

# **WOMEN WHO KILL THEIR ABUSERS: HOW QUEENSLAND'S NEW ABUSIVE DOMESTIC RELATIONSHIPS DEFENCE CONTINUES TO IGNORE REALITY**

MICHELLE EDGELY AND ELENA MARCHETTI<sup>†</sup>

## **ABSTRACT<sup>1</sup>**

Queensland has been the last Australian jurisdiction to reform its law of criminal defences to try and take account of the difficulties faced by victims of domestic abuse in satisfying the traditional elements of self-defence. Section 304B of the Queensland *Criminal Code* was designed to create a partial defence for victims of domestic violence who, fearing for their lives, kill their abusers in circumstances that would otherwise constitute murder. Usually, these cases involve killing in the absence of a triggering assault or where the feared harm is not imminent. The partial defence provides that the accused will be found guilty of manslaughter only, thereby allowing for judicial discretion in sentencing. This paper argues that the new provision is ineffective and, in fact, puts victims of abuse who kill in a more difficult tactical position than if it had not been enacted. The theory of criminal responsibility (juxtaposing justification and excuse) and various moral theories are used to argue that victims of serious abuse who kill their abuser should be entitled to an acquittal, even without a triggering assault and even if the threat posed by the abuser is not immediate.

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<sup>†</sup> Michelle Edgely, B Commerce, LLB (Hons), GradDipLegalPrac, LLM, Associate Lecturer in Law, Law School, Griffith University; email: m.edgely@griffith.edu.au. Elena Marchetti, Professor in Law, Faculty of Law, University of Wollongong; email: elenam@uow.edu.au.

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## I INTRODUCTION

In 2008, the Queensland Law Reform Commission (QLRC) opined that in Queensland ‘it is extremely difficult, if not impossible, to apply the defence of self-defence to a woman who kills her sleeping abuser’.<sup>1</sup> These uncontroversial words spearheaded a review process which culminated in the Queensland government’s enactment of section 304B of the *Criminal Code*.<sup>2</sup> It came into effect in February 2010. The effect of the new provision is to create a partial defence for victims of serious domestic violence who intentionally kill their violent abusers in the reasonably grounded belief that the killing was necessary for their own preservation. If the defence succeeds, the accused will be convicted of manslaughter, despite the fact that the killing would otherwise constitute murder. Queensland provides for mandatory life imprisonment for murder.<sup>3</sup> If successful, the partial defence under section 304B opens the way for the use of sentencing discretion. Almost two decades after the infamous *Kina* case,<sup>4</sup>

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<sup>1</sup> Queensland Law Reform Commission (QLRC), *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (2008) 313.

<sup>2</sup> Schedule to the *Criminal Code Act 1899* (Qld) (*Criminal Code*).

<sup>3</sup> *Criminal Code Act 1899* (Qld) s 305.

<sup>4</sup> Robin Kina was subjected to horrific abuse by her partner, Tony Black, which included being repeatedly punched around the face, kicked with steel-capped boots, being tied up in the house while he was at work, being repeatedly raped by her partner and twice gang-raped by his workmates, on his instigation. Her trial for Black’s murder lasted less than one day. No evidence was called on her behalf and no affirmative defences presented: *R v Kina* (Unreported, Queensland Court of Appeal, Fitzgerald P, Davies and McPherson JJA, 29 November 1993) 2, 5-7. In accordance with Queensland’s mandatory sentencing provision, Kina was sentenced to life imprisonment for murder: *Criminal Code Act 1899* (Qld) s 305. According to a statement not obtained until after her conviction, on the day of Black’s killing, Kina refused his demands for anal sex and he punched her in the face and stomach. Black threatened that if she continued to refuse him, he would sodomise her 14 year-old niece. As a result Kina armed herself with a knife and ended up stabbing Black in the abdomen when he approached her with a chair: *R v Kina*, (Unreported, Queensland Court of Appeal, Fitzgerald P, Davies and McPherson JJA, 29 November 1993) 10. On application for pardon, and after spending more than five years in prison, Kina’s conviction was overturned and a retrial ordered. The Attorney-General (Qld) declined to re-prosecute: Karen Pringle, ‘*R v Robyn Bella Kina*’ (1994) 3(67) *Aboriginal Law Bulletin* 14. The case is also discussed in QLRC, above n 2, 299-304.

Queensland has been the last Australian jurisdiction to review and reform its law of criminal defences to take account of the difficulties abused partners often have in satisfying the traditional elements of self-defence.<sup>5</sup>

By way of convenient shorthand, we will refer to Queensland's new defence as the abusive domestic relationship defence. Section 304B applies to a wide range of domestic relationships.<sup>6</sup> This paper focuses on the use of the defence for intimate personal relationships where the abused ends up killing their abuser. Despite the fact that the provision is cast in gender-neutral terms and includes those in same-sex relationships,<sup>7</sup> we consider this issue as it applies to women who have killed their violent *male* partners, since that is the most common situation in which an abuser is killed by their abused partner.<sup>8</sup>

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<sup>5</sup> Geraldine Mackenzie and Eric Colvin, *Homicide in Abusive Relationships: A Report on Defences* (Report prepared for the Attorney-General and Minister for Industrial Relations, 2009) 27. In other jurisdictions see: *Crimes Act 1900* (NSW) ss 418-423; *Crimes Act 1958* (Vic) ss 9AC, 9AD; *Criminal Law Consolidation Act 1935* (SA) s 15; *Criminal Code Act 1913* (WA) s 248; Schedule 1, *Criminal Code Act 1924* (Tas) s 46; Schedule to the *Criminal Code Act 1995* (Cth) s 10.4; *Criminal Code Act 2002* (ACT) s 42; *Criminal Code Act 2011* (NT) s 29.

<sup>6</sup> *Criminal Code Act 1899* (Qld) s 304B(2), imports the definition of 'domestic relationship' from s 11A of *Domestic and Family Violence Protection Act 1989* (Qld), which brings spousal, intimate personal, family and informal care relationships within the scope of the defence.

<sup>7</sup> *Domestic and Family Violence Protection Act 1989* (Qld) s 12A. The Queensland Law Reform Commission (QLRC) recommendation for consideration of the development of a separate defence stipulated that it apply gender-neutrally: QLRC, above n 2, 501. The *Terms of Reference* for the Review into the development of a separate defence required that the reviewers ensure that any new defence could be framed in a gender-neutral way: Geraldine Mackenzie and Eric Colvin, *Victims who Kill their Abusers: A Discussion Paper on Defences* (2009) 2. The Review considered a range of research, which demonstrated that violent abuse is not inflicted only on women in heterosexual relationships: Mackenzie and Colvin, above n 8, 13-14.

<sup>8</sup> See section 2 below for a more detailed discussion of this phenomenon.

Two archetypes of mariticide<sup>9</sup> are identified in the literature.<sup>10</sup> The first is when the defending partner kills her abuser during an episode of physical abuse. In theory, these types of cases should not be problematic under Queensland's general law of self-defence when the defender can show, perhaps through previous serious violence, that she had reasonable grounds for her fear of grievous bodily harm or death on the occasion of the killing.<sup>11</sup> The second archetype is often referred to as a 'non-confrontational' killing because the killing occurs when the abuser is sleeping or is otherwise not immediately threatening violence.<sup>12</sup> In this paper, we are concerned with non-confrontational mariticides where the abuse suffered has been at the more serious end of the scale. As Burke has noted, there is no reason why all battered women's self-defence claims should stand or fall together.<sup>13</sup> That is why we use this

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<sup>9</sup> 'Mariticide' derives from the Latin *maritus* (married) and the familiar Latin suffix, *cida* (killer). Although the term is gender neutral, it is most often used to refer to killing a husband because there is another gender-specific term, *uxoricide*, for killing a wife: <<http://en.wikipedia.org/wiki/Mariticide>> at 10 March 2011. We use the terms *mariticide* and *uxoricide* in their gendered meanings, but as encompassing all forms of intimate partner relationships.

<sup>10</sup> See, eg, Christine Belew, 'Killing One's Abuser: Premeditation, Pathology, or Provocation?' (2010) 59 *Emory Law Journal* 769, 770-771; Alafair Burke, 'Rational Actors, Self-Defence, and Duress: Making Sense, not Syndromes, out of Battered Women' (2002) 81 *North Carolina Law Review* 211, 275; Susannah Bennett, 'Ending the Continuous Reign of Terror: Sleeping Husbands, Battered Wives, and the Right of Self-Defense' (1989) 24 *Wake Forest Law Review* 959, 978; Anne Coughlin, 'Excusing Women' (1994) 82 *California Law Review* 1, 49; 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, 733.

<sup>11</sup> We say 'should not be problematic', but in fact there is evidence that women may not be able to satisfy prosecutors of the validity of their defensive claims, even when the history of abuse is undisputed. The QLRC discusses a number of cases where women pled guilty to manslaughter despite claiming that the killing was done defensively and in fear and during an episode of violence. In the cases discussed, the Director of Public Prosecutions accepted that the women were acting defensively for sentencing purposes: QLRC, above n 2, 272-275.

<sup>12</sup> See, eg, Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010), 624; Burke, above n 11, 275.

<sup>13</sup> Burke, above n 11, 216.

demarcation - our discussion focuses on women at risk of very serious harm who are driven by fear to kill their abusers.<sup>14</sup>

This paper will begin by briefly outlining the gendered nature of domestic violence and how women who are subjected to such violence often have limited avenues of escaping the abuse. This discussion assists in understanding why some abused women resort to killing their abusive partners to end the violence. Next, the paper traces how the traditional defence of self-defence in Queensland has been applied to women who kill their abusers and considers how, if at all, the abusive domestic relationship defence changes the landscape for such women. The application of the new defence is then illustrated by discussing the evidence presented in the *R v Susan Falls, Bradley James Coupe, Christopher Anthony Cumming-Creed and Anthony James Hoare*<sup>15</sup> ('Falls') case. We argue that in cases involving a history of extreme abuse, a woman who intentionally kills her abuser because she fears for her life and has a reasonably-grounded belief that there is no other way to protect herself is morally justified in doing so, even if the killing was during a non-confrontational moment. Rather than a merciful sentence, she should be entitled to acquittal.<sup>16</sup> In every other Australian jurisdiction, reforms have delivered precisely that result.<sup>17</sup> We conclude that Queensland's new abusive domestic relationship

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<sup>14</sup> Zoe Rathus notes that adopting a standard based on the 'level' of abuse suffered, might result in women being considered 'not battered enough' to deserve a defence: Zoe Rathus, *Submission to Victims who Kill their Abusers: A Discussion Paper on Defences*, 16 June 2009, 4-5. We agree and therefore propose that the claims should depend not on the 'level' of abuse suffered, but on the degree of harm feared, based on reasonable grounds.

<sup>15</sup> Transcript of Proceedings, *R v Susan Falls, Bradley James Coupe, Christopher Anthony Cumming-Creed and Anthony James Hoare* (Supreme Court of Queensland, Applegarth J, 26 May 2010).

<sup>16</sup> Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Charges of Homicide: The Structural and Systemic Versus the Personal and Particular' in Wendy Chan, Dorothy Chunn and Robert Menzies (eds), *Women, Madness and the Law: A Feminist Reader* (Glasshouse Press, 2005) 191, 191.

<sup>17</sup> See *Crimes Act 1900* (NSW) ss 418 – 423; *Crimes Act 1958* (Vic) ss 9AC, 9AD; *Criminal Law Consolidation Act 1935* (SA) s15; *Criminal Code* (WA) s 248; *Criminal Code* (Tas) s 46; *Criminal Code* (Cth) s 10.4; *Criminal Code* (ACT) s 42; *Criminal Code* (NT) s 29.

defence is problematic because it creates a serious risk that women will be unjustly convicted of manslaughter.<sup>18</sup>

## II BATTERED WOMEN WHO KILL

As we now know, '[t]he private and often hidden nature of domestic violence makes it one of the most under-reported crimes, with estimates of reporting ranging from only 2 to 52 per cent'.<sup>19</sup> The reported results for various indicators of intimate partner violence are nevertheless alarming and confirm the gendered nature of spousal homicide, 'since most studies indicate that around 90-95% of victims of domestic violence are women, and the perpetrators are their male partners or ex-partners'.<sup>20</sup> The most recent *Australian Bureau of Statistics Personal Safety Survey* reported that from age 15, 2.1 percent (160,100) of women experienced current partner violence, as compared with 0.9 percent (68,100) of men, and that 10 percent of women who had experienced violence by their current partner, had a protection order issued against the abusive partner. Despite the protection order, however, 20 percent reported that the violence continued.<sup>21</sup> The survey defined violence as 'any incident involving the occurrence, attempt or threat of either physical or sexual assault'.<sup>22</sup> More disturbing are the statistics which provide an estimate of how many women had experienced violence during their lifetime. The Australian Institute of Criminology's findings from the 2004 *International Violence Against Women Survey* found that one third of women who had been involved in an intimate partner

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<sup>18</sup> Anthony Hopkins and Patricia Easteal, 'Walking in her Shoes: Battered Women who Kill in Victoria, Western Australia and Queensland' (2010) 35(3) *Alternative Law Journal* 132, 136.

<sup>19</sup> Crime and Misconduct Commission, *Policing Domestic Violence in Queensland: Meeting the Challenges* (2005) 15.

<sup>20</sup> Robyn Edwards, *Staying Home Leaving Violence: Promoting Choices for Women Leaving Abusive Partners* (Australian Domestic & Family Violence Clearinghouse, 2004) 12.

<sup>21</sup> Australian Bureau of Statistics, *Personal Safety Survey 2005: Summary* (2006) 11.

