999/~/\\_/media/conferences/policewomen2/wearing.pdf](http://aic.gov.au/en/events/aic%20upcoming%20events/1999/~/_/media/conferences/policewomen2/wearing.pdf)>; Rosemary Hunter, ‘Narratives of domestic violence’ (2006) 28 *Sydney Law Review* 733. However, contrary to the cases discussed in this article, some studies have reported that protection orders have contributed to overall reduced rates of violence against women who have obtained these orders: see, eg, Judith MacFarlane, Ann Malecha, Julia Gist, Kathy Watson, Elizabeth Batten, Iva Hall and Sheila Smith, ‘Protection orders and intimate partner violence’ (2004) 94 *American Journal of Public Health* 613.

<sup>204</sup> *R v Kennedy* [2000] NSWSC 109 [14]-[18].

<sup>205</sup> *R v Kennedy* [2000] NSWSC 109 [14]-[18].

<sup>206</sup> *R v Kennedy* [2000] NSWSC 109 [22].

<sup>207</sup> (Unreported, Supreme Court of Victoria, Coldrey J, 14 December 1994).

<sup>208</sup> (Unreported, Supreme Court of Victoria, Coldrey J, 14 December 1994).

abuser, age and gender vary, as do the social supports available to them. Their continued participation in the abusive relationship may be for manifold reasons, some of which raise issues of their contribution and complicity; others suggest extreme coercive control by their abuser. Consequently, it is not credible to make generic claims about their status. However, for those victims of violence who do not receive effective assistance from the State, this lack of assistance may contribute to the reasonableness of their belief in the necessity of self-defence and justify their acting in non-imminent circumstance. For these individuals, imminence should *not* be necessary.

This position is consistent with recent reforms in Australia that have emphasised reasonable necessity and downplayed the significance of imminence. Reforms in Victoria and Western Australia (limited to circumstances of family violence in Victoria) specifically provide that a defensive act may be necessary even when a threat is not immediate or imminent. Similarly, developments at common law consider imminence as an evidentiary matter going to the necessity and reasonableness of the defendant's conduct. The 'abusive relationships' partial defence in Queensland (limited to accused who were victims of domestic violence by the deceased) makes no specific reference to imminence and emphasises the history of violence in the relationship. Consequently, it appears that, in the context of chronically violent family relationships, imminence may function as a relatively poor proxy for necessity and that courts and legislatures in Australia have demonstrated an increased willingness to focus on necessity itself.

### B *Public policy, imminence and necessity*

Although a small number of cases have explored the boundaries of imminence,<sup>209</sup> the relaxation of imminence and concomitant focus on necessity are yet to be adequately explored in Australian courts. Developments in Canada point to some of the dilemmas that might arise.

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<sup>209</sup> See *R v PRFN* [2000] NSWCCA 230; *Osland v R* (1998) 159 ALR 170.

In Canada, considerations of imminence have been significantly relaxed in cases where defendants could satisfy an evidentiary burden that a killing was necessary although carried out in non-imminent circumstances. In the seminal case of *Lavallee v R*<sup>210</sup> the Canadian Supreme Court reversed previous decisions applying imminence strictly to battered woman cases. *Lavallee* involved a defendant who shot and killed her abusive *de facto* husband after he had assaulted her and was walking away. The deceased had threatened to kill his wife just prior to the killing. The jury acquitted the defendant but the verdict was overturned on appeal. At issue when the matter went to the Supreme Court was whether expert evidence on battered woman syndrome was admissible. In the course of considering this issue, the Supreme Court noted that although not stipulated by legislation, courts had erroneously read an imminence requirement into self-defence because a non-imminent response suggested the accused was motivated by revenge.<sup>211</sup> The decision in *Lavallee* was confirmed in *R v Petel*<sup>212</sup> where the Supreme Court held that ‘imminence is only one of the factors which the jury should weigh in determining whether the accused had a reasonable apprehension of danger and a reasonable belief that she could not extricate herself otherwise than by killing the attacker.’<sup>213</sup>

However, this erosion of imminence began to result in more controversial outcomes when applied beyond the battered woman context. In *R v McConnell*<sup>214</sup> the defendant (a prison inmate) killed another prisoner, Casey, in a pre-emptive strike following a confrontation. The defendant claimed that he had believed that Casey and two other prisoners ‘intended to kill him that day, and that he had no choice but to defend himself’.<sup>215</sup> The Supreme Court accepted the notion of ‘prison environment syndrome’ outlined by an expert psychiatrist witness called by the defence. This expert testified as to the dangerous features of prison culture, including its

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<sup>210</sup> [1990] 1 SCR 882.

