HOLDING BACK THE 'BATTERED WOMAN': *WESTERN AUSTRALIA V LIYANAGE* [2016] WASC 12

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Notwithstanding judicial authorities confirming the admissibility of battered woman syndrome ('BWS') testimony, typically tendered in defence of women accused of killing their violent partners, Australian courts have approached BWS evidence and battered women's defences with marked ambivalence and inconsistency. In response, feminist legal theorists have urged attention to the ways the rules of evidence work to filter and silence the stories of battered women at trial, calling for judicial acknowledgement of 'social framework evidence' to incorporate these social realities. The feminist legal analysis undertaken in this article of the decision in The State of Western Australia v Liyanage *[2016] WASC 12 suggests these concerns remain very pertinent ones in Western Australian evidence law.*

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I INTRODUCTION

Typically tendered in defence of women accused of killing their abusive partners, battered woman syndrome ('BWS')[1] testimony describes 'the psychological sequelae that result from living in a violent relationship',[2] leading to a 'distortion of thought and perception'[3] that confines the accused's repertoire of responses to lethal violence as a means of self-defence.[4] Whereas '[s]ome positive outcomes' have been attained in this regard,[5] it is observed that the Australian judicial approach to battered women's defences generally has remained impaired by considerable 'inconsistency and confusion'.[6]

The recent case of *Western Australia v Liyanage*[7] provides pause for reflection on the utility of BWS and the broader role of expert evidence in cases involving battered women who kill. In considering BWS and evidence law, this case analysis proceeds in the following parts: Part II provides an overview of BWS testimony in the context of Western Australian ('WA') evidence law. Part III then locates this discussion within a broader feminist conversation about the gendered nature of laws, and evidence law in particular. Part IV outlines the facts and decision in *Liyanage*, before a critical analysis is undertaken, in Part V, of the decision. The paper will argue that whilst Hall J was correct to identify

[1] It is acknowledged that terms such as 'battered woman' are not unproblematic, just as the use and application of BWS has been widely discredited, particularly by North American scholarship. This paper continues to utilise these terms as a means of reference to concepts that remain in common usage and for which there are no broadly accepted alternatives.

[2] Rebecca Bradfield, 'Understanding the Battered Woman Who Kills her Violent Partner – The Admissibility of Expert Evidence of Domestic Violence in Australia' (2002) 9 *Psychiatry, Psychology and Law* 177, 180, citing inter alia *Runjanjic and Kontinnen* (1991) 56 SASR 114 (citations omitted). BWS has also been accepted in cases outside this context, see, eg, *Runjanjic and Kontinnen* (1991) 56 SASR 114 (duress), *Winnett v Stephenson* (unreported, Magistrates' Court of the ACT, 19 May 1993); *Scott v SA Police* (1993) 6 SASR 589 (armed robbery).

[3] Robert Schopp et al, 'Battered Woman Syndrome, Expert Testimony, and the Distinction between Justification and Excuse' (1994) 1 *University of Illinois Law Review* 45, 93.

[4] BWS is most commonly associated with self-defence, in which context the expert testimony seeks to reconcile the accused's actions with the elements of reasonableness and – where applicable – imminence. It is not so limited, however. BWS evidence has been also used where arguments of provocation and duress have been made. It is self-defence which forms the focus of discussion in this paper, both because it is the most common defence for which BWS evidence is tendered, and its particular relevance to the case: see Ian Freckelton and Hugh Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (Lawbook Co, 5th ed, 2013) 774–5 [10.35.100].

[5] Stubbs and Tolmie perceive this positivity not only in the leniency of the sentences handed down to women in battered women's defence cases in Australia, but in the jurisprudential developments that have made self-defence more accessible to women: 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, 748.

[6] Ibid.

[7] [2016] WASC 12 ('*Liyanage*').

the shortcomings of the BWS framework, His Honour's refusal to admit the evidence of a social worker called by defence counsel was an opportunity missed to acknowledge the broader importance of 'social framework evidence' in the context of domestic violence and battered women who kill. In so doing, a feminist analysis is undertaken of the decision in *Liyanage*, uncovering the ways in which silences are reflected in and maintained by notions of admissibility and credibility.[8] Seeking to redress these omissions, Part VI makes tentative recommendations as to legislative reforms to incorporate feminist perspectives into the rules of evidence around battered women's defences, at least insofar as they are applied in WA.

II BATTERED WOMAN SYNDROME EVIDENCE

The admissibility of BWS expert testimony is set against a long history of judicial anxiety surrounding the use of expert evidence in court.[9] Permitted to give evidence in the form of opinions and inferences, 'experts' are 'extended a privilege' lay witnesses are not generally allowed.[10] Fuelled by concerns around expert competence, the unnecessary prolonging of litigation, and the usurpation or overbearing of the jury, a number of exclusionary rules have been developed around the admissibility of expert evidence.[11] Thus, to qualify as 'expert evidence' under the common law applicable in WA, the evidence must generally be: confined to matters about which ordinary persons are not able to form sound judgment without the assistance of those possessing special expertise ('the common knowledge rule'); a subject sufficiently organised or recognised as a reliable body of knowledge or experience; and adduced by a relevantly qualified person.[12]

In a series of Australian authorities, expert evidence of BWS has been held to satisfy these rules of admissibility.[13] BWS has been seen to form a 'reliable body of knowledge and experience';[14] the experience of a 'habitually battered

[8] 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 ('A Feminist Critique').
[9] See generally Freckelton and Selby, above n 4, ch 2.
[10] Ibid 18 [2.0.03].
[11] Ibid 20–1 [2.0.20].
[12] *Mallard v The Queen* (2003) 28 WAR 1, 53 [242], quoting *Osland v The Queen* (1998) 197 CLR 316, 336 (per Gaudron and Gummow JJ). See also *Clark v Ryan* (1960) 103 CLR 486.
[13] *Runjanjic and Kontinnen v R* (1991) 56 SASR 114; *Osland v The Queen* (1998) 197 CLR 316.
[14] *Osland v The Queen* (1998) 197 CLR 486, 336 [54] (Gaudron and Gummow JJ).

woman' recognised as lying so beyond the ordinary experience that expert knowledge should be made available to courts and juries.[15] To the extent that BWS evidence is relevant to the facts in issue in a given proceeding,[16] it has been admissible where adduced by a qualified expert.

