

HOMICIDE LAW REFORM IN AUSTRALIA: IMPROVING ACCESS TO DEFENCES FOR WOMEN WHO KILL THEIR ABUSERS

THOMAS CROFTS* AND DANIELLE TYSON**

Over the past three decades, the law of homicide has been the subject of much academic debate, parliamentary review and various law reform commission reports throughout Australia. Such activity is largely a response to concerns about the availability and operation of the defences to homicide for women who kill in the context of family violence. The law in each state and territory in Australia differs and the issues with which reform bodies are grappling are complex. It is therefore not surprising that different recommendations have been made about how best to produce a more just law of homicide. This article explores some of these reviews and recommendations — particularly in New South Wales, Queensland, Victoria and Western Australia — and the reforms that have been planned and implemented. It will reveal that, despite sharing the core concern of improving the access to appropriate defences for women who kill their abusers, reform has been far from consistent across these jurisdictions.

I INTRODUCTION

In the past three decades in Australia, the defences to homicide have been the subject of much academic debate, parliamentary review and several law reform commission reports. Often these reviews have been spurred by criticisms of the way in which legal categories have failed to take account of the social context of homicide, particularly the gendered nature of the availability of defences. In this regard it has been argued that any reconsideration of defences to homicide should be informed by the circumstances of women's lives since 'the categories that have been used to define legal problems ... have played a role in the relegation of women's concerns to the margins of the legal terrain and ... the subordination of women'.¹ The Law Reform Commissions of Victoria, Western Australia and Queensland, as well as a Parliamentary Committee and Government response in New South Wales, have each made recommendations to reduce the gendered nature of the defences to homicide. Some of the reviews have looked at only one defence, while others have reviewed the whole range of defences and considered whether measures, such as the introduction or reintroduction of the partial defence

* Associate Professor, Sydney Law School, University of Sydney; Director, Sydney Institute of Criminology.

** Lecturer in Criminology, School of Social Sciences, Monash University.

1 Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002) 2. See also Jenny Morgan, 'Who Kills Whom and Why: Looking beyond Legal Categories' (Occasional Paper, Victorian Law Reform Commission, 2002) 1.

of excessive self-defence or an abuse specific defence, could more appropriately improve the access to defences for women who kill in response to family violence.

The outcomes of these reviews have varied considerably. Victoria has reformed self-defence, abolished provocation² and introduced a form of excessive self-defence through the creation of the offence of ‘defensive homicide’,³ alongside the adoption of legislative guidance on the admissibility of evidence of family violence to enable judges and juries to better understand the dynamics of family violence. Similarly, in Western Australia, self-defence was reformed, provocation was abolished and the partial defence of excessive self-defence was introduced, along with abolition of the mandatory life sentence for murder. In contrast, in Queensland, where the mandatory life penalty for murder continues to exist, self-defence has remained unamended, provocation has been retained but amended, and a new defence of killing for preservation in an abusive domestic relationship was introduced. In New South Wales, self-defence had been reformed earlier and excessive self-defence introduced in 2002.⁴ More recently, the 2013 report of a Parliamentary Committee focussed on the partial defence of provocation and has recommended its retention, subject to reform⁵ and the introduction of legislative guidance on the admissibility of evidence of family violence along the lines of Victorian law. A Government response issued by the Attorney General of New South Wales in October 2013 supports the Committee’s recommendation of retaining an amended form of the partial defence, but with differing reform recommendations.⁶ The Exposure Draft Crimes Amendment (Provocation) Bill 2013 was released with this response.

These stark differences are noteworthy given that the debates driving reform in these jurisdictions have each been underpinned by a shared set of core concerns — namely, that the availability and operation of the defences of self-defence and provocation have tended to privilege men who kill their intimate partners out of anger, jealousy, a need for control or following the breakdown of a relationship, or other men in response to a non-violent sexual advance, and to the disadvantage of women who have killed their violent partners out of fear or self-preservation.

2 It should be noted that Tasmania was the first Australian jurisdiction to abolish provocation (in 2003), however, this was not the result of a Law Reform Commission report or Parliamentary review process.

3 Although the Victorian Department of Justice has recently proposed that ‘the offence of defensive homicide be abolished’: Department of Justice (Vic), ‘Defensive Homicide: Proposals for Legislative Reform’ (Consultation Paper, September 2013) xi, 35 [2.9.1] (Proposal 1).

4 *Crimes Amendment (Self-Defence) Act 2001* (NSW). This repealed the common law position on self-defence, and introduced ss 418–22 into the *Crimes Act 1900* (NSW): *Crimes Amendment (Self-Defence) Act 2001* (NSW) sch 1 item 4.

5 The New South Wales Law Reform Commission (NSWLRC) had also recommended retention and reformulation (although along different lines) in NSWLRC, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997).

6 Department of Attorney General & Justice (NSW), ‘Reform of the Partial Defence of Provocation: Call for Submissions on the Exposure Draft Crimes Amendment (Provocation) Bill 2013’ (Consultation Paper, October 2013) <[http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/61173c421853420aca257b5500838b2e/\\$FILE/Partial%20defence%20of%20provocation%20-%20Govt%20response.pdf](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/61173c421853420aca257b5500838b2e/$FILE/Partial%20defence%20of%20provocation%20-%20Govt%20response.pdf)>. It should be noted that while the Government agrees with retention, the proposals for reform differ from those recommended by the Parliamentary Committee. For discussion of these recommendations, see Thomas Crofts and Arlie Loughnan, ‘Provocation, NSW Style: Reform of the Defence of Provocation in NSW’ [2014] *Criminal Law Review* 109.

It is beyond the scope of this article to seek to address all the issues raised by these debates and developments in case law in all jurisdictions. The article will therefore focus on the more recent reforms that have been undertaken to enable women who have killed in response to family violence to access defences. The main, but not sole, focus will be on reforms undertaken in Victoria, Western Australia, Queensland and reforms recommended in New South Wales. Part II will explore problems with the traditional defences of provocation and self-defence and how these defences have been amended with the aim of making them gender appropriate or, in the case of provocation, have been abolished in the belief that such change is not possible. Part III will then examine the newly introduced (or reintroduced) partial defences of excessive self-defence and killing for preservation and the offence of defensive homicide. It will assess the rationales and realities of these reforms, highlighting some of the criticisms that have ensued. The article will show that the diversity of approaches in Australia is due partly to varied legal and political constraints but also due to fundamental differences in conviction about the need and capacity for reform of existing defences.

II ADDRESSING THE PROBLEMS OF TRADITIONAL DEFENCES TO HOMICIDE

A *Provocation*

1 *Problems with Provocation*

The partial defence of provocation is one of the most controversial doctrines in criminal law. Feminist scholars have argued for decades that it operates as a profoundly sexed excuse for men who have killed their nagging, unfaithful or departing wives to avoid a conviction for murder and be convicted of the lesser crime of manslaughter.⁷ The argument that provocation is gender-biased has been traced to its historical (masculine) origins as a creature of the English common law dating back to the 16th and 17th century at a time when the death penalty was

7 See, eg, Susan S M Edwards, “‘Provoking Her Own Demise’: From Common Assault to Homicide” in Jalna Hanmer and Mary Maynard (eds), *Women, Violence and Social Control* (Macmillan Press, 1987) 152; Sue Bandalli, ‘Provocation — A Cautionary Note’ (1995) 22 *Journal of Law and Society* 398; Adrian Howe, ‘Provoking Comment: The Question of Gender Bias in the Provocation Defence — A Victorian Case Study’ in Norma Grieve and Ailsa Burns (eds), *Australian Women: Contemporary Feminist Thought* (Oxford University Press, 1994) 225; Jenny Morgan, ‘Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them’ (1997) 21 *Melbourne University Law Review* 237; Danielle Tyson, “‘Asking for It’: An Anatomy of Provocation’ (1999) 13 *Australian Feminist Law Journal* 66; Rebecca Bradfield, ‘Domestic Homicide and the Defence of Provocation: A Tasmanian Perspective on the Jealous Husband and the Battered Wife’ (2000) 19 *University of Tasmania Law Review* 5; Graeme Coss, ‘Provocation, Law Reform and the Medea Syndrome’ (2004) 28 *Criminal Law Journal* 133, 136; Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (Routledge, 2013) 17–34.

mandatory for those convicted of murder.⁸ As a concession to ‘human frailty’, provocation distinguished between those murders where a person acted out of malice or premeditation, where the use of force was presumed illegitimate, and those where a person killed in cases of ‘chance medley’ — where the person’s use of force was presumed partially justifiable.⁹ The provocation defence was deeply connected to the right of men to defend their honour in response to perceived slights to their masculinity by other men.¹⁰ In its modern form, the defence of provocation developed to extend the right of a husband to defend his honour against acts of challenge by a female partner.¹¹ Over the years, many have remained critical of the way provocation cases have historically operated, and in some jurisdictions continue to operate, to normalise male violence as a natural characteristic of masculinity,¹² and where the woman victim’s performance depends on her perceived conformance to the norms of femininity. As Susan Edwards has argued, where it can be alleged that the deceased woman failed to approximate behaviour deemed appropriate to her expected feminine role, by either challenging male authority or appearing sexually non-conforming, ‘she is held responsible’.¹³

Gradually, Australian courts refined the requirements for provocation in response to the criticisms about the gendered nature of the defence.¹⁴ For instance, the traditional requirement of a clear provocative incident of sufficient gravity to warrant an immediate reaction was loosened. Now, courts do not necessarily require a specific triggering incident; they are willing to permit consideration of cumulative acts of provocation and do take into account the context of the provocative act.¹⁵ The requirement of an immediate loss of control has also been loosened, such that a time lag will not necessarily destroy a claim of loss of control.¹⁶

In addition to such changes to increase the scope for women to plead provocation, there has been a tightening up of the circumstances in which men may

8 For a brief history of provocation, see Graeme Coss, “‘God is a Righteous Judge, Strong and Patient: and God is Provoked Every Day’”. A Brief History of the Doctrine of Provocation in England’ (1991) 13 *Sydney Law Review* 570.

9 Bernard J Brown, ‘The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law’ (1963) 7 *American Journal of Legal History* 310, 310–18.

10 Jeremy Horder, *Provocation and Responsibility* (Clarendon Press, 1992) 26–7.

11 Ian Leader-Elliott, ‘Passion and Insurrection in the Law of Sexual Provocation’ in Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of Law* (Sweet & Maxwell, 1997) 149, 153.

12 Julia Tolmie, ‘Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation’ [2005] *New Zealand Law Review* 25, 45; Stephen Tomsen and Thomas Crofts, ‘Social and Cultural Meanings of Legal Responses to Homicide among Men: Masculine Honour, Sexual Advances and Accidents’ (2012) 45 *Australian & New Zealand Journal of Criminology* 423; Tyson, *Sex, Culpability and the Defence of Provocation*, above n 7, 19–20.