<sup>22</sup> *Ibid* 5.

relationship had experienced at least one form of violence perpetrated by an intimate partner.<sup>23</sup>

Studies have shown that victims of partner violence are at greatest risk of being killed by their abusive partner, when leaving or attempting to leave the relationship.<sup>24</sup> This is particularly the case during the first two months of separation.<sup>25</sup> The *2007-08 National Homicide Monitoring Program Annual Report* published in 2010 by the Australian Institute of Criminology found that:

in 2007-08, 144 victims were killed by an offender with whom they shared a principle domestic relationship. Sixty percent of these victims (n=87) were female, while 40 percent (n=57) were males. Within the category of domestic homicide, female over-representation was greatest in intimate partner homicides (n=62, 78%), whereas male representation was highest in siblicides (n=6, 86%).<sup>26</sup>

More alarming are the rates for Indigenous Australians. The 2007-08 National Homicide Monitoring Program found that ‘[j]ust over one in 10 homicide victims in 2007-08 were identified as an Aboriginal or Torres Strait Islander’ and 42 percent of these victims were killed in an intimate partner homicide.<sup>27</sup> Although the report does not identify how many of those victims were female, it does state that Indigenous females made up more than half of all Indigenous homicide victims, much higher than the non-Indigenous female proportion of 38 percent.<sup>28</sup>

<sup>23</sup> Jenny Mouzos and Toni Makkai, *Women's Experiences of Male Violence: Findings From the Australian Component of the International Violence Against Women Survey (IVAWS)* (Australian Institute of Criminology, 2004) 44.

<sup>24</sup> Silke Meyer, *Understanding the Help-Seeking Decisions of Female Victims of Intimate Partner Violence* (PhD Thesis, Griffith University, 2009) 252.

<sup>25</sup> Crime and Misconduct Commission, *Policing Domestic Violence in Queensland: Meeting the Challenges* (2005) 3.

<sup>26</sup> Marie Virueda and Jason Payne, *Homicide in Australia: 2007–08 National Homicide Monitoring Program Annual Report*, Monitoring Reports No 13 (Australian Institute of Criminology, 2010) 19. Siblicide is defined in the report as one sibling killing another.

<sup>27</sup> *Ibid* 22-23.

<sup>28</sup> Virueda and Payne, above n 27, 22.

There are many more Australia-wide or jurisdiction specific studies that have similarly found that women are much more likely than males to be killed by an intimate partner, often after separating.<sup>29</sup> Women who killed their intimate partner do so for reasons which are markedly different to their male counterparts. Women usually kill as an act of self-defence whereas men, 'kill their female partners when they challenge the man's authority, leave (actual or threatened), or form a new relationship (actual or suspected)'.<sup>30</sup>

Although legislative and policy reforms have over the past 30 years resulted in greater protections for victims of domestic abuse, historically, (and some may argue currently) the legal system worked within a patriarchal culture where police and court responses treated the problem of domestic violence as one which belonged in the confines of the home. Through the efforts of feminist lobbyists and victim advocacy groups, and as a result of successful civil liability suits, police training for officers responding to domestic violence shifted from 'primarily focusing on crisis intervention and referral' or what some referred to as social work, to a proactive criminal justice response.<sup>31</sup> This has assisted women seeking help, but does not guarantee that a woman will be able to leave the abusive relationship.

Victims of partner abuse experience a number of obstacles when seeking help. In her PhD research, Silke Meyer found that a victim's emotional attachment to her partner, access to finance, a loss of self, cultural heritage and immigration status, and awareness of available services are factors that influence whether or not a victim of partner

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<sup>29</sup> Miranda Kaye, Julie Stubbs and Julia Tolmie, 'Domestic Violence and Child Contact Agreements' (2003) 17 *Australian Journal of Family Law* 93; Jenny Mouzos and Catherine Rushforth, 'Family Homicide in Australia' (2003) *Australian Institute of Criminology: Trends & Issues Series* 1; Jenny Mann, *Family and Domestic Violence in Western Australia: Building a Profile of those Involved* (Western Australia Police, 2007).

<sup>30</sup> Rebecca Bradfield, *The treatment of women who kill their violent male partners within the Australian criminal justice system* (PhD thesis, University of Tasmania, 2002) 19.

<sup>31</sup> Crime and Misconduct Commission, above n 26, 10.



violence will seek help.<sup>32</sup> An Australian Domestic and Family Violence Clearinghouse and UNSW Centre for Gender-Related Violence study, which explored how women who ended an abusive relationship could remain safely in their homes, listed the following reasons why women found it difficult to leave abusive relationships:

- Women's fear for their safety, including fear of being killed, if they leave the relationship.
- Women's beliefs and feelings, including shame, denial, disbelief, emotional bonds to the partner, commitment to the marriage, waiting for change to occur.
- Structural barriers, including lack of access to an adequate income, affordable housing, legal rights and information on support services.
- Ineffective responses from informal and formal supports, including a judgemental [sic] response, blaming the woman and normalisation of violence.<sup>33</sup>

The gendered nature of intimate partner homicide and indeed, domestic violence is important to acknowledge, particularly when it comes to reforming the law. In a paper, which describes how male victims experience domestic violence, Jane Mulroney and Carrie Chan state that:

[r]ecording violence should not be seen as merely recording different acts of violence but further efforts should be made to understand and record more about the context in which such violence occurs. More specifically, 'contextualising' the violence in terms of its impact on the intended victim is a critical component of such an assessment.<sup>34</sup>

After conducting a contextual analysis of cross applications of apprehended domestic violence orders in NSW, Wangmann has confirmed that feminist claims about the way in which domestic violence is experienced, are correct.<sup>35</sup> The power differential

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<sup>32</sup> Meyer, above n 25.

<sup>33</sup> Edwards, above n 21.

<sup>34</sup> Jane Mulroney and Carrie Chan, 'Men as Victims of Domestic Violence' (2005) *Australian Domestic and Family Violence Clearinghouse Topic Paper* <[http://www.adfvc.unsw.edu.au/PDF%20files/Men\\_as\\_Victims.pdf](http://www.adfvc.unsw.edu.au/PDF%20files/Men_as_Victims.pdf)> 8.

<sup>35</sup> Jane Wangmann, 'Gender and Intimate Partner Violence: A Case Study from NSW' (2010) 33 *University of New South Wales Law Journal* 945.

between men and women has implications for the degree of harm likely to be suffered in abusive episodes, the intensity of the victim's fear and the type of defensive response required to survive.<sup>36</sup> Unless statistics are contextualised they remain simply numbers and little can be done to properly reform the law and criminal justice practices. Indeed, the evolution of the law relating to defences for victims of serious domestic violence who intentionally kill their violent abusers has occurred as a result of the continued push by feminist lobbyists and scholars for the contextualisation of partner homicide rates.

Since Lenore Walker's large-scale empirical study of violence against women, the psychological impact of the violence has more commonly been dubbed 'battered women syndrome'.<sup>37</sup> The term has, over the years, been challenged and varied to better reflect the psychological terror and states of mind experienced by abused women. Since the early 1990s Australian courts have followed their American and Canadian counter-parts in allowing expert evidence to be admitted to educate the court about the traumas experienced by an accused woman who has killed her abuser. This evidence assists a jury to understand why these women resort to deadly force to extricate themselves from the abusive relationship, rather than simply leaving.<sup>38</sup> The use of this expert evidence has been in response to the difficulty abused women have had in being able to rely on the defence of self-defence for mariticides. In the next section we consider in more detail, why this difficulty still exists and whether or not the new abusive domestic relationship defence makes any difference.

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<sup>36</sup> Kevin L Hamberger, 'Men's and Women's use of Intimate Partner Violence in Clinical Samples: Toward a Gender-Sensitive Analysis' (2005) 20(2) *Violence and Victims* 131, 139; Wangmann, above n 36, 951; Elizabeth Schneider, 'Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense' (1980) *Harvard Civil Rights Civil Liberties Law Review* 632.

<sup>37</sup> Lenore E A Walker, 'Battered Women Syndrome: Empirical Findings' (2006) *Annals New York Academy of Sciences* 142, 143.

<sup>38</sup> Elizabeth A Sheehy, Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Trial: The Battered Women Syndrome and its Limitations' (1992) 16 *Criminal Law Journal* 369.

### III SELF-DEFENCE VS ABUSIVE DOMESTIC RELATIONSHIP DEFENCE

It is well-accepted that women who kill their batterers in circumstances where the feared harm is not immediate traditionally have had difficulty fitting their defensive claims within the doctrinal rules of self-defence.<sup>39</sup> In Queensland, under the *Criminal Code* there are four separate schemes for self-defence, two of which apply when the defensive force resulted in an intended or likely death.<sup>40</sup> These two schemes are distinguished according to whether or not the accused provoked the violence to which she responded with deadly defensive force.<sup>41</sup> Provocation by the accused does not fit the profile of non-confrontational mariticides, so our discussion of the general law of self-defence will focus on section 271(2) of the *Criminal Code*, which reads:

**271 Self-defence against unprovoked assault**

- (1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.
- (2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person

<sup>39</sup> Hopkins and Easteal, above n 19, 132; Stubbs and Tolmie, above n 17, 191, 192-193; Australian Law Reform Commission, 'Chapter 14: Homicide Defences and Family Relationships in Criminal Laws', *Family Violence – A National Legal Response*, Report No 114 (2010) 624; Law Reform Commission of Western Australia, 'Chapter 4: Defences to Homicide', *A Review of the Law of Homicide: Final Report* (2007) 158; Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) 59, 61, 63; Lenny Roth, *Provocation and Self-Defence in Intimate Partner and Homophobic Homicides*, NSW Parliamentary Library Research Service Briefing Paper 3/07 (2007) 2.

<sup>40</sup> Sections 271(2) and 272 are the defensive provisions applicable to most uses of deadly defensive force. Section 271(1) only applies to deadly force when the death was neither intended nor likely: *R v Prow* [1990] 1 Qd R 54. Section 31(1)(c) does not apply to an act which would constitute murder: *R v Fietkau* [1995] 1 Qd R 667.

<sup>41</sup> Section 271(2) applies to defence against unprovoked assaults and section 272 to defence against provoked assaults.

using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

For an accused to successfully rely on the defensive scheme in subsection 2 of section 271, the prosecution must disprove (beyond reasonable doubt) at least one of the following elements:

1. The deceased made an unprovoked assault against the accused;
2. which, of its nature, caused reasonable apprehension of death or grievous bodily harm;
3. the accused believed that her use of defensive force was necessary to preserve herself from death or grievous bodily harm; and
4. this belief was based on reasonable grounds.<sup>42</sup>

The initial requirement of a triggering assault means that self-defence is not available for a pre-emptive strike unless the danger feared is imminent and helps ensure that the use of defensive force is driven by a need to protect, rather than by a desire to retaliate for past wrongs.<sup>43</sup> As we discuss below, in the *Falls* case a decidedly welcome approach was taken to the legal analysis of ‘assault’ in this first element in Queensland self-defence law.<sup>44</sup> It is well-established

<sup>42</sup> *R v Gray* (1998) 98 A Crim 4 589, 593; *R v Muratovic* [1967] Qd R 15, 26. The way that the elements are demarcated varies in the cases: in *Gray*, three elements are listed by McPherson JA at 593; in *Muratovic*, Hart J identified five elements at 26; in *R v Wilmot* (2006) 165 A Crim R 14, 25-26, Jerrard JA interprets McPherson J’s judgement in *Gray* as prescribing two elements, with the unlawful unprovoked assault being akin to a precondition to the availability of the defence. Perhaps nothing turns of the different numbers of elements because the differences are not substantive, although it might reflect different emphases.

<sup>43</sup> Belew, above n 11, 774, 792. A pre-emptive strike is not ruled out altogether. In *R v Lawrie* [1986] 2 Qd R 502, 505, Connolly J noted that a pre-emptive strike is permissible when there is an honest and reasonably-grounded belief that a blow is about to be struck.

<sup>44</sup> In his summing up to the jury, Applegarth J in the *Falls* case applied the ratio of *R v Secretary* (1996) 107 NTR 1 to the meaning of ‘present apparent ability’ within the context of an assault: Transcript of Proceedings, *R v Susan Falls, Bradley James Coupe, Christopher Anthony Cumming-Creed and*

in Queensland that the second element can be proven by evidence of past serious violence by the deceased towards the accused.<sup>45</sup> Elements three and four, considered together, are predominantly subjective. In *R v Marwey*,<sup>46</sup> the High Court confirmed that the test of necessity is essentially subjective, albeit that the accused's belief must be based on reasonable grounds.<sup>47</sup> In subsequent cases the subjectivity of the necessity element has been affirmed and emphasised on numerous occasions.<sup>48</sup> In *R v Wilmot*,<sup>49</sup> McMurdo P reiterated that this provision does not require the act to be objectively necessary; the defender's belief that the use of force was necessary to preserve himself must be held on reasonable grounds, but the necessity of force need not be measured according to the standard of a reasonable person.<sup>50</sup> It is also well-established that elements three and four do not impose any obligation on the accused to retreat from the violence.<sup>51</sup>

Women have two main difficulties in raising self-defence under section 271(2) in non-confrontational mariticides. The first is not

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*Anthony James Hoare* (Supreme Court of Queensland, Applegarth J, 26 May 2010) day 13-92. *Secretary* was a decision of the Northern Territory Court of Criminal Appeal, which has not yet been considered by the Queensland Court of Appeal. *Falls* is only the second case in Queensland where *Secretary* has been applied. It was also applied in *R v Sternqvist* (Unreported, Supreme Court of Queensland, Cairns Circuit, Derrington J, 18 June 1996): Stubbs and Tolmie, above n 11, 735. We conducted our own search on 28 August 2011 for consideration of *Secretary* by Queensland's Court of Appeal. Using the search terms 'secretary' and 'self-defence', we searched the Queensland Court of Appeal database on Austlii; the Queensland Court of Appeal judgments database of the Supreme Court of Queensland Library; Queensland Legal Indices Online; and LexisNexis Casebase. We also used the case citator for *Secretary* on LexisNexis CaseBase. We found no case where *Secretary* was considered by the Queensland Court of Appeal.

<sup>45</sup> *R v Muratovic* [1967] Qd R 15; *R v Keith* (1934) St R Qd 155.

