

SELF DEFENCE AGAINST INTIMATE PARTNER VIOLENCE: LET'S DO THE WORK TO SEE IT

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*This article explains a doctrinal problem in s248 of the Western Australian Criminal Code (the law of self-defence) and Mitchell JA's analysis of that problem in *Egitmen v Western Australia* [2016] WASCA 214 in order to make an argument about how the law of self-defence is (still) operating in the context where an accused has killed resisting intimate partner violence (IPV). In spite of the considerable social and legal attention this matter has received in the past three decades there is a persistent failure of justice: we are reluctant to recognise responses to IPV as lawful. Manslaughter convictions are reflections of an urge to sympathise but a failure to perceive the form of violence IPV is. The case of *Liyanage v Western Australia* [2017] WASCA 112 demonstrates the compromise a manslaughter conviction can reflect in this context with particular clarity, not because the facts of the case are significantly different from other cases but because the doctrinal confusion in s248 has the effect of revealing what underpins the decision more clearly. Examining the decision in this case in light of Mitchell JA's construction of a "reasonable response" in s248(4), shows how resistance to IPV is minimised and sidelined in a manslaughter conviction.*

I INTRODUCTION

How we describe a problem (for example, what we see as the concern and the cause) will determine our response to it, including what kinds of reforms we see as necessary. Yet rarely do we examine the assumptions that we have made and the underlying thinking that informs the construct of the problem.¹

The law of self-defence in Western Australia is contained in s248 of the *Criminal Code* (WA) (*Criminal Code*). The terms of s248, enacted in 2008, create a torturous doctrinal problem relating to the question whether an accused's act was a "reasonable response" under paragraph (b) of s248(4). Mitchell JA's opinion in *Egitmen v Western Australia*,² decided in 2016, is the first judicial analysis of the problem. His Honour's approach is correct, it is suggested, because it is the only coherent construction of the provisions. This article explains the doctrinal problem in s248 and Mitchell JA's analysis in order to make an argument about how the law of self-defence is (still) operating in the context where an accused has killed resisting intimate partner violence (IPV). In spite of the considerable social and legal attention this matter has received in the past three decades there

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1 Family Violence Death Review Committee, *Fifth Report, January 2014 to December 2015* (Health Quality and Safety Commission New Zealand, 2016) 34 (citations omitted).

2 [2016] WASCA 214.

is a persistent failure of justice. We do not, it is argued, recognise the contours of self-defence within a marriage.³ We are frightened we will get it wrong, so much so that we are hardly entering the field. The greater general awareness of IPV in society is reflected in the greater ease with which a woman can raise self-defence in this context, in particular in the absence of an immediate physical attack. But the failure of justice is in a resistance to configuring women's responses to lethal danger from an intimate partner as *lawful* – as self-defence. Along with condemnation, sympathy is routinely invoked but we are a long way from a quiet, confident application of justice.

Part 1 explains the doctrinal problem in s248 of the *Criminal Code*. In Part 2 it is argued that the harm envisaged when cases of self-defence are considered remains that of “a fight”, even where a claim relates to “non-imminent” harm. Manslaughter convictions are reflections of an urge to sympathise with an accused but a failure to perceive the form of violence IPV is. In the central case of a woman resisting severe IPV manslaughter convictions are unprincipled, and in this sense compromise verdicts. In Part 3 the case of *Liyanage v Western Australia*⁴ is examined. This case, decided in 2017, is an illustration of the manslaughter convictions discussed in Part 2 and is a conviction pursuant to the provisions of s248 explained in Part 1. The facts of the case are not significantly different from other cases but because of the doctrinal confusion in s248(3) and (4) of the *Criminal Code* discussed in Part 1, the unprincipled basis on which the conviction rests is revealed with particular clarity.

II PART 1: THE DOCTRINAL PROBLEM IN S248 OF THE CRIMINAL CODE

Section 248 (2) provides that a “harmful act done by a person is lawful if the act is done in self-defence under subsection (4)”. Subsection (4) provides:

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

A formal reformulation of s248(4), then, would involve the insertion of the requirement in paragraph (c) (that there be reasonable grounds for the accused's

3 'Marriage' includes de facto marriage and will be used interchangeably with 'partnership'. 'Wife'/'husband' will be used interchangeably with 'partner' and 'intimate partner'.

4 [2017] WASCA 112.

beliefs) into each of the requirements for a belief in paragraphs (a) and (b).⁵ In that case s248(4) would read:

A person's harmful act is done in self-defence if—

- (a) the person believes, on reasonable grounds, the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; (paras (a)/(c)) and
- (b) the person's harmful act is a reasonable response by the person in the circumstances as the person believes, on reasonable grounds, [those circumstances] to be. (paras (b)/(c))

The import of the problem created by this definition of self-defence has to be understood in the context of another provision in s248. Subsection 248(3) provides:

(3) If—

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

Under s248(3), where a person is charged with murder and the State has failed to disprove all the elements of self-defence except that the person's act was "not a reasonable response.... in the circumstances as the person believe[d] them to be" (248(3)) then the accused is guilty of manslaughter, not murder. The terms in s248(3), which determine when the conviction is "reduced" to manslaughter in this way, are the same as those in s248(4)(b), which requires, for an accused's act to be justified as self-defence, that their act is a "reasonable response by the person in the circumstances as the person believes them to be". That is, this lesser conviction turns on the meaning of those words in s248(4)(b) – and it is the meaning of "reasonable response" in that paragraph that is the doctrinal problem in s248(4) to be discussed here.

A requirement to assess what is reasonable conduct is contained in any formulation of self-defence, not only legal formulations but social, lay, philosophical constructions also. A person's act in causing harm, to be justified as self-defence, must be within the scope of reason. But another order of difficulty arises if more than one objective ("reasonableness") assessment is required, as it is in s248(4). In paragraph (a) (read with paragraph (c)) - a belief *on reasonable grounds*, and in

⁵ Buss P in *Egitmen v Western Australia* [2016] WASCA 214, [76], enumerates 'four elements' in s248(4) but that formulation is no inconsistent with the one set out here for present purposes.

paragraph (b) (read with paragraph (c)) – a *reasonable response*. I have explained elsewhere⁶ how this conceptual problem arises in s248(4). It is useful to repeat part of that explanation for the purposes of the arguments to follow.

[I]n order to have been acting in self-defence a person must have believed the following. (1) They were in danger - that an attack was going to occur against them. (2) They could not deal effectively with the danger except by attacking back – using physical force against the attacker. For example, they could not remove themselves in a way that would eliminate the danger or restrain their attacker or get help to restrain them in a way that would eliminate the danger. (3) What they did to the attacker was required to eliminate the danger - the amount of force they used was needed to quell the attack. They did not, for example, kill their assailant out of a reasonably held belief that they were at risk of a simple assault.

The first of these components is sometimes referred to as the ‘threat occasion’; the third as the ‘response’, corresponding to the ‘necessity test’ and the ‘proportionality test’. The second component of the defence, dealing with the person’s perception of their options, is part of the ‘threat occasion’ insofar as it refers to a person *assessing* danger, risk and preservation and it is part of the ‘response’ insofar as it refers to a decision to physically attack an assailant (rather than seek an escape). [Further], each statutory formulation must also determine whether each of these components should be assessed objectively as well as subjectively. Sub-section 248(4) is unique among the Australian jurisdictions with regard to which aspects should be determined subjectively and which objectively/subjectively.