13 Edwards, above n 7, 158–9, 165. See also Bandalli, above n 7.

14 See, eg, Heather Douglas, ‘The Demise of the Provocation Defence and the Failure of Equality Concepts’ in Rosemary Hunter (ed), *Rethinking Equality Projects in Law: Feminist Challenges* (Hart Publishing, 2008) 41.

15 See, eg, *Muy Ky Chhay* (1994) 72 A Crim R 1; *Mehemet Ali v The Queen* (1957) 59 WALR 28; *R v R* (1981) 28 SASR 321.

16 *Muy Ky Chhay* (1994) 72 A Crim R 1, 13.

traditionally claim provocation. Courts have limited the circumstances in which acts of infidelity are sufficient to found the defence of provocation.¹⁷ Similarly, courts have determined that words alone cannot amount to provocation unless they are of ‘exceptional character’ or ‘violently provocative’.¹⁸ Despite such changes, a number of commentators have argued that these have largely been limited in their effectiveness¹⁹ and called for legislative reform of the provocation defence.²⁰ Others, such as Howe, have argued it is ultimately ‘beyond redemption’ and should be abolished.²¹

2 Abolition of Provocation

In the mid 1990s, a Standing Committee of the Attorneys-General (SCAG) discussed the development of a national model criminal code for Australian jurisdictions.²² SCAG established a further committee, the Model Criminal Code Officers Committee (MCCOC), which published a discussion paper entitled *Model Criminal Code — Chapter 5 — Fatal Offences against the Person*. In the discussion paper, MCCOC came to the conclusion that there was overwhelming evidence that the partial defence of provocation was so deeply male-oriented that it should be abolished.²³ MCCOC further noted that it was more appropriate that differences in culpability be resolved at the sentencing stage.²⁴ On the issue of gender-bias, MCCOC was of the view that the sexed-specificity of the provocation doctrine could not be resolved by ‘cosmetic changes’ such as relaxing the requirements, and that the ‘injustice’ created by the defence stems from its ‘very structure’.²⁵

17 For example, in *Hart v The Queen* (2003) 27 WAR 441, it was found that the sight of the accused’s estranged wife kissing another man was not sufficiently provocative to found a claim of provocation. As long ago as 1946 the House of Lords in the United Kingdom held that a claim that provocation was based on a confession of adultery could be withheld from the jury on the basis that no reasonable person would have been provoked by such a confession: *Holmes v DPP* [1946] AC 588, 600. This situation was changed by the *Homicide Act 1957*, 5 & 6 Eliz 2, c 11, s 3, which required that the defence go to the jury if there was evidence of a loss of self-control. This provision was abolished along with the common law defence of provocation by the *Coroners and Justice Act 2009* (UK) c 25, s 56. A new partial defence of ‘loss of control’ was introduced in place of provocation: ss 45, 55.

18 *Moffa v The Queen* (1977) 138 CLR 601, 603 (Gibbs J), quoting *Holmes v DPP (UK)* [1946] AC 588, 600.

19 Morgan, ‘Provocation Law and Facts’, above n 7, 256–7; Douglas, ‘The Demise of the Provocation Defence’, above n 14, 46–9.

20 See, eg, Tolmie, above n 12, 27; Thomas Crofts and Arlie Loughnan, ‘Provocation: The Good, the Bad and the Ugly’ (2013) 37 *Criminal Law Journal* 23.

21 Adrian Howe, ‘Provoking Polemic — Provoked Killings and the Ethical Paradoxes of the Postmodern Feminist Condition’ (2002) 10 *Feminist Legal Studies* 39, 43. See also Horder, above n 10; Kate Fitz-Gibbon, ‘Provocation in New South Wales: The Need for Abolition’ (2012) 45 *Australian & New Zealand Journal of Criminology* 194.

22 MCCOC, ‘Model Criminal Code — Chapter 5 — Fatal Offences against the Person’ (Discussion Paper, June 1998) i.

23 *Ibid* 87, 89, 91.

24 *Ibid* 89, 105.

25 *Ibid* 91.

In 2001 the Victorian Law Reform Commission (VLRC) was given the task of reviewing the defences to homicide.²⁶ The review was grounded in and guided by substantive equality principles. It sought to curtail the range of situations in which men who have killed an intimate partner out of anger, jealousy, a need for control or a breakdown in the relationship, or who have killed another man in response to a non-violent sexual advance were able to avail themselves of a full or partial defence to mitigate culpability. The VLRC was also guided by the need to redress the long standing difficulties faced by women who have killed their abusers relying on criminal law defences, particularly self-defence and provocation.

The general approach taken by the VLRC to how criminal law should take account of the factors that reduce or eliminate criminal culpability was informed by empirical literature on the social contexts in which homicides typically occur.²⁷ In considering whether a new partial defence or offence should be introduced or abolished, the VLRC were also guided by a number of key principles, including that 'differences in culpability should be taken into account ... [at] sentencing' and acknowledging the 'symbolic and practical effects of defences and partial defences'.²⁸ The ensuing report *Defences to Homicide* released in 2004 emphasised how provocation operated to the disadvantage of people (largely women) who were exercising their equality rights: for instance, leaving a relationship or starting a new relationship with another person.²⁹ The VLRC were also particularly concerned that provocation cases operated to imply that the woman victim killed in the context of sexual possessiveness and jealousy is somehow to blame for her own death, while the male defendant's 'violent loss of self-control [was] partly excusable'.³⁰ Ultimately, the VLRC 'failed to be persuaded by arguments that provocation is a necessary concession to human frailty or that provoked killers are not murderers'.³¹

The VLRC acknowledged that sometimes provocation provides a partial defence for women who kill in the context of prior violence but found the 'costs of its retention outweigh any potential advantages'.³² A primary concern was to have 'the self-defensive nature of their actions recognised'.³³ Accordingly, the VLRC argued that self-defence was the most appropriate defence for women who kill out of fear for their lives but '[i]n cases where women have not acted in self-defence, the history of prior abuse can be taken into account at sentencing in mitigation of

26 See VLRC, *Defences to Homicide*, Final Report (2004). However, we note that debates about the need for reform or abolition of provocation commenced well before this.

27 Morgan, 'Who Kills Whom and Why', above n 1, cited in VLRC, *Defences to Homicide*, above n 26, 14–15.

28 VLRC, *Defences to Homicide*, above n 26, 4.

29 Ibid 56–8.

30 Ibid xxviii.

31 Ibid 56.

32 Ibid xxviii.

33 Ibid.

sentence'.³⁴ Following the VLRC's recommendations, provocation was abolished through the *Crimes (Homicide) Act 2005* (Vic), which came into effect in 2006.³⁵

In contrast to the VLRC's remit, the Law Reform Commission of Western Australia (LRCWA) was commissioned in 2006 to review and report on the whole law of homicide, including the offences, defences and penalty for murder.³⁶ In making its recommendations for reform the LRCWA was guided by seven core principles, which included that the only lawful purpose for intentional killings is self-preservation or protection of others, that flexible sentencing can reflect differences in culpability, that reform should adequately reflect contemporary circumstances and that there should be no bias in the application of any offences or defences.³⁷ These principles were significant in leading the LRCWA to conclude that provocation should be abolished and that no gender-specific or abuse-specific defence should be introduced.³⁸ Furthermore, the LRCWA felt that provocation could be taken into account at sentencing if the mandatory penalty of life imprisonment was replaced with a presumptive sentence of life imprisonment.³⁹ Following this recommendation the mandatory life sentence and provocation were abolished in Western Australia in 2008.⁴⁰

The review by the Queensland Law Reform Commission (QLRC) in 2008 was much narrower in scope and involved an audit of the excuses of accident and provocation in homicide trials over a five-year period.⁴¹ The review commenced against the background of public criticism of the outcomes in three cases from 2007.⁴² One of these high profile cases was *R v Sebo; Ex parte Attorney-General (Qld)*, which involved a man who was convicted of manslaughter after he bashed his 16-year-old former girlfriend Tarryn Hunt to death with a steering wheel lock

34 Ibid.

35 This closely followed the abolition of provocation in Tasmania in 2003 by the *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas). However, while the Victorian reforms were based on a thorough review of the defences to homicide, the Tasmanian legislature's decision to abolish provocation was not preceded by a formal review. The Tasmanian Attorney-General identified four reasons for abolition of provocation in the Second Reading Speech on the Criminal Code Amendment (Abolition of Defence of Provocation) Bill 2003 (Tas). These included that the defence is an anachronism since the death penalty had been abolished; intentional killing should not be mitigated by a loss of self-control; the defence is unjust and gender biased and the defence was subject to abuse: Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003, 30–108 (Judy Jackson). See also Carolyn B Ramsey, 'Provoking Change: Comparative Insights on Feminist Homicide Law Reform' (2010) 100 *Journal of Criminal Law & Criminology* 33. It was not accompanied by changes to the laws of evidence to make it easier for battered women charged with murder to convince the jury they had acted in self-defence, and no alternative to provocation was enacted.

36 LRCWA, *Review of the Law of Homicide*, Final Report, Project No 97 (2007) 3–4.

37 Ibid 6–9.

38 Ibid 287–9.

39 Ibid 222 (Recommendation 29).

40 *Criminal Law Amendment (Homicide) Act 2008* (WA).

41 QLRC, *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (2008).

42 See *R v Sebo; Ex parte A-G (Qld)* [2007] QCA 426 (30 November 2007). The two other high profile cases involved Jonathan James Little, who was acquitted of murder in relation to the death of David Stevens, and Ryan William Moody, who was acquitted of manslaughter in relation to the death of Nigel Lee. For a discussion of the public reactions surrounding these cases see: Department of Justice and Attorney-General (Qld), 'Audit on Defences to Homicide: Accident and Provocation' (Discussion Paper, October 2007) 1; QLRC, above n 41, 94–7.

on 9 September 2005.⁴³ At his trial, Sebo claimed that he lost self-control and killed the deceased, who was allegedly affected by alcohol and ‘taunted’ him with claims of having slept with a number of other men, telling him that he was easy to cheat on and that she was not going to stop.⁴⁴ He was sentenced to 10 years’ imprisonment. In examining provocation, the QLRC found that

[t]here can be no doubt that the law of provocation, as it presently works in Queensland does not satisfy the test of substantive gender equality. On the one hand, it partially excuses the man who kills his intimate partner in circumstances where the partner is merely seeking to exercise a choice to live separately from him. On the other hand, because of the rules that have developed around the plea of provocation, and because of the different circumstances in which women kill, the battered woman who has killed her violent and abusive partner may find it difficult to bring her claim of mitigation within the law of provocation.⁴⁵

The QLRC’s view was that the partial defence of provocation ‘should be abolished’ but only if ‘mandatory life imprisonment for murder is replaced with presumptive life imprisonment for murder, so that circumstances that might otherwise give rise to the partial defence could be taken into account on sentencing’.⁴⁶ Given the Government’s expressed intention to make no change to the existing penalty of life imprisonment for murder, the QLRC resolved that while ‘a provoked killing is difficult to understand in some cases ... preservation of the defence provides at least some avenue for compassionate treatment in deserving cases’.⁴⁷ Thus despite sharing concerns about the partial defence of provocation, the QLRC was not in favour of abolition so long as Queensland retained the mandatory life sentence for murder.⁴⁸ Provocation was thus retained but amended to ‘reduce the scope of the defence being available to those who kill out of sexual possessiveness or jealousy’.⁴⁹

In 2012 a Select Committee of the New South Wales Legislative Council was established and given the task of inquiring into provocation and reporting on whether the defence should be abolished, retained or amended in the light of reforms in other jurisdictions. The review was a response to public criticism by the victim’s family, crime victim advocates and a state government MP following the jury’s decision to find a Sydney man, Chamanjot Singh, guilty of the manslaughter of his wife, Manpreet Kaur.⁵⁰ The jury accepted the defendant had

43 [2007] QCA 426 (30 November 2007).