<sup>46</sup> (1977) 138 CLR 630.

<sup>47</sup> *R v Marwey* (1977) 138 CLR 630, 635, 637, 638.

<sup>48</sup> *R v Gray* (1998) 98 A Crim R 589; *R v Greenwood* [2002] QCA 360, [38]; *R v Mackenzie* [2000] QCA 324, [47]; *R v Vidler* (2000) 110 A Crim R 77, 82; *R v Wilmot* (2006) 165 A Crim R 14, 17, 26.

<sup>49</sup> (2006) 165 A Crim R 14.

<sup>50</sup> *R v Wilmot* (2006) 165 A Crim R 14, 16-17.

<sup>51</sup> *R v Keith* (1934) St R Qd 155, 184; *R v Muratovic* [1967] Qd R 15, 29.

strictly a problem of law, but a misapplication of law.<sup>52</sup> Despite the abundance of authority that elements three and four are essentially subjective, women are, in practice, required to demonstrate that the force they used was objectively necessary.<sup>53</sup> The second difficulty is a problem of law and it concerns the first element. In non-confrontational cases, it can be extremely difficult showing that the killing was in response to a specific, precipitating assault.<sup>54</sup> Under the *Criminal Code*, an assault includes the threat of battery. But a threat of battery will only amount to an assault if the assailant has an ‘actual or apparent present ability’ to carry out the threat.<sup>55</sup> At common law, the equivalent difficulty is in showing that the threat of harm was imminent.<sup>56</sup> These are equivalent elements because both impose a requirement for temporal proximity between the threatened harm and the defensive action.<sup>57</sup>

<sup>52</sup> Hopkins and Easteal, above n 19, 134; Stubbs and Tolmie, above n 11, 713.

<sup>53</sup> Queensland Government, *Taskforce on Women and the Criminal Code* (1999) 107-108.

<sup>54</sup> An ‘assault’ is defined in section 245(1) of the *Criminal Code* as follows:

A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person’s consent, or with the other person’s consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person’s consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person’s purpose, is said to assault that other person, and the act is called an assault.

<sup>55</sup> At common law an assault can be constituted even if the victim does not know when the feared violence will occur: *R v Mostyn* [2004] NSWCCA 97, [63]-[65]; *Barton v Armstrong* [1969] 2 NSWLR 451, 454-455; or if the threatened harm is not immediate, but the fear continues while the threat remains on foot and it seems unlikely that anything will intervene to prevent the threat materialising: *Zanker v Vartzokas* (1988) 34 A Crim R 11, 16, per White J in the SASC.

<sup>56</sup> Hopkins and Easteal, above n 19, 135; Stubbs and Tolmie, above n 11, 733; Law Reform Commission of Western Australia, above n 40, 167; Zoe Ratus, *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>57</sup> David McCord and Sandra Lyons, ‘Moral Reasoning and the Criminal Law: The Example of Self-Defence’ (1992) 30 *American Criminal Law Review* 97, 136; Marina Angel, ‘Criminal Law and Women: Giving the Abused Woman who Kills a Jury of her Peers who Appreciate Trifles’ (1996) 33 *American Criminal Law Review* 229, 326; Cf Victoria Nourse, ‘Self-Defence and Subjectivity’ (2001) 68 *University of Chicago Law Review* 1235, 1237.

At this point, it seems apposite to consider section 304B. The elements are contained in the first subsection.<sup>58</sup>

**304B Killing for preservation in an abusive domestic relationship**

- (1) A person who unlawfully kills another (the deceased) under circumstances that, but for the provisions of this section, would constitute murder, is guilty of manslaughter only, if—
  - (a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and
  - (b) the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and
  - (c) the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.

The new abusive domestic relationship defence was intended to apply as a partial defence only when women, 'motivated by fear, desperation and a belief that there is no other viable way of escaping the danger', kill their abusive spouses.<sup>59</sup> As with the general self-defence provision, reasonable grounds are required for that belief, but it is clear that the reasonableness of the grounds is to be assessed from the perspective of someone who has lived with domestic violence, and in light of the particular history of abuse that the accused endured.<sup>60</sup> Based on the case law for section 271(2) and as argued above, there seems to be no reason why this element would not operate the same way as for the general law of self-defence.<sup>61</sup> On that basis, there are really only two substantive differences between these separate defensive provisions as they apply to the killing of an

<sup>58</sup> Subsections (2) – (6) of section 304B contain definitions and rules for interpreting and applying the elements of the section.

<sup>59</sup> Explanatory Memoranda, Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009 (Qld) 2.

<sup>60</sup> Explanatory Memoranda, Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009 (Qld) 10.

<sup>61</sup> Patricia Eastal and Anthony Hopkins, 'Women and the Criminal Law: Defences to Homicide' in Patricia Eastal (ed), *Women and the Law in Australia* (LexisNexis, 2010) 109, 119.

abusive spouse: first, the abusive domestic relationship defence has no requirement for a triggering assault;<sup>62</sup> and second, when successfully deployed, the abusive domestic relationship defence results in a manslaughter conviction, rather than complete acquittal. To be clear, the difference between an acquittal under section 271(2) and a conviction for manslaughter under section 304B, even when there is a history of serious violence and the accused had a genuine and reasonably-grounded fear for her life, is the absence in the latter case of the requirement for a specific triggering assault. On the face of the law, therefore, it seems that *the opportunity* to strive for an acquittal as opposed to facing a manslaughter conviction is predicated on that triggering assault. This makes it likely that many non-confrontational mariticides will result in a manslaughter conviction.<sup>63</sup> Moreover, the abusive domestic relationship defence is thereby placed on a similar footing under Queensland law to provocation and diminished responsibility.<sup>64</sup> General self-defence is the only defence that offers vindication for the use of deadly force; the others are concessions to human frailties.<sup>65</sup> Seemingly, a woman's killing while in fear for her life has some equivalency in law to a (man's) killing brought on by his sudden, angry loss of control or his diminished mental capacities.

Queensland is unique in taking this approach. All other jurisdictions have attempted to redress the gender inequality of self-defence law by reforming their general laws of self-defence.<sup>66</sup> Although the various legislative formulations differ, each has been informed by the defensive needs of seriously abused women, despite

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<sup>62</sup> Explanatory Memoranda, Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009 (Qld) 11.

<sup>63</sup> Hopkins and Easteal, above n 19, 135, 136.

<sup>64</sup> The successful use of the partial defences of provocation and diminished responsibility to a murder charge results in a manslaughter conviction. See *Criminal Code Act 1899* (Qld) ss 403, 304A. The different levels of culpability are reflected at sentencing: *R v Whiting, ex parte Attorney-General (Qld)* [1995] 2 Qd R 199, 202.

<sup>65</sup> Stubbs and Tolmie, above n 17, 193.

<sup>66</sup> ALRC, above n 40, 642-643; Law Reform Commission of Western Australia, above n 40, 158; Victorian Law Reform Commission, above n 40, 68.



the fact that none apply exclusively to that group, and each offers a complete acquittal from a charge of murder or manslaughter.<sup>67</sup>

Moreover, even in cases where there has arguably been a triggering assault, the existence of a separate partial defence might compromise the possibility of a full acquittal on the basis of self-defence. In these cases, it will be impossible to discharge the evidentiary burden for self-defence without also triggering the availability of section 304B. This means that the jury will have to be instructed on both the full defence and the partial defence.<sup>68</sup> There is a significant risk that, even with careful instructions and the best of judicial intent, some juries might reason that the abusive domestic relationship defence is the one that should be applied because it is circumstance specific and specifically stipulates the relevance of the abusive relationship.<sup>69</sup>

#### IV *FALLS'* CASE AND THE APPLICATION OF SECTION 304B

Queenslanders did not have to wait long to see how the abusive domestic relationship defence works in practice. In May 2010, only three months after the enactment of the new provision, the *Falls* case came before Queensland's Supreme Court. Susan Falls was charged with the shooting murder of her husband, Rodney Falls. It was not disputed that Susan planned her husband's murder; that she illegally obtained a gun some two weeks before the offence; that on the night of the offence, she laced her husband's evening meal with sedatives; that she then waited for him to pass out before shooting him once in the head at close range, and then again a second time, three hours later. Susan claimed that she acted to protect her infant son, whom

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<sup>67</sup> *Crimes Act 1900* (NSW) ss 418-423; *Crimes Act 1958* (Vic) ss 9AC, 9AD; *Criminal Law Consolidation Act 1935* (SA) s15; *Criminal Code* (WA) s 248; *Criminal Code* (Tas) s 46; *Criminal Code* (Cth) s 10.4; *Criminal Code* (ACT) s 42; *Criminal Code* (NT) s 29.

<sup>68</sup> *R v Willett* (2005) QCA 339, [16], [37]; *Viro v R* (1978) 141 CLR 88, 118.

<sup>69</sup> Hopkins and Easteal, above n 19, 136.

Rodney had threatened to kill on her mother's birthday, which was, at the time of the shooting, four days away.<sup>70</sup> At her trial, Susan relied on self-defence<sup>71</sup> as well as the new abusive domestic relationship defence. The prosecution's case centred on arguing that Susan intended to kill Rodney or at least cause him grievous bodily harm pursuant to section 302(1) of the *Criminal Code*. In the alternative, the prosecution argued that Susan should be found guilty of manslaughter pursuant to the new abusive domestic relationship defence.

Susan's evidence painted a picture of a life controlled by fear. She was born in 1967 in Yugoslavia and moved to Sydney with her parents when she was two. Her father was a heavy drinker who verbally and physically abused her mother. According to Susan, her mother would 'stand there and take it'.<sup>72</sup> She met Rodney in 1981 when she was 14 and he was 17. He was her first boyfriend. Her parents were strict, which initially made Susan hide her relationship with Rodney from them. Rodney did not get along with Susan's parents, causing much friction and tension between Susan and her parents, and which eventually led her to move in with Rodney just before they were due to be married in January 1987. Her family did not attend the wedding. Rodney had started physically abusing Susan prior to them living together, which was partly why Susan's parents objected to the relationship. In her testimony, Susan declared how during the early stages of the courtship she 'adored' and 'loved' Rodney 'more than anything'.<sup>73</sup>

Susan gave evidence that throughout the marriage Rodney had controlled her employment, finances and her relationships with

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<sup>70</sup> Transcript of Proceedings, *R v Susan Falls, Bradley James Coupe, Christopher Anthony Cumming-Creed and Anthony James Hoare* (Supreme Court of Queensland, Applegarth J, 26 May 2010) day 9-42.

<sup>71</sup> Section 273 extends the self-defence provision in section 271(2) to someone acting in defence of another.

<sup>72</sup> Transcript of Proceedings, *R v Susan Falls, Bradley James Coupe, Christopher Anthony Cumming-Creed and Anthony James Hoare* (Supreme Court of Queensland, Applegarth J, 26 May 2010) day 8-55.

<sup>73</sup> *Ibid* day 8-57.

family and friends. At times, Susan was not allowed to visit her parents even when they lived less than a five minute drive away.<sup>74</sup> Rodney would get jealous of the attention Susan gave to her children and therefore insisted that she fed or looked after him prior to attending to the children.<sup>75</sup> Their first child, Amanda was born in May 1990, the second child Danielle, in October 1991, the third child Cassandra, in July 1993, and the fourth child Jackson, in May 2003. Susan had also terminated a pregnancy at the end of 1998 because at the time she thought they could not afford another child. Throughout the relationship, they owned 12 dogs, nine of which were killed by bashing and drowning at Rodney's hands.<sup>76</sup>

Around 1992, Rodney started using steroids to build muscle, which made him 'snappy, edgy, more aggressive' and 'more violent'.<sup>77</sup> Rodney's muscle mass became quite large, which was in stark contrast to his lean frame when Susan first met him. He not only beat her, but, according to Susan's testimony, he also raped her.<sup>78</sup> Susan hid her injuries with clothes, make-up and glasses. She was not allowed to speak to anyone about the violence, least of all her parents. She was extremely fearful of his reactions, which were often unpredictable. Rodney owned a gun, which he had acquired during a trip the family took to Hawaii for Rodney's 40<sup>th</sup> birthday in March 2005, and which he sometimes used to fire at Susan's parent's house and at animals.<sup>79</sup> When asked why Susan put up with Rodney's behaviour, Susan said:

I really didn't have a choice. He thought he owned me. I did try to, you know, ask him why he was treating me that way and it would be like "That's the only way I can keep you under control. Get you to do what I want you to do".<sup>80</sup>

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<sup>74</sup> Transcript of Proceedings, *R v Susan Falls, Bradley James Coupe, Christopher Anthony Cumming-Creed and Anthony James Hoare* (Supreme Court of Queensland, Applegarth J, 26 May 2010) day 8-65.

<sup>75</sup> Ibid day 8-73.

<sup>76</sup> Ibid day 8-78.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid day 9-9.

<sup>79</sup> Ibid day 8-81.

<sup>80</sup> Ibid day 9-4.

She was afraid of leaving because she thought that he would hurt her children and her parents. Susan had at various times contacted the police but found them unhelpful. The first time they came to the house they offered to take her to a safe house, but not the children.<sup>81</sup> The police issued a domestic violence protection order but that did not stop the violence. While Rodney was away for his sister's wedding in 2000 and with the support of a close friend, Susan attended the police station to make a statement about Rodney's violent behaviour.<sup>82</sup> She then moved to South Australia for six weeks. Initially, Rodney was apologetic about his behaviour, asking Susan to return, but when she did not respond, he started threatening to hurt her parents, her sister and her family, and friends who had assisted her to leave.<sup>83</sup> Susan therefore returned, hoping Rodney would honour his promise to change, but, as one might expect, that did not happen. This made Susan feel even more helpless:

He promised me he was going to change, promised me that he was going to try and make things better. I felt totally helpless then because I, when I went back to him he got me to, I had a DVO on him and I had to cancel that or withdraw it, so when the police came around to do that I got the feeling that they looked upon me as some fool. ... I felt I had wasted their time and their efforts to help me get away, that then they wouldn't take me seriously if I were to call them again, that I would just call them and go back to him after any help that they would offer me.<sup>84</sup>

The violence continued to escalate, keeping Susan a prisoner in her own home. Even when Rodney was not violent, she 'would still

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<sup>81</sup> Transcript of Proceedings, *R v Susan Falls, Bradley James Coupe, Christopher Anthony Cumming-Creed and Anthony James Hoare* (Supreme Court of Queensland, Applegarth J, 26 May 2010) day 9-10.