The difficulty arises because in its terms paragraph (a) of sub-s248(4) covers all three components of self-defence [stated above]. A determination that an accused believed they were under attack, or would be, is not express, but inherent, in paragraph (a). Further, and this is the source of the difficulty, paragraph (a) requires an inquiry about not only the accused’s perception *that a physical response was needed* (as opposed to a non-violent resolution – i.e. component (2) listed above) but also about the accused’s perception of the *nature and degree of force actually used* (i.e. component (3) listed above). This is so because what is required to be assessed by paragraph (a) is the accused’s belief about the necessity to do the “harmful act” they in fact did. That is, their *particular act* that caused the victim harm is the subject of inquiry in paragraph (a) not merely their belief about the need to use force. Insofar as the inquiries required by paragraph (a) cover all ... components of

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Stella Tarrant, ‘Self Defence in the Western Australian Criminal Code: Two Proposals for Reform’ (2015) 38 *University of Western Australia Law Review* 1.

self-defence in this way, it is very unclear what paragraph (b) means – what work remains for that paragraph to do.

The question that makes the complexity clear is this one: if a person believed, on reasonable grounds, that they would be attacked and believed on reasonable grounds that they needed to do what they in fact did in defence against that attack (para (a) [read with para(c)]), what room is left for an inquiry into whether what they did was a reasonable response (para (b))? Either their response was *necessarily* reasonable because they had reasonable grounds for believing what they did was necessary *or* an overarching, abstract, ‘more objective’ notion of what is reasonable is required by paragraph (b) in addition to the earlier inquiries. This latter approach would mean that a claim of self-defence could be defeated *even if* a person had reasonable grounds for doing what they in fact did in defence of themselves.”⁷

This dilemma is not new. It inhered in the terms of self-defence prior to the 2008 amendments. Those old terms determined that where lethal force was used and intended, reliance on self-defence depended on: (i) a reasonable belief that a severe attack would take place; (ii) belief, on reasonable grounds, that no other avenue was reasonably open to the accused; and (iii) **the force used was “necessary”**.⁸ How was the “necessary force” requirement to be interpreted? In *The Queen v Muratovic*,⁹ *Marwey v The Queen*,¹⁰ *Gray v The Queen*¹¹ and *Minnitti v The Queen*¹² it was held that if (i) and (ii) were found to have existed (the accused reasonably believed they would be severely harmed and believed on reasonable grounds no course of action was reasonably open to them except to act as they did) then the third requirement of “necessary force” was also, necessarily, met. Pincus J in *Julian v The Queen*¹³ doubted this approach on the basis that it interpreted out of existence one of the elements of the defence.¹⁴ However, Murray J in *Minnitti* expressed the dominant view:

In the final analysis ... the second paragraph of s248 requires three conditions for its operation:

- (1) The accused must be the recipient of an unprovoked unlawful assault.
- (2) The nature of that assault must be such as to cause the accused reasonable apprehension of death or grievous bodily harm judged

7 Stella Tarrant, ‘Self Defence in the Western Australian Criminal Code: Two Proposals for Reform’ (2015) 38 *University of Western Australia Law Review* 1, 12-13. (References omitted)

8 See s248 (second paragraph), *Criminal Code* prior to 2008.

9 [1967] QdR 15

10 (1977) 138 CLR 630, 638.

11 (1998) 98 A Crim R 589

12 [2001] WASCA 148, [56]-[60].

13 (1998) 100 A Crim R 430.

14 At 431-2.

objectively from his or her point of view in the circumstances known to him or her

- (3) the accused person ... believes, upon objectively reasonable grounds, that the person to be defended from the reasonably apprehended risk of death or grievous bodily harm, cannot be so defended otherwise than by doing what the accused did so as to cause the death or grievous bodily harm which results to the initial attacker.

If those conditions were satisfied, the force used by the accused is lawful – is taken to be necessary for defence”¹⁵

However, taking this approach to the interpretation of an ‘overlapping’ or ‘repeated’ objective requirement is not feasible with respect to the current formulation of s248. This is because, to allow the meaning of a “reasonable response” in paragraph (b) of s248(4) to follow the outcome of the assessments made under paragraph (a) of s248 (read with paragraph (c)), would deprive paragraph (b) of legal effect. In the current law a whole paragraph is at stake, not merely a phrase as in the old formulation. More importantly, as discussed, s248(3) determines that the outcome of a murder trial may depend precisely on whatever is decided pursuant to paragraph (b) of s248(4). It is clear a court must determine the correct interpretation of a “reasonable response” in paragraph (b) and a jury must apply that meaning in determining which verdict to return.

The only judgment of the Western Australian Supreme Court to date that has addressed this problem is Mitchell JA’s opinion in *Egitmen v Western Australia* [2016] WASCA 214. In that case the appellant was convicted of murder. He admitted killing the deceased and wished to plead guilty to manslaughter pursuant to (as is relevant here) s248(3). That is, the appellant claimed that he believed on reasonable grounds that he needed to stab the deceased as he did in order to defend himself (under s248(4)(a)/(c)) but he admitted that his response was not reasonable in the circumstances as he believed them to be. The appellant described himself as having “overreacted”.¹⁶ Thus, an acquittal under s248 was not at issue at trial but the State was put to disprove the matters in s248(3) – or more precisely, was put to disprove the matters in s248(4) so that the operation of s248(3) was avoided.

In *Egitmen* the appellant argued that the only way the State could avoid the operation of s248(3) was (disregarding s248(4)(a)(c)) by disproving the matters in s248(4)(b) (that the accused’s response was not reasonable in the circumstances as she or he believed them to be). The State argued that the operation of s248(3) could be defeated either in that way or, alternatively, by disproving the matters in s248(4)(c) – as that paragraph relates to paragraph (b). The majority (Buss P and Mazza JA) adopted the State’s view, that if the State could disprove the matters in

¹⁵ [2001] WASCA 148, [59]-[60]

¹⁶ At [45]

paragraph (c) this would in itself defeat an “excessive self-defence” claim under s248(3).¹⁷ Mitchell JA approached the construction in a different way: that since s238(3) only arises for consideration where the State has disproved the matters in paragraph (b) of s248(4), this means that the “belief” in that paragraph must have been disproved, and therefore paragraph (c) of s248(4) (as it pertains to paragraph (b)) simply does not arise for consideration.¹⁸ It is unclear that there will be different substantive outcomes from these different approaches.¹⁹ However, in any case, this difference of opinion in *Egitmen* is of incidental concern to the problem raised in this article. On either approach to the interpretation of s248(3) the problem raised here, the meaning of “reasonable response” in s248(4)(b), remains to be answered.

The problem here is the meaning of “reasonable response” in s248(4)(b) and, as explained, the issue is what discrete legal ground “reasonable response” covers, after the inquiry required by s248(a) (in conjunction with paragraph (c)) has been completed. Mitchell JA addressed this problem at length in *Egitmen* and construed s248(4) as follows.

A Section 248(a)/(c)

Section 248(a) and (c), as stated above, requires an inquiry into whether the accused had a belief on reasonable grounds that her or his harmful act was necessary to defend themselves or another from a harmful act. The accused’s “harmful act” Mitchell JA said, was what she or he actually did (in *Egitmen*, the accused stabbed the deceased five times).²⁰ In homicide cases it will be the act that caused the death.²¹ That is, a finding that the accused had the belief in s248(4)(a) and that it was on reasonable grounds (s248(4)(c)) is a finding that she or he had a belief on reasonable grounds that they needed to use the degree of force they actually used (in order to prevent their assailant inflicting the anticipated harmful act or acts). The first aspect of the accused’s “belief”, Mitchell JA said, is a belief that a harmful act will be perpetrated against her/him.²² The second aspect of this belief is that it was “necessary” to do as they did to defend themselves against

17 At [98]-[105].

18 At [301]-[307].

19 This is because Mitchell JA was of the view that if matters in paragraph (c) – as they pertain to paragraph (b) – were the *only* matters the State was able to disprove in s248(4) then self-defence would be disproved, and s248(3) would not be engaged and so there would appear to be little if any difference between the two interpretations. In addition, it would seem the circumstances considered for paragraph (b) must, in each case, be the same factors as have been considered for a determination under paragraphs(a)/(c) (see *Raux v Western Australia* [2012] WASCA 1, [144]), in which case they will have been found to have been based on reasonable grounds.