44 Ibid [3]; QLRC, above n 41, 257.

45 QLRC, above n 41, 395 (citations omitted). See also the QLRC’s comments at 331.

46 Ibid 500.

47 Ibid 474.

48 Ibid 500.

49 Queensland, *Parliamentary Debates*, Legislative Assembly, 24 November 2010, 4253 (Cameron Dick). See *Criminal Code and Other Legislation Amendment Act 2011* (Qld).

50 *Singh v The Queen* [2012] NSWSC 637 (7 June 2012). See, eg, Adele Horin, ‘Out-of-Step Excuse is No Defence’, *The Sydney Morning Herald* (Sydney), 14 July 2012, 14; Josephine Tovey, ‘Dead Woman’s Sister Pleads for a Change in Provocation Law’, *The Sydney Morning Herald* (Sydney), 27 August 2012, 5; Josephine Tovey, ‘Provocation is a “Taliban Excuse”’, *The Sydney Morning Herald* (Sydney), 29 August 2012, 2.

been provoked to kill his wife after an argument during which she allegedly made threats to have him deported, causing him to lose self-control and slit her throat with a box cutter. While acknowledging that '[c]oncerns about gender bias were undoubtedly one of the most significant issues raised by Inquiry participants who were critical of the partial defence',⁵¹ the Committee found that 'there are certain limited circumstances where the partial defence has a legitimate purpose'.⁵² Despite the fact that, unlike Queensland, there is no mandatory life penalty for murder in New South Wales, the Committee therefore recommended against abolition of the partial defence as the NSWLRC had done in 1997.⁵³ Following this report the NSW Government issued a paper detailing its proposals for a retained and reformed partial defence in cases of 'extreme provocation'.⁵⁴

3 Reform of Provocation

The main rationale for the retention of provocation is that it provides an alternative for abused women who kill out of fear or self-preservation, which, as already highlighted, is the predominant context in which such women kill. In the event such women's responses are not found to be reasonable, the argument is that such women may be found guilty of murder in jurisdictions where there is no partial defence of excessive self-defence or diminished responsibility. Of course, it is important to note that such women may be found guilty or indeed plead guilty to manslaughter instead. However, some commentators are of the view that it is not the case that all women who kill to escape abuse do so in the face of physical abuse. As Julia Tolmie notes with reference to *R v Suluape*⁵⁵ in which the defendant, who successfully claimed the defence of provocation, 'killed her husband against a background of physical and emotional abuse, infidelity, and degradation':

it is also important to acknowledge that not all battered defendants who have been the victims of ongoing and severe violence, and who finally respond to that violence, will be purporting to act in self-defence. For these defendants provocation might be an appropriate defence.⁵⁶

It is now well recognised that family violence can take many forms, not just physical violence but also psychological and emotional abuse which may include intimidation, harassment, stalking, economic abuse, social isolation, and threats

51 Select Committee on the Partial Defence of Provocation, Parliament of New South Wales, *The Partial Defence of Provocation* (2013) 45 [4.56].

52 Ibid 45 [4.60].

53 Ibid 87–8 [5.103]; NSWLRC, above n 5, 5.

54 Department of Attorney General & Justice (NSW), above n 6.

55 (2002) 19 CRNZ 492.

56 Tolmie, above n 12, 42. See also Alafair Burke who has noted that there is no reason why all battered women's self-defence claims should be treated the same: Alafair S Burke, 'Rational Actors, Self-Defence, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman' (2002) 81 *North Carolina Law Review* 211, 216, 275. This point has also been noted by Michelle Edgely and Elena Marchetti, 'Women Who Kill Their Abusers: How Queensland's New Abusive Domestic Relationships Defence Continues to Ignore Reality' (2011) 13(2) *Flinders Law Journal* 125, 128.

of damage to property and pets.⁵⁷ As Tolmie notes, ‘it is not uncommon for victims of domestic violence, including victims of severe physical abuse, to observe that the physical abuse is easier to withstand than the emotional abuse experienced in such a relationship’.⁵⁸ Traditional understandings of self-defence as based on an ongoing or imminent act of violence have made it hard to access this defence where such requirements are not met. As Evan Stark notes, the focus on physical violence means that the approach to domestic violence (and legal responses) ‘minimizes both the extent of women’s entrapment by male partners in personal life and its consequences’.⁵⁹ Changes to self-defence have challenged this traditional view that self-defence must be based on a one-off violent act; nonetheless difficulties may remain in accessing the defence where there is ongoing coercive control and routine, relatively minor acts of violence⁶⁰ rather than significant acts of violence. Thus, as the New South Wales Select Committee notes, there may be cases where provocation still has a legitimate role to play.⁶¹

The argument that adequate account can be taken of provocation at sentencing does not acknowledge the importance of the stigma attached to a criminal conviction. Offence labels are of fundamental importance given that in a liberal democracy ‘criminal law ... is a tool of moral condemnation’.⁶² As noted by Wilson: ‘Precise, meaningful offence labels are as important as justice in the distribution of punishment. These labels help us to make moral sense of the social world’.⁶³ According to the principle of fair labelling, differences between offences

57 Among the significant changes to the law of homicide in Victoria was the insertion of a new provision, s 9AH, in the *Crimes Act 1958* (Vic), which provides for admission of evidence highlighting the relationship and social context of family violence to be admitted in cases of homicide. It is important to note that while this reform to the law of evidence specifically recognises the potentially cumulative effect of family violence on an individual and the particular dynamics of abusive relationships, it is equally important that this evidence is actually utilised. Recent trends in Victorian case law suggest that this is not the case, and despite the fact that the 2005 amendments to self-defence make it clear that, in cases of family violence, self-defence may be raised even if the accused person is responding to a harm that is not immediate, or his or her response involves the use of force in excess of the force involved in the harm or threatened harm, self-defence has not been tested at trial. As noted in a recent study of women who kill intimate partners in Victoria post reforms (2005–2013), Kirkwood, McKenzie and Tyson have found that there appears to be reluctance on the part of defence counsel to pursue a full acquittal on the ground of self-defence. Moreover, it also appears that in some cases, defensive homicide is being automatically seen as the appropriate defence for women who kill intimate partners in the context of a history of family violence: Debbie Kirkwood, Mandy McKenzie and Danielle Tyson, ‘Justice or Judgement? The Impact of Victorian Homicide Law Reforms on Responses to Women Who Kill Intimate Partners’ (Domestic Violence Resource Centre Victoria, Discussion Paper No 9, 2013) 39, 42–3.

58 Tolmie, above n 12, 42, quoted in Crofts and Loughnan, ‘Provocation: The Good, the Bad and the Ugly’, above n 20, 32; Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007).

59 Stark, *Coercive Control*, above n 58, 10.

60 Which as Evan Stark notes forms the basis of much domestic abuse: Evan Stark, ‘Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control’ (1995) 58 *Albany Law Review* 973, 982–5.

61 Select Committee on the Partial Defence of Provocation, above n 51, 45 [4.60].

62 Crofts and Loughnan, ‘Provocation: The Good, the Bad and the Ugly’, above n 20, 27, citing Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 5th ed, 2006) 1.

63 William Wilson, ‘What’s Wrong with Murder?’ (2007) 1 *Criminal Law and Philosophy* 157, 162.

and degrees of culpability should be indicated by offence labels.⁶⁴ Such labels allow the public to identify ‘the degree of condemnation that should be attributed to the offender’ and how the offender should be regarded by society.⁶⁵ They also convey information to operators within the criminal justice system about how the offender should be dealt with, for instance, a person’s past criminal record may be drawn on in determining a future sentence.⁶⁶ On an individual level, fair labelling is also important in ensuring that a person is convicted of an appropriately named offence and sentenced in proportion to their wrongdoing.⁶⁷

Without the partial defence of provocation a person may face a murder conviction with the high level of stigma and further consequences that this entails.⁶⁸ However, if a person is regarded as less culpable for a killing because of provocation, then this should be reflected in the label of the offence for which they are convicted.⁶⁹ As Oliver Quick and Celia Wells point out, when a person has killed in response to abuse, it is not just the sentence that is relevant to the victim but the offence label and associated stigma. These authors note that ‘shaking off the shackles of a murder label is often as important a focus of the post-conviction struggle of abused women who kill, as is their quest for freedom’.⁷⁰ Similarly, the New South Wales Select Committee on the Partial Defence of Provocation commented that:

simply moving consideration of provocation to sentencing may result in injustices, particularly for victims of prolonged domestic violence who kill their abusers. ... The Committee is concerned that if the partial defence of provocation were abolished and that provocative conduct was to be considered only as a sentencing factor, there is a risk that some offenders with arguably a ‘lesser’ level of moral culpability would be convicted of murder and would consequently carry that stigma with them, even in the event that a ‘lenient’ sentence were imposed.⁷¹

Furthermore, retaining the partial defence of provocation fosters transparency in the criminal justice system by keeping the decision about provocation with the jury rather than pushing it to the opaque sentencing process.⁷²

64 Thomas Crofts, ‘Two Degrees of Murder: Homicide Law Reform in England and Western Australia’ (2008) 8 *Oxford University Commonwealth Law Journal* 187, 196; Ashworth, above n 62, 88.

65 James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71 *Modern Law Review* 217, 226.

66 *Ibid* 231.

67 Ashworth, above n 62, 88–9.

68 Tolmie, above n 12, 28–9. It also fails to acknowledge how provocation-type arguments can persist in jurisdictions that have abolished the partial defence in the guise of other defences or offences: see, eg, Danielle Tyson, ‘Victoria’s New Homicide Laws: Provocative Reforms or More Stories of Women “Asking for It”?’ (2011) 23 *Current Issues in Criminal Justice* 203.