<sup>82</sup> Ibid day 9-17.

<sup>83</sup> Ibid day 9-18. The experience of Susan Falls, as outlined in her Examination-in-Chief, is almost a perfectly classic description of the 'cycle of violence' experienced by victims of intimate partner violence.

<sup>84</sup> Examination-in-Chief of Susan Falls, Transcript of Proceedings, *R v Susan Falls, Bradley James Coupe, Christopher Anthony Cumming-Creed and Anthony James Hoare* (Supreme Court of Queensland, Applegarth J, 26 May 2010) day 9-19, 20.

have to be on guard because anything could upset him'.<sup>85</sup> Rodney was also violent and threatening towards the children. It was his threats to kill one of the children if Susan's mother visited in 2006, which led to Susan killing her husband. Susan could not dissuade her mother from visiting and nor could she tell her parents about the violence, because of her fear of Rodney retaliating if he ever found out she had confided in others. Rodney forced Susan to pick a child, whom he said he would kill if her mother visited, by making Susan write the children's names on separate pieces of paper and then blindly choosing one. The name she selected was Jackson's. Upon seeing his name, Rodney said it would be easy to kill him because they could pass it off as a cot death.<sup>86</sup> He decided that the date he would kill Jackson would be on Susan's mother's birthday, May 29, in order to punish her for insisting on visiting. In cross-examination Susan testified that she felt she had no other option but to kill Rodney. She honestly believed that his threats were genuine and that Rodney would kill Jackson since she had been unable to convince her mother not to visit.<sup>87</sup>

The prosecution, in cross-examination, questioned Susan's credibility by focusing on her ability to recall particular incidents of abuse, her motives for killing Rodney, and her ability to leave the relationship as a way to end the abuse. For example:

Prosecutor:	I'm suggesting to you Rodney didn't punch you.
Susan Falls:	That he didn't punch me?
Prosecutor:	Didn't?
Susan Falls:	Well, I was there, I'm sorry, and he punched me and my tooth was loose. <sup>88</sup> ...
Prosecutor:	Okay, so that I can be absolutely clear about this, so there is no mistake, what I'm suggesting to you is that there was never any threat to kill Jackson. There was never any lottery. There was never wondering [sic] around the house saying,

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<sup>85</sup> Transcript of Proceedings, *R v Susan Falls, Bradley James Coupe, Christopher Anthony Cumming-Creed and Anthony James Hoare* (Supreme Court of Queensland, Applegarth J, 26 May 2010) day 9-34.

<sup>86</sup> Ibid day 9-42.

<sup>87</sup> Ibid day 10-43.

<sup>88</sup> Ibid day 10-30.

- ‘tick, tick, tick.’ There were never comments about picking the child or taking you to a cemetery. That’s a complete fabrication on your part?
- Susan Falls: Well, with all due respect, I was the one that was there not you. I know what my husband said to me. I know what my husband put me through. I recall walking through that cemetery. I recall seeing my son’s name through tears written on that piece of paper. It did happen.<sup>89</sup> ...
- Prosecutor: An alternative to you, other than shooting Mr Falls in the head, was to ring up your parents and tell them, ‘I’ve lied. He hasn’t changed and now he is threatening the kids if you come up. Can you please not come up.’ That was an option open to you, wasn’t it?
- Susan Falls: I didn’t see it as an option back then, no. I was just trying to stop her from coming.
- Prosecutor: Because it was far easier to shoot and kill someone you hated and despised?
- Susan Falls: No, it wasn’t easy. ... He to me was the terminator. It was not easy.<sup>90</sup> ...
- Prosecutor: Another alternative for you would have been to contact that police officer and say, ‘I know I came back. He lied to me. He has been violent. It’s getting worse and now he’s threatened to kill Jackson’. You could have done that couldn’t you?
- Susan Falls: I didn’t believe I could.
- Prosecutor: You made no effort to, did you?
- Susan Falls: No, I did not.<sup>91</sup>

A similar line of questioning was used when cross-examining the two medical experts called by the defence. Both experts were female and both specialised in forensic psychiatry. The experts were questioned in relation to their ability to determine whether a patient was falsely claiming the symptoms of a mental illness, whether a syndrome, such as ‘battered woman syndrome’ was recognised as a mental disorder, and whether the threats to kill Jackson posed a

<sup>89</sup> Transcript of Proceedings, *R v Susan Falls, Bradley James Coupe, Christopher Anthony Cumming-Creed and Anthony James Hoare* (Supreme Court of Queensland, Applegarth J, 26 May 2010) day 10-53.

<sup>90</sup> Ibid day 10-54.

<sup>91</sup> Ibid day 10-66.

threat which left Susan with no other option than to kill Rodney in order to protect her life and the life of her children, questions which tested the applicability of self-defence. In particular, evidence of the deceased's present and apparent ability to carry out the threat is a necessary part of establishing that the force used by the accused was driven by a need to protect.<sup>92</sup> As Applegarth J explained in his summing up, this is because:

[t]he critical question is whether Ms Falls believed on reasonable grounds that the force used was necessary for defence. The important issue is her state of mind or belief. The question is whether the prosecution has proved beyond reasonable doubt that she did not actually believe on reasonable grounds that it was necessary to do what she did to save herself from death or grievous bodily harm.<sup>93</sup>

Applegarth J made it clear in his summing up, that it was up to the prosecution to satisfy the jury beyond a reasonable doubt that self-defence pursuant to section 271(2) and defence of another pursuant to section 273 did not apply. For example, in relation to section 273, his direction was that the prosecution needed to prove beyond a reasonable doubt:

that there was no threat to assault the child; or, secondly, the nature of the assault was not such as to cause reasonable apprehension of death or grievous bodily harm to the child; or, thirdly, Ms Falls did not actually believe on reasonable grounds that she could not otherwise save the child from death or grievous bodily harm; or, fourthly, she wasn't acting in good faith in the child's aid; or, fifthly, the force used by her was not used for the purpose of defending the child.<sup>94</sup>

Applegarth J then went on to say that it was only if the prosecution was able to exclude the defences and conclude that Susan was guilty of murder, that the jury needed to consider the new abusive domestic

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<sup>92</sup> Of course, it is up to the prosecution to disprove this (or another) element of self-defence.

<sup>93</sup> Transcript of Proceedings, *R v Susan Falls, Bradley James Coupe, Christopher Anthony Cumming-Creed and Anthony James Hoare* (Supreme Court of Queensland, Applegarth J, 26 May 2010) day 13-92.

<sup>94</sup> *Ibid* day 14-7.

relationship defence, section 304B.<sup>95</sup> He explained that the provision was enacted as a result of research, which demonstrates that victims of abusive relationships often believe that they have no alternative means of self-preservation, other than to kill their abusers. Furthermore, (and one could argue, fortunately for Susan) the jury were told that:

[t]he fact that the Parliament has enacted this partial defence for victims of abuse in an abusive domestic relationship does not mean that other defences such as self-defence are not available for people who have been in an abusive relationship.<sup>96</sup>

Applegarth J emphasised the fact that in considering the application of section 304B, the jury needed to take into account all of the circumstances of the relationship, not only the acts that would constitute acts of domestic violence. Evidence of battered woman syndrome, although not a psychological disorder, was relevant to Susan's mental state and 'whether she exhibited hyperarousal and other symptoms that are recognised in such cases'.<sup>97</sup> It was, therefore clear that, had the jury had any doubts about whether Susan had acted in defence of herself and/or her family against an impending assault that they could easily have resorted to the new abusive domestic relationships defence. After a trial that took two weeks, Susan was found not guilty of murder and not guilty of the lesser charge of manslaughter. It took the jury only two hours to reach the verdict as a result of finding that she had acted in self-defence.

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<sup>95</sup> See the *Explanatory Memoranda*, Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009 (Qld) 4, where it is clearly stated that the new defence is intended to apply in addition to other defences.

<sup>96</sup> Transcript of Proceedings, *R v Susan Falls, Bradley James Coupe, Christopher Anthony Cumming-Creed and Anthony James Hoare* (Supreme Court of Queensland, Applegarth J, 26 May 2010) day 14-14.

<sup>97</sup> *Ibid* day 14-45, 46.



## V SECTION 304B – BACKGROUND TO ITS ENACTMENT

There is an interesting and circuitous back-story to the abusive domestic relationships reform in Queensland. A media storm arose in 2007 when 28 year-old Damien Sebo was acquitted of murder and convicted instead of the provocation manslaughter of his 16 year-old ex-girlfriend. She had taunted him about her infidelities and he bashed her to death with a metal steering lock.<sup>98</sup> Around the same time, two men were fully acquitted of murder and manslaughter arising from separate drunken altercations. In these latter cases, the violence erupted between men who were strangers and the circumstances in both cases supported jury instructions on accident as well as self-defence.<sup>99</sup> It needs hardly be said that these three cases are not the most fortuitous progenitors of a solution to the legitimate defensive needs of women who kill violent abusive spouses.

Concerns about these particular cases led the Queensland Government to commission an audit of homicide trials over a five-year period, focussing particularly on the use of the excuses of provocation and accident.<sup>100</sup> A plethora of reports followed.<sup>101</sup> A number of respondents to the *QLRC Discussion Paper* questioned why the review of was not inclusive of other defences, opining that the two excuses should not be considered in isolation.<sup>102</sup> Some singled out self-defence as a defence which particularly warranted

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<sup>98</sup> Queensland Department of Justice and Attorney-General, *Discussion Paper Audit on Defences to Homicide: Accident and Provocation* (2007) 4-5.

<sup>99</sup> Queensland Department of Justice and Attorney-General, *Discussion Paper Audit on Defences to Homicide: Accident and Provocation* (2007) 5-6. The cases were Jonathon James Little, who was indicted for murder and Ryan William Moody, indicted for manslaughter.

<sup>100</sup> *Ibid* 1-2.

<sup>101</sup> Queensland Law Reform Commission, *A Review of the Defence of Provocation: Discussion Paper* (2008); QLRC, above n 2; Queensland Law Reform Commission, *A Review of the Defence of Accident: Discussion Paper* (2008).

<sup>102</sup> QLRC, above n 2, 490-491.

inclusion in the review.<sup>103</sup> In its final report, the QLRC noted that, because of the *Terms of Reference*, it could not properly consider the position of those who kill an abusive partner in circumstances other than provocation. Accordingly, the QLRC did not review the appropriateness of self-defence for women who kill their abusers. Notwithstanding that limitation on its work, the QLRC recommended that priority consideration be given to the development of a *separate defence*, with particular consideration to whether the defence should be complete or partial.<sup>104</sup> That recommendation was adopted by the Queensland Government and another discussion paper and report followed.<sup>105</sup> Arguably, the initial framing of these reviews to exclude existing self-defence provisions helped shape the final outcome. The *Terms of Reference* for the latter review specifically pertained to the development of a separate defence to the offence of murder and expressly stipulated that regard be had to whether the defence should be complete or partial.<sup>106</sup> In drafting the *Discussion Paper*, (and despite the express words of the *Terms of Reference*) Geraldine MacKenzie and Eric Colvin interpreted that brief as requiring the consideration of a *partial defence to the offence of murder* and a *complete defence to other charges*, such as attempted murder and the infliction of non-fatal injuries.<sup>107</sup> However, they did interpret the *Terms of Reference*

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<sup>103</sup> Women's Legal Service, *Submission to Department of Justice and Attorney-General Discussion Paper*; and Queensland Department of Child Safety and Office for Women, *Submission to DJAG Discussion Paper*, cited in QLRC, above n 2, 463, 492 respectively. Previous calls for a review of self-defence highlighted claims that existing self-defence provisions are too confusing: *R v Gray* (1998) 98 A Crim R 589, McPherson JA at 592; or insufficiently sensitive to the defensive needs of women: Stubbs and Tolmie, above n 17, 192-193; Stubbs and Tolmie, above n 11, 726.

<sup>104</sup> QLRC, above n 2, 501, Recommendation 21-4.

<sup>105</sup> Mackenzie and Colvin, above n 8; Mackenzie and Colvin, above n 6.

<sup>106</sup> The Terms of Reference are reproduced in both the Discussion Paper and the final Report: Mackenzie and Colvin, above n 8, 2; Mackenzie and Colvin, above n 6, 4. Term of reference 1.1 was to: 'prepare an initial discussion paper and eventual report on: "the development of a separate defence to murder for persons who have been the victims of a seriously abusive relationship who kill their abusers".' [The quoted section was not referenced in either report.]

<sup>107</sup> Mackenzie and Colvin, above n 8, 3. Term of Reference 1.2(d) was to have regard to 'whether the defence should provide a complete defence to murder or a partial defence only (that is, reducing murder to manslaughter)': at 2.

broadly to permit some consideration of whether the general law of self-defence should be amended.<sup>108</sup>

The MacKenzie and Colvin *Discussion Paper* concisely articulated the argument in favour of a complete defence:

[T]he general defence of self-defence has historic associations with confrontational circumstances, typically a brawl, in which one person responds spontaneously to present or imminent violence by another person. Such circumstances may fit male patterns of responsive force more closely than female patterns. ... [F]emale patterns of responsive violence often stem more from fears about the course of a relationship than about a particular incident. Any particular incident which triggers the violence may even appear relatively trivial when considered in isolation; its significance may lie in what it portends for the continuation of the pattern of the relationship.<sup>109</sup>

The final report (the *Bond Report*) noted that, while there was a diversity of views expressed most respondents in submissions and at consultations favoured a separate, but only partial defence, to the killing of an abusive spouse, even in desperate circumstances where the abused spouse has a reasonably-grounded fear for her life.<sup>110</sup> The *Bond Report* noted that many respondents opposed widening existing self-defence law because it might extend protection to unmeritorious defendants.<sup>111</sup>

Ultimately, the *Bond Report* recommended that a separate but partial defence be enacted to apply to victims of serious abuse, who, in fear and desperation, kill their abuser. The authors opined that the

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Mackenzie and Colvin interpreted that to mean that '[a] partial defence would be designed only for cases that would otherwise be murder. However, a complete defence could also be made available for cases of attempted killing and for cases where non-fatal injuries were inflicted': at 3. However, see pages 5 and 15 where the authors pose the question for submitters of whether a complete defence should be available for murderous mariticide.