In WA,[17] the availability of self-defence requires a subjective and objective determination: that the accused believed on reasonable grounds that their actions were necessary to defend against a harmful act, and responded reasonably in the circumstances as they (reasonably) believed them to be.[18] In this context, BWS evidence demonstrates that a battered woman's response 'cannot be understood in a vacuum'.[19] Although an imminent threat is not required under WA law,[20] BWS is said to explain how domestic violence generates different perspectives of danger and escalation,[21] leading a battered woman to believe that her actions were necessary to avoid death or serious harm.[22] BWS testimony on 'learned helplessness' is also said to explain why a woman had not escaped her abuser, perceiving (criminal) action as her only recourse.[23]

Whereas in North America, BWS evidence is judicially acknowledged as a means of redressing the inadequacies of the law to respond to the circumstances of battered women,[24] Australian BWS jurisprudence has been uniquely propelled Australian courts, in contrast, have typically approached BWS more narrowly: as an improved method of applying existing law to 'the female victim' of domestic violence, whose responses differ from the 'behaviour of normal people'.[25] This approach, Stubbs and Tolmie suggest, has impaired

[15] *Runjanjic and Kontinnen v R* (1991) 56 SASR 114, 121 (King CJ).
[16] *Dair v Western Australia* (2008) 36 WAR 413, 428–9 [60] (Steytler P).
[17] *Criminal Code Compilation Act 1913* (WA) s 248(4).
[18] *Raux v The State of Western Australia* [2012] WASCA 1, [44] (Buss JA); *Goodwyn v The State of Western Australia* (2013) 45 WAR 328, 331–2 [3] (Martin CJ), 341 [89] (Buss JA), 350 [170] (Mazza JA).
[19] Phyllis L Crocker, 'The Meaning of Equality for Battered Women Who Kill Men in Self-Defense' (1985) 8 *Harvard Women's Law Journal* 121, 135.
[20] See also Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 March 2008, 1209c–1212a (Jim McGinty, Attorney-General).
[21] Crocker, above n 19, 132.
[22] *Osland v The Queen* (1997) 197 CLR 316, 336 [52] (Gaudron and Gummow JJ), 381–2 [172] (Kirby J).
[23] *Runjanjic and Kontinnen v R* (1991) 56 SASR 114, 120 (King CJ).
[24] Stubbs and Tolmie, above n 5, 722.
[25] *Runjanjic and Kontinnen v R* (1991) 56 SASR 114, 118, 120 (King CJ).

the nature and range of evidence admissible in Australian courts in cases where women have killed their abusive partners.[26]

These shortcomings are necessarily viewed against broader concerns around BWS.[27] The scientific basis and methodology adopted by its progenitor, Dr Lenore Walker, has been roundly challenged.[28] Feminist scholars, too, have long argued that the label itself tends to pathologise the accused,[29] and that it creates a new, dysfunctional stereotype: an irrational, damaged woman, rather than one responding reasonably to her circumstances.[30] This interpolation of mental health evidence, it is argued, not only threatens the accused's reliable retelling of her story, but vitiates the legitimacy of her actions.[31] Additional challenges attend the treatment of BWS 'as a standard to which all battered women must conform',[32] raising questions of whether an accused would 'qualify' if she was 'not sufficiently beaten',[33] or had previously fought back.[34]

There are especial difficulties with BWS in its Australian application.[35] Ideally, expert testimony is adduced to provide the context in which to understand the issues in a given case.[36] Because Australian decisions have

[26] Stubbs and Tolmie, above n 5, 711.

[27] Several of these concerns have been judicially noted. See especially *Osland v The Queen* (1998) 197 CLR 316, 371–7 (Kirby J). Notably, whilst Hall J makes broad reference to these 'controversies' in *Liyanage* (see especially [2016] WASC 12, [64], [67]), His Honour does not fully engage these criticisms, simply noting the concerns 'surrounding the reliability of the syndrome and its relevance for legal purposes' (ibid [67]).

[28] See, eg, Marilyn McMahon, 'Battered Women and Bad Science: The Limited Validity and Utility of Battered Woman Syndrome' (1999) 6 *Psychiatry, Psychology and Law* 23; Freckelton and Selby, above n 4, 782–5 [10.35.170].

[29] See, eg, Crocker, above n 19, 121; Elizabeth M Schneider, 'Resistance to Equality' (1986) 57 *University of Pittsburgh Law Review* 477.

[30] Regina A Schuller and Sara Rzepa, 'Expert Testimony Pertaining to Battered Woman Syndrome: Its Impact on Jurors' Decisions' (2002) 26 *Law and Human Behaviour* 655, 657.

[31] Cf Jozsef Meszaros, 'Achieving Peace of Mind: The Benefits of Neurobiological Evidence for Battered Women Defendants' (2011) 23 *Yale Journal of Law and Feminism* 117.

[32] Crocker, above n 19, 144.

[33] Freckelton and Selby, above n 4, 784 [10.35.160].

[34] Schuller and Rzepa, above n 30, 657.

[35] Stubbs and Tolmie, above n 5; 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 ('Defences to Homicide').

[36] Ibid 711–12. As one practitioner puts, '[t]he challenge … is not simply to present evidence of the physical battery inflicted on the defendant, but also to describe the coping mechanisms employed by the victim to protect herself over time, the reasons she was unable to leave and her efforts to achieve safety. If the decision maker cannot empathise with the defendant, even in small measure, there is little likelihood of the evidence being evaluated fairly': Sarah M Buel, 'Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct' (2003) 26 *Harvard Women's Law Journal* 217, 266.

interpreted BWS as a tool to explain the perceptions of 'battered women' however, evidence has primarily been tendered only to demonstrate that the accused had BWS, such that the syndrome 'applied',[37] proving the consistency of the defendant's narrative with the 'pathology of the condition'.[38] The use of BWS evidence to denote mental states beyond that of ordinary comprehension [39] moreover, has meant the requisite expertise is typically considered to lie exclusively in psychology or psychiatry.[40] As will be suggested in the following section, the admissibility of BWS as a 'syndrome' or abnormal mental state' intersects with the rule that expert evidence be based on 'recognised' areas of 'scientific' study,[41] a putatively neutral, value-free notion of justice.[42]