69 Crofts and Loughnan, ‘Provocation: The Good, the Bad and the Ugly’, above n 20, 27.

70 Oliver Quick and Celia Wells, ‘Getting Tough with Defences’ [2006] *Criminal Law Review* 514, 516, citing Justice for Women, Submission to Law Commission, *Partial Defences to Murder: Consultation Paper* 173, January 2004.

71 Select Committee on the Partial Defence of Provocation, above n 51, 73 [5.29]–[5.31].

72 Crofts and Loughnan, ‘Provocation: The Good, the Bad and the Ugly’, above n 20, 29.

There is a case to be made for retaining provocation provided it can be amended to reduce the scope of the defence to men who kill to defend their honour while expanding the defence to women who kill in response to abuse. In theory, this modification recognises different circumstances of killing, which are not always for self-preservation but are deserving of compassion, and allow them to be appropriately labelled to reflect different levels of culpability. For instance, the QLRC recognised that ‘the law of provocation, as it presently works in Queensland does not satisfy the test of substantive gender equality’⁷³ and recommended reform of the defence of provocation to reduce the problematic ways in which it had traditionally operated. Based on the recommendations of the QLRC, the *Criminal Code and Other Legislation Amendment Act 2011* (Qld) changed the burden of proof and places the onus on the defendant, rather than the prosecution, to prove on the balance of probabilities that provocation occurred. The changes also restrict the range of circumstances in which the partial defence may be raised and will no longer apply where ‘the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character’.⁷⁴ Nor will it apply, according to *Criminal Code Act 1899* (Qld) sch 1 s 304(3), other than in circumstances of a most extreme and exceptional character, where:

- (a) a domestic relationship exists between 2 persons; and
- (b) one person unlawfully kills the other person (the deceased); and
- (c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done—
 - (i) to end the relationship; or
 - (ii) to change the nature of the relationship; or
 - (iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.

The Queensland reforms addressed two of the main concerns about provocation. First, the changes to provocation reduced the possibility that men will be able to use this defence to killing in the context of a breakdown in a domestic relationship. Second, a new defence of killing in response to abusive domestic violence opened up the possibility of a defence (albeit a partial one) for persons who kill in the face of ongoing abuse.

The New South Wales Select Committee on the Partial Defence of Provocation also recommended in favour of reform of the partial defence of provocation in its 2013 report.⁷⁵ The reforms suggested are a mix of a model recommended by the

73 QLRC, above n 41, 395. See also the QLRC’s comments at 331.

74 *Criminal Code Act 1899* (Qld) sch 1 s 304(2). Douglas points out that that the risk inherent in this approach is that there is no definition of what amounts to extreme or exceptional circumstance which could lead to ‘retention of the status quo’: Heather Douglas, ‘A Consideration of the Merits of Specialised Homicide Offences and Defences for Battered Women’ (2012) 45 *Australian & New Zealand Journal of Criminology* 367, 372.

75 Select Committee on the Partial Defence of Provocation, above n 51, 191–209.

Law Commission of England and Wales in its Consultation Paper in 2005,⁷⁶ with specific limitations which go beyond those included in the *Criminal Code Act 1899* (Qld) and include changes to the law of evidence similar to those adopted in Victoria to expressly allow evidence of family violence to be adduced.⁷⁷ The defence would be relabelled ‘gross provocation’ and would only be available where the defendant acted in response to words or conduct which caused him or her to have a justifiable sense of being seriously wronged.⁷⁸ The defence would not be available where the defendant did something to incite an excuse for his or her response or he or she responded to a non-violent sexual advance by the deceased. Furthermore, it would only be available in extreme and exceptional cases if there is a domestic relationship between the defendant and the deceased and the provocation is based on something said or done by the deceased to end or change the relationship. The Committee also recommends that guidance should be given to the court about the sort of factors which cannot be called upon to support a claim of gross provocation, except in extreme and exceptional circumstances. Such factors include, amongst other things, that the deceased discloses infidelity to the defendant, the deceased taunts the defendant about sexual infidelity or the defendant kills a person with whom they are in conflict about parenting arrangements.⁷⁹

While agreeing that provocation should be retained, the New South Wales Government has taken a different approach to reform. It recommends relabelling the partial defence as ‘extreme provocation’ and seeks to limit its application to a response to a serious indictable offence.⁸⁰ Beyond this, conduct by the deceased that amounted only to a non-violent sexual advance or conduct that was incited by the accused in order to provide an excuse to use violence against the deceased are expressly excluded as forms of extreme provocation. It is noteworthy, and disappointing, that the New South Wales Government makes no reference to the exclusion of provocation in situations of domestic violence. This was thought to be unnecessary given that ‘[o]ngoing domestic violence will generally involve serious indictable offences such as assaults. Even where abuse is not physical but psychological it may amount to a serious indictable offence under s 13 of

76 Law Commission, *A New Homicide Act for England and Wales? An Overview*, Consultation Paper No 177 (2005).

77 Select Committee on the Partial Defence of Provocation, above n 51, xii–xiii.

78 However, we are acutely aware that relabelling partial defences can sometimes have unintended and deleterious consequences. In the United Kingdom, for example, the *Coroners and Justice Act 2009* (UK) c 25 effectively rebadged the partial defence of provocation by calling it the partial defence of ‘loss of control’. For a discussion of how such a move does not in fact prevent men from using claims of ‘infidelity’ and ‘sexual taunts’ as ‘narratives of excuse’ for violence against women post-‘reform’ in England and Wales, see Adrian Howe, ‘Mastering Emotions or Still Losing Control? Seeking Public Engagement with “Sexual Infidelity” Homicide’ (2013) 21 *Feminist Legal Studies* 141; Adrian Howe, ‘“Red Mist” Homicide: Sexual Infidelity and the English Law of Murder (Glossing *Titus Andronicus*)’ (2013) 33 *Legal Studies* 407; Adrian Howe, ‘A “Right to Passions”?: Compassion’s Sexed Asymmetry and a Minor Comedy of Errors’ (2012) 23 *Law and Critique* 83.

79 Select Committee on the Partial Defence of Provocation, above n 51, xii–xiii.

80 See Department of Attorney-General & Justice (NSW), above n 6, 2. For an evaluation of the recommendations of the Parliamentary Committee and NSW Government Response, see generally Crofts and Loughnan, ‘Provocation, NSW Style’, above n 6.

the *Crimes (Domestic and Personal Violence) Act 2007*.⁸¹ Arguably this approach ‘does not really address the true abusive domestic relationship’⁸² and underestimates the fact that it may be difficult to obtain proof of the elements of stalking (such as the intention to cause the person to fear physical or mental harm) even in the face of on-going emotional abuse.⁸³

The reforms recommended by the Committee are preferable to the Government’s proposal, yet, despite these limitations, the approach of retaining a reformed and relabelled form of provocation alongside self-defence and excessive self-defence stands to more appropriately recognise the fact that not all situations in which a person kills in response to family violence are the same and that a person may not always be killing for self-preservation. It has the advantage of ensuring that there are varied defences which can appropriately reflect different circumstances in which a person kills and different levels of culpability. It reduces the chances that a defendant misses out on an appropriate defence altogether because she either does not fit the paradigm case for that defence or she has to remould her story to fit an existing defence. It also minimises the dangers that claims that would have fallen transparently under provocation are reshaped to fit newly formulated defences or defences.

B Self-Defence

1 Problems with Self-Defence

Like most defences to homicide, self-defence has gendered origins.⁸⁴ It arose out of the traditional association with a one-off spontaneous encounter, such as a pub brawl, between two men of relatively equal size and strength.⁸⁵ Moreover, the majority of homicide offenders and homicide victims are men.⁸⁶ This means that the original model for the defence best fits the psychological profile and context in which men kill other men.⁸⁷

The rationale of the defence of self-defence is that a person has a right and it is socially acceptable (if not a duty) to use force to defend themselves against an unlawful attack.⁸⁸ Such a conceptual starting point meant that the traditional common law elements for self-defence were that the accused believed that the

81 Department of Attorney General & Justice (NSW), above n 6, 2.

82 Evidence to Select Committee on the Partial Defence of Provocation, Parliament of New South Wales, Sydney, 29 August 2012, 6 (James Wood), quoted in Select Committee on the Partial Defence of Provocation, above n 51, 93 [6.22].

83 Crofts and Loughnan, ‘Provocation, NSW Style’, above n 6, 122.

84 F Manning, ‘Self Defence and Provocation: Implications for Battered Women Who Kill and for Homosexual Victims’ (Briefing Paper No 33, Parliamentary Library, Parliament of New South Wales, 1996) 6.

85 Rebecca Bradfield, ‘Is Near Enough Good Enough? Why Isn’t Self-Defence Appropriate for the Battered Woman?’ (1998) 5 *Psychiatry, Psychology and Law* 71, 74.

86 Morgan, ‘Who Kills Whom and Why’, above n 1, 7.

87 Bradfield, ‘Domestic Homicide and the Defence of Provocation’, above n 7, 5.

88 See, eg, Paul A Fairall and Stanley Yeo, *Criminal Defences in Australia* (LexisNexis, 4th ed, 2005) 164.

force used was necessary to defence themselves and that this belief was based on reasonable grounds. This required that the person was responding to an ongoing or imminent attack and that the degree of force used in defence was necessary. At common law it has been held that lethal force would usually only be necessary where it was in response to a threat of death or serious harm.⁸⁹ Furthermore, in order to be viewed as necessary it was generally thought that the force used in defence should be proportionate to that used in the attack.⁹⁰ In *Zecevic v Director of Public Prosecutions (Vic)*, the High Court of Australia clarified and simplified the common law test for self-defence, which applied in New South Wales and Victoria until the reforms of 2002 and 2005 respectively.⁹¹ The test contained both a subjective and an objective assessment, requiring that the accused person *honestly* believed that lethal force was necessary (the subjective test) and the belief was *reasonable* in the circumstances (the objective test).⁹² This common law test was not constrained by a legal requirement that the threat be ‘imminent’ or that the response be necessarily ‘proportionate’ to the threat, nonetheless imminence and proportionality are considerations which ultimately bear upon the assessment of the existence of the reasonableness of the belief.⁹³

The traditional position on self-defence in the Code jurisdictions of Queensland and Western Australia is more complex⁹⁴ and requires that a person is responding to an assault, meaning that defensive force can only be used where a person is actually being attacked or the attacker had a present ability to carry out a threat.⁹⁵ Thus, killing where the aggressor was asleep or where there was a lull

89 *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 662.

90 *Viro v The Queen* (1978) 141 CLR 88, 100.

91 (1987) 162 CLR 645, 661 (*‘Zecevic’*).