<sup>108</sup> Mackenzie and Colvin, above n 8, 3.

<sup>109</sup> Ibid 15.

<sup>110</sup> Mackenzie and Colvin, above n 6, 8-9.

<sup>111</sup> Ibid 9.

defence should contain objective and subjective elements, along the lines of general self-defence, viz, that the belief in the necessity for deadly force be reasonably-grounded. It was also recommended that the defence apply to other family members who kill on behalf of the victim of abuse.<sup>112</sup>

In enacting section 304B, the government adopted most of the substantive recommendations, with one notable exception. The *Bond Report* recommended that the partial defence extend to family members of a victim of abuse who kill the abuser in defence of that victim.<sup>113</sup> As enacted, section 304B only applies when the victim of abuse kills the abuser. Interestingly, and in contrast to the general law of self-defence, section 304B does not apply when a victim of abuse kills an abuser to protect a third party, such as a child.<sup>114</sup>

Queensland's law of self-defence has been the subject of scathing criticism for decades on the basis that it is complex and confusing,<sup>115</sup> and that the case law is difficult to reconcile with the

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<sup>112</sup> Ibid 10, 11, 47.

<sup>113</sup> Mackenzie and Colvin, above n 6, 45.

<sup>114</sup> Section 273 of the *Criminal Code* applies to extend an entitlement to use defensive force for the benefit of third parties, but only when the use of force was *lawful* for the benefit of the defender. The authors of the *Bond Report* decided not to recommend extension of the partial defence to these cases under what is now section 304B because:

a victim of abuse would not necessarily be excluded from relying upon the defence because the killing was intended to protect a third party. In many such cases, the victim of abuse would be fearful for himself or herself as well as for the third party. The conduct of the abuser towards the third party could be encompassed within our definition of violence towards the victim of abuse, specifically as psychological abuse. It would form part of the history of serious violence in the relationship: Mackenzie and Colvin, above n 6, 46.

That analysis might have been correct on the basis of the provision drafted by Mackenzie and Colvin, but section 304B makes it clear that it only applies when the defender believes (on reasonable grounds) that the killing was necessary to save *herself* from death or grievous bodily harm.

<sup>115</sup> *R v Gray* (1998) 98 A Crim R 589, 592; *Zecevic v DPP* (1987) 162 CLR 645, 653; Mackenzie and Colvin, above n 6, 26; Law Reform Commission of Western Australia, above n 40, 162; Taskforce on Women and the Criminal Code, 'Chapter 6: Defences to Violence', Women and the Criminal Code

express words of the section.<sup>116</sup> It seems unfortunate that the government did not take this opportunity to consider revising self-defence more generally.

## VI WHERE TO FROM HERE?

### A *Justifications and Excuses*

One matter that received scant attention in the *Bond Report* or the preceding *Discussion Paper* was the theory of criminal responsibility that underlies the concepts of justification and excuse.<sup>117</sup> It is not an altogether surprising omission - many would probably accept the views expressed by some eminent scholars and jurists, that, as a practical matter, the distinction between the two concepts has become a matter of historical interest only.<sup>118</sup> Despite that, Queensland's *Criminal Code* is replete with references to justifications and excuses, although the terms are not defined.<sup>119</sup> In the principled development of the early common law, the concepts

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(1999) 135; Eric Colvin and John McKechnie, *Criminal Law in Queensland and Western Australia: Cases and materials* (5<sup>th</sup> ed, 2008) 296; Sally Kift, 'Defending the Indefensible: The Indefatigable Queensland Criminal Code Provisions on Self-Defence' (2001) 25 *Criminal Law Journal* 28, 30.

<sup>116</sup> *R v Wilmot* (2006) 165 A Crim R 14, 26, which also confirmed that the effect of the decisions in *R v Gray* (1998) 98 A Crim R 589, *Marwey v R* (1977) 138 CLR 630, and *R v Muratovic* [1967] Qd R 15 has been to write out of section 271(2) the words 'such force ... as is necessary for defence'.

<sup>117</sup> The concepts of justification and excuse are referred to in the *Bond Report*, but not discussed: Mackenzie and Colvin, above n 6, 27. The *Discussion Paper* distinguished the concepts without delving into the underlying moral theories: Mackenzie and Colvin, above n 8, 26-27.

<sup>118</sup> *R v Zecevic* (1987) 162 CLR 645, Wilson, Dawson and Toohey JJ, 657, 658; Paul Robinson, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (1975) 23 *University of California Los Angeles Law Review* 266, 276; George Fletcher, 'The Right and the Reasonable' (1985) 98 *Harvard Law Review* 949, 954.

<sup>119</sup> The *Criminal Code* contains 34 uses of the word 'justification', eight of 'justified'; two of 'justifying'; two of 'justifies'; one of 'justifiable'; and one of 'unjustified', for a total of 48 references. There are 52 uses of the word 'excuse'; nine of 'excused' and one of 'excuses', for a total of 62 references.

of justification and excuse were of crucial importance.<sup>120</sup> They were distinguished under a theory of criminal responsibility, which still underpins the doctrinal frameworks of defences that we recognise today.<sup>121</sup> This theory of criminal responsibility remains useful as an analytic tool to assess whether our exculpatory law is continuing to develop in a principled way.<sup>122</sup> In particular, we consider it important in relation to assessing the criminal responsibility of a woman who kills her abusive partner.

Criminal law is concerned with prescribing the bare minimum standards of acceptable conduct.<sup>123</sup> It does this by, firstly, proscribing certain conduct. If the law went no further, it would be vastly over-inclusive in terms of the conduct it rendered liable to punishment.<sup>124</sup> The theory of criminal responsibility has developed two doctrinal mechanisms to correct for this over-inclusiveness: the doctrine of culpable mental state (*mens rea*) and various affirmative defences.<sup>125</sup> Justifications and excuses are the tools of the latter mechanism. Under this theory, justified conduct is conduct that, although *prima facie* in breach of some prohibition, is deemed not to be wrongful because of the objective circumstances. Theoretically, in considering whether particular conduct satisfies the doctrinal elements of the justification, the focus is on the act, not the actor, and the objective circumstances of the actor's conduct. The conduct is justified because it has been deemed in advance that conduct of the type in question does not warrant punishment as it is not

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<sup>120</sup> Robinson, above n 119, 275; Fletcher, above n 119, 954; Joshua Dressler, 'Justifications and Excuses: A Brief Review of the Concepts and the Literature' (1987) 33 *The Wayne Law Review* 1155, 1157; Eugene Milhizer, 'Justification and Excuse: What They Were, What They are, and What they Ought to be' (2004) 78 *St John's Law Review* 725, 727; Nourse, above n 58, 1244.

<sup>121</sup> Robinson, above n 119, 275.

<sup>122</sup> Fletcher, above n 119, 955.

<sup>123</sup> McCord and Lyons, above n 58, 99.

<sup>124</sup> Cathryn Rosen, 'The Excuse of Self-Defence: Correcting a Historical Accident on behalf of Battered Women who Kill' (1986) 36 *American University Law Review* 11, 18.

<sup>125</sup> *Ibid* 18; Robinson, above n 119, 272. In Code jurisdictions, which do not use the concept of *mens rea*, the absence of a culpable mental state is the excuse of 'unwilled action'. See, eg, *Criminal Code* (Qld) s 23(1).

inherently wrongful under the objective circumstances. Others who find themselves in the same set of circumstances can, therefore, similarly rely on a justification to exculpate their conduct.<sup>126</sup>

Anne Coughlin writes that justifications reflect the criminal law's archetype of the responsible actor.<sup>127</sup> Any criminal justice system built on a concept of culpability must necessarily reject wholly determinist accounts of human action, and opt instead for an assumption that actors are capable of self-control and moral, rational decision-making.<sup>128</sup> In relation to self-defence, a justification implies that the actor made a rational choice even when faced with imminent, life-threatening danger. Despite the danger, she or he was nonetheless able to properly assess the strength of the threat they faced and properly calibrate their response by reference to their attacker's rights, as well as their own.<sup>129</sup> This model of the responsible actor is one that resonates powerfully, not only throughout our criminal law, but throughout our entire legal and social culture.<sup>130</sup>

The rationale for justifying an otherwise prohibited act is described in the literature in different ways. For example, Paul Robinson states that the law justifies conduct because it is 'correct behavior and therefore is not only tolerated but encouraged'.<sup>131</sup> Phyllis Crocker agrees, stating that a justified act is 'correct and even laudable' because the act is recast from a prima facie wrong

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<sup>126</sup> Dressler, above n 121, 1161; Milhizer, above n 121, 726; Fletcher, above n 119, 954-955, 958; Kent Greenawalt, 'The Perplexing Borders of Justification and Excuse' (1984) 84 *Columbia Law Review* 1897, 1900; Robinson, above n 119, 272-275; Coughlin, above n 11, 13-14; Michael Moore, 'Causation and the Excuses' (1985) 73 *California Law Review* 1091, 1096.

<sup>127</sup> Coughlin, above n 11, 13.

<sup>128</sup> Coughlin, above n 11, 10-12; Donald Creach, 'Partially Determined Self-Defence: The Battered Wife Kills and Tells Why' (1982) 34 *Stanford Law Review* 615, 615.

<sup>129</sup> Coughlin, above n 11, 13-14.

<sup>130</sup> *Ibid* 25.

<sup>131</sup> Robinson, above n 119, 274.

into something that is right and therefore, ‘not condemnable’.<sup>132</sup> David McCord and Sandra Lyons claim that such an act can be viewed as being ‘right, desirable, warranted, permissible, or, at least, [under the circumstances,] tolerable’.<sup>133</sup> Kent Greenawalt’s version is neutral; he opines that justified actions, which ‘typically arise out of the nature of the actor’s situation’, are justified simply because they are warranted.<sup>134</sup> Cathryn Rosen argues that conduct is justified because it was the lesser of two alternate harms.<sup>135</sup> The difference between these rationales, that is, the gap between ‘laudable’ and ‘lesser harm’, arguably arises from different features of various justification defences and from different understandings of the balance between distinct but complementary moral theories that underpin our criminal law. That issue is discussed further below.

An excuse, by contrast, focuses on the actor, not the act. The inquiry is therefore subjective. The idea here is that although the act was wrongful, because of some circumstance personal to the accused, she or he should not be blamed.<sup>136</sup> The rationale for excuses seems more straightforward because the focus is not on the moral rightness of the act, but on the culpability of the actor. Excuses reflect society’s acceptance that, although the actor acted wrongfully, it would be inappropriate to hold her or him liable [or fully liable] because some personal characteristic vitiated their culpability.<sup>137</sup> The types of characteristics associated with excuses generally operate to impair either the actor’s cognitive capacity or the actor’s volitional capacity.<sup>138</sup> Thus, excuses recognised at common law and under Australia’s Codes, include insanity,

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<sup>132</sup> Phyllis Crocker, ‘The Meaning of Equality for Battered Women who Kill men in Self-Defense’ (1985) 8 *Harvard Women’s Law Journal* 121, 130, 131.

<sup>133</sup> McCord and Lyons, above n 58, 99.

<sup>134</sup> Greenawalt, above n 127, 1915.

<sup>135</sup> Rosen, above n 125, 21; Richard Rosen, ‘On Self-Defense, Imminence, and Women who Kill Their Batterers’ (1993) 71 *North Carolina Law Review* 371, 409.

<sup>136</sup> Dressler, above n 121, 1162; Milhizer, above n 121, 726; Fletcher, above n 119, 954-955, 958; Greenawalt, above n 127, 1900; Robinson, above n 119, 274-275; Coughlin, above n 11, 13-15; Moore, above n 127, 1096.

<sup>137</sup> Robinson, above n 119, 274; Fletcher, above n 119, 954; Milhizer, above n 121, 726.

<sup>138</sup> Coughlin, above n 11, 15; Milhizer, above n 121, 817, 846-847.



intoxication, provocation, duress, mistake of fact and infancy (inter alia).<sup>139</sup> Some excuses are legislatively formulated as partial defences only. Examples include provocation, diminished responsibility and excessive self-defence, each of which is a partial defence, which operates only against the charge of murder.<sup>140</sup> The classic formulation of battered women's syndrome lends itself to supporting excuse-based defences, such as diminished responsibility, insanity or provocation.<sup>141</sup> The reason for this is because the essential features of the syndrome, learned helplessness and the cycle-of-violence theory are, respectively, volitional and cognitive peculiarities of those who suffer from the "syndrome".<sup>142</sup> We argue, however, that despite displaying characteristics of battered woman syndrome and despite such characteristics supporting principles of an excuse-based defence, the situation of women who defensively kill their abusers should be placed within a justification-based framework.

### B *Theories of Justification Defences and their Application to Women who Kill their Abusers*

Justifications recognised at common law and under the Codes include authorisation of actions done in official capacity, necessity,

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<sup>139</sup> Robinson, above n 119, 275. Excuses under the Codes are not necessarily co-extensive with common law or each other, although most have similar elements. The denomination of excuses may also vary from the common law. For example, duress is referred to under the Queensland *Criminal Code*, as 'compulsion': *Criminal Code* (Qld) s 31.