20 At [277], [279], [282]-[283].

21 At [277].

22 At [236], [280]-[281]. Compare Buss P at [68]: ‘Section 248(4)(a) is not concerned with two separate beliefs’. However, Buss P does not, presumably, reject the idea that in order to form that single belief, a person must assess both the danger they are in and the courses of action they might take.

that harmful act. This second aspect “draws attention to” whether the accused’s harmful act was required (“necessary”)²³ to defend against a harmful act – or whether some other action might have been taken. “For example, the availability of assistance from authorities or an avenue of retreat”.²⁴ That is, Mitchell JA determined that paragraphs (a)/(c) require the following questions to be answered: whether or not the accused (believed on reasonable grounds that she/he) -

- had no reasonably available alternative course of action (as opposed to the use of physical force in defence); and
- needed to do the act they in fact did (use the degree of force they used).

B Section 248(4)(b)/(c)

Turning to s248(4)(b), Mitchell JA recognised that the operation of subsections 248(3) and (4) *require* there to be a distinction between paragraphs (a)/(c) of s248 on the one hand and the requirements of a “reasonable response” in paragraph (b) on the other. Although he considered s248(4)(a) and (b) probably do not deal with entirely discrete topics the distinctive operation of paragraph (b) he found in an overarching concept of “proportionality”. He refers to a “theoretical” possibility that a “degree of force” inquiry may be relevant pursuant to paragraphs (b)/(c) in addition to its relevance under paragraphs (a)/(c), though it is “difficult to see” how this could apply in practice.²⁵ However, whether or not it will ever arise in practice, the point at issue, in any case, is what *discrete* inquiry is required by s248(4)(b)/(c). In this regard Mitchell JA writes:²⁶ “Section 248(4)(b) and s248(4) (c) are more likely to impose a separate requirement where the degree of force used was needed but was disproportionate to the harmful act (for example, where an accused *believed, on reasonable grounds, that a lethal response was necessary* [under paragraphs (a)/(c)] to defend against an *assault* which was not believed to present a risk of death or serious injury).”²⁷ Indeed, as Mitchell JA recognises,²⁸ paragraph (b) must have such a discrete operation in order for s248(3) to have any effect.

Thus, Mitchell JA construes s248(4)(b) to require a jury to make an overall assessment of commensurability between the harm the accused faced from their

23 ‘Necessary’, according to Mitchell JA, means ‘requisite’ or ‘needful’, relying on *Marwey* (1977) 138 CLR 630.

24 At [282], [291].

25 At [287]. It is difficult to see how this could arise. In a s248(3)/(4) case it surely could not arise because lethal force is ultimate and so it is impossible to go ‘too far’ in the sense of using too much force to effect the killing. That is, if killing per se were found to be reasonably proportionate it could hardly be said that the accused’s act was not reasonable only on the basis that, for example, several blows rather than one were inflicted. The manner of killing may go to whether the reason for killing was defensive or for some other purpose, but that question has already been determined under paragraphs (a)/(c) of s248(4).

26 At [287].

27 Emphasis added.

28 At [293].

assailant and the harm the accused meted out – which with respect to a murder charge, will be killing. This is the approach taken by Pincus J in *Julian* in relation to the equivalent problem in the self-defence provisions prior to 2008. Pincus J’s approach was in dissent but the terms of s248(4) now dictate this construction.²⁹ Under s248(4)(a)/(c) an inquiry must be made about whether the accused believed on reasonable grounds they needed to do as they did. In particular this includes an inquiry about whether the accused had reasonable grounds for believing both: that they could not reasonably access alternative routes to safety other than by using some force; and that the degree of force they used was necessary. Section 248(4)(b)/(c) creates a requirement for an overarching objective assessment (grounded in the accused’s reasonably held beliefs) of the relationship between the “harmful act(s)” of the accused and the “harmful act(s)” of the deceased. Mitchell JA uses the concept of “proportionality” but it is important to note that this is a different concept of proportionality from that used in many other discussions of self-defence. In particular, as Mitchell JA explains, it does not include the idea of the “degree of force” used by the accused³⁰ (for example, the number of stabs or the use of a knife as opposed to fists). Mitchell JA’s concept of “proportionality” could be described as a requirement for an overall commensurability between the harm (reasonably) anticipated by the accused from the deceased (for example, minor harm, very serious harm or lethal harm) and the harm inflicted by the accused (minor harm, very serious harm or lethal harm). Mitchell J writes:

Suppose that an accused’s only means of preventing an assault which could not cause them any serious injury was to shoot the assailant. Although the existence of a threat may have given rise to a need for some force, and the application of lethal force may be the degree of force needed to stop or prevent the assault, the use of that degree of force may be regarded as disproportionate to the threat ... I am not here concerned with the degree of force needed to meet an existing threat, but the relationship between the level of harm likely to result from the defensive action to the level of harm to which the existing threat may give rise if defensive action is not taken.³¹

Thus, the construction of s248(4) alone, but with particular import when s248(3) is engaged on a charge of murder, requires courts to identify the *discrete* operation of paragraph (b) of s248(4). A determination of what *additional* work paragraph (b) (in conjunction with paragraph (c)) does is necessary for s248(3) (and s248(4) itself) to operate at all. That is, s248(4) and s248(3) cannot be applied

29 This effect may well have been unintended. See Stella Tarrant ‘Self Defence in the Western Australian Criminal Code: Two Proposals for Reform’, (2015) 38 *University of Western Australia Law Review* 1, 14-15.

30 At [238]-[239], [246]. This must be the case because if ‘degree of force’ in this sense were taken to amount to ‘proportionality’ in this assessment, then defence against non-imminent harm would be excluded – because it could never be reasonable in the sense of it being a proportionate degree of force to inflict harm on a sleeping person.

31 At [239].

correctly unless an inquiry that is discrete to paragraph (b) of s248 is applied to determine the outcome of a trial where self-defence is raised. Given the terms of s248(4)(a)/(c), which require an inquiry that is in itself a comprehensive inquiry about the fundamental components of a self-defence claim, s248(4)(b) must, as Mitchell JA finds, require an overarching inquiry of this kind.

III PART 2: MANSLAUGHTER CONVICTIONS IN THE CONTEXT OF INTIMATE PARTNER VIOLENCE

It has been recognised for several decades that women resisting severe intimate partner violence (IPV) have been systematically denied access to the defence of self-defence.³² At the heart of the criticisms of the defence is its inability to provide justice to an accused where they were responding to violence embedded in their everyday life, as opposed to violence in a once-off physical attack. With the possible exception of self-defence under the Griffith Codes³³ self-defence was never limited in its terms to ‘once-off attack’ situations but in all jurisdictions that is how it has been applied. From the 1990s³⁴ courts began to respond to this criticism by, for example, declaring the admissibility of expert evidence aimed at assisting a jury understand the dynamics of IPV³⁵ and interpreting the concept of “assault” as incorporating a threatened application of force at a future, specified

32 See for example, Alison Wallace, *Homicide: The Social Reality* (NSW Bureau of Crime Statistics and Research, Attorney General’s Dept, Sydney, 1986); Ian Leader-Elliott, ‘Battered But Not Beaten: Women Who Kill in Self-Defence’ (1993) 15 *Sydney Law Review* 403; Patricia Esteal, *Killing The Beloved: Homicide Between Adult Sexual Intimates* (Australian Institute of Criminology, 1993); Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Final Report No 69, Vol I (1994); Julie Stubbs and Julia Tolmie, ‘Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on Battered Woman Syndrome’ (1999) 23 *Melbourne University Law Review* 709; Barbara Hocking, ‘Gender Specific Response Patterns in Criminal Defences’ (1996) 20 *Criminal Law Journal* 185; Rebecca Bradfield, ‘Is Near Enough Good Enough? Why Isn’t Self-Defence Appropriate for the Battered Woman?’ (1998) 5 *Psychiatry, Psychology and Law* 71; Zoe Rathus, ‘There Was Something Different About Him That Day: The Criminal Justice System’s Response to Women Who Kill Their Partners’ (Brisbane Women’s Legal Service, 2002); Julie Stubbs, ‘Domestic Violence and Women’s Safety: Feminist Challenges to Restorative Justice’ in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002); Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004); Kate Fitz-Gibbon and Julie Stubbs ‘Divergent Directions in Reforming Legal Responses to Lethal Violence’ (2012) 45 *Australian and New Zealand Journal of Criminology* 318; 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.