Several of these difficulties play out in *Liyanage*. Critically bypassed, however, is the thrust of contemporary critiques of BWS evidence. Underscoring that BWS is 'only one kind of relevant expert evidence',[43] feminist scholars have recommended 'a more progressive usage' of expert testimony.[44] Social framework evidence, in particular, has been seen to provide a psychological *and* social context to assist jurors to understand the accused's experience of violence; its content tailored to the circumstances of the particular accused, and the context in which she killed her violent partner.[45] To this end, social science research is used to construct a frame of reference, or context, against which critical factual issues are decided.[46]

[37] Stubbs and Tolmie, above n 5, 711–12.
[38] *J v The Queen* (1994) 75 A Crim R 522, 530.
[39] See, eg, *Runjanjic and Kontinnen v R* (1991) 56 SASR 114, 120 (King CJ).
[40] Stubbs and Tolmie, above n 5, 730. See, eg, *Runjanjic and Kontinnen v R* (1991) 56 SASR 114, where King CJ refers (at 119) to BWS as 'a scientifically established facet' of psychology and psychiatry.
[41] *Liyanage* [2016] WASC 12, [86].
[42] Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Allen & Unwin, 1990) 34–6. See generally Donald Nicolson, 'Gender, Epistemology and Ethics: Feminist Perspectives on Evidence Theory' in Mary Childs and Louise Ellison (eds), *Feminist Perspectives on Evidence* (Cavendish Publishing, 2000) 13.
[43] Stella Tarrant, 'Self Defence in the Western Australian Criminal Code: Two Proposals for Reform' (2015) 38(2) *University of Western Australia Law Review* 1 ('Self-Defence in the WA Criminal Code').
[44] Regina A Schuller et al, 'Rethinking Battered Woman Syndrome Evidence: The Impact of Alternative Forms of Expert Testimony on Mock Jurors' Decisions' (2004) 36 *Canadian Journal of Behavioural Sciences* 127, 129.
[45] Bradfield, above n 2, 184; Neil J Vidmar and Regina A Schuller, 'Juries and Expert Evidence: Social Framework Testimony' (1989) 52(4) *Law and Contemporary Problems* 133, 135.
[46] Laurens Walker and John Monahan, 'Social Frameworks: A New Use of Social Science in Law' (1987) 73 *Virginia Law Review* 559, 559.

It is observed that domestic violence is especially difficult to convey: it has a cumulative impact, typically spanning a length of time; it is a pattern of behaviour, rather than an event or events; and it is more complex than an account of discrete incidents of physical violence would reveal.[47] If storytelling is central to the legal process, and the aim 'to present the winning story',[48] this form of evidence can be vital to supporting the testimony of the accused – in the context of self-defence, for example, going to those critical subjective *and* objective questions of reasonableness of belief in the need for recourse to a harmful act, and reasonableness of response in those circumstances.

The admissibility of social framework evidence in the context of battered women who kill has not typically been questioned. Bradfield, for example, argues that because misapprehensions continue to underpin community attitudes towards domestic violence, social framework evidence would not infringe the common knowledge rule.[49] Expert evidence, she suggests, should be admissible to 'cause the judge or jury to review impressions or instinctive judgments based on ordinary experience'.[50]

Indeed, Sheehy, Stubbs and Tolmie refer to the Queensland case of *R v Falls*[51] as judicial authority for the admissibility of social framework evidence. There, expert evidence was tendered in support of the defence of a woman who had sedated her abusive husband, then shot him in the head once he was asleep, subsequently maintaining for four weeks that he had disappeared.[52] Critically, both expert witnesses were psychiatrists. Even whilst testifying 'under the rubric of [BWS] evidence',[53] however, they were careful to underscore the looseness with which they used the term 'syndrome', referring instead to 'a group of behaviours' recognised as statistically significant in circumstances of intimate partner violence.[54] Notably, '[b]oth experts also described the social frameworks within which such violence took place', emphasising that the

[47] Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in *R v Falls*' (2014) 38 *Melbourne University Law Review* 666, 707 ('Securing Fair Outcomes').
[48] Diana Eades, 'Telling and Retelling Your Story in Court: Questions, Assumptions and Intercultural Implications' (2008) 20 *Current Issues in Criminal Justice* 209, 210.
[49] Bradfield, above n 2, 190.
[50] Ibid, quoting *R v Decha-Iamsakun* [1997] 1 NZLR 141; (1992) 8 CRNZ 470, 475–6 (Cooke P).
[51] (Unreported, Supreme Court of Queensland, Applegarth J, 3 June 2010).
[52] Sheehy, Stubbs and Tolmie, 'Securing Fair Outcomes', above n 47, 669.
[53] Ibid 697.
[54] Ibid 697—8, quoting Transcript of Proceedings, *R v Falls* (Supreme Court of Queensland, 928/2007, Applegarth J, 28 May 2010) 97 (G J Cummings, Joan Lawrence).

accused not only faced psychological trauma, but 'an *objectively* serious and escalating threat' without reasonable lawful recourse.[55]

Commentators suggest that the North American jurisprudence around battered women's defences has broadly recognised the difficulties of the BWS framework and its emphasis on an accused's learned helplessness, dependence and victimisation. Canadian courts, in particular, have commended instead evidence demonstrating the 'elements of a woman's social context which help to explain her inability to leave her abuser'.[56] There are no Australian appellate court decisions in this vein, however. *Liyanage*, as will be shown, reveals the difficulties involved in fitting this form of testimony within extant common law rules on expert evidence – certainly insofar as they are applied in WA. These difficulties, it is suggested, reflect and embody several of the gendered assumptions and exclusions which have been observed to run through legal rules and practices.