92 As outlined by Hopkins and Easteal, to be entitled to an acquittal, the test for reasonableness is assessed according to the ‘belief of the accused, based upon the circumstances as he [or she] perceived them to be’, rather than ‘the belief of the hypothetical person in his [or her] position’: Anthony Hopkins and Patricia Easteal, ‘Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland’ (2010) 35 *Alternative Law Journal* 132, 133, quoting *R v Hawes* (1994) 35 NSWLR 294, 306. See also *R v Hendy* (2008) 191 A Crim R 81, 87; *R v Portelli* (2004) 10 VR 259, 272, cited in Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence — A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) 623 n 7.

93 *Zecevic* (1987) 162 CLR 645, 661, 665. As Patricia Easteal has argued, while this is the case in theory, ‘[s]ome courts ... continued to interpret the factors of self-defence in terms of what is reasonable for the average ... middle class white male, rather than what a battered woman might reasonably do. Accordingly, in most cases in which women have been acquitted to date, they killed immediately (as defined in seconds) after their partner assaulted them.

Patricia Easteal, *Less Than Equal: Women and the Australian Legal System* (Butterworths, 2001) 46.

94 Queensland’s law of self-defence has been subject to criticism for its complexity: see, eg, *R v Gray* (1998) 98 A Crim R 589, 592; R S O’Regan, ‘Self-Defence in the Griffith Code’ (1979) 3 *Criminal Law Journal* 336, 353; Sally Kift, ‘Defending the Indefensible: The Indefatigable Queensland Criminal Code Provisions on Self-Defence’ (2001) 25 *Criminal Law Journal* 28, 30.

95 *Criminal Code Act 1899* (Qld) sch 1 ss 271–3; *Criminal Code Act Compilation Act 1913* (WA) s 248, as amended by *Criminal Law Amendment (Homicide) Act 2008* (WA) s 8; *Criminal Code Act Compilation Act 1913* (WA) ss 249–50, as repealed by *Criminal Law Amendment (Homicide) Act 2008* (WA) s 8. For a discussion of the problematic aspects of the Queensland provisions in relation to battered women, see Douglas, ‘Merits of Specialised Homicide Offences and Defences for Battered Women’, above n 74, 373. It should, however, be noted that in *R v Secretary* (1996) 5 NTLR 96, a wide view was taken of the ability to carry out the threat in relation to the Northern Territory Code.

in the violence would not satisfy the assault requirement.⁹⁶ Different tests apply depending on whether the assault which the person is defending themselves against was provoked or unprovoked and depending on whether death or grievous bodily harm was intended. Where the assault was unprovoked and no serious harm was intended a more generous test applied. Where death or grievous bodily harm was intended but was not provoked⁹⁷ then to have acted in lawful self-defence the person must have had a reasonable apprehension that the attacker would cause death or grievous bodily harm and believed on reasonable grounds that such force was necessary to defend against death or grievous bodily harm.

In order to understand what aspects of self-defence make its use difficult for women who kill in response to abuse, it is important to understand the social context of domestic homicide and the history of violence.⁹⁸ Research has shown that when women kill they usually do so in the context of a long history of family violence and typically their emotional response is one of fear and the need for self-preservation.⁹⁹ However, self-defence raises a number of difficult issues for those subjected to family violence who kill their abusers, including the legal requirement for immediacy, proportionality and duty to retreat.¹⁰⁰ These issues were canvassed by the Queensland Taskforce on Women and the Criminal Code in its 2000 Report. According to data from interviews conducted with 122 women who had experienced family violence, the Taskforce found that:

often women use passiveness to defend themselves most of the time. When they do react or retaliate it is not always when they are under immediate threat in a classic sense. The man may be asleep, have his back turned or be otherwise in a non-combative position.¹⁰¹

The research concluded that the use of force in these circumstances of abuse can be characterised as an extension of self-defensive behaviour, but those working within the criminal justice system have traditionally precluded such women from successfully relying on the defence of self-defence in these ostensibly

96 In *R v Secretary* (1996) 5 NTLR 96, 98, 103–4, the Court determined that an assault can continue while the person making the threat is asleep and will not be regarded as completed merely because the person is temporarily unable to carry it out.

97 Where the attack was provoked, self-defence is only available where there was a threat of death or grievous bodily harm on similar grounds to the former test but with further limitations.

98 It is widely acknowledged in the research that while most family violence is perpetrated by men against their female partners, it ‘can occur in the context of any close personal relationship, including women against male partners, between same-sex partners, children and parents or grandparents, and other family and non-family members’: VLRC, *Defences to Homicide*, above n 26, 61.

99 Zoe Rathus, ‘There Was Something Different about Him That Day: The Criminal Justice System’s Response to Women Who Kill Their Partners’ (Women’s Legal Service, 2002) 10–12; Alison Wallace, *Homicide: The Social Reality* (Bureau of Crime Statistics and Research, Attorney-General’s Department (NSW), 1986) 103; Margo I Wilson and Martin Daly, ‘Who Kills Whom in Spouse Killings? On the Exceptional Sex Ratio of Spousal Homicides in the United States’ (1992) 30 *Criminology* 189, 206. See also Morgan, ‘Who Kills Whom and Why’, above n 1.

100 See VLRC, *Defences to Homicide*, Options Paper (2003) ch 4. This summary is taken from VLRC, *Defences to Homicide*, above n 26, 63. See also LRCWA, *Review of the Law of Homicide*, above n 36, ch 6.

101 Taskforce on Women and the Criminal Code, Department of the Premier and Cabinet (Qld), *Women and the Criminal Code* (2000) 86.

‘non-confrontational’ circumstances. Similarly, Stella Tarrant finds that the way gendered power relations are reflected in the criminal law means that things that are understood to be objective facts may be reflecting the experience of some while silencing and excluding the experiences of others (women).¹⁰² Thus:

the primary structural requirements of the defences work to reproduce the silencing of women in domestic violence because the defences fail to contemplate the power dynamics involved in that violence. A woman’s experience of her marital relationship and the killing itself is likely to be systematically skewed. This skewing may preclude access by women to the defence; however, even where the defence is available (and even where it is successful) her experience may be presented and understood in a distorted way.¹⁰³

Tarrant notes that the requirement that self-defence needed a physical attack in progress or the perception of an imminent attack ‘represents the most profound instance of the exclusion of women’s experience’ because it focuses on an isolated incident representing ‘an extraordinary eruption in a normal existence’ whereas ‘women who kill in retaliation to systematic abuse are killing in response to an aspect of their *ordinary* existence’.¹⁰⁴ The fact that men are often physically stronger may mean that an abused woman waits for a lull in the violence before responding or uses a weapon to carry out the defensive action.¹⁰⁵ However, ‘a woman [who] kills her spouse sometime well *after* an attack or well *before* an anticipated attack, or where the immediate assault is relatively minor’ may find it difficult ‘to argue persuasively that her fear of death or her belief that she could not otherwise save herself was reasonable’.¹⁰⁶

2 Reform of Self-Defence

Starting around the 1980s, reformers aimed to address the silencing and exclusion of women’s experience from the law by pushing for reforms which ‘bring [women] into the discursive legal realm’.¹⁰⁷ Such reform efforts began to illuminate how things that are understood to be objective facts may in fact be reflecting the experience of some while silencing and excluding the experiences of others.¹⁰⁸ For instance, in 1981 a Task Force on Domestic Violence was set up in New South Wales to provide ‘an avenue for feminists within the bureaucracy

102 Stella Tarrant, ‘Something Is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws’ (1990) 20 *University of Western Australia Law Review* 573, 574.

103 Ibid 585.

104 Ibid 597–8 (emphasis in original).

105 See VLRC, *Defences to Homicide*, above n 26, 62.

106 Tarrant, above n 102, 598 (emphasis in original).

107 Kate Fitz-Gibbon and Sharon Pickering, ‘Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond’ (2012) 52 *British Journal of Criminology* 159, 168.

108 Tarrant, above n 102, 574.

and the community to urge reform¹⁰⁹ including calls for legislative changes to improve the access of abused women who kill to appropriate defences.¹¹⁰ Initially, such reform efforts centred on provocation rather than self-defence, with focus beginning to shift in the 1990s to self-defence as the appropriate defence for abused women who kill.¹¹¹ Nonetheless, the criticisms that legal requirements of self-defence were excluding and silencing the experience of women gradually filtered through to the judiciary in the 1980s and led to changes at common law to the defence to accommodate the different circumstances in which women victims of family violence kill their abusers.¹¹²

Development of the concept of ‘battered woman syndrome’¹¹³ has also been instrumental in shifting not only the legal requirements of the defence but the laws and practice surrounding the defence, such as the evidence admissible to substantiate claims of self-defence. Battered woman syndrome relies on an expert witness providing the court with evidence that is outside the experience of the ordinary juror; particularly, the psychological effects of regular abuse.¹¹⁴ It may be used to explain why an abused woman remains in an abusive relationship and how she may perceive threats of violence.¹¹⁵

Initially, this was a measure to ensure the reactions of women to an abusive partner could be recognised as ‘reasonable’ in the context of a self-defence claim. While this development has allowed some recognition and contextualisation of battered women’s experiences,¹¹⁶ the application of self-defence in this context remains problematic because it has ultimately produced a number of ‘essentializing and syndromizing’ effects.¹¹⁷ As Belinda Morrissey has argued,

although self-defence law may ... allow for the incorporation of battered women’s experiences ... the spirit of that law is still at the mercy of its judicial interpretation and application. ... In practice, self-defence largely

109 Kate Fitz-Gibbon and Julie Stubbs, ‘Divergent Directions in Reforming Legal Responses to Lethal Violence’ (2012) 45 *Australian & New Zealand Journal of Criminology* 318, 321, citing Ann L Genovese, *The Battered Body: A Feminist Legal History* (PhD Thesis, University of Technology, 1998).

110 New South Wales Task Force on Domestic Violence, *Report of the New South Wales Task Force on Domestic Violence to Honourable N K Wran QC, MP, Premier of New South Wales* (1981) 76.

111 See Fitz-Gibbon and Stubbs, above n 109, 320–2, 325.

112 Despite such changes, Patricia Eastal has argued
[s]ome courts ... continued to interpret the factors of self-defence in terms of what is reasonable for the average ... middle class white male, rather than what a battered woman might reasonably do. Accordingly, in most cases in which women have been acquitted to date, they killed immediately (as defined in seconds) after their partner assaulted them.
Eastal, above n 93, 46.

113 Lenore E A Walker, *The Battered Woman Syndrome* (Springer Publishing, 1984).

114 Tarrant, above n 102, 600.

115 Ibid 600–1.

116 Elizabeth A Sheehy, Julie Stubbs and Julia Tolmie, ‘Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations’ (1992) 16 *Criminal Law Journal* 369; Douglas, ‘The Demise of the Provocation Defence’, above n 14, 51.