33 The *Criminal Code* and the *Criminal Code 1899* (Qld) are the Griffith Codes. The Queensland Code retains a requirement that the accused was ‘assaulted’ for self-defence to operate (s271).

34 Judicial reform was focussed on the defences of provocation and unwilling act (involuntariness) before this. See for example, *R v R* (1981) 28 SASR 321 and *R v Falconer* (1990) 171 CLR 30.

35 *Runjanjic and Kontinnen v R* (1991) 56 SASR 114.

time.³⁶ Then in the 2000s legislatures responded. In the past decade all Australian jurisdictions have amended their criminal defences to homicide in response to criticisms that women's resistance to IPV was not recognised appropriately as self-defence.³⁷ These judicial and legislative developments have increased reliance on self-defence by women who were resisting IPV but only a small minority of them have been successful and, except where her husband was physically attacking her at the time of the killing, the number of women acquitted on grounds of self-defence remains vanishingly small.³⁸ Bradfield's assessment in 1998 remains true today:

The defence of self-defence has been remarkably resilient to the recent recognition of the injustice in the treatment by the legal system of women who have killed their violent partners.³⁹

A Understanding IPV and Recognising Resistance To It

Despite the judicial and legislative changes to self-defence there is a persistent reluctance, or unwillingness, to configure women's responses to lethal danger from an intimate partner *as lawful*. It is as if we do not know how to recognise self-defence if it does not appear in response to a *particular incident* of physical violence; even more, as if we do not know how to *calibrate* danger when it is entwined in the fabric of everyday life. We do not know how to recognise or calibrate danger if we cannot identify when, how or even *if* the danger will manifest in physical harm. And (therefore) we cannot recognise resistance to this form of danger. Yet, we know that IPV is not uncommonly mortally dangerous: 30-40 Australian women are killed each year in this way.⁴⁰ And we know that

36 *R v Secretary* (1996) 86 A Crim R 119

37 Western Australia has abolished provocation and introduced 'excessive self-defence'; Tasmania has abolished provocation and not introduced excessive self-defence; South Australia has introduced 'excessive self-defence' and retained provocation (*Criminal Law Consolidation Act 1935*, s15); Victoria has abolished provocation and introduced 'defensive homicide', a form of excessive self-defence in 2004, with the same aims relating to gender equality, and then abolished that offence in 2014; New South Wales has introduced excessive self-defence (*Crimes Act 1900*, s421) and retained provocation with amendments aimed at gender equality (*Crimes Amendment (Provocation) Act 2014*); The Australian Capital Territory (*Crimes Act 1900*, s13) and the Northern Territory (*Criminal Code Act 2005*, s158) have retained provocation with amendments. Queensland has retained provocation with amendments aimed at gender equality (*Criminal Code 1899*, s304) and introduced a partial defence, 'Killing for preservation in an abusive domestic relationship' (*Criminal Code 1899*, s304B).

38 Discussed below.

39 Rebecca Bradfield, 'Is Near Enough Good Enough? Why Isn't Self-defence Appropriate for Battered Women' (1998) 5 *Psychiatry Psychology and Law* 71, 75; see also, Domestic Violence Resource Centre Victoria, *Out of Character: Legal Responses to Intimate Partner Homicide by Men in Victoria 2005-2014*, (2016) 31-6.

40 There is no national system for collection of information about deaths resulting from intimate partner killings and the contexts in which they occur. Since 2009, a number of Australian jurisdictions have established family death review bodies whose purposes include collection of this information and a national scheme has been called for: Anna

recognition of danger and calibration of its seriousness is *precisely* what is required for a just assessment of self-defence.

Section 248 of the *Criminal Code* has been amended to recognise that non-imminent harm is within the scope of self-defence. A person acts in self-defence where she or he has a belief on reasonable grounds that their act is necessary to defend themselves from a harmful act, “including a harmful act that is not imminent”. With the exception of Queensland this is the law in all Australian jurisdictions.⁴¹ But what does that mean? If we envisage merely that self-defence encompasses defence against a harm that is an *incident* occurring at some point in the future, with varying degrees of probability that the incident will occur, we have come virtually nowhere by this newly recognised context in which the need for defence not uncommonly arises. This is self-defence envisaged as a response to an immediate, physical attack – “a fight” - simply displaced into the future. It encompasses danger as an irruptive event only, isolated in an environment in which danger is otherwise absent, minimal or of no consequence. This construction of self-defence against “non-imminent” harm misses the circumstances of IPV, the immersive nature of danger and resistance, including targeted and strategic control conducted in private; that is, in relational, social and not uncommonly literal and physical isolation.

The New Zealand Family Violence Death Review Committee considers IPV is best understood not as a series of incidents but as a “pattern of harm”⁴² that causes a form of “social entrapment.”

IPV is a form of ‘social entrapment’ with three dimensions:

- social isolation, fear and coercion the abusive partner’s violence creates in the victim’s life
- the indifference of powerful institutions to the victim’s suffering
- the ways in which coercive control (and the indifference of powerful institutions) can be aggravated by the structural inequities of gender, class and racism.⁴³

Butler et al, ‘Australia’ in Myrna Dawson (ed), *Domestic Homicides and Death Reviews* (Palgrave MacMillan, 2017) 125-57, 126-7. It has been widely publicised recently, however, that every fortnight one or more Australian woman is killed by her partner or former partner. (Counting Dead Women, Australian Researchers <<http://www.facebook.com/DestroyTheJoint/>>).

41 Queensland retains a requirement that a person was assaulted in order to rely on self-defence and the legal requirements of an assault include a threatened or attempted application of force. But cf *R v Secretary* (1996) 86 A Crim R 119. No other Australian jurisdictions now includes a purely objective requirement relating to the harm that was directed at the accused.

42 Family Violence Death Review Committee, *Fifth Report, January 2014 to December 2015* (Health Quality and Safety Commission New Zealand, 2016) 34; see also, Royal Commission into Family Violence Report (Victorian Government, Vol 1, 2016) 20.

43 Family Violence Death Review Committee, *Fifth Report, January 2014 to December 2015* (Health Quality and Safety Commission New Zealand, 2016) 39.