III Gender in Evidence

Feminist theory is plainly variegated, and there is no unitary 'feminist approach' towards law and laws. Still, particular themes and insights might be taken as pivotal to developments in feminist theory. At its broadest, feminist theory 'question[s] everything'.[57] Underscoring the distinction of gender from sex, feminism has sought not only to disturb settled understandings of identity, but to conceptualise the construction of sex/gender relations 'as a fundamental organising principle in society'.[58] One of the primary concerns of feminist legal scholarship, therefore, has been to articulate how legal rules and practices take effect in ways which typically, 'silently … submerge the perspectives of women and other excluded groups'.[59]

It has been suggested that evidence law is particularly appropriate for feminist analysis, as 'feminism, like evidence is concerned with how stories are heard and how society determines credibility'.[60] Rules of evidence determine

[55] Sheehy, Stubbs and Tolmie, 'Securing Fair Outcomes', above n 47, 699—70 (emphasis added).
[56] *R v Malott* [1998] 1 SCR 123, 143; 155 DLR (4th) 513, 529 (L'Heureux-Dubé J).
[57] Kit Kinports, 'Evidence Engendered' [1991] 2 *University of Illinois Law Review* 413, 414 (citations omitted).
[58] Tarrant, 'A Feminist Critique', above n 8, 575 (emphasis altered).
[59] Katharine T Bartlett, 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829, 836.
[60] Mary Childs and Louise Ellison, 'Introduction' in Mary Childs and Louise Ellison (eds), *Feminist Perspectives on Evidence* (Cavendish Publishing, 2000) 1, 7, quoting Aviva Orenstein, ' "My God!" A

the information that can be received by the court, the form in which it must or may be received, and the use to which it can be put. In determining 'who can speak within legal settings and what they can say, evidential regimes reflect *and* construct the social and cultural context in which they function'.[61]

As Naffine writes, the legal world presents itself 'an impartial, neutral and objective system'; an 'intellectually rigorous' method of 'discern[ing] "the facts"'.[62] Yet, law's values and orientation are founded in a particularly Anglo-American liberal individualism – one privileging a style of reasoning that is intelligent, abstract and rational, but which disregards 'relationships, contextual reasoning, interdependence and connection and responsibility to others'.[63] This preferred style of reasoning 'has tended to be associated with the masculine intellect'; its 'antithetical qualities … being associated with the feminine persona'.[64]

To be sure, feminist theorists have sought to challenge assumptions of a fixed or homogenised standard of 'femininity' or of 'women's experiences'.[65] Similarly, it is emphasised that law cannot be characterised 'as uniformly masculine in its orientation and its priorities'.[66] In spite of these difficulties, terms such as 'femininity', 'masculinity', 'man' and 'woman' retain analytical utility as 'presently understandable categories' for critical analysis.[67] It is not, as Scully writes, that 'all forms of "knowledge" [are] male', but that standpoints and discourses associated with a masculinist rationality are privileged, 'making invisible other conceptions of truth and the world at large'.[68]

Evidentiary rules in relation to sexual offences have been of particular interest to feminist scholars 'because it is in such cases that the gendered assumptions of evidence law and practice are most evident'.[69] Feminist analyses

feminist critique of the excited utterance exception to the hearsay rule" (1997) 85 *California Law Review* 159, 162.

[61] Kathy Mack, 'An Australian Perspective on Feminism, Race and Evidence' (1999) 28 *Southwestern University Law Review* 367, 367 ('Feminism, Race and Evidence').

[62] Naffine, above n 42, 24.

[63] Ibid 27; Kinports, above n 57, 417 (citations omitted).

[64] Naffine, above n 42, 26–7.

[65] Bartlett, above n 59, 834.

[66] Naffine, above n 42, 3.

[67] Bartlett, above n 59, 835.

[68] Anne Scully, 'Expert Distractions: Women Who Kill, Their Syndromes and Disorders' in Mary Childs and Louise Ellison (eds), *Feminist Perspectives on Evidence* (Cavendish Publishing, 2000) 191, 203.

[69] Childs and Ellison, above n 60, 7.

of evidence law have, for example, examined how procedural and evidential rules have operated to foster distrust of the credibility of female complainants in trials for sexual assault,[70] and the ways discourses of gender, race and power are unchallenged by and reproduced in evidentiary rules and practices.[71]

Perhaps unsurprisingly, especial attention has been directed in feminist literature to gender in the context of women who kill their abusive partners. The profoundly gendered nature of domestic violence and the responses of victims of abuse, as Kaganas writes, 'are factors to which the criminal law has remained largely impervious'.[72] Feminist analyses of the traditional defences of provocation and self-defence, for example, have therefore worked to uncover the ways in which the law has tended to evaluate the actions of the accused against a standard typically reflecting a male experience, or male behaviours.[73] To this end, the admissibility of BWS evidence was initially 'celebrated as a victory for battled women and medical or psychological evidence'.[74]

The admissibility of BWS evidence has proven a particularly 'vexed' issue[75] however, given – as noted above – the ways in which it draws force from a problematic stereotyping and pathologising of women accused. To the extent that BWS is underpinned by medical discourse, it designates the battered woman as 'mad',[76] rather than as a person responding reasonably to protracted brutality. In privileging scientific diagnoses and rational proof, the medical discourse of BWS excludes women's diverse experiences of subordination and power, ultimately 'locating the problem within the woman who kills rather than in the material conditions of her life'.[77]

Notwithstanding feminist caution around the limits of formal legal change in achieving gender equality,[78] the receipt into court of social framework evidence to support battered women's defences in jurisdictions outside

[70] See, eg, Kathy Mack, 'Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process' (1992) 4 *Criminal Law Forum* 327.
[71] See, eg, Mack, 'Feminism, Race and Evidence', above n 61.
[72] Felicity Kaganas, 'Domestic Homicide, Gender and the Expert' in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds), *Body Lore and Laws* (Hart Publishing, 2002) 105, 105.
[73] Ibid 106.
[74] Scully, above n 68, 194.
[75] Childs and Ellison, above n 60, 8.
[76] Kaganas, above n 72, 106.
[77] Ibid.
[78] Heather Douglas, 'A Consideration of the Merits of Specialised Homicide Offences and Defences for Battered Women' (2012) 45 *Australian and New Zealand Journal of Criminology* 367, 378 (citations omitted).

Australia is acknowledged as a broadly progressive move.[79] *Liyanage*, in contrast, would appear to demonstrate a conspicuous judicial conservatism in respect of expert evidence that might better expose the lived realities of women subjected to domestic violence.