<sup>211</sup> [1990] 1 SCR 882, [25] – [27].

<sup>212</sup> [1994] 1 SCR 3.

<sup>213</sup> [1994] 1 SCR 3, [15]-[16].

<sup>214</sup> [1996] 1 SCR 1075.

<sup>215</sup> (1995) 169 AR 321, [36].

psychological effects (allegedly similar to some of the symptoms of battered woman syndrome).<sup>216</sup> Imminence was conceptualised on a sliding scale: of great importance in conflicts between equal persons, of decreasing in significance in confrontations between unequal opponents,<sup>217</sup> and ultimately a matter for jury determination.<sup>218</sup> The Supreme Court accepted the dissenting decision of Conrad J of the Court of Appeal of Alberta that ‘earlier threats and continuing and escalating activity with present ability to carry them out, could justify the pre-emptive strike, depending on the jury’s findings.’<sup>219</sup>

Subsequently the Canadian Supreme Court attempted to limit this development in *R v Charlebois*.<sup>220</sup> Following a ‘long and difficult relationship’ with his friend Jette, the defendant shot him as he slept after Jette produced a knife and threatened to ‘have some fun tonight’.<sup>221</sup> The defendant claimed he felt ‘overwhelming panic’ despite a lack of ‘argument, skirmish or threat’.<sup>222</sup> An attempt to extend *Lavallee* was rejected, with the court citing lack of justification on factual or policy grounds.<sup>223</sup>

While we have relaxed the requirement of imminency of the threat in self-defence analysis particular to battered women, on the basis of expert evidence outlining the unique conditions they face, there is no justification for extending its scope further on the basis of evidence presented in this case.<sup>224</sup>

These cases from Canada demonstrate possible developments when imminence is relaxed. Reforms to self-defence in Victoria and Queensland would appear to limit the likelihood of similar

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<sup>216</sup> (1995) 169 AR 321, [77].

<sup>217</sup> ‘Unequal’ in the sense of a considerable power imbalance between opponents, for example where one is substantially stronger physically than the other: [1996] 1 SCR 1075.

<sup>218</sup> [1996] 1 SCR 1075.

<sup>219</sup> (1995) 169 AR 321, [72].

<sup>220</sup> [2000] 2 SCR 674.

<sup>221</sup> [2000] 2 SCR 674, [2].

<sup>222</sup> [2000] 2 SCR 674, [2].

<sup>223</sup> [2000] 2 SCR 674, [16].

<sup>224</sup> [2000] 2 SCR 674, [16].

developments by arbitrarily restricting the relaxation of imminence to circumstances of family violence (Victoria) or abusive relationships (Queensland). However, at common law and in Western Australia courts may be required to justly accommodate the experiences of other types of defendants who act in non-confrontational circumstances while preserving the integrity of the doctrine of self-defence.

## V CONCLUSION

Cases involving claims of self-defence by victims of family violence who kill in non-confrontational circumstances challenge traditional notions of imminence. Recent reforms, motivated largely by concern for battered women who killed their abusive partners, have de-emphasised the importance of imminence and have drawn attention to the underlying requirement for which it functions as a proxy – necessity. As Justice Kirby observed in *Osland v R*<sup>225</sup> (a case involving an unsuccessful claim of self-defence by a defendant who had been a victim of violence by the deceased):

The significance of the perception of danger is not its imminence. It is that it renders the defensive force used really necessary and justifies the defendant's belief that 'he or she had no alternative but to take the attacker's life'.<sup>226</sup>

The contemporary focus on necessity rather than imminence is an appropriate development. Cases involving victims of family violence who kill their abusers in non-confrontational circumstances sometimes demonstrate that, due to the State's inability to effectively protect them, defensive violence might be necessary in circumstances where the harm to which they are responding is not imminent.

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<sup>225</sup> *Osland v R* (1998) 159 ALR 170.

<sup>226</sup> *Osland v R* (1998) 159 ALR 170, 221.

Thus far, courts and some legislatures in Australia have restricted the relaxation of imminence to circumstances of family violence. In cases involving anticipatory self-defence by other types of defendant, a traditional construction of imminence has been maintained. Consequently, for many defendants imminence is still very much necessary in self-defence law. Whether the relaxation of imminence that has occurred in relation to victims of family violence will occur in relation to other groups of defendants remains to be seen. The effect of other reforms that may impact on self-defence, such as the abolition of the partial defence of provocation in Tasmania, Victoria and Western Australia, will also have to be considered. However, for some victims of family violence who kill their abusers in non-confrontational circumstances, necessity rather than imminence is the key consideration in self-defence.