117 Celia Wells, ‘Provocation: The Case for Abolition’ in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (Oxford University Press, 2000) 85, 91.

remains the preserve of men, with battered women still relying on the far less appropriate defence of provocation.¹¹⁸

In practice, this has meant battered women who killed their partners have been forced to rely on diminished responsibility or provocation claims.¹¹⁹

While acknowledging the importance of legal innovations to allow the admission of expert evidence in cases involving family violence, Evan Stark labels battered woman syndrome a ‘traumatization model’ and argues that this provides ‘an inaccurate, reductionist, and potentially demeaning representation of woman battering’.¹²⁰ In focussing on discrete episodes of violence, the traumatization model perpetuates ‘the same persistent structural inequities and biases which underlie battering itself’.¹²¹ Stark provides an alternative framework for understanding family violence, labelled ‘coercive control’, which places focus on the patterns of coercion and control rather than on the violent acts of abusers or the psychological effect of violence on the victim.¹²² This effect of this framework is that it:

shifts the basis of women’s justice claims from stigmatizing psychological assessments of traumatization to the links between structural inequality, the systemic nature of women’s oppression in a particular relationship, and the harms associated with domination and resistance *as it has been lived*.¹²³

In recent years, there has been a push for Australian case law to move away from narrow constructions of battered woman syndrome towards ‘social context framework evidence’ for juries and judges to better assess the reasonableness of a defendant’s claim to self-defence.¹²⁴ The VLRC noted that such evidence

would address the sorts of myths and misconceptions judges and jurors might have about family violence and ‘may overcome some of the problems with BWS evidence, while still retaining the beneficial effects of introducing expert evidence to explain the actions of the person who has been subjected to abuse’.¹²⁵

118 Belinda Morrissey, *When Women Kill: Questions of Agency and Subjectivity* (Routledge, 2003) 98–9; Manning, above n 84, 16–17.

119 Julie Stubbs and Julia Tolmie, ‘Battered Woman Syndrome in Australia: A Challenge to Gender Bias in the Law?’ in Julie Stubbs (ed), *Women, Male Violence and the Law* (Institute of Criminology, 1994) 192, 192.

120 Stark, ‘Re-Presenting Woman Battering’, above n 60, 974–5.

121 Ibid 979–80.

122 Ibid 975–6.

123 Ibid 976 (emphasis in original).

124 See, eg, 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; VLRC, *Defences to Homicide*, above n 26, 172–6; Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, ‘Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand’ (2012) 34 *Sydney Law Review* 467, 468–9.

125 VLRC, *Defences to Homicide*, above n 26, 173.

In line with this view the VLRC recommended that a provision be introduced to clarify that regard should be had to social context evidence where self-defence is raised in relation to murder where the accused claims a history of family violence.¹²⁶

In an effort to better accommodate the situations in which women kill to defend themselves (for example, in response to an ongoing threat of violence) most jurisdictions have now reformed the law regarding the full defence of self-defence. In 2005 the Victorian government introduced a substantial package of reforms to the defences to homicide through the *Crimes (Homicide) Act 2005* (Vic). The Act replaced the common law defence of self-defence to murder with a statutory defence that retained the essential subjective and objective elements of the common law test in *Zecevic* and is based on the Model Criminal Code provision.¹²⁷ In support of these amendments, Victoria provided legislative guidance on the potential relevance of evidence of family violence in the context of the defences to homicide, including self-defence that removes the requirement of immediate response and allows for the introduction of information about the dynamics of violent relationships.¹²⁸

In Western Australia self-defence has been reformulated, bringing it closer to the test found in the Model Criminal Code. The new test of self-defence expressly makes clear that the defence is available even where a person is responding to a threat of force that is not imminent.¹²⁹ However, it is still necessary to show there are reasonable grounds for the person's belief that the act of self-defence was necessary and the force used must be objectively reasonable in the circumstances as the person believed to exist.¹³⁰

126 Ibid 188 (Recommendation 34)

127 *Crimes Act 1958* (Vic) s 9AC, as inserted by *Crimes (Homicide) Act 2005* (Vic) s 6. Prior to 2005, Victoria was the only Australian state not to have separate statutory provisions for self-defence: see VLRC, *Defences to Homicide*, above n 26, xxviii. The Victorian Supreme Court discussed the need to determine judicial practice of directing in terms of the common law self-defence and statutory self-defence as the statutory definitions of self-defence in the *Crimes Act 1958* (Vic) ss 9AC (murder) and 9AE (manslaughter) do not expressly abrogate the common law: *R v Parr* (2009) 21 VR 590. However, the Victorian Supreme Court held that as a matter of fairness juries should be directed on both common law and statutory self-defence: *DPP (Vic) v Samson-Rimoni (Ruling No 1)* [2010] VSC 26 (8 February 2010) [33]. The Victorian Court of Appeal expressly abrogated the common law of self-defence so that it does not apply where statutory self-defence applies to the offence: *Babic v The Queen* (2010) 28 VR 297. Since 1987, all other Australian jurisdictions except Queensland have enacted new legislative provisions governing the complete defence of self-defence. Further changes have been recommended for Victoria in Department of Justice (Vic), 'Defensive Homicide: Proposals for Legislative Reform', above n 3, 42–6 [3.3]–[3.5], 60–1 [4.4].

128 *Crimes Act 1958* (Vic) ss 9AH(1)(c)–(d), (3). When announcing the reforms, the then Attorney-General, Rob Hulls, stated that the impetus for the reforms was that: 'self-defence evolved from a bygone era when the law was concerned with violent confrontations between two males of roughly equal strength where a threat of death or serious injury was immediate', but that 'in cases involving family violence there may be reasons why a person might consider it necessary to kill, even though he or she is not facing immediate attack': Office of the Attorney-General (Vic), 'Hulls Announces Major Reform to Homicide Laws' (Media Release, 4 October 2005).

129 *Criminal Code Act Compilation Act 1913* (WA) s 248(4)(a), as amended by *Criminal Law Amendment (Homicide) Act 2008* (WA). For further discussion of imminence, see Sheehy, Stubbs and Tolmie, 'Defences to Homicide for Battered Women', above n 124, 470–2.

130 *Criminal Code Act Compilation Act 1913* (WA) s 248(4), as amended by *Criminal Law Amendment (Homicide) Act 2008* (WA). For further discussion of the objective and subjective tests in self-defence, see Sheehy, Stubbs and Tolmie, 'Defences to Homicide for Battered Women', above n 124, 472–6.

The changes in Victoria and Western Australia aim to broaden self-defence and make it easier for women who kill abusive family members to receive a complete acquittal for murder when they were acting in self-preservation and even when the attack was not immediate but it was imminent. Since the *Crimes (Homicide) Act 2005* (Vic) was implemented, there have been nine cases involving women who have killed in response to family violence. Two of the cases did not proceed to trial.¹³¹ At the time, the outcomes reached in these cases were cautiously interpreted as a sign the reforms were producing positive outcomes for abused women. Arguably, these two cases did not proceed to trial because they fit into traditional notions of self-defence (with respect to imminence and proportionality).¹³² It has not necessarily followed that other women defendants who have killed their violent abuser have received a similar (positive) outcome since the 2005 amendments.¹³³ According to Kellie Toole, the new provisions are activating pre-existing stereotypes in ways that can result in convictions for defensive homicide where complete acquittals would seem to be more appropriate.¹³⁴ Reforms to self-defence highlight that legal reform without

131 On 27 March 2009 the then Director of the Victorian Office of Public Prosecutions, Jeremy Rapke QC, dropped a murder charge against a young woman from Shepparton accused of murdering her stepfather who sexually abused her. He said there was no reasonable prospect that a jury would convict her and outside the court her lawyer, Brian Birrell, said '[t]he legal defence in this case have always taken the view that a jury would find this to be a legally justifiable homicide': Chris Johnston, 'Murder Charge Dropped against "Sex Slave" Teen', *The Age* (online), 27 March 2009 <<http://www.theage.com.au/national/murder-charged-dropped-against-sex-slave-teen-20090327-9czp.html>>. On 6 May 2009 a Magistrate dismissed the murder charges against Freda Dimitrovski accused of killing her husband, Sava Dimitrovski, after a three-day committal hearing. Freda Dimitrovski's lawyer, Ian Hill QC, said: 'recent changes to the *Crimes Act* made self-defence in family violence cases acceptable under law': K Stevens, 'Breakthrough Case — Dismissed Murder Charge Defence Successful Under New Laws', *Shepparton News*, 8 May 2009, 3, cited in Department of Justice (Vic), 'Defensive Homicide: Review of the Offence of Defensive Homicide' (Discussion Paper, August 2010) 31–2 [108]–[109]. The remaining seven cases involved a woman defendant who killed in response to a prior history of abuse from a male partner or ex-partner: *R v Kulla Kulla* [2010] VSC 60 (9 April 2010); *R v Black* [2011] VSC 152 (12 April 2011); *R v Creamer* [2011] VSC 196 (20 April 2011); *R v Downie* [2012] VSC 27 (2 February 2012); *R v Kells* [2012] VSC 53 (24 February 2012); *R v Edwards* [2012] VSC 138 (24 April 2012); *R v Hudson* [2013] VSC 184 (26 April 2013). Melissa Kulla Kulla, Elizabeth Downie and Veronica Hudson pleaded guilty to manslaughter. Jade Kells was found guilty of manslaughter by unlawful and dangerous act after a trial. Karen Black and Jemma Edwards pleaded guilty to defensive homicide. Eileen Creamer is the only woman in Victoria so far to have been found guilty of defensive homicide after a trial. In her evaluation of the outcomes in *R v Black* and *R v Creamer*, Kellie Toole has argued that because:

both accepted, retrospectively, that their belief was not reasonable ... they were not entitled to a complete acquittal. The cases suggest that pre-existing attitudes toward women and family violence survived the statutory amendments and produced unintended outcomes that are not satisfactory to either abused women or to the broader community.

Kellie Toole, 'Self-Defence and the Reasonable Woman: Equality before the New Victorian Law' (2012) 36 *Melbourne University Law Review* 250, 271.

132 Danielle Tyson, Sarah Capper and Debbie Kirkwood, Submission to the Department of Justice (Vic), *Review of the Offence of Defensive Homicide*, 13 September 2010, 8 <<http://www.dvrcv.org.au/knowledge-centre/our-blog/%E2%80%98defensive-homicide%E2%80%99-safety-net>>.

133 Commenting on Victoria's new provisions, Carolyn Ramsey has applauded them for being among the most 'trendsetting' feminist reforms to ever have been implemented in a Western jurisdiction: Ramsey, above n 35, 33–4. She has also noted, however, that '[d]espite elevating the significance of relationship history and social context in terms divorced from psychology, they failed to jettison [battered woman syndrome] evidence' and in doing so 'muddied the evaluative orientation of their reform package': at 40. See also Department of Justice (Vic), 'Proposals for Legislative Reform', above n 3, 22–7 [2.6.1]–[2.6.3].