IV CASE SUMMARY: *WESTERN AUSTRALIA V LIYANAGE* [2016] WASC 12

Dr Liyanage was charged with the murder of her husband, whom she had struck in the head at least twice with a mallet whilst he slept. Both were doctors and had emigrated together from Sri Lanka. In a police interview, Dr Liyanage alleged that she had suffered physical and emotional abuse through their relationship, including sexual coercion, physical violence and financial control.[80] The evidence the subject of the preliminary determination went to one of two defences: that Dr Liyanage was acting in reasonable self-defence when she fatally injured her husband.[81] It was submitted that the evidence of Ms Cooke, a family and domestic violence consultant, supported Dr Liyanage's claim of self-defence: that her actions were necessary, and reasonable, both objectively and subjectively.[82]

Following the incident, Ms Cooke had assessed Dr Liyanage's risk of domestic violence using two actuarial tools:[83] the Danger Assessment Scale ('Scale') and the Abusive Behaviour Inventory. Ms Cooke concluded that 'the accused was at high risk of serious harm at the relevant time',[84] describing 'very typical emotional confusion … often experienced by adult victims trying to make sense of an intensively abusive and violent relationship'.[85]

The question, as Hall J framed it, was not the admissibility of evidence of domestic violence suffered by the accused, but of 'opinions regarding the subject matter of that evidence':[86] placing at front and centre of the enquiry domestic violence as a 'subject matter', and Ms Cooke's expertise in relation to

[79] See, eg, Kaganas, above n 72; Bradfield, above n 2; Stubbs and Tolmie, above n 5.
[80] *Liyanage* [2016] WASC 12, [9].
[81] Ibid [11].
[82] Ibid [12].
[83] Ibid [22].
[84] Ibid [33].
[85] Ibid [36].
[86] Ibid [4].

it. The admissibility of Ms Cooke's evidence, as with all expert evidence,[87] required that: the subject matter was part of an organised, accepted and reliable body of knowledge; the methods used had a sufficiently scientific basis; Ms Cooke was appropriately qualified; and the subject matter was outside ordinary experience.[88]

Ms Cooke's opinions were described as having been given in respect of the risk of harm to the accused, the behaviour of domestic violence victims, and the accused's state of mind.[89] Each was inadmissible. The following section examines the decision, noting the effects of the judicial isolation of 'subject matter' from Dr Liyanage's experience, and the assumptions underlying the judicial reasoning.

V ANALYSIS

A *Risk of Harm to the Accused*

Ms Cooke's views on the risk of harm to Dr Liyanage from the deceased were found to be inadmissible on several grounds, key amongst these the lack of scientific reliability of the actuarial tools as they had been utilised, and the risk assessment not being part of 'an organised, accepted and reliable body of knowledge'.[90]

Hall J was particularly concerned with the retrospective use of actuarial tools 'designed to assist battered women in assessing their danger of being murdered (or seriously injured)' by a partner.[91] For one, Dr Liyanage's 'interest in giving answers that support[ed] the existence of a risk … that would assist a claim of self-defence' created 'obvious difficulty in obtaining reliable answers' from a test so reliant on the truthfulness of the participant.[92] The quantification of her answers in numerical form, His Honour suggested, would provide the

[87] See text accompanying nn 12–13 above.
[88] *Liyanage* [2016] WASC 12, [54].
[89] Ibid [70].
[90] Hall J 'accep[ted] that the subject matter of risk assessment may be a matter outside ordinary experience', that Ms Cooke held the relevant qualifications to use and give evidence in relation to those tools: ibid [75].
[91] Jacquelyn C Campbell, Daniel W Webster and Nancy Glass, 'The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide' (2009) 24 *Journal of Interpersonal Violence* 653, 658.
[92] *Liyanage* [2016] WASC 12, [77].

veneer of 'an objective outcome independent of the person tested'.[93] That the Scale had not been developed in contemplation of the method utilised further militated against its reliability 'in determining a historical risk'.[94]

Hall J's concerns clearly reflect broader, historical anxieties around the receiving into court of actuarial evidence,[95] including their reliability[96] and the capacity for predictions of risk to draw 'a veil of science' over decisions within the province of the jury.[97] Indeed, it appears to be well acknowledged within the field that the science around assessment instruments for intimate partner violence is, in fact, 'relatively young'.[98] On its face, and on strict application, black-letter law was correctly applied.

Yet, there are reasons to recommend that Hall J need not have wholly discarded this evidence. Setting aside concerns as to the veracity of an accused's evidence, empirical research suggests that women's perceptions of risk in respect of intimate partner violence are reasonably accurate predictors of repeated harm.[99] That the Scale was originally designed to also assess 'the risk of women killing their abusive male partner'[100] further intimates that Ms Cooke's application of the Scale was not entirely dissociated from its primary purpose.[101]

More problematically, the ruling precluded any opportunity to adduce social framework evidence. With respect, expert testimony of her self-assessment of risk need not have amounted to mere 'repetition' of what Ms Cooke had been told.[102] In describing the history of abuse, revealing hidden violence, and positioning physical violence within the larger context of coercive control and cumulative harm, social framework evidence might have played an

[93] Ibid.
[94] Ibid [78], [80].
[95] See generally Freckelton and Selby, above n 4, ch 10.45. See, eg, *Director of Public Prosecutions (WA) c Mangolamara* (2007) 169 A Crim R 379, 406 [165]–[166] (Hasluck J); *Woods v Director of Public Prosecutions (WA)* (2008) 38 WAR 217, 236–7 [60] (Steytler P and Buss JA), 270 [239] (Murray AJA).
[96] See, eg, *Director of Public Prosecutions (WA) v Comeagain* [2008] WASC 235, [20] (McKechnie J).
[97] *TSL v Secretary to the Department of Justice* [2006] VSCA 199, [41] (Callaway AP).
[98] Campbell, Webster and Glass, above n 91, 656.
[99] See, eg, Arlene Weisz, Richard Tolman and Daniel Saunders, 'Assessing the Risk of Severe Domestic Violence: The Importance of Survivors' Predictions' (2000) 15 *Journal of Interpersonal Violence* 75; D Alex Heckert and Edward W Gondolf, 'Battered Women's Perceptions of Risk Versus Risk Factors and Instruments in Predicting Repeat Reassault' (2004) 19 *Journal of Interpersonal Violence* 778.
[100] Campbell, Webster and Glass, above n 91, 658.
[101] *Liyanage* [2016] WASC 12, [78].
[102] This, as Hall J rightly noted, would have been inadmissible on account of being hearsay: ibid [73].

important role in contextualising Dr Liyanage's alleged perception of threat, escalation and exit.[103] Given the impact of expert testimony on jurors' decision-making,[104] Hall J's recommendation that Dr Liyanage herself give evidence of her assessment of risk would seem to be a deficient alternative. Concerns that jurors might be overborne by an expert's 'oracular pronouncement'[105] are appreciable, but must be balanced against the utility of expert evidence in homicide cases involving battered women.[106] Socially and culturally sensitive expert evidence on battering and its effects need not overwhelm a trier of fact, but could well assist the tribunal to make appropriate evaluations of the available evidence, particularly where corroborating evidence of the deceased's alleged violence is sparse.[107]

To be sure, there are dangers inherent in having an expert 'speak for' the experience of another;[108] feminist literature has long urged attention to the ways in which 'the voice of the expert supplants and silences that of the parties … denying them their authenticity and dignity'.[109] Yet, the rejection *in toto* of the evidence on assessment of risk arguably amounted to the exclusion not only of Dr Liyanage's interpretation and explanation of her own reality, but of an expert opinion which could have attested to the reasonableness of Dr Liyanage's response in the circumstances.