<sup>140</sup> Provocation: see *Criminal Code* (Qld) s 304 and *Crimes Act 1900* (NSW) s 23; Diminished responsibility: see *Criminal Code* (Qld) s 304A and *Crimes Act 1900* (NSW) s 23A; Excessive self-defence: see *Crimes Act 1900* (NSW) s 421.

<sup>141</sup> Belew, above n 11, 792; Rosen, above n 125, 17; Milhizer, above n 121, 833-834; Kit Kinports, 'Defending Battered Women's Self-Defense Claims' (1988) 67 *Oregon Law Review* 393, 421; Burke, above n 11, 243.

<sup>142</sup> Burke, above n 11, 216. Learned helplessness explains why women who suffer from battered woman syndrome cannot leave an abusive relationship, even when the abuse becomes life-threatening. Cycle-of-violence theory explains why abused women would perceive a threat from the abuser's conduct in circumstances where a reasonable observer would not: David Faigman and Amy Wright, 'The Battered Woman in the Age of Science' (1997) 39 *Arizona Law Review* 67, 72-74.

self-defence and defence of third parties.<sup>143</sup> Robinson claims that the weakest case for justification belongs to actions done in self-defence.<sup>144</sup> In English common law, by the time of Blackstone, modern self-defence was emerging as the fusion of two distinct doctrines: the first, a justification of actions committed to prevent a felony (or even to arrest a felon); the second, an excuse for chance-medley – that is, a necessary, defensive killing committed during a brawl.<sup>145</sup> The former was laudable conduct, seen as rendering a public service; the latter merely excusable because the survivor of a deadly brawl was seen as never entirely blameless.<sup>146</sup> In Australia, the merger was complete by 1828 when forfeiture was abolished for the use of defensive force, the result of which was that the consequences of justification and excuse became identical: either one entitled the accused to full acquittal.<sup>147</sup> Most commentators today recognise modern self-defence as a justification,<sup>148</sup> although the use of defensive force by someone who provoked the violence remains an excuse.<sup>149</sup> Moreover, in all Australian jurisdictions, as

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<sup>143</sup> Robinson, above n 119, 275. ‘Necessity’ is referred to under the Queensland *Criminal Code* as ‘sudden and extraordinary emergency’: *Criminal Code* (Qld) s 25.

<sup>144</sup> Robinson, above n 119, 284.

<sup>145</sup> Milhizer, above n 121, 786, 788-789, 792-793; Fletcher, above n 119, 954; Dressler, above n 121, 1158; Nourse, above n 58, 1244; Robinson, above n 119, 275.

<sup>146</sup> Rosen, above n 125, 26; Milhizer, above n 121, 729.

<sup>147</sup> Jurists have nominated 1828, citing the imperial enactment, 9 Geo. IV, c. 31, s 10: *R v Lawson and Forsythe* [1986] VR 515, 555; *R v Zecevic* (1987) 162 CLR 645, 658. Elsewhere 1870 is nominated, citing the *Imperial Forfeiture Act 1970* (UK): Arie Freiberg and Richard Fox, ‘Fighting Crime with Forfeiture: Lessons from History’ (2000) 6 *Australian Journal of Legal History* 1, 5. In relation to self-defence, the earlier date is no doubt correct since 9 Geo. IV, c. 31 (also known as *Offences Against the Person Act 1828* (UK) or Peel’s Acts) applied in the colonies: Victor Windeyer, ‘“A Birthright and an Inheritance”: The Establishment of the Rule of Law in Australia’ (1962) 1 *University of Tasmania Law Review* 635, 668.

<sup>148</sup> Schneider, above n 37, 630; Coughlin, above n 11, 13; Crocker, above n 133, 130; Kinports, above n 142, 420, 421; McCord and Lyons, above n 58, 158; Robert Schopp, Barbara Sturgis and Megan Sullivan, ‘Battered Women Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse’ (1994) 45 *University of Illinois Law Review* 45, 97; Faigman and Wright, above n 143, 88; Cf Rosen, above n 125, 49.

<sup>149</sup> *Criminal Code* (Qld) s 272.

will be discussed below, self-defence has developed some unmistakable excuse-like characteristics.

Despite the absence of practical consequences, the distinction between justification and excuse has important moral and theoretical implications for the development of defences. Joshua Dressler argues that there is no single unified theory that coherently explicates all justification defences.<sup>150</sup> He argues that there are four theories which contribute to an ‘amalgam of different, even inconsistent moral theories’ under which justifications have developed.<sup>151</sup> The first two theories focus on the denial or protection of rights for the actors involved. The starting point for both theories is that both actors’ lives are of equal value, but because of the kill-or-be-killed dynamic, society can only protect the life of one. Some factor has to tip the balance in favour of one or the other actor and provide guiding principles for the development of doctrine.<sup>152</sup> The first theory is what Dressler describes as the ‘moral forfeiture’ theory. This theory focuses on the wrongdoing by the aggressor who, by initiating violence, has triggered a fault principle and has thereby forfeited any right to have his life protected by the legal system.<sup>153</sup> The next ‘positive rights’ theory focuses on the affirmative legal right of an innocent person to defend the important moral right constituted by his personal autonomy and safety.<sup>154</sup> Dressler’s third and fourth theories embrace a societal perspective. Under the ‘lesser harm’ theory, the death of the aggressor is calculated to be a lesser social harm than the defender’s death would have been, not because his life is of less value, but because the prevention of a crime of aggression is factored into the equation

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<sup>150</sup> Dressler, above n 121, 1163.

<sup>151</sup> Ibid 1164. Eugene Milhizer also adopts this ‘four theories’ analysis of justification: Milhizer, above n 121, 841-846.

<sup>152</sup> Rosen, above n 125, 19.

<sup>153</sup> Dressler, above n 121, 1164; Milhizer, above n 121, 842; Rosen, above n 125, 48; Rosen, above n 136, 378-379; Andrew Ashworth, ‘Self-Defence and the Right to Life’ (1975) 34 *Cambridge Law Journal* 282, 288.

<sup>154</sup> Dressler, above n 121, 1164; Milhizer, above n 121, 843.

(that is, the murder of the innocent defender).<sup>155</sup> This theory enjoys the support of many in the academy.<sup>156</sup> Finally, Dressler discusses the ‘public benefit’ theory, which justifies conduct resulting in a net social benefit.<sup>157</sup> Arguably, this last theory applies to justifications other than self-defence. If the sanctity of human life is the cardinal social value upheld by our criminal justice system,<sup>158</sup> then the violent loss of even a culpable life cannot amount to a net social benefit. As Milhizer notes, if a women’s killing of her abuser served a laudable public benefit, then it truly would be open season on (violent) men.<sup>159</sup>

Arguably, the moral forfeiture theory has a very minor role to play, at least in Australia, as a moral accounting for the rules on self-defence. Although some might be tempted to think that aggressors have forfeited their right to have their lives protected by law,<sup>160</sup> this is not a tenable position in a legal culture like Australia’s, where the value of life is pre-eminent.<sup>161</sup> In a country that has rejected the death penalty, where a man’s own consent to serious harm is nugatory,<sup>162</sup> a man cannot with moral consistency be deemed to have

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<sup>155</sup> Dressler, above n 121, 1164; Moore, above n 127, 1096; Milhizer, above n 121, 844; Bennett, above n 11, 969; Fletcher, above n 119, 954; Coughlin, above n 11, 14; Schopp, Sturgis and Sullivan, above n 149, 68.

<sup>156</sup> Moore, above n 127, 1096; Fletcher, above n 119, 960; Bennett, above n 11, 969.

<sup>157</sup> Dressler, above n 121, 1164; Rosen, above n 125, 48-49; Milhizer, above n 121, 841.

<sup>158</sup> Rosen, above n 125, 46. As murder is the most serious offence in our criminal justice system (as measured by sentencing tariffs) it is a reasonable inference that human life must be the cardinal value upheld by that system. See also *Universal Declaration of Human Rights 1948*, art 3.

<sup>159</sup> Milhizer, above n 121, 834. The literature abounds with authors who refute the claim that addressing women’s legitimate defensive needs could constitute open season on men: Bennett, above n 11, 991; Kinports, above n 142, 441; McCord and Lyons, above n 58, 150. We have not observed any such ‘open season’ claims being made about men’s use of self-defence.

<sup>160</sup> Christine Belew argues that some jury nullifications (legally dubious acquittals) might be accounted for on this basis: Belew, above n 11, 807.

<sup>161</sup> Rosen, above n 125, 46; Belew, above n 11, 798.

<sup>162</sup> *R v Brown* [1994] 1 AC 212 (HL).

forfeited his humanity, no matter how egregious his conduct.<sup>163</sup> On that basis, the moral forfeiture theory does no more (if at all) than explain which party is favoured in self-defence law, as between an aggressor and defender, but does not help to explain the content of the doctrine.<sup>164</sup> That leaves Dressler's positive rights and lesser harm theories to explain self-defence doctrine.

Victoria Nourse offers two distinct analyses of justification defences. The first posits a balance of two conflicting theories: 'pacifism' and 'libertarianism'.<sup>165</sup> The pacifist view emphasises the primacy of human life and the monopoly that the state has over the legitimate use of force. The libertarian view emphasises the autonomy rights of the defender, and the positive right to self-help triggered by the actions of the aggressor.<sup>166</sup> As Nourse recognises, neither theory by itself can descriptively account for modern self-defence law.<sup>167</sup> Nourse's second and preferred analysis is that self-defence engages two distinct relationships: the relationship between the defender and aggressor and the relationship between the defender and the state. Arguably, Nourse's two analyses are not so different. We contend that libertarians emphasise the former relationship and pacifists the latter.<sup>168</sup> Nourse argues that 'both relationships must be considered, not balanced or pitted against each other'.<sup>169</sup> The pacifist position emphasises the risk of privatised violence when a defender 'takes the law into her own hands'. The libertarian position emphasises the egoistic necessity of responding, rather than succumbing to violence.<sup>170</sup>

Descriptively, as well as normatively, this composite explanation of the concept of justification has force, especially in relation to self-

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<sup>163</sup> Rosen, above n 125, 48-49; Belew, above n 11, 805; Milhizer, above n 121, 842.

<sup>164</sup> Rosen, above n 136, 379; Ashworth, above n 154, 288.

<sup>165</sup> Nourse, above n 58, 1271.

<sup>166</sup> *Ibid* 1271-1272.

<sup>167</sup> Nourse, above n 58, 1273.

<sup>168</sup> *Ibid* 1275.

<sup>169</sup> *Ibid*; Ashworth, above n 154, 289.

<sup>170</sup> Nourse, above n 58, 1275.

defence, but it is not really inconsistent with Dressler's view. Dressler's positive rights theory can be understood as emphasising the protection of rights to life, dignity and autonomy as between the defender and aggressor. This dovetails neatly with both Nourse's 'libertarian' and 'relationship of the actors' explanations for self-defence. Dressler's lesser harm theory is a societal perspective which emphasises society's acceptance of the primacy of human life; the need for the state to maintain its monopoly on the legitimate use of violence; and the recognition that by a defensive killing, a defender has not only saved his own life from a deadly threat, but has prevented the crime of murder. This seems consistent with engaging considerations drawn from Nourse's pacifism position and her 'relationship of the defender to the state' analysis. Inevitably there is an overlap because certain individual rights are so important to our social foundations that they comprise a social good.<sup>171</sup> And the converse is also true: the rule of law and protection of social order is generally fundamental to our well-being as individuals.

Whichever labels one uses for these two theories, it seems that both have contributed to the development of justifications generally and self-defence in particular. In the discussion below, the terms 'individual rights' and 'lesser societal harm' are used to refer to these two theories. The theoretical explanations have significance because they shape the doctrinal rules that descriptively and normatively apply to self-defence. Cathryn Rosen, for example, argues that common law self-defence is underpinned by a moral forfeiture theory.<sup>172</sup> She argues that, even on a lesser harm analysis, the loss of the aggressor's life can only be a lesser harm than the loss of the defender's if it is devalued through moral forfeiture.<sup>173</sup> Consequently, Rosen argues that the doctrinal rules for self-defence should be tightly constrained, and that 'there probably is no acceptable calculus to support treatment of self-defense as a justification'.<sup>174</sup> She states that:

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<sup>171</sup> Milhizer, above n 121, 841.

<sup>172</sup> Rosen, above n 125, 30, 48.

<sup>173</sup> Ibid 30.

<sup>174</sup> Ibid 49, 27.

The difficulty in devaluing the life of the aggressor is particularly acute in some battered women's cases. Many men who abuse their spouses never display aggressive or violent behavior outside the confines of their homes. Certainly, perpetrators of domestic violence are not nice people. Yet, it is doubtful that anyone seriously could argue that ridding society of people merely because they are not nice benefits all. ... His right to life, though, is equally important as the woman's.<sup>175</sup>

And further:

Abusers are not entirely morally reprehensible. According to psychological and sociological literature, they also are victims of 'disease' or of their social reality. This makes it even more difficult for the legal system to determine that the abuser's life is less valuable than his victim's.<sup>176</sup>

Rosen concludes that moral forfeiture cannot normatively underpin a justification defence. She argues that women who kill their abusers are entitled to expect, at the most, an excuse. That argument is underpinned by her conclusion that a victim of battered women's syndrome is likely to be mistaken about the extent of the threat posed by her partner.<sup>177</sup> And, in the absence of a deadly, imminent threat, she writes, '[o]ne must suffer non-deadly harm if use of deadly force would be the only way to avoid it'.<sup>178</sup> Arguably, and with respect, Rosen has made two errors. First, she has misapplied the theory that she used to reach her conclusions. The lesser harm theory looks at harms at the societal level. Human life is socially valued and the value of all lives is putatively equal. But the basis on which one life is favoured over another is measured at the societal level and that basis includes society's interest in protecting legal order.<sup>179</sup> One does not need to resort to the moral forfeiture theory when applying a lesser harm analysis.

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<sup>175</sup> Rosen, above n 125, 49-50.