134 Toole, above n 131, 286.

corresponding cultural change and challenging of traditional stereotypes that pathologise and essentialise the experiences of women who kill their violent abusers will be limited in effect. There is a need not only to increase legal and social understanding of the dynamics of family violence but also to ensure that the new provisions relating to evidence of family violence are being fully utilised to give legitimacy to women's self-defence claims.¹³⁵

III NEW PARTIAL DEFENCES TO HOMICIDE AND A NEW OFFENCE

A *Arguments for Excessive Self-Defence and Defensive Homicide*

Excessive self-defence was a common law partial defence which usually operated in connection with self-defence as a halfway house between an acquittal for murder (where force was used in defence and it was deemed to be reasonably necessary) and a conviction for murder (where there were no grounds for acting in self-defence). Thus successful excessive self-defence would reduce a conviction from murder to manslaughter where the person was acting in self-defence but the response was deemed not to be objectively reasonable. The defence did not exist in the code jurisdictions and had a relatively short life at common law, first being recognised in *R v McKay*¹³⁶ in 1957, and then being abolished by the High Court in *Zecevic*¹³⁷ in 1987.

Victoria effectively reintroduced excessive self-defence but in the form of a new offence called 'defensive homicide' rather than re-establishing the partial defence, whereas New South Wales and Western Australia introduced the partial defence in 2002 and 2008 respectively.¹³⁸ The test for excessive self-defence and defensive homicide are similar, both requiring a belief that defensive force was necessary but where the response was objectively not reasonable. The test becomes subjective in dispensing with the requirement that the response was objectively reasonable — thus the focus of the defence and offence of defensive homicide is on the belief of the person that it was necessary to defend themselves.¹³⁹

A main argument in favour of introducing excessive self-defence is that it provides a 'halfway house' and thus may encourage women who have been abused to plead self-defence, knowing that if it is found that the response was not reasonable

135 For an in-depth analysis of these seven cases and whether, and to what extent, the 2005 reforms to the laws of homicide in Victoria are being fully utilised, see generally Tyson, Kirkwood and McKenzie, above n 57.

136 [1957] VR 560.

137 (1987) 162 CLR 645.

138 *Crimes Act 1900* (NSW) s 421; *Criminal Code Act Compilation Act 1913* (WA) s 248(3). It should be noted that South Australia was the first state to reintroduce excessive self-defence in 1997: *Criminal Law Consolidation Act 1935* (SA) s 15(2).

139 *Crimes Act 1958* (Vic) s 9AD; *Criminal Code Act Compilation Act 1913* (WA) s 248(3).

all is not lost.¹⁴⁰ In the absence of such a halfway house, women who kill in response to abuse may plead guilty to manslaughter rather than risking going to trial for murder and pleading self-defence because if a jury finds the response unreasonable they face a murder conviction. A further argument is that where a woman kills in self-preservation self-defence is the appropriate defence and even if the force used is clearly unreasonable the killing is less culpable.¹⁴¹ Culpability for the killing is reduced in such instances because the aggressor acted unlawfully thus opening up the need for a person to act in defence in the first place. As Yeo argues: 'A person who defends herself or himself over-zealously should not be treated as equally culpable with one who killed but not in circumstances of self-defence at all'.¹⁴² The argument here is that unlike provocation the accused had a 'worthy motive'¹⁴³ and if it is thought that a person's culpability is reduced then this should be reflected in the conviction for a lesser offence rather than simply taken into account at sentencing. From a fair labelling perspective the Victorian approach is preferable in creating a separate offence which appropriately labels the person's behaviour and allows sense to be made of what the person did.¹⁴⁴

B Assessment of Excessive Self-Defence and Defensive Homicide

Aside from complexity it has been argued that excessive self-defence is largely unnecessary because if a person really does believe that they need to use force in defence then they should be acquitted under self-defence.¹⁴⁵ An appropriate reformulation of self-defence should therefore largely be sufficient to capture deserving cases of self-defence and those cases which fall beyond a reformulated self-defence would not be deserving of any defence (but perhaps a mitigated sentence). Reformulation of self-defence to limit the requirements of a proportionate response to an immediate threat of violence would then capture some of the cases where a woman responds to family violence but does so, for example, while the abuser is asleep or by adopting a weapon due to the disproportionate physical strength between a woman and a man. In line with the concern to ensure that women who kill in such situations do actually get self-defence is the concern that introducing excessive self-defence might disadvantage

140 VLRC, *Defences to Homicide*, above n 26, 102.

141 *Ibid* xxviii.

142 Stanley Meng Heong Yeo, 'Applying Excuse Theory to Excessive Self-Defence' in Stanley Meng Heong Yeo (ed), *Partial Excuses to Murder* (Federation Press, 1991) 158, 163, quoted in LRCWA, *Review of the Law of Homicide*, above n 36, 181. The Model Criminal Code Officers Committee found excessive self-defence to be so vague and lacking in a suitable test that they reached the conclusion that it should not be included in the Model Criminal Code: MCCOC, above n 22, 113.

143 Paul Ames Fairall, 'Excessive Self-Defence in Australia: Change for the Worse?' in Stanley Meng Heong Yeo (ed), *Partial Excuses to Murder* (Federation Press, 1991) 178, 185, quoted in LRCWA, *Review of the Law of Homicide*, above n 36, 181.

144 For more on fair labelling in homicides, see generally Crofts, above n 64.

145 For a discussion of views that excessive self-defence is unnecessary, see Justice Mark Weinberg, 'Moral Blameworthiness: The "Objective Test" Dilemma' (2003) 24 *Australian Bar Review* 173, 191-7; LRCWA, *Review of the Law of Homicide*, above n 36, 178-9.

women in such situations by giving the jury a halfway house or an easy option of excessive self-defence rather than a full-defence. Thus excessive self-defence could undermine successful pleas for self-defence.

There has been much public dissatisfaction surrounding the way in which defensive homicide has operated since its inception in Victoria. A key rationale for the enactment of defensive homicide was as a safety net for women who kill in response to abuse but who may fail to have their actions recognised as self-defence and be acquitted. Much of the criticism has been in response to the number of men who have been convicted of defensive homicide. The latest case to reignite concerns about the gendered operation of the law of homicide is *R v Middendorp*.¹⁴⁶ In that case, a Victorian Supreme Court jury acquitted Luke John Middendorp of murder after he fatally stabbed his former female partner, Jade Bownds, four times in the back after she came at him with a knife. Moments after he stabbed her, Middendorp was heard by witnesses to have said that she was a 'filthy slut' who 'had it coming' and 'got' what she 'deserved'. The jury accepted his version of events that he stabbed his ex-partner in 'self-defence' and convicted him of defensive homicide. The successful use of defensive homicide in this case rekindled concerns about the continuation of a culture of 'excuses' for male violence against women.¹⁴⁷ Concerns have thus been expressed that '[a] law meant to protect battered women is being abused by brutal men'.¹⁴⁸ Such concerns prompted a review by the Department of Justice, although with the change of government in 2010, the review was put on hold.¹⁴⁹ In September 2013, the Department of Justice released a Consultation Paper, *Defensive Homicide: Proposals for Legislative Reform*, in which it makes a number of proposals for legislative reform including that the offence of defensive homicide be abolished.¹⁵⁰

The Department of Justice's Consultation Paper states that the fact that defensive homicide has mainly been relied on men and usually in non-family violence situations 'is the very antithesis of the reason for introducing defensive homicide'.¹⁵¹ However it must be remembered that the amendments were not intended to apply exclusively to women who kill abusive partners. Although defensive homicide was written with the situation of abused women who kill in mind,¹⁵² the fact that it has been used mainly by men who have killed other men should not mean the whole offence is regarded as a failure and in need of

146 [2010] VSC 202 (19 May 2010).

147 Tyson, 'Victoria's New Homicide Laws', above n 68, 214. Tyson, Capper and Kirkwood, above n 132, 20.

148 See Geoff Wilkinson and Courtney Crane, 'A Law Meant to Protect Battered Women is Being Abused By Brutal Men', *Herald Sun* (Melbourne), 10 February 2012, 1. See also Fitz-Gibbon and Pickering, above n 107.

149 See Department of Justice (Vic), 'Review of the Offence of Defensive Homicide', above n 131; Robert Clarke, 'Giving a Stronger Voice to Crime Victims' on *Herald Sun Law Blog* (20 June 2012) <<http://blogs.news.com.au/heraldsun/law/index.php/heraldsun/comments/victims/>>. However, it would appear that these concerns related to the need for greater 'transparency and accountability' of the plea process: Andrea Petrie, 'Murder "Deals" under Fire', *The Age* (Melbourne), 25 June 2012, 1–2.

150 See generally Department of Justice (Vic), 'Proposals for Legislative Reform', above n 3.

151 *Ibid* 27 [2.7].

152 Toole, above n 131, 266.

abolition.¹⁵³ Such a step would close off the possibility of a conviction for a lower level offence where a jury is not convinced that the response was reasonable in the circumstances as the defendant believed them to be. The Department of Justice considered restricting the offence to situations involving serious family violence rather than recommending abolition, but noted that a better path was to focus on ‘procedural equality’ and amending self-defence.¹⁵⁴

C Abuse Specific Defence

1 Arguments for an Abuse Specific Defence

Several reviews have considered whether there should be a specific defence for victims of family violence who kill, for example the Law Reform Commissions of Victorian, Western Australian and Queensland. The various models identified by the VLRC include:

- the ‘battered woman syndrome’ model, which would require that the woman was suffering from battered woman syndrome when she killed;
- the ‘self-preservation’ model, which would apply where the woman honestly believes there is no protection or safety from the abuse and so kills in the belief that this is necessary for self-preservation; and
- the ‘coercive control’ model — this would focus on the person’s need to free themselves from circumstances of coercive control.¹⁵⁵

In Victoria most submissions and those consulted supported focussing on making self-defence work for women rather than the introduction of an abuse specific defence. The VLRC agreed and felt that it was possible to redefine self-defence to make it operate in a way ‘that takes adequate account of women’s experiences of violence through reforms to evidence and clarification of the scope of the defence’.¹⁵⁶ In contrast to Victoria, there was considerable support among submissions in Western Australia for the introduction of a specific defence. Out of 35 responses, only six submissions rejected reform for quite varied reasons. Some

153 From a fair labelling perspective it could even be argued that whereas provocation inappropriately reflected the situations in which some men kill other men out of ‘slights’ to their ‘masculine honour’, defensive homicide more appropriately recognises these situations, which are a defensive response to other men’s violence.

154 Department of Justice (Vic), ‘Proposals for Legislative Reform’, above n 3, 11–12 [2.3]–[2.4]. Related to this was the concern that ‘the existence of defensive homicide has in some ways distorted the legal landscape. The focus of debate concerning women who kill in response to family violence has become about defensive homicide, not self-defence. It should be the other way around’: at 25 [2.6.2]. Such distortion would indeed be a matter for concern. However, just how much distortion has occurred due to the existence of defensive homicide is questionable given that the Department comments that ‘it is not at all clear that, in any of the Victorian cases in which a woman has relied on defensive homicide, the primary self-defence laws failed appropriately to recognise that the woman acted in self-defence’: at 33 [2.9].