A subtler gender bias might be identified in the theoretical assumptions underlying the methods and values of the 'black-letter' evidentiary rules applied. The form the 'risk assessment' took was seen to fall short of the requisite 'objectivity' to be reliable, 'depend[ing] entirely on the truth and accuracy of the answers given by the person being tested'.[110] To be sure, Hall J may well have been justified in questioning an accused's interest in giving answers that would support a defence claim. His Honour's insistence on 'objective' tests and outcomes, however, appeared to betray an epistemological bias: privileging the observable 'fact' of abuse over an idiosyncratic account of that lived reality, founded on intuition and emotion. Privileging fact over value

[103] Sheehy, Stubbs and Tolmie, 'Securing Fair Outcomes', above n 47, 679 (citations omitted).
[104] See, eg, ibid; Schuller and Rzepa, above n 30.
[105] *Davie v Magistrates of Edinburgh* [1953] SC 34, 40 (Lord President Cooper).
[106] Sheehy, Stubbs and Tolmie, 'Securing Fair Outcomes', above n 47, 690.
[107] Ibid 700.
[108] See Kaganas, above n 72, 123.
[109] Nicolson, above n 42, 33. See Katherine O'Donovan, 'Law's Knowledge: The Judge, the Expert, the Battered Woman and her Syndrome' (1993) 24 *Journal of Law and Society* 427.
[110] *Liyanage* [2016] WASC 12, [77].

and perception over intuition, these rules of evidence are observed to impart greater cultural value to 'masculine' attributes as a means of accessing the 'truth'.[111]

B *Behaviour of Domestic Violence Victims*

The inadmissibility of Ms Cooke's opinions on 'the behaviour of domestic violence victims' raises further difficulties. Ms Cooke's evidence appeared to traverse many aspects of BWS now recognised as problematic, including 'learned helpless behaviour' and 'confused decision making'.[112] In addition to describing 'the "symptoms" of [the] syndrome', however, she had also spoken to '[its] likely effect upon the accused's behaviour and thinking'[113] – hinting, perhaps, at a more nuanced assessment of the dynamics of dominance and control. Yet, Hall J's key concern was that a social worker was unqualified to give evidence on 'scientifically valid' concepts such as 'learned helplessness' or 'traumatic bonding' that had been studied and developed by psychologists and psychiatrists.[114] To the extent that Ms Cooke could speak only to 'the behaviour of domestic violence victims generally', that evidence was inadmissible.

This line of reasoning traces the unsatisfactorily narrow construal of BWS in Australian jurisprudence: directed towards explaining the psychology of the 'battered woman', even despite the literature suggesting it would be more useful to adduce expert evidence on social factors relevant to understanding the perceptions and behaviour of the accused.[115] Relevantly to *Liyanage*, social framework expert evidence may be particularly significant in cases involving non-confrontational self-defence scenarios, or where the accused might have appeared 'resilient and capable' to the outsider.[116] Indeed, counsel in *Liyanage* might have selected expert witnesses qualified to speak on how gender *and*

[111] Rosemary C Hunter, 'Gender in Evidence: Masculine vs Feminist Reforms' (1996) 19 *Harvard Women's Law Journal* 127, 129–30.
[112] *Liyanage* [2016] WASC 12, [85].
[113] Ibid.
[114] Ibid [85]–[86]
[115] Stubbs and Tolmie, above n 5, 727.
[116] It is suggested that women who are perceived as 'resourceful and rational' may be at greater risk 'of being seen as cold-blooded killers deserving of criminal condemnation': Sheehy, Stubbs and Tolmie, 'Securing Fair Outcomes', above n 47, 700.

ethnicity might have converged to make self-defence a viable option for the accused.[117]

Despite the potential for social framework evidence to assist juries to more accurately determine a defendant's claim of self-defence,[118] the insistence in *Liyanage* on expertise in 'an area of study that is methodologically robust and scientifically valid'[119] reveals a theoretical bias. The decision arguably fails to fully engage the question of why social framework evidence is inadmissible. Domestic violence as a 'subject matter' for expertise, after all, arguably satisfies the legal requirement that it 'require a course of previous habit or study' in its attainment.[120] Moreover, methods of testing or peer review vary across disciplines; the experimental method, though preeminent, is not the only determinant of 'scientific validity'.[121]

This judicial deference to scientific criteria of reliability is not simply unquestioned,[122] but profoundly gendered.[123] By discrediting the qualities and signifiers associated not only with social work, but social framework evidence, such as care, engagement, and personal experience,[124] the decision in *Liyanage* reflects and maintains the exclusion of the 'feminine' – and women, in particular[125] – from the production of social meaning.[126]

Given the 'fine points of distinction as to whether or not something is within … common knowledge',[127] claims of heightened awareness of domestic