In this kind of construction of IPV physical violence is instrumental and is not itself the extent of the IPV. The paradigm is a configuration of practices within broader social structures central to which is control and a frightening social isolation. The Victorian Royal Commission into Family Violence states:

The Commission received hundreds of submissions from people who have lived with, and continue to live with, the terror of family violence. And those submissions have a common theme – that the violence is a tool used to gain control over them.⁴⁴

Unless this fundamentally different context and experience of violence is understood to be the foundation of a claim of self-defence, the idea that self-defence may be against “non-imminent harm” will allow a person to raise self-defence where there was, in simplistic terms, no imminent danger but it will not support an accused to succeed in a self-defence claim. This is because claims will always be measured according to their conceptual distance from self-defence envisaged as an isolated response to an irruptive event. Unless we can envisage lethal self-defence against ongoing danger involving episodic,⁴⁵ strategized, and at the same time unpredictable and uncontrollable behaviour that achieves a form of social entrapment - *and* unless we actually relinquish the “fight” as the sole paradigm - women who kill resisting lethal danger in the form of IPV will not have access to self-defence.

It is necessary to explain references to “we” and “us” in this discussion: who is it that should, as it is argued, imagine the form of violence and resistance differently? “We”, here, refers to judges (trial and appellate), lawyers (defence and prosecution), jury members and ‘the community’. The terminology is used for two reasons. First, because it is argued the work that needs to be done for self-defence properly to apply in circumstances where an accused has killed an intimate partner while he was (in an immediate sense) passive, is to be done by those configuring or ‘making sense of’ what has occurred. “More information”, especially about individualised motives, is not the problem addressed here, but rather how understandings are reached about what we accept happened. Second, those who, it is argued, must do this work are those both within and without the legal process; that precisely the same perceptual work is required in the law as in society as a whole, and by each party involved. This is about more than a general relationship between law and society; it is to say that self-defence is, as a matter of law, determined and constrained by whatever the social understandings and perceptions of IPV, and resistance to it, are. This is because “reasonableness” is the legal rubric whose content is drawn directly and entirely from “our”

44 Royal Commission into Family Violence Report (Victorian Government, Vol 1, 2016) 19.

45 Denise Wilson, Rachel Smith, Julia Tolmie and Irene de Haan in ‘Better Helpers: Rethinking Language to Move Beyond Simplistic Responses to Women Experiencing Intimate Partner Violence’, (2015) 11 *Policy Quarterly* 25, 27, make the point that experiences of family violence are ‘better captured within the language of ‘episodes’ rather than incidents.

understanding of IPV, spoken about by lawyers in a trial, shaped and directed on by judges, determined by jury-members and received, assessed and commented on by ‘the community’. This process occurs with every legal requirement that an (objective) standard of “reasonableness” be determined. The point is that in this context a preparedness to learn, and a gaining of capacity about, what lethal self-defence will look like in a marriage rests with everyone.

The New Zealand Law Commission states:

- How family violence is understood will be relevant to:
- the prosecutor’s decision to lay the charge;
 - how the prosecutor and defence counsel approach pre-trial discussions;
 - if the case goes to trial, how the prosecutor and defence counsel choose to run their cases, including the evidence they seek to introduce;
 - the issues and questions on which the trial judge directs the jury;
 - how juries assess the credibility of the defendant, their state of mind at the time and in the case of self-defence, the nature of the threat the defendant faced and whether the defendant’s actions were reasonable in the circumstances; and

..... As the [Family Violence Death Review Committee] states:

‘to reform the current system while we continue to think about family violence in exactly the same way will not produce the kinds of systemic changes we all want.’⁴⁶

B Manslaughter Convictions

Manslaughter convictions are the most common outcomes where women have killed their violent husbands. In a national study (“the Bradfield Study”) of 65 cases between 1980 and 2000 in which a woman killed her violent male partner, 45 cases resulted in a manslaughter conviction.⁴⁷ In another national study (“the Sheehy, Stubbs and Tolmie Study”) of 67 cases concluded between 2000 and 2010 in which a woman was charged with homicide after killing her violent partner, 50 cases resulted in a manslaughter conviction.⁴⁸ And in a Victorian study (the Victorian Study) of women who killed intimate partners between 2005 and

46 New Zealand Law Commission, *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide*, (New Zealand Government, 2016) 36.

47 Rebecca Bradfield, *The Treatment of Women Who Kill Violent Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 22.

48 Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, ‘Battered Women Charged with Homicide in Australia, Canada and New Zealand’ (2012) 45 *Australia and New Zealand Journal of Criminology* 383, 385-7.

2014 (13), nine were convicted of manslaughter and four of defensive homicide.⁴⁹ Defensive homicide was⁵⁰ the equivalent of a manslaughter conviction resulting from what is often referred to as “excessive self-defence”.⁵¹ Thus all 13 women in the Victorian Study were convicted of manslaughter or its equivalent.

Of the remaining cases, in the Bradfield Study six of the 65 cases resulted in a murder conviction.⁵² In the Sheehy, Stubbs and Tolmie Study, two of the 67 cases resulted in a murder conviction and in the Victorian Study none of the 13 cases resulted in a murder conviction. With respect to acquittals: in the Bradfield Study 10 of the 65 cases resulted in an acquittal.⁵³ In the Sheehy, Stubbs and Tolmie Study 11 of the 67 cases resulted in an acquittal on grounds of self-defence and the prosecutions of two more cases were not proceeded with.⁵⁴ Just three of the self-defence acquittals were in “non-traditional” circumstances (where no physical assault was occurring at the time of the killing) and in one of those three cases the deceased had specified the day on which he would kill the accused’s child.⁵⁵ In the Victorian Study four women raised self-defence and none was successful.⁵⁶ In the Sheehy, Stubbs and Tolmie Study two cases resulted in a conviction for an offence less than manslaughter. These results are set out in the Table below.

TABLE

Outcomes: women charged with a homicide offence after killing their intimate partner

49	Domestic Violence Resource Centre Victoria, <i>Out of Character: Legal Responses to Intimate Partner Homicide by Men in Victoria 2005-2014</i> (2016) 32
50	This offence was abolished in 2014.
51	Section 248(3) of the <i>Criminal Code</i> , discussed in Parts 1 and 3, is an ‘excessive self-defence’ provision.
52	Rebecca Bradfield, <i>The Treatment of Women Who Kill Violent Partners Within the Australian Criminal Justice System</i> (PhD Thesis, University of Tasmania, 2002) 22.
53	Ibid.
54	Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, ‘Battered Women Charged with Homicide in Australia, Canada and New Zealand’ (2012) 45 <i>Australia and New Zealand Journal of Criminology</i> 383, 386.
55	Ibid 385-7. Other studies are consistent with these findings. For example, in a Western Australian study, that included all women tried for wilful murder or murder of their husbands between 1983 and 1988 (10) six relied on provocation. Two women also relied on self-defence and self-defence was raised tangentially by the court in two other cases. Only one woman was acquitted (probably on grounds of self-defence) in circumstances where her husband was strangling her at the time of the stabbing. (Stella Tarrant, ‘Something is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws’ (1990) 20 <i>University of Western Australia Law Review</i> 573, 586-9, 597. In a New Zealand study, of 18 victims of family violence charged with murder, four pleaded guilty to manslaughter and 14 defended the charge. Of those 14, eight were convicted of manslaughter, three of murder and three were acquitted. (New Zealand Law Commission, Te Aka Mathua O Te Ture, <i>Understanding Family Violence: Reforming the Criminal Law Relating to Homicide</i> (2016) 125, 127).
56	Domestic Violence Resource Centre Victoria, <i>Out of Character: Legal Responses to Intimate Partner Homicide by Men in Victoria 2005-2014</i> , (2016) 32.