155 VLRC, *Defences to Homicide*, above n 26, 64.

156 *Ibid* 68.

opposed in principle any gender specific defences while others were concerned about basing a defence on the battered women's syndrome.¹⁵⁷

The reasons for introducing such a defence are that it would overcome the problems that women face accessing self-defence when they are responding to family violence and it would allow express consideration of the history, nature and effects of abuse to be taken into account.¹⁵⁸ Submissions to the LRCWA in support of such a defence noted that it could 'counteract bias and stereotypes; bring clarity to the law; educate judges, lawyers and the community about the dangers faced by women; and redress inequality in the law'.¹⁵⁹

Furthermore, a new defence would then ensure that other defences do not continue to be interpreted in ways which exclude women's experience. It would also be preferable to widening self-defence because it would avoid the danger that self-defence is used in inappropriate cases. As has already been noted in Victoria there is a concern that cases which would traditionally have fallen under the defence of provocation are now being re-written to fit defensive homicide.¹⁶⁰

Nonetheless, following its guiding principles for reform the LRCWA rejected an abuse specific defence because of the view that homicide laws should be of general application and should not be limited to particular groups in society.¹⁶¹ The LRCWA was of the view that self-defence is a more appropriate defence in many situations where a person kills for self-preservation in an abusive situation. However '[v]ictims of domestic violence who kill their abusers should only be acquitted when they satisfy the test for self-defence as it applies to every member of the community'.¹⁶² The LRCWA therefore recommended that self-defence be reformulated in Western Australia so that it was available also where a person was not responding to an immediate threat of violence but an inevitable threat, and that excessive self-defence be introduced.¹⁶³

The LRCWA was also not of the view that a new defence would significantly ensure that misconceptions and stereotypes about family violence in the legal system and the community would best be addressed through a new defence. Indeed, concern was expressed that a new defence, rather than a modification of self-defence, could create an impression that a person was not legitimately acting for self-preservation. This could in turn 'detract from an understanding of the very real danger faced by victims'.¹⁶⁴ Furthermore, the LRCWA feared that such a specific defence could exclude others who might be in an abusive relationship, such as children, parents, grandparents, and people in same sex relationships. Of course the latter concern could be remedied through a carefully drafted offence

157 LRCWA, *Review of the Law of Homicide*, above n 36, 287–8.

158 Ibid.

159 Ibid 288 (citations omitted).

160 See, eg, Fitz-Gibbon and Pickering, above n 107.

161 LRCWA, *Review of the Law of Homicide*, above n 36, 289.

162 Ibid.

163 Ibid 169, 172, 183. See also Department of Justice (Vic), 'Proposals for Legislative Reform', above n 3, 11–12 [2.3].

164 LRCWA, *Review of the Law of Homicide*, above n 36, 289.

which specified that it applied to any situations of domestic or family abuse.¹⁶⁵ The former concern is more real. A specific defence could run into the problems associated with the battered women syndrome in that it sends certain messages about the abnormality of the response to abuse.

2 Assessment of an Abuse Specific Defence

The QLRC's recommendation 'that consideration be given, as a matter of priority, to the development of a separate defence for battered persons',¹⁶⁶ led to the Department of Justice and Attorney-General retaining academics from Bond University, Professors Geraldine Mackenzie and Eric Colvin, in July 2009 to examine the development of such a defence. In their report entitled *Homicide in Abusive Relationships: A Report on Defences* the authors recommended the introduction of a separate partial defence to murder into the *Criminal Code* applicable to victims of seriously abusive domestic relationships who kill their abusers, believing their actions are necessary for self-defence where there are reasonable grounds for such belief.¹⁶⁷ In response to the recommendations of the independent review, Queensland introduced a new separate partial defence of killing for preservation in an abusive domestic relationship in February 2010.¹⁶⁸ If successfully argued, the accused person will be found guilty of manslaughter.

So far there have been very few cases which have considered this new partial defence. The first case to do so was *Falls*.¹⁶⁹ Despite the fact that the woman defendant in this case was acquitted of murder on the basis of self-defence, a criticism of the new partial defence is that while it

may well reduce the number of murder convictions for those who kill after being subjected to serious domestic violence ... it will do nothing to increase the prospect of acquittal for battered women, and may even jeopardise their claims of justified self-defence.¹⁷⁰

Michelle Edgely and Elena Marchetti have commented that gender-bias in self-defence has long been recognised as stemming from the imminence requirement. Unlike Victoria and Western Australia, the Queensland review did not consider the appropriateness of reforming self-defence for women who kill their abusers out of fear and self-preservation. Edgely and Marchetti are of the view that the provision of an abuse-specific partial defence only perpetuates gender-bias because it operates in much the same way as provocation and diminished responsibility — it assumes equivalency between 'a woman's killing while in fear

165 Ibid.

166 QLRC, above n 41, 491, 500–1 (Recommendations 21.1–21.4).

167 Geraldine Mackenzie and Eric Colvin, 'Homicide in Abusive Relationships: A Report on Defences' (Report, 6 July 2009) 10.

168 *Criminal Code Act 1899* (Qld) sch 1 s 304B, as inserted by *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010* (Qld) s 3.

169 For a detailed discussion of the case involving Susan Falls, see Edgely and Marchetti, above n 56, 141–8.

170 Hopkins and Eastal, above n 92, 136. See also Edgely and Marchetti, above n 56, 141–8.

for her life' and 'a (man's) killing brought on by his sudden, angry loss of control or his diminished mental capacities'.¹⁷¹ They contend that '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'.¹⁷² Furthermore:

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. 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.¹⁷³

In her review of the cases considering the new partial defence, Heather Douglas concludes that it is unlikely to have a large role to play given that developments in case law mean that abused women who kill in Queensland may be accessing self-defence.¹⁷⁴ Case law confirms that expert evidence about the effects of living in an abusive relationship is relied on in Queensland courts to allow a finding that 'a history of past abuse, along with an expectation that the abuse would continue' is a sufficient trigger for self-defence.¹⁷⁵ Thus it may be premature to speculate that juries will reason that an abuse-specific partial defence is the most appropriate for women who kill in the context of family violence rather than the complete defence of self-defence. This concern does not detract from the need for this halfway house if the reaction is found to be unreasonable in the circumstances as the person believes themselves to be in. As noted above, to claim that a manslaughter conviction is automatically an unjust outcome fails to take into account the reality and diversity of situations in which people kill and different levels of culpability.

IV CONCLUSION

This article has shown that despite sharing similar core concerns about the gendered nature of defences to homicide there have been divergent approaches

171 Edgely and Marchetti, above n 56, 140. According to Edgely and Marchetti, 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.

Ibid 140.

172 Ibid 141.

173 Ibid (citations omitted). See also Anthony Hopkins and Patricia Easteal who have commented that s 304B of the *Criminal Code Act 1899* (Qld) 'now emphasises the necessity to judge reasonableness from the perspective of the battered woman *only* in so far as this may enable a verdict of murder to be reduced to manslaughter': Hopkins and Easteal, above n 92, 132 (emphasis in original).

174 Douglas, 'Merits of Specialised Homicide Offences and Defences for Battered Women', above n 74, 377.

175 Ibid.

throughout Australia to reforms to improve the access of women who kill their abusers to appropriate defences and to produce a more just law of homicide. This diversity of approaches is partly due to varied legal and political constraints but also due to fundamental differences in conviction about the need and capacity for reform of existing defences. It is now widely recognised that women who kill in response to abuse are generally doing so to defend themselves from fatal violence, which may not be imminent, thus causing problems accessing self-defence. Reform of self-defence is therefore at the core of moves to afford abused women better access to more appropriate defences. Most jurisdictions have therefore focussed, whether through legislation or through case law, on removing the requirement of an immediate threat of violence and making clear that evidence of the nature and dynamics of family violence is essential to an assessment of the reasonableness of the response (where reasonableness is still required).

In some jurisdictions, there has been reform to the partial defences to murder. The argument that these partial defences can detract from allowing a woman who is truly acting for self-preservation from accessing the full defence of self-defence is important but can be remedied to a large degree by appropriately reforming self-defence, as noted above. Furthermore, this argument does not diminish the importance of the partial defences where a person fails to convince a jury either that they truly were acting in self-defence but that their response was not reasonable or that they were not using defensive force but killed due to a loss of control. Accordingly, excessive self-defence or defensive homicide have been introduced in some jurisdictions in an attempt to ensure that there is a halfway house between the full defence of self-defence and a murder conviction. This is designed to encourage women to argue self-defence, knowing that all is not lost if a jury is not convinced that the response was reasonable. In some jurisdictions this has occurred along with the abolition of provocation based on the rationale that provocation is beyond gender appropriate reform. Other jurisdictions see provocation as continuing to have a role to play and have limited the situations in which men have traditionally argued provocation and at the same time opened up the defence to situations in which women may argue provocation in response to abuse.

The concern that has been associated with defensive homicide being used mainly by men was not unexpected. However, with hindsight, this was perhaps an evident result of the abolition of provocation. The fact that men have been convicted of this offence should also not detract from the merits of this offence for women who kill in response to abuse. If it was the desire of legislators to only provide a defence for people who have suffered abuse then a more appropriate method of reform would have been to adopt the Queensland model and introduce a situation-specific defence. The criticisms of this approach are similar to those surrounding excessive self-defence in that it could detract from the full defence of self-defence. Indeed, given the label of this defence there is a danger that jurors (and also legal professionals) may see this as the fit and proper defence for someone who kills in response to abuse. However, as already stated, such problems can largely be addressed in tandem with reforms to the law of self-defence or indeed, by developing a full defence of killing in response to family violence where the

response was reasonable (self-defence in specific circumstances), together with a partial defence where the response was not considered reasonable (even after considering evidence relating to family violence).

The lesson that has been learned about the gendered nature of the defences to homicide is that creating defences based on specific gendered models of reaction does not adequately take account of the varied situations in which people kill but are not deemed to be culpable or their culpability is reduced. There are many varied situations in which a person lives with, and sometimes kills in response to, abuse. Thus the most appropriate structure of defences for modern Australian society is a variety of defences rather than aiming for a one-size-fits-all model. More fundamentally, it must be realised that law does not get created, nor does it exist, in a vacuum. Legal change without social change will be ineffective. Clearly, more education around the dynamics of family violence is needed if both the legal profession and wider community (eg juries) are to fully utilise important changes to the law in a way that more justly recognises women's human rights and communicates the distinctions between offences and defences and their proportionate wrongfulness in a way that achieves positive rather than negative reactions within the community.