[117] See Julie Tolmie, 'Pacific-Asian Immigrant and Refugee Women Who Kill Their Batterers: Telling Stories that Illustrate the Significance of Specificity' (1997) 19 *Sydney Law Review* 472.
[118] Crocker, above n 19, 135 (emphasis added).
[119] *Liyanage* [2016] WASC 12, [86]
[120] *Clark v Ryan* (1960) 103 CLR 486, 491 (Dixon CJ).
[121] Sheila Jasanoff, 'Law's Knowledge: Science for Justice in Legal Settings' (2005) 95(S1) *American Journal of Public Health* S49, S53–4.
[122] Ibid S49.
[123] Naffine, above n 42, 34–6.
[124] See Nicolson, above n 42. Cf Bradfield, above n 2, 191, citing *Weal v Bottom* (1966) ALJR 436 as High Court authority that expert evidence may, in some circumstances, be admitted as evidence of 'experience' and not 'opinion evidence'.
[125] The category of 'woman', as feminist scholars have noted, is itself problematic; typically reflecting the experience of white, heterosexual middle-class women, and ignoring complex intersections of race, class and sexual orientation with gender: Hunter, above n 111, 128. It is similarly recognised that there is no single, unified feminist perspective or analysis; this paper adopts just one account of what might be deemed 'a feminist approach' to evidence law: Childs and Ellison, above n 60, 5—6.
[126] Tarrant, 'A Feminist Critique', above n 8, 576.
[127] David Field and Kate Offer, *Western Australian Evidence Law* (LexisNexis Butterworths, 2015) 359 [11.16]. Freckelton and Selby similarly note that '[c]ourts have differed as to the existence of levels of societal awareness about a range of phenomena whose characteristics [syndromes including BWS] have sought to address': above n 4, 773 [10.35.55].

violence might also be challenged – though it is not for this paper to determine if Hall J's optimism was misplaced.[128] In any event, the literature suggests expert evidence on 'contemporary knowledge about the phenomenon of domestic violence' would not have gone amiss. There may well be an increased level of sophistication in contemporary community attitudes towards domestic violence, but 'considerable apprehension and contradictions remain'.[129] With respect, the judicial treatment of the evidence presented by defence counsel might be seen to underscore this. Hall J dealt at length with a 2014 WA survey report finding that a number of community members did not connect certain behaviours – such as denying someone access to a telephone, or being overly critical of their cooking, clothes or appearance – to domestic violence.[130] His Honour was particularly critical of the methodology, noting, for instance, that the survey did not allow for '[t]he possibility that some of the behaviours may occur other than in a context of domestic violence'.[131] Yet, Hall J's focus on this aspect of the survey alone might have overlooked broader points made in the report: that few in the community named power and control as a core dynamic in the perpetration of domestic violence; that numerous responses indicated a strong prevalence of victim blaming; that responses with respect to community 'tolerance' of types of abusive behaviour varied across metropolitan and regional parts of WA; and significantly, that abusive behaviour was not a 'one off incident', but a pattern of behaviour.[132] Whilst His Honour drew from his reading that '[i]t [was] not possible to … [conclude] that members of the community have fundamental misconceptions as to what domestic violence *is*',[133] it would seem more circumspect to conclude that community perceptions as to *how* abuse is perpetrated and what it can entail remain, in large part, misinformed.

More fundamentally, perhaps, the decision to exclude expert testimony in this case might be seen to '[reflect] an assumption that issues of importance to

[128] Indeed, Callinan J had contemplated in *Osland* (199) 159 ALR 170 (at 243) that 'growing community awareness' of 'these matters' would eventually make expert testimony redundant in cases involving women at the centre of domestic violence. Some research around community attitudes towards domestic violence in Australia does raise 'doubt as to whether expert evidence on [BWS] is really necessary to disabuse members of a jury of myths and stereotypes concerning domestic violence': McMahon, above n 28, 43.

[129] Bradfield, above n 2, 190; Sheehy, Stubbs and Tolmie, 'Defences to Homicide', above n 35, 484.

[130] *Liyanage* [2016] WASC 12, [45]—[51].

[131] Ibid [50].

[132] Anglicare WA, *Community Perceptions Report 2014: Family and Domestic Violence* (Report, Anglicare WA, 2014) 2—3.

[133] *Liyanage* [2016] WASC 12, [51] (emphasis added).

women are simple, "common" matters that everyone understands, rather than "technical", male issues that might require expert testimony'.[134] Feminists have long argued that experiences, behaviours, reactions and perspectives are not 'common', but gendered, and shaped by inflections of ethnicity, class, and sexual orientation. [135] The assumption that ordinary jurors are able to 'understand the characteristics and effect of domestic violence' [136] without expert testimony as to the significance of these specificities risks stripping the narrative of these nuances, potentially distorting the narrative, or incorporating systemic biases into the jury's assessment of it.

C *Accused's State of Mind*

In closing, Hall J gave short shrift to Ms Cooke's opinion that Dr Liyanage 'firmly believed what [she] said about her experiences of abuse', stating that it would be for the jury to decide if the evidence as to the subjective element of the defence was 'truthful'.[137]

Whilst Bradfield has suggested that social framework evidence may be an exception to the principle that judges and juries are capable of assessing the credibility and reliability of evidence on their own, this line of argument may well raise its own difficulties. Bradfield cites *Toohey v Metropolitan Police Commissioner*[138] as authority for this proposition. There, Lord Pearce noted that 'when a witness through physical ([including] mental) disease or abnormality is not capable of giving a true or reliable account to the jury, it must surely be allowable for medical science to reveal this vital hidden fact to them'.[139] Because expert evidence is admissible to demonstrate the presence of a 'hidden fact' which could adversely affect the weight to be given to evidence, Bradfield argues, social framework evidence – in 'providing the trier of fact with information about the social and psychological context in which points in issue are to be determined' – can be used to 'rehabilitate' a witness' evidence,

[134] Kinports, above n 57, 444.
[135] Hunter, above n 111, 131.
[136] *Liyanage* [2016] WASC 12, [51].
[137] Ibid [91].
[138] [1965] 1 All ER 506.
[139] Ibid 512.

contextualising behaviour which, left unexplained, could call her credibility into question from the perspective of the lay juror.[140]

A key difficulty with this argument, it is suggested, lies in the inevitable pathologising of the accused as mentally defective or abnormal[141] which is particularly problematic in light of extant feminist critiques of BWS. It may be more persuasive to concede that the 'truthfulness' of a witness' evidence is for the jury to decide, but to admit social framework evidence as a means of providing vital context for that finding of fact. With respect, it is unclear why the jury's conclusions as to the 'alleged physical, psychological and emotional abuse' or Dr Liyanage's 'state of mind' should be isolated from expert opinion on the reasonableness of her assessment of threat. Indeed, the 'hidden' nature of domestic violence may make this evidence imperative: expert opinion can assist juries 'to make appropriate evaluations of the available evidence' where corroborative evidence may be in short supply.[142]

VI LEGISLATIVE REFORM

A route towards a more gender-sensitive engagement with battered women's defences may rest in legislative reform.[143] Victoria, in particular, has legislated to admit a wide range of evidence in self-defences cases involving family violence.[144] There, the provision expressly sets out six types of evidence that 'may be relevant in determining' if an accused believed it was necessary to defend themselves. The provisions include: (a) the history of the relationship and violence within it; (b) the cumulative effect of the violence; (c) social, cultural or economic factors impacting on the accused or family member affected by family violence; (d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser; (e) the psychological effects of the violence; (f)

[140] See John Norris and Maryls Edwardh, 'Myths, Hidden Facts and Common Sense: Expert Opinion Evidence and the Assessment of Credibility' (1995–6) 38 *Criminal Law Quarterly* 73, 82–3, but note the authors' concerns as to 'the conditions under which expert opinion evidence touching on credibility is admissible' (at 91).