	ACQUITTAL, PROSECUTION DISCONTINUED, OR LESSER OFFENCE	MANSLAUGHTER OR DEFENSIVE HOMICIDE	MURDER	TOTAL
Bradfield Study 1979-1997	10 - acquittal	45	6	65
Sheehy Stubbs and Tolmie Study 2000-2010	11 - acquittal (3 in the absence of physical attack) 2 – prosecution discontinued 2 – lesser offence	50	2	67
Victorian Study 2005-2014	0	9 - Manslaughter 4 – Defensive Homicide	0	13

That this preponderance of manslaughter convictions indicates unprincipled justice has been argued in various ways. In both the national studies referred to a very high proportion of the manslaughter convictions were the result of a guilty plea in exchange for a murder charge being dropped. In the Bradfield study, of all cases considered (both the 65 cases in which there was a history of domestic violence and 12 where no history of domestic violence was evident), 65% of manslaughter convictions resulted from a guilty plea⁵⁷ and in the Sheehy, Stubbs and Tolmie Study 39 of the 50 convictions were based on a guilty plea. In particular, in the 19 manslaughter convictions where the accused was Aboriginal, 17 were based on a guilty plea. In the Victorian Study, five of the nine manslaughter convictions and two of the four defensive homicide convictions resulted from guilty pleas. In the four cases in which the accused was Aboriginal three convictions resulted from a guilty plea.⁵⁸ Thus, with respect to a substantial majority of manslaughter convictions (or an overwhelming majority for Aboriginal women) the woman had no opportunity to have a self-defence claim considered. Yet it is clear that most women who kill their husbands are responding to IPV.⁵⁹ For example, in a focus on New South Wales within the Sheehy, Stubbs and Tolmie Study:

16 of the 24 cases were resolved by guilty pleas. In all instances the accused had been indicted on murder charges. The accused pleaded guilty to manslaughter in 15 cases and the murder charges were dropped and in nine (60%) of those cases she had, on her account, inflicted the lethal violence while being physically attacked or threatened by her violent partner. In a further two (13%) of these cases she was responding

57 Rebecca Bradfield, *The Treatment of Women Who Kill Violent Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 27.

58 Ibid.

59 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, 587-8, 590; Rebecca Bradfield, *The Treatment of Women Who Kill Violent Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 22; Domestic Violence Resource Centre, *Out of Character: Legal Responses to Intimate Partner Homicide by Men in Victoria 2005-2014* (2016) 32.

to the general threat posed to her by the deceased rather than a specific attack.⁶⁰

Moreover, in “several cases the sentencing judge effectively acknowledged that, had the case proceeded to trial, the accused may have had a realistic chance of being acquitted on the basis of self-defence”.⁶¹

The persistence of manslaughter convictions over time and across jurisdictions, despite the legal basis for manslaughter differing widely, also brings into question the principles underpinning them. The bases for a manslaughter conviction may be the partial defence of provocation, lack of the intent necessary for murder or what is often referred to as “excessive self-defence”. In Western Australia the partial defence of provocation was abolished in 2008. It has also been abolished in Tasmania and Victoria. “Excessive self-defence” became available in 2008 in Western Australia (in s248(3) discussed in Part 1) and is also available in New South Wales⁶² and South Australia.⁶³ Other jurisdictions have rejected “excessive self-defence” and it no longer exists at common law.⁶⁴ Killing because one has lost emotional control as a result of provocative conduct, in an effort to defend oneself against harm but in a way that does not amount to self-defence and killing unintentionally are very different, legally incompatible, bases for killing, yet manslaughter convictions are favoured where a woman kills in response to IPV regardless of which legal construction is available to a jury. Writing with respect to provocation Bradfield concludes:

The cost of favouring the use of the provocation defence for women who kill violent partners has been that women are being convicted of manslaughter, rather than being acquitted. The reliance on provocation as well as self-defence has encouraged juries to compromise. It absolves the jury from grappling with the ‘big’ questions of guilty of murder or acquittal and provides them with a ‘half-way’ position.⁶⁵

Elsewhere, Bradfield concludes that in some cases the lack of intent was “being used as a de facto domestic violence defence”.⁶⁶ By this she means that juries are probably relying in a general, extra-legal way on evidence of IPV to sympathise with an accused and return a verdict of manslaughter rather than murder. But

60 Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, ‘Battered Women Charged with Homicide in Australia, Canada and New Zealand’ (2012) 45 *Australian and New Zealand Journal of Criminology* 383, 389.

61 Ibid.

62 *Crimes Act 1900* (NSW) s421.

63 *Criminal Law Consolidation Act 1935* (SA) s15(2).

64 *Zecevic v DPP (Vic)* (1987) 162 CLR 645.

65 Rebecca Bradfield, ‘Is Near Enough Good Enough? Why Isn’t Self-defence Appropriate for Battered Women?’ (1998) 5 *Psychiatry Psychology and Law* 71, 80

66 Rebecca Bradfield, *The Treatment of Women Who Kill Violent Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 124.

the sympathy is gained at “significant cost”- the obscuring of self-defence.⁶⁷ The Law Reform Commission of Western Australia (the Commission) found its examination of Western Australian cases tended to support Bradfield’s argument that “courts are showing sympathy for the circumstances of victims of domestic violence who kill but their circumstances are not being assessed in the framework of self-defence”.⁶⁸

That s248(3) of the *Criminal Code* may be used as a ‘half-way’ position in the same way provocation and lack of intent has been was anticipated by the Commission. In its *Review of the Law of Homicide*, which formed the basis for the substantial reforms to the *Criminal Code* in 2008, the Commission recommended the abolition of the partial defence of provocation and the introduction of this provision. The Commission recognised that, in the event that self-defence laws continued to operate unjustly for women, the absence of any partial defence would further disadvantage them.⁶⁹ Thus, the Commission recognised the use of a partial defence (provocation) as a compromise and presaged the possibility of those outcomes continuing under other provisions (“excessive self-defence”).

IV PART 3: LIYANAGE V WESTERN AUSTRALIA

The decision in *Liyanage* is an illustration of the kind of manslaughter conviction discussed in Part 2. Ms Liyanage was tried for the murder of her husband. She raised self-defence and was convicted of manslaughter. The IPV the deceased had perpetrated against her was characterised by extreme levels of control in daily life, sexual and physical violations, threats of grievous bodily harm and regular and frequent diminishment and humiliation. This case demonstrates the compromise a manslaughter conviction can reflect in this context with particular clarity, not because the facts of the case are significantly different from other cases but because the doctrinal confusion discussed in Part 1 has the effect of revealing what underpins the decision more clearly. Section 248(4)(b) isolates the question of what Mitchell JA calls “proportionality” because a conviction pursuant to s248(3) means that *all other* questions required to be answered in an assessment of self-defence have been answered in the accused’s favour.

There was evidence that Ms Liyanage’s husband was probably asleep when he was killed by being struck with a heavy mallet. Ms Liyanage has no memory of the night but she rang an emergency number early in the morning saying her husband was dead. The following summary provides something of a context of the IPV that formed the basis of Ms Liyanage’s claim of self-defence. Ms

⁶⁷ Ibid 125.

⁶⁸ Law Reform Commission of Western Australia, *Review of the Law of Homicide* (2007) 282.

⁶⁹ Ibid 179-80. See also, Domestic Violence Resource Centre, *Out of Character: Legal Responses to Intimate Partner Homicide by Men in Victoria 2005-2014* (2016) 35; Heather Douglas, ‘A Consideration of the Merits of Specialised Defences for Battered Women’ (2012) 45 *Australian and New Zealand Journal of Criminology* 367, 371.