<sup>176</sup> Ibid 51.

<sup>177</sup> Rosen, above n 125, 50.

<sup>178</sup> Ibid 53.

<sup>179</sup> Schopp, Sturgis and Sullivan, above n 149, 68.

Second, she has assumed that women are mistaken when they believe that they will be killed or seriously harmed by their abusers. It is true that most men who physically abuse their partners do not ultimately kill them. It is also true that the signals read by a woman who commits mariticide as indicating her partner's deadly intent might not have signalled the same to a reasonable observer.<sup>180</sup> But that does not mean that the woman is mistaken. Her intimate knowledge of her partner and his capacity for violence gives her expertise on that particular question which a reasonable observer lacks. Given the number of women who are in fact killed by their abusers,<sup>181</sup> legal settings or theories that reject that possibility are fundamentally at odds with the empirical evidence.

Most scholars accept that the doctrinal rules for self-defence reflect a balancing between the lesser societal harm and individual rights theories.<sup>182</sup> An unmitigated application of the individual rights theory would seem to entitle a defender to use any amount of force, even deadly force, to prevent a slap or a kiss or some minor, inconsequential invasion of personal autonomy.<sup>183</sup> However, the aggressor has rights too (because this analysis does not rely on the moral forfeiture theory), so some balancing is necessary between the interests of the defender and the aggressor.<sup>184</sup> Thus the doctrinal rules on self-defence impose strict conditions on when deadly force can be used to ensure that it is only used when absolutely necessary to protect the most important value it serves – life itself.<sup>185</sup> An unmitigated application of the lesser social harm approach might also set undesirable rules, perhaps for example, according to whether aggressors or defenders are accorded greater societal value.<sup>186</sup>

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<sup>180</sup> Stubbs and Tolmie, above n 11, 724; Taskforce on Women and the Criminal Code, 'Chapter 5: Women and Violence', *Women and the Criminal Code* (1999) 124.

<sup>181</sup> Virueda and Payne, above n 27.

<sup>182</sup> Bennett, above n 11, 969; Schopp, Sturgis and Sullivan, above n 149, 68; Milhizer, above n 121, 844; Rosen, above n 136, 406; Creach, above n 129, 627-628.

<sup>183</sup> Fletcher, above n 119, 968; Milhizer, above n 121, 843-834.

<sup>184</sup> Ashworth, above n 154, 289.

<sup>185</sup> Belew, above n 11, 773.

<sup>186</sup> One might argue that the traditional rules have reflected that sort of reckoning. In cases involving domestic violence, it is notorious that self-



Alternatively, in the interests of preserving legal order, the law might simply prohibit any resort to violence, placing the onus on citizens to avoid violence absolutely, and allow the victim's aggression to operate in mitigation of sentence. But these are not examples of how self-defence actually operates. It can only be explained as a composite.

### 1 *The Necessity Principle*

A number of scholars lament the compromises involved in justifying deadly self-help.<sup>187</sup> Others accept that the criminal law does not require perfection of us, but instead makes a concession to the realities of human nature and especially our overwhelming instinct for self-preservation.<sup>188</sup> This is not the type of personal frailty that applies to excuses. It is not a cognitive or volitional defect – rather, it is the characteristic of individuals which collectively drives the primacy socially accorded to the value of human life. It is this shared feature of the individual and the societal that makes it possible for the two theories discussed above to be balanced in a coherent way.

We accept that the mechanism by which these theories are balanced in doctrinal practice is the necessity principle. It has been persuasively argued elsewhere that the doctrinal rules governing justified self-defence are essentially directed at limiting the availability of self-defence to occasions when it is objectively necessary.<sup>189</sup> Society does not condone privatised violence and aims to minimise the occasions for its lawful use. The law does not generally permit someone to be killed with impunity, even in circumstances where that person is an aggressor. The necessity principle allows the victim of aggression to defend her or his rights,

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defence has been distinctly unfavourable to women: Schneider, above n 37; Crocker, above n 133; Stubbs and Tolmie, above n 17; Eastel and Hopkins, above n 62, 116.

<sup>187</sup> Belew, above n 11, 787; Rosen, above n 125, 15, 17, 52.

<sup>188</sup> Greenawalt, above n 127, 1905; McCord and Lyons, above n 58, 130.

<sup>189</sup> Burke, above n 11, 276-277; Schopp, Sturgis and Sullivan, above n 149, 68; Rosen, above n 136, 380; Nourse, above n 58, 1271; Ashworth, above n 154, 284; Bennett, above n 11, 985.

while simultaneously recognising the rights of the aggressor. It recognises the death of the aggressor as a lesser harm only because it was the unavoidable cost of preventing the defender's murder. This principle neatly explains the doctrinal rules which have developed around self-defence. The purpose behind the rule which requires an assault to trigger the right to use force in self-defence, or at common law, the rule requiring imminence of danger, is to ensure that defensive force is only used when necessary.<sup>190</sup> If the danger is not imminent or the aggressor lacks a present ability to carry out a threat, then the law deems that the defensive force is not necessary. The law presumes that the defender can escape or seek help or avert the harm by some means.<sup>191</sup> Conversely, when the danger is imminent, or when an assault gives rise to fear of imminent harm, the law assumes that there is no time to summon police assistance.<sup>192</sup> Other doctrinal features of self-defence similarly developed to ensure that self-defence applies only to necessary uses of force. Key among these are the rules requiring retreat from danger, if safe to do so, and the rule requiring that use of force be proportional.<sup>193</sup> Finally, an overarching standard of reasonableness ensures that, as a justification, self-defence is only available when a reasonable person (formerly framed as a 'reasonable man') would have feared for their life and found the use of force necessary.<sup>194</sup>

Not all of these doctrinal rules still apply in Australia. The balance of rules in Australia suggests that our law owes more to the libertarian or individual rights theory of self-defence, than the lesser societal harm theory. Thus, a victim of aggression is not obliged to retreat before being entitled to use defensive force<sup>195</sup> and, as argued above, there is no requirement under the Code jurisdictions or at common law that the force used be objectively proportionate to the

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<sup>190</sup> Bennett, above n 11, 985; Kinports, above n 142, 424;

<sup>191</sup> Kinports, above n 142, 424.

<sup>192</sup> David Gauthier, 'Self-Defense and the Requirement of Imminence: Comments on George Fletcher's Domination in the Theory of Justification and Excuse' (1996) 57 *University of Pittsburgh Law Review* 615, 616.

<sup>193</sup> Rosen, above n 136, 378-379; Ashworth, above n 154, 284-285.

<sup>194</sup> Ashworth, above n 154, 284.

<sup>195</sup> *R v Keith* (1934) St R Qd 155, 184; *R v Muratovic* [1967] Qd R 15, 29; *Zecevic v DPP* (1987) 162 CLR 645.

threat.<sup>196</sup> These modifications have incorporated excuse-like characteristics into self-defence, making it available even when the defender has made a mistake about the necessity of resorting to force or its quantum.<sup>197</sup>

The main feature of objectivity which is retained in self-defence law and which developed for justifiable defences is, under the various Codes, the requirement for the triggering assault, or at common law, the imminence requirement.<sup>198</sup> In many cases, the objectivity of this element is not acknowledged. It simply operates as a precondition to the availability of self-defence,<sup>199</sup> obviating the need to impose any particular standard of reasonableness or to interrogate the fairness of that standard. Richard Rosen argues that imminence (and the triggering assault) has no doctrinal significance

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<sup>196</sup> *Zecevic v DPP* (1987) 162 CLR 645.

<sup>197</sup> *Marwey v R* (1977) 138 CLR 630, 637; *R v Mackenzie* [2000] QCA 324, [48].

<sup>198</sup> Burke, above n 11, 229; George Fletcher, 'Domination in the theory of Justification and Excuse' (1996) 57 *University of Pittsburgh Law Review* 553, 561. Some Australian commentators have argued in reliance on *Osland v R* (1998) 197 CLR 316 (*Osland*) and *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645 (*Zecevic*), that Australia's common law no longer has an imminence requirement: Hopkins and Easteal, above n 19, 133; ALRC, above n 40, 623. In our view, that conclusion cannot be drawn from either case. In *Zecevic*, the High Court did away with the common law doctrine of excessive self-defence and made the necessity test more subjective. But the High Court had nothing to say about imminence per se and *Zecevic* arguably treats some kind of threat of imminent harm (albeit broadly conceived) as a foundation for the existence of reasonable grounds for a belief in the necessity of the defensive response: *Zecevic*, Wilson, Dawson and Toohey JJ 661-662. In *Osland*, Kirby J was the only judge to discuss imminence. At 381, he reads *Zecevic* as authority for the proposition that imminence is either not required or that it can be satisfied when an attack is not underway. The issue is not discussed in any other judgment. It is unsurprising that imminence was not dealt with more extensively in these cases because in both cases there was uncontradicted evidence of fear of an imminent (but not necessarily immediate) harm (albeit in *Osland*, not from Heather Osland herself): *Osland* 22, 361, 397; *Zecevic* 655.

<sup>199</sup> *R v Johnson* (1964) Qd R 1, 11 per Stanley J; *R v Muratovic* [1967] Qd R 15, 18 per Gibbs J; *R v Gray* (1998) 98 A Crim 4 589, 593 per MacPherson JA (with whom Davies JA and Freyberg J agreed). In *Marwey v R* (1977) 138 CLR 630, Barwick CJ and Mason J in separate judgments approved Gibb J's formulation, respectively at 637 and 642.

except as a translator of necessity. Imminence of harm is required, not because an imminent harm is worse than a non-imminent harm, but because it is one way of ensuring that defensive action is not taken unless and until it is truly necessary. There has been an a priori determination that a non-imminent harm can be avoided, hence defensive violence is unnecessary.<sup>200</sup>

Nourse argues that imminence carries a range of undeclared meanings.<sup>201</sup> The most cogent reveals the operation of imminence as a covert retreat rule. As mentioned above, in Australia, we do not require a person whose life is threatened to retreat before entitling them to use defensive force.<sup>202</sup> However, the effect of the imminence rule is to require an abused woman to wait for a physical confrontation before she can use defensive force, even if the necessity was apparent earlier and the delay would prevent her from using defensive force at the only time it would be effective.<sup>203</sup> Thus the real impact of the imminence rule is to require her to retreat *before* the violence materialises, even from her own home and even when she fears for her life.<sup>204</sup> This is what Nourse describes as a ‘pre-retreat rule’.<sup>205</sup> The difficulty with this rule is that ultimately, there may be no escaping the violence for victims of serious domestic abuse. As Kit Kinports has observed, the chances that a man with a long history of serious abuse will simply change his ways are negligible.<sup>206</sup>

Thus, the rule effectively requires the woman to commit unlawful mariticide or suffer ‘murder by instalment’.<sup>207</sup> As noted

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<sup>200</sup> Rosen, above n 136, 380; Burke, above n 11, 277; Ashworth, above n 154, 298; Fletcher, above n 199, 570.

<sup>201</sup> Nourse, above n 58, 1237.

<sup>202</sup> *R v Keith* (1934) St R Qd 155, 184; *R v Muratovic* [1967] Qd R 15, 29; *Zecevic v DPP* (1987) 162 CLR 645.

<sup>203</sup> Bennett, above n 11, 986.

<sup>204</sup> Burke, above n 11, 284.

<sup>205</sup> Nourse, above n 58, 1284-1285.

<sup>206</sup> Kinports, above n 142, 424-425.

<sup>207</sup> Loraine Eber, ‘The Battered Wife’s Dilemma: To Kill or be Killed’ (1981) 32 *Hastings Law Journal* 895, 928; Bennett, above n 11, 979.

earlier, leaving is not always a viable alternative. It often poses heightened dangers, not only for the woman but also for those she loves.<sup>208</sup> The difference between imminence and the common law retreat requirement (i.e., in those jurisdictions that retain it), is twofold: first, a longstanding exception to the requirement to retreat applied when someone was attacked in their own home,<sup>209</sup> and second, the retreat rule never required pre-emptive retreat. For example, the law does not ask a man why he went to a bar, which is known for its fights. We do not ask a man why he did not leave the bar before the brawl broke out. We do not ask a man why he was walking late at night in Fortitude Valley or Kings Cross or another district known for its drunken violence. But we do ask women why they did not leave the relationship before the threat reached deadly proportions.<sup>210</sup> Indeed, as our analysis of Susan Falls' cross-examination has shown, it is a primary line of enquiry in mariticide cases.

There are scholars who accept the fairness of the imminence rule as it applies to mariticides on the basis that it saves the lives of abusers.<sup>211</sup> But the imminence rule can only be fair on that basis if the women are mistaken about the nature of the threat that they face. Why does the law assume that battered women cannot predict the extent of the danger they face? As Nourse notes, this is where the imminence rule serves as an undisclosed proxy for pre-determinations about the severity of the threat and the likelihood of it materialising.<sup>212</sup> There is no need to resort to the battered women's syndrome, cycle-of-violence theory to consider that someone who had endured escalating violence over the course of a long relationship would be eminently and uniquely qualified to predict life-threatening danger. This capacity to predict another's behaviour is not indicative of a supernatural psychic ability, or the result of an atypical psychology. Arguably, our common experience teaches us that in a long, intimate relationship we become attuned to reading

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<sup>208</sup> Burke, above n 11, 282.

<sup>209</sup> Ashworth, above n 154, 294.

<sup>210</sup> Nourse, above n 58, 1238.

<sup>211</sup> Rosen, above n 125, 31; Belew, above n 11, 798; Fletcher, above n 199, 571.