[141] This 'recognised exception', as Brennan J set out in *Bromley v The Queen* (1986) 161 CLR 315, applies where a witness's 'capacity to observe, to recollect, or to express is impaired by *mental disorder*' (at 322; emphasis added).

[142] Sheehy, Stubbs and Tolmie, 'Securing Fair Outcomes', above n 47, 700.

[143] See especially Sheehy, Stubbs and Tolmie, 'Defences to Homicide', above n 35, 483ff; Tarrant, 'Self-Defence in the WA Criminal Code', above n 43, 21–3.

[144] *Crimes Act 1958* (Vic) s 9AH(3)(a)–(f).

social or economic factors impacting on people in such relationships. Despite recommendations made by the Law Reform Commission of Western Australia ('LRCWA')[145] however, WA has not implemented statutory amendments to provide expressly for the admissibility of opinion evidence where self-defence is raised in the context of domestic violence.[146] In these circumstances, the LRCWA's 2007 *Homicide Report* broadly recommended that amendments be made to the *Evidence Act 1986* (WA) to permit the leading of 'opinion evidence about domestic violence' to assist in the determination of the reasonableness of the accused's belief that force was necessary, and the reasonableness of the force used.[147] As Tarrant observes, this was virtually the only substantive recommendation made by the LRCWA in 2007 not subsequently implemented in a raft of reforms to the statutory reformulation of self-defence in 2008.[148]

It is clear that legislative reform alone will not change battered women's experience of justice, given that 'the impact of legal change is dependent on wider social and cultural contexts'.[149] Yet, in light of the importance of social framework evidence in adequately contextualising battered women's defences, the limitations demonstrated in *Liyanage* may signal greater urgency for an express legislative declaration, 'encourag[ing] a proper assessment' of the reasonableness of self-defence in the context of domestic violence.[150]

VII Conclusion

Dr Liyanage was acquitted of murder, but convicted of manslaughter, and sentenced to four years' imprisonment[151] – though this is currently under appeal. Although transcripts of the trial and judgment are unavailable, it can be assumed that a partial defence of excessive self-defence was successfully run:[152] that is, Dr Liyanage was found to have had reasonable grounds to believe she

[145] Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report* (LRCWA, 2007) ('*Homicide Report*').
[146] See especially Tarrant, 'Self-Defence in the WA Criminal Code', above n 43.
[147] *Homicide Report*, above n 145, 293.
[148] Tarrant, 'Self-Defence in the WA Criminal Code', above n 43, 16.
[149] Douglas, above n 78, 378.
[150] Tarrant, 'Self-Defence in the WA Criminal Code', above n 43, 20.
[151] Bonnie Christian, 'Geraldton doctor Chamari Liyanage sentenced to four years' jail for husband's manslaughter' *ABC News* (online), 23 February 2016 <http://www.abc.net.au/news/2016-02-22/verdict-in-geraldton-doctor-murder-trial-chamari-liyanage/7188772>.
[152] *Criminal Code Compilation Act 1913* (WA) s 248(3).

needed to defend herself,[153] but her response in the circumstances was unreasonable.[154] This partial defence was introduced in 2008 at the recommendation of the LRCWA, which took the view that self-defence was 'the appropriate defence … where a woman responded to serious and on-going violence in a spousal relationship', but expressed concern that some women would be 'unjustly convicted of murder if the extremity of their circumstance was not recognised in a trial'.[155] In light of this outcome, it is worth asking if the admission into court of social framework evidence might have more clearly conveyed 'the extremity' of Dr Liyanage's lived reality.

It could well be argued that Hall J was bound by precedent; *Liyanage* reflected a strict application of black-letter law. Counsel might have also sought to adduce expert evidence locating Dr Liyanage's actions within the milieu of gender, *ethnicity* and violence; perhaps an expert qualified to speak to Sri Lankan culture would have been seen as better placed to assist a jury unfamiliar with those norms and expectations.[156] Still, the case reveals and preserves the rigidity of BWS evidence jurisprudence in Australia – and more fundamentally, the gendered assumptions which pervade the rules of evidence.

These assumptions, it is argued, have real and profound effects. It is trite to state that evidence law is a system for admitting and excluding evidence. Yet, it is also much more. Rules of evidence affect 'how a "story" is heard at trial',[157] filtering the information upon which fact finders make their decisions.[158] Evidence law 'shapes and reflects who and what are deemed credible … direct[ing] acquisition of knowledge and describ[ing] our legal way of knowing things'.[159] Feminist analyses reveal that these processes of exclusion are often profoundly gendered. As Meszaros writes, 'a battered woman … convicted of a crime connected to her history of abuse … becomes a double victim', both of the violence to which she was subject, and to 'a legal system that struggles to clarify how her abuse history is relevant to her legal defence'.[160] WA evidence law, therefore, can do more to incorporate these women's social reality.

[153] Ibid s 248(4)(a).
[154] Ibid s 248(4)(b).
[155] Tarrant, 'Self-Defence in the WA Criminal Code', above n 43, 6.
[156] *Liyanage* [2016] WASC 12, [34].
[157] Tarrant, 'Self-Defence in the WA Criminal Code', above n 43, 20.
[158] *Homicide Report*, above n 145, 291.
[159] Aviva Orenstein, 'Evidence in a Different Voice: Some Thoughts on Professor Jonakait's Critique of a Feminist Approach' (1997) 4 *William & Mary Journal of Women and the Law* 295, 297.
[160] Meszaros, above n 31, 119–20.