Liyanage and her husband lived in a regional town. He emigrated from Sri Lanka three months after they were married, in January 2011, and Ms Liyanage came to Australia in November that year. No other family members emigrated with them. For the duration of the marriage her husband exerted control over Ms Liyanage's movements and relationships. The degree of control increased over time, some conduct being, or couched as, protective. For example, her husband insisted that she phone him frequently to let him know where she was, he said, to ensure she was safe. This became a "rule" that Ms Liyanage should phone him and stay on the phone to him for the time it took her to arrive at her destination. If Ms Liyanage did not do as her husband told her to, in relation to this and many other things, he became violent. In October 2012, Ms Liyanage was on the phone to her husband as she walked home when she stopped to help a woman who was crying on the footpath. Because her husband had told her not to do this he came to where she was. He struck her on the back of the head hard enough for her to fall to the pavement and later beat her so that she felt she could not breathe. Before this day every time her husband hit her he would "tell me that's why I'm hitting you to correct you ... before he hit me he would tell me why he's hitting, but this time there was no warning".⁷⁰

... from that day the relationship changed a lot. Like, I was so scared of him from that day, a lot, because he hit me so much I couldn't even breathe. I was so scared of him and I didn't want to do anything wrong, because I don't know whether he's going to hit me again. So I try my best not to do anything to make him angry and tried to stay calm and silent ...⁷¹

Her husband frequently told her that she was a "bad wife", or "stupid", and that this made him angry. He assaulted her frequently by hitting her face, chest, arms and legs.⁷²

In the months they lived apart, before Ms Liyanage emigrated from Sri Lanka she and her husband communicated via Skype. Her husband told her to have "affairs" with men and without her knowledge created a Facebook account and published her phone number advertising her as a sex worker.⁷³ This exertion of sexual control increased through the duration of the marriage so that he began making her appear naked or in "sex clothes", or he would have sex with her, in front of a Skype camera for viewing by those online. If she objected to this he would hit her or pull her hair. Her husband's use of pornography, including child pornography, increased and was at an extremely high level. Her husband made Ms Liyanage watch his child pornography, sometimes while he had sex with her. He would "punish" her by having anal sex with her if she cried or did not want to watch the

70 Trial transcript, 958-9.

71 Trial transcript, 960.

72 Trial transcript, 974-6

73 Trial transcript, 935-44.

pornography. At first, her husband did this a few times a week but it increased so that at the time of the killing it was virtually every night.⁷⁴ During this time Ms Liyanage also had to sit and listen to her husband for long periods while he did what he called “thought teaching”. She would have to repeat everything he said and if she forgot he would put her down, call her stupid and hit her.

Ms Liyanage’s husband had a pattern of telling her to make contact with young women with whom he wanted to have sex. For example, he wanted a young Sri Lankan woman to come to live with them and blamed and hit Ms Liyanage across the course of a whole day when this did not eventuate. Another of the young women was K, who was 17years old. Ms Liyanage’s husband told her to arrange a holiday for K, himself and herself because he wanted to have sex with K away from her parents. He told Ms Liyanage all the things he wanted to do to K.

In the weeks before the killing Ms Liyanage’s husband was hitting her many times per week with his knees, feet, fists, a wooden rolling pin or wooden spoons and a sling shot which propelled small metal balls.⁷⁵ He rarely left her alone. He made her follow him around the house all the time⁷⁶ and he determined how long she could spend outside the house gardening (10-15 minutes). About two weeks before the killing Ms Liyanage’s work arrangements changed so that she and her husband worked in the same work area but on different teams. Before this Ms Liyanage had experienced some relief while being at work. Her husband kept trying to be around her and if she spoke to someone in front of him, he would “tell her off” when they got home. By 4pm each day she was acutely anxious because it was time to go home.

He wrote a list of conditions, backed by threats, if he were to “let her go” (meaning leave the marriage). She could not tell anyone about what he had done to her, or do anything to harm his reputation, or he would harm her sister’s children or other family members. She was required to forward all her personal emails to him and not change her passwords. He implied that he would arrange for acid to be thrown on the children or other family members if she did not comply.⁷⁷

Ms Liyanage was frightened her husband would kill her, or kill members of her family in order to destroy her life.⁷⁸

I was extremely scared about safety of myself, safety of [K] and her family and especially scared of my sister and her kids, and my parents. I was really scared, what he is going to do to me because I showed my dislike of his – what he is trying to do with [K], so he was extremely angry with me and - extremely angry with me about the attempt - I tried

74 Trial transcript, 951, 974-6.

75 Trial transcript, 1001-2.

76 Trial transcript, 1018.

77 Trial transcript, 987-8.

78 Trial transcript, 1048- 51.

to – [leave the marriage] on the first of that month. ... And he was getting paranoid all the time and I was extremely scared.⁷⁹

Her husband was afraid that she would:

tell people the things he do, that things – he beat me up ...and he’s downloading this child pornography and things – so he was all the time keep telling me, if I do anything, or if I tell anything to anyone, he would really, really do something, either to me ... or to my family, especially my sister or kids...⁸⁰

This could be understood to be evidence of IPV as social entrapment: ongoing and escalating fear resulting from strategies of control, through isolation and sexual and physical violence, and threats of violence, in the broader social structure of gendered expectations surrounding marriage, being recent migrants, from a minority culture and without wider family or social supports. And within this context, it is also evidence of crimes under the *Criminal Code*, including daily aggravated sexual penetration without consent under s326⁸¹ and threats to cause grievous bodily harm or life-endangering injuries under s338A of the *Criminal Code*. The State’s case was not that Ms Liyanage’s husband had not been violent towards her⁸² but this understanding of the violence is not reflected in the conviction; it is minimised and sidelined.

The jury’s verdict of manslaughter was determined by the sentencing court to have been made pursuant to s248(3).⁸³ This means, as explained in Part 1, the verdict rests on the meaning of “reasonable response” in s248(4)(b). It means, necessarily, that the jury found⁸⁴ that Ms Liyanage:

- Intended to kill her husband (or cause him injury that was likely to endanger his life⁸⁵); and
- She killed him because she believed, on reasonable grounds, that it was necessary to kill him (or to cause him life-endangering injury) in order to defend herself or another from harmful acts she believed on

79 Trial transcript, 1049-50

80 Trial transcript, 987.

81 Circumstances of aggravation in s319 of the *Criminal Code* include the offender doing an act which is likely seriously and substantially to degrade or humiliate the victim and where the offender is in company with another person. Circumstances of aggravation in s221 include the offender being in a domestic relationship with the victim.

82 See for example, the courts’ acceptance of this in *Liyanage v Western Australia* [2017] WASCA 112, [2] [148] and *Western Australia v Liyanage* [2016] WASCSR 31, [29], [31].

83 This was also the construction given by the Court of Appeal: *Liyanage v Western Australia* [2017] WASCA 112, [4]

84 There are different standards of proof, of course, with respect these findings.

85 The mental element for murder in s279(1) of the *Criminal Code* includes an intention to cause a bodily injury that endangers or is likely to endanger life.

reasonable grounds he would perpetrate against her or someone else (s248(4)(a)(c)).

But that her:

- Response in killing her husband was not reasonable in the circumstances she believed to have existed (s248(4)(b)).⁸⁶

Thus, even though Ms Liyanage believed on reasonable grounds she needed to do what she did in defence, what she did was not reasonable. What does this mean? It is to be remembered from Mitchell JA's analysis of s248(3) and s248(4) (b) that the jury's conclusion under paragraphs (a)/(c) of s248(4) means that they accepted that Ms Liyanage believed on reasonable grounds: (i) her husband would have perpetrated a harmful act had she not killed him; and (ii) she had no reasonable alternative to using the force she used in defence in order to avoid that harm. However, killing her husband was, nevertheless, "out of proportion" (and therefore unreasonable) in the sense that there was no general commensurability between what she believed her husband would do, and killing. In other words, this was within the class of cases Mitchell JA describes where "the degree of force used was needed but was disproportionate to the harmful act (for example, where an accused believed, on reasonable grounds, that a lethal response was necessary to defend against an *assault* which was not believed to present a risk of *death or serious injury*)."⁸⁷

How is this conclusion to be understood in light of the evidence in the case? It must be taken to mean that the jury concluded beyond reasonable doubt that Ms Liyanage did not kill her husband to avoid him killing her or someone else, for example if she left the marriage, or, that if she did hold such a belief, there were no reasonable grounds for holding it. This is so because being killed is proportionate to killing. Therefore, although the case was not framed in this way, the conclusion amounts to a finding beyond reasonable doubt that Ms Liyanage was *not* one of the group of women who would have been killed by their husband or former husband in future.⁸⁸

The verdict in light of the evidence, then, might appear to mean that Ms Liyanage believed on reasonable grounds she needed to kill her husband to avoid her

⁸⁶ Paragraph (c) as it relates to paragraph (b) is not relevant here, either because, since the State has failed to 'disprove 'excessive self-defence'', it must be taken to have failed to disprove the matters in paragraph (c) (the majority construction in *Egitmen v Western Australia*) or because, since s248(3) has been engaged, paragraph (c) does not arise for consideration. (Mitchell JA's construction in *Egitmen*).