<sup>212</sup> Nourse, above n 58, 1255.

the ebb and flow of our partner's moods and we can accurately predict what those mood changes portend within the context of that relationship.<sup>213</sup>

To return to the doctrinal elements, as discussed above, the main difference between entitlement to an acquittal under section 271(2) of Queensland's *Criminal Code* and a manslaughter conviction under section 304B is the requirement for a triggering assault – the elemental equivalent of imminence at common law. To put that another way, in the context of a relationship characterised by domination, isolation, serious physical violence and the terror that necessarily accompanies such abuse, the presence or absence of a *particular* triggering assault determines whether a killing is justified or only partly excused. If a woman believes that her abusive partner will kill her (or will inflict grievous bodily harm) and she believes that the only way to save herself is to kill him during a non-confrontational moment, then why is she not entitled to a full defence? Assuming a commitment to substantive gender equality, under the 'individual rights' theory she should enjoy the same affirmative legal right to self-help as another innocent defender of personal autonomy who fears for their life. Under the 'lesser harm' approach she kills, like her male counterparts, but only to preserve her own life from unavoidable violent aggression. The same theoretical analysis made above for the general applicability of self-defence applies to the women under consideration in this paper. The death of the aggressor would be a lesser harm because it was necessary to prevent the crime of uxoricide. As has been argued above, the application of *Secretary*<sup>214</sup> in Queensland in the *Falls* case has given judges a new way to think about the 'present apparent ability' requirement, but some kind of specific assault (or as was evident in *Falls*' case, some kind of continuing threat) is still required prior to the killing. Women who kill in the absence of a

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<sup>213</sup> Kinports, above n 142, 423; Nourse, above n 58, 1288; Danielle Dubin, 'A Woman's Cry for Help: Why the United States Should Apply Germany's Model of Self-Defence for the Battered Woman' (1995) 2 *ILSA Journal of International and Comparative Law* 235, 244; Schopp, Sturgis and Sullivan, above n 149, 67, 69.

<sup>214</sup> *R v Secretary* (1996) NTLR 96.

precipitating assault must resort to the abusive domestic relationships defence and will face a manslaughter conviction.

## VII CONCLUSION

Richard Rosen argues that the imminence/assault requirement is a 'translator' of the necessity principle.<sup>215</sup> In most cases, imposing a requirement for imminence or a preceding assault ensures that the defensive action was actually necessary, and hence the doctrinal rules further the underlying norm of necessity. But where there is a conflict between the principle and the translator, Rosen argues that the principle must prevail.<sup>216</sup> In Queensland, however, it seems that the necessity principle remains subservient to its imperfect doctrinal instrument.

There is an abundance of literature detailing the gendered nature of self-defence law.<sup>217</sup> There has also been ample consideration given to the gendered nature of the imminence requirement specifically.<sup>218</sup> Stubbs and Tolmie have drawn particular attention to the failure of Australian courts to engage with these critiques for the purpose of redressing gender biases as part of the principled development of common law.<sup>219</sup> It might be countered that this is more properly a task for the legislature. In every Australian jurisdiction except Queensland, parliaments have removed the requirement for imminence or a precipitating assault from self-

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<sup>215</sup> Rosen, above n 136, 380.

<sup>216</sup> Ibid 405.

<sup>217</sup> Stubbs and Tolmie, above n 17, 191, 192-193; ALRC, above n 40, 624; Law Reform Commission of Western Australia, above n 40, 158; Victorian Law Reform Commission, above n 40, 61, 63; Roth, above n 40, 2; Coughlin, above n 11; Schneider, above n 37; Crocker, above n 133; Nourse, above n 58; Kinports, above n 142.

<sup>218</sup> Crocker, above n 133, 143; Angel, above n 58, 326-327; Stubbs and Tolmie, above n 11, 711; Rosen, above n 125, 34, 37.

<sup>219</sup> Stubbs and Tolmie, above n 11, 711, 722; Stubbs and Tolmie, above n 17, 192-193.

defence.<sup>220</sup> However, decades after the first gender critiques of self-defence law, the Queensland legislature has failed to grasp the nettle.

As noted above, the *Bond Report* recommended that a new battered woman defence be a partial defence only because many respondents were concerned that widening existing self-defence could extend protection to unmeritorious defendants.<sup>221</sup> There are three problems with that as a rationale for the final form of section 304B of the Queensland *Criminal Code*. First, it completely fails to engage with one very fundamental question: does a woman who kills her partner non-confrontationally *deserve* to be convicted of any crime, when she has suffered extreme abuse from the deceased; when she is in fear for her life; and when she has a reasonably-grounded belief that there is no other way she can preserve herself? The question of desert, arguably, can only be answered by reference to the types of moral theories engaged with above.<sup>222</sup> Moral theories were not considered in the *Bond Report*. The question of whether the defence should be partial or complete was considered under the heading of ‘Strategic Issues’.<sup>223</sup> Arguably, providing a partial defence only to ensure that unmeritorious defendants are unable to enjoy wider protection condemns a very vulnerable group of women

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<sup>220</sup> *Crimes Act 1900* (NSW) ss 418-423; *Crimes Act 1958* (Vic) ss 9AC; *Criminal Law Consolidation Act 1935* (SA) s15; *Criminal Code* (WA) s 248; *Criminal Code* (Tas) s 46; *Criminal Code* (Cth) s 10.4; *Criminal Code* (ACT) s 42; *Criminal Code* (NT) s 29.

<sup>221</sup> Mackenzie and Colvin, above n 6, 9.

<sup>222</sup> In this sentence ‘types of moral theories’ is considered expansively. For a more comprehensive discussion of the moral philosophies underpinning criminal law and self-defence in particular, see McCord and Lyons, above n 58. Their discussion includes post-Augustinian Christian moral theory, Kantian theory, Egoistic social contract theory, rule utilitarianism, Humean/feminist theory and Rawlsian theory. They conclude, as we do, that in a heterogeneous society, criminal law should be underpinned by some form of [limited] moral pluralism: at 159. They conclude, [If] law schools, courts and legislatures are unwilling to engage in informed moral analysis, they will be unable to get to the heart of the burning social issue of battered intimates who kill. More broadly, without a willingness to engage in such moral analysis, the answers to every basic question relating to affirmative defences that fall into the ‘justifications’ category will remain elusive: at 160.

<sup>223</sup> Mackenzie and Colvin, above n 6, 6-8.



to be convicted of manslaughter, not because they deserve it, but for the utilitarian purpose of ensuring conviction of unrelated offenders. Moreover, consequentialist arguments, such as those based on general deterrence, don't readily fit the archetype of mariticides. There is no evidence to suggest that battered women know the intricacies of self-defence law; or that they perform a rational cost-benefit calculus prior to killing their dangerous spouses.<sup>224</sup> As the *Falls* case demonstrates, even when premeditated, the mariticide of an abusive spouse may well bear the hallmarks of clumsy desperation.

Second, the provision of a partial defence only perpetuates the gender bias in self-defence law. Feminists have argued for decades that the key bias in self-defence doctrine inhered in the imminence requirement.<sup>225</sup> The new abusive domestic relationship defence removes that requirement, but remains unequal because it denies battered women the acquittal that should equitably follow. Moreover, battered women defendants may not be the only ones to suffer injustice from an imminence requirement which is estranged from its necessity-based parent in general self-defence law. Famously, Robinson postulates a hostage who is told by his kidnappers that he will be executed in due course.<sup>226</sup> The claim is credible because he knows that this group of kidnappers have killed their hostages in the past, even if the ransom is paid. So, although the danger is not imminent, it is relatively certain to eventuate. On the reasoning above, if he can escape by killing his guard before the danger becomes imminent, should that action not be justified?<sup>227</sup> Let us alter the scenario just a little – imagine that the kidnappers tell him nothing but he knows that his kidnappers have killed their victims in the past. Again, should he not have a justification for a

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<sup>224</sup> Kinports, above n 142, 444.

<sup>225</sup> Schneider, above n 37, 634; Bennett, above n 11, 985; Angel, above n 58, 326; Dubin, above n 214, 240; Kinports, above n 142, 426; Nourse, above n 58, 1237; Stubbs and Tolmie, above n 11, 733; Arthur Ripstein, 'Self-Defense and Equal Protection' (1996), 57 *University of Pittsburgh Law Review* 685, 698.

<sup>226</sup> Paul Robinson, *Criminal Law Defences* (West Publishing, 1984) 78 cited in Rosen, above n 136, 381; Burke, above n 11, 276.

<sup>227</sup> Rosen, above n 136, 381.

pre-emptive killing if he is in fear for his life and has a reasonably-grounded belief that there is no other way he can preserve himself? This scenario would undoubtedly be a rare occurrence in the annals of criminal law but battered women have been likened to hostages<sup>228</sup> and the scenario has created sufficient concern to be expressly reflected in the self-defence reforms in every jurisdiction in Australia, except Queensland.<sup>229</sup>

Third, the rationale for a partial defence is based on a false premise – that providing a complete acquittal to battered women who kill requires *expanding* the availability of self-defence. By analysing this problem through the lens of necessity, battered women who kill their abusers might have been provided a full justificatory defence even while *narrowing* the availability of self-defence. As things stand, provided there is the precipitant assault, a man can claim self-defence even when the killing was not necessary. That is because the law recognises a claim to self-defence even when the defender might have safely retreated or when the force used was disproportionate to the threat.<sup>230</sup> The courts used to hold that these issues were relevant to the question of the reasonableness of the grounds for the defender's belief that the use of deadly force was necessary.<sup>231</sup> However, as noted above, the trend towards subjectivity means that in practice, the failure to retreat or the use of disproportionate force, are no longer significant. Despite the clear words in section 271(2),<sup>232</sup> 'Gray is still authority for the proposition

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<sup>228</sup> Law Reform Commission of Western Australia, above n 40, 275; Victorian Law Reform Commission, above n 40, 78-79; Dubin, above n 214, 243; Faigman and Wright, above n 143, 112.

<sup>229</sup> Legislation in all Australian jurisdictions except Queensland now defines self-defence in terms which include preventing or terminating unlawful deprivation of liberty: *Crimes Act 1900* (NSW) s 418(2); *Crimes Act 1958* (Vic) s 9AE; *Criminal Code* (WA) s 248(1); *Criminal Law Consolidation Act 1935* (SA) s 15(3); *Criminal Code* (Tas) s 46; *Criminal Code* (NT) s 29(2); *Criminal Code* (ACT) s 42(2); *Criminal Code* (Cth) s 10.4(2).

<sup>230</sup> *Zecevic v DPP* (1987) 162 CLR 645, 663; *R v Muratovic* [1967] Qd R 15, 29. Cf when the deceased's precipitating assault was provoked by the accused, in which case there is a requirement to retreat: s 272 *Criminal Code* (Qld).

<sup>231</sup> *Zecevic v DPP* (1987) 162 CLR 645, 663; *R v Muratovic* [1967] Qd R 15, 29.

<sup>232</sup> Section 271(2) states:

that the approach to section 271(2) dictated by *Muratovic* and *Marwey* effectively writes out of the section the words “necessary for defence”<sup>233</sup>. It is not completely clear why the courts have taken this approach. In disclaiming an obligation to retreat, US courts have explained in terms redolent of manhood and honour: ‘a true man, who is without fault is not obliged to fly from an assailant’.<sup>234</sup> In Australia, we have been told merely that the jury:

should approach its task in a practical manner and without undue nicety, giving proper weight to the predicament of the accused which may have afforded little, if any, opportunity for calm deliberation or detached reflection’.<sup>235</sup>

That dicta suggests an excuse – the pressure of circumstances means that an unnecessary but defensive killing will be excused, even if the accused would have acted differently, given the opportunity for ‘calm deliberation’.

Arguably, had there been a thorough ongoing review of the law self-defence greater attention could have been given to the theoretical foundations of self-defence law, the range of gender critiques and various potential doctrinal adjustments that would make self-defence law more equitable. To make self-defence more gender-neutral, Richard Rosen proposes that necessity be incorporated directly into self-defence doctrine to replace the imminence requirement. He notes that this would incorporate no

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If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant *as is necessary for defence*, even though such force may cause death or grievous bodily harm (emphasis added).

<sup>233</sup> *R v Greenwood* [2002] QCA 360, [26], referring to *R v Gray* (1998) 98 A Crim R 589; *R v Muratovic* [1967] Qd R 15; *Marwey v R* (1977) 138 CLR 630.

<sup>234</sup> *Erwin v State*, 29 Ohio St. 186, 199-200 (1876) cited in Dan Kahan and Martha Nussbaum, ‘Two Concepts of Emotions in Criminal Law’ (1996) 96 *Columbia Law Review* 269, 329; Burke, above n 11, 283.

<sup>235</sup> *Zecevic v DPP* (1987) 162 CLR 645, 662-663.

new norms into self-defence, but merely change the locus of decision-making. That is, under our existing law, parliaments and higher courts have predetermined that imminence or a triggering assault will act to ensure that self-defence only applies to necessary defensive violence. Replacing imminence with necessity removes the translator and allows the jury to determine the core issue of necessity based on the facts at hand.<sup>236</sup> Effectively, this is what has been done in all other Australian jurisdictions. Section 10.4 of the *Criminal Code* (Cth) is typical.<sup>237</sup> A person is acquitted for conduct done in self-defence which is defined as conduct that the person believed was necessary which was a reasonable response in the circumstances as the person perceived them to be. The Commonwealth legislation was based on section 10.4 of the *Model Criminal Code* (the Model Code) and analogues were passed in a number of other jurisdictions.<sup>238</sup> Queensland is the only jurisdiction that still puts victims of abuse who kill their abuser in a position of having to resort to partial defences that inadequately reflect the terror-stricken reality in which these women lived and ignores the morally justified response often afforded to men who kill in the name of self-defence.

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<sup>236</sup> Rosen, above n 136, 404.

<sup>237</sup> *Criminal Code* (Cth), s 10.4 provides:

**Self-defence**

- (1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.
- (2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:
  - (a) to defend himself or herself or another person, or
  - (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
  - (c) to protect property from unlawful taking, destruction, damage or interference, or
  - (d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,
  - (e) to remove from any land or premises a person who is committing criminal trespass;  
and the conduct is a reasonable response in the circumstances as he or she perceives them.

<sup>238</sup> *Criminal Code* (NT) s 29(2); *Criminal Code* (ACT) s 42(2).