⁸⁷ *Egitmen v Western Australia* [2016] WASCA 214, [287] (emphasis added).

⁸⁸ One of the grounds of appeal to the Court of Appeal was that the jury was not in a position properly to assess this risk without assistance from a specialist domestic violence worker, of social scientific knowledge about risk factors for lethal violence. This ground was rejected on the basis that the evidence was irrelevant [129] and that, in any case, such risk assessments were within the knowledge of the ordinary juror [148].

husband's IPV which he would continue to perpetrate against her – but that that IPV did not cause sufficiently serious harm to be commensurate with killing the perpetrator of it. This raises questions about what would be serious enough harm. Self-defence at common law permits lethal force against the threat of very serious injury.⁸⁹ Moreover, in a once-off attack situation, lethal force is permitted in self-defence where a person reasonably fears just *one* very serious injury. Similarly, under the *Criminal Code* prior to 2008 lethal force was permitted against a threat of grievous bodily harm.⁹⁰ This approach, which permits a reasonable belief that a person will be profoundly harmed to be the basis for the use of lethal force in defence, must also be taken to underpin the current terms of s248.⁹¹ Thus, the decision can be seen to embody a minimisation of the harm where it occurs in the context of IPV since, apart from any other aspect of the IPV, Ms Liyanage's husband would have continued to rape her and control her movements.⁹²

In fact, however, this is not the construction the courts have given to the evidence and the jury's verdict. The sentencing court constructed the conviction such that Ms Liyanage's response was unreasonable because she acted not in defence of herself at all but in defence of *K*. That is, Ms Liyanage, was found to have believed on reasonable grounds she needed to kill her husband to defend *K* from him. It may make sense of the proportionality/commensurability principle to conclude that killing in order to prevent further immoral but not criminal sexual "use" of a 17 year old was unreasonable, even where killing the perpetrator was the only reasonably available way of preventing that reprehensible conduct from occurring. But this is a simplistic, unrealistic construction of Ms Liyanage's defensive action and it has the effect of taking the IPV she would have continued to suffer out of consideration.

In his sentencing remarks Hall J wrote:

You were concerned that the deceased would not stop at the conduct that occurred by 24 June 2014. You had a genuine concern, and I accept that it was a reasonable one, that the deceased wanted to go further and have a sexual relationship with the girl. You related to her because ... what had happened to you as a naïve, albeit much older woman, was something that you saw happening to the girl. You were concerned that he would discard her, having had a sexual relationship with her, and destroy her life.⁹³

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

90 Section 248 (second paragraph), *Criminal Code* prior to 2008.

91 Martin CJ recognises this in *Liyanage* at [77], though he does not refer to this as 'proportionate' but rather 'reasonable'. That is, His Honour's use of the concept of 'proportionality' is that of precise correlation (i.e. only an apprehension of death is sufficient to justify the use of lethal force) and then distinguishes what s248(4)(b) requires – that is, a 'reasonable' response.

92 '[I]t was obvious that that, had the appellant stayed with the deceased, there was a high risk that the pattern of which had been established would have continued.' *Liyanage v Western Australia* [2017] WASCA 112, [148].

93 *Western Australia v Liyanage* [2016] WASCSR 31, [18].

And, later:

I do take seriously the history of domestic violence and I accept that that was something that influenced your thinking. It influenced your thinking in this way; given what you know of the deceased you believed him when he said he intended to consummate his relationship with the girl and that it would occur soon. that he would treat it lightly and discard her, possibly to her great detriment. Your own experience showed that he was a cold and manipulative and controlling person.⁹⁴

The IPV Ms Liyanage would have continued to suffer is characterised as being “discarded” after a “sexual relationship”, and the part it plays in the manslaughter conviction is as “experience” on which she could draw to “relate to K”. In this construction the real control and violence, the existence of which is acknowledged, is not only minimised; it is removed as a basis for the conviction. The part it plays is as background experience or knowledge, which motivated Ms Liyanage to act disproportionately: unreasonably. The harm against which Ms Liyanage is said to have acted is narrowed drastically, to her husband’s impending act of sexual intercourse with K: she simply didn’t act in self-defence against his impending (and perpetual) treatment of her. In Ms Liyanage’s manslaughter conviction the court’s acceptance that her husband was a “manipulative and merciless abuser”⁹⁵ is confined to this ‘contextual’ role, and her claim that she acted to defend herself is unanswered.⁹⁶

V CONCLUSION

The doctrinal problem in s248(3) and (4) of the *Criminal Code* isolates a particular concept of “proportionality” under s248(4)(b) and means that in a conviction pursuant to s248(3) *all* requirements of self-defence other than this one have been found in favour of the accused. This legal structure has the effect of elucidating the confused bases on which manslaughter conviction can rest, with particular clarity. In *Liyanage* the manslaughter conviction can be seen to have written the IPV Ms Liyanage suffered – and would, as the court accepted, have continued to suffer had she not killed her husband – out of the picture.

We are reluctant to configure women’s resistance to IPV as self-defence – as lawful conduct. Instead we label it provoked, excessive or, paradoxically, lacking in intent. These labels reflect a fear that, in a society where this form of violence that is embedded in everyday life is common, we do not have the capacity to recognise when it is really “serious enough” for us to label it lethal force in self-defence. Manslaughter convictions are an avoidance of this task, and also reflect an impulse for sympathy; they acknowledge the pain suffered by victims and the

94 Ibid [31].

95 Ibid [29].

96 And with respect to sentencing, it provides the basis for a sentence ‘very much lower than is usually imposed for offences of this type’ at [29], [35].

abominations enacted by perpetrators, and are an exoneration from the worst of criminality. But sympathy is not justice and we have a considerable way to go in construing the law of homicide so that it justly recognises the forms of violence some people encounter – and the forms of resistance they act out. The difference between resistance to IPV characterised as self-defence, and as provoked, excessive or lacking in intent is often not a contest between different versions of “the facts”. Often, as in *Liyanage*, versions of “what happened” do not differ all that widely. The difference is in how we perceive and understand what happened. In a context in which between 30 and 40 Australian women are killed each year by their husband or former husband how is it that so few defend themselves? When a woman is charged with the murder of her violent husband we employ a frame of reference for assessing her guilt that is entirely different from the frame of reference we employ to understand what has happened when we hear that another woman has been killed. That is, in a woman’s trial for murder of her controlling and violent husband, those dead women are not, as it were, ‘in the room’. But they should be if we are to gain a capacity to recognise lethal self-defence in marriage. More work needs to be done to shift our imaginative frames because by reference to those which currently constrain our concepts of “reason” – the paradigm, “fight” - women who are victims of very severe IPV do not have a right of self-defence until they cannot use it. Those who in fact defend themselves are, with very few exceptions, offered a compromise conviction of manslaughter.