

# Chapter 6

## Domestic Violence and Homicide

### CONTENTS

- 263 Homicide and Domestic Violence
- 265 Nature and Dynamics of Domestic Violence
- 271 Defences and Domestic Violence
- 285 Should There Be a Separate Defence?
- 290 How Will the Commission's Reforms Apply?

# Chapter 6

## Contents

### **Homicide and Domestic Violence**

<b>Terminology</b>	263
--------------------	-----

### **Nature and Dynamics of Domestic Violence**

<b>Domestic violence is multi-faceted and constant</b>	265
--	-----

Domestic violence can take many different forms	266
---	-----

<b>The 'constant' nature of abuse</b>	266
---------------------------------------	-----

<b>The victim of domestic violence is captive</b>	267
---	-----

Why doesn't she leave?	267
------------------------	-----

<b>The hidden nature of domestic violence</b>	269
---	-----

<b>Domestic violence in aboriginal families</b>	269
---	-----

### **Defences and Domestic Violence**

<b>Self-defence</b>	271
---------------------	-----

Problems with the Code test in the domestic violence context	272
--	-----

Problems with the 'general concept' of self-defence	273
---	-----

Lack of understanding about domestic violence in the legal system	275
---	-----

<b>Provocation</b>	276
--------------------	-----

When the victim of the previous violence is killed	276
--	-----

When the perpetrator of the previous violence is killed	278
---	-----

<b>Lack of intention to kill or do grievous bodily harm</b>	280
---	-----

Intoxication	281
--------------	-----

Nature of the act causing death	281
---------------------------------	-----

Emotional turmoil	281
-------------------	-----

<b>A de facto defence of domestic violence?</b>	282
---	-----

<b>Diminished responsibility</b>	282
----------------------------------	-----

When men rely on diminished responsibility	282
--	-----

When women rely on diminished responsibility	283
--	-----

<b>The prevalence of guilty pleas</b>	283
---------------------------------------	-----

### **Should There Be a Separate Defence?**

<b>Battered women's syndrome</b>	285
----------------------------------	-----

Battered women's syndrome in the courts	285
---	-----

Problems with battered women's syndrome	286
---	-----

<b>Is a separate defence necessary?</b>	287
---	-----

### **How Will the Commission's Reforms Apply?**

<b>Self-defence</b>	290
---------------------	-----

Directions by the trial judge	291
-------------------------------	-----

<b>Evidence</b>	291
-----------------	-----

Evidence about reasonableness	292
-------------------------------	-----

<b>Excessive self-defence</b>	294
-------------------------------	-----

<b>Conclusion</b>	294
-------------------	-----

# Homicide and Domestic Violence

In Western Australia approximately one quarter of all homicides involve intimate partners.<sup>1</sup> In many cases there is a history of violence in the relationship.<sup>2</sup> Domestic violence is therefore an important context for homicide in Western Australia.<sup>3</sup> For this reason, the Commission has considered the impact of its reforms on homicide committed in the context of domestic violence.

In the majority of domestic homicides the woman has been the victim of previous violence.<sup>4</sup> Research shows that when men kill women it is often the final episode in a pattern of violence.<sup>5</sup> By contrast, in many cases where women have killed their partners there has been a history of abuse by the victim.<sup>6</sup> This demonstrates that women who kill and women who are killed often share an important history: they are victims of domestic violence. This is a crucial point to understand before embarking on reform of the law of homicide. The Commission has therefore examined the nature and dynamics of domestic violence and the way that the legal system treats men and women who kill in the context of a violent relationship.

## TERMINOLOGY

In this Report the Commission has used 'intimate partner' to refer to people who are married, separated, divorced or de facto.<sup>7</sup> Much of the research on domestic violence (and many of the submissions) identifies women as the victims of domestic violence and men as the perpetrators. Where necessary, the Commission has referred to men and women in these stereotypical roles; this avoids confusion where it might not be clear whether the 'victim' being referred to is the victim of the domestic violence or of the homicide. It also reflects the fact that domestic violence is overwhelmingly directed at women by men<sup>8</sup> and that research findings consistently show that three-quarters of intimate partner homicides in Australia involve male offenders and female victims.<sup>9</sup> However, the Commission acknowledges that domestic violence—and domestic homicide—does not always occur in that way.<sup>10</sup>

The Commission also notes that some of the submissions and commentary on this topic refer to 'family and domestic violence'.<sup>11</sup> The term 'family violence' explicitly recognises that children and other family members may be subject to violence within the home. In some circumstances, this

1. Davies M & Mouzos J, *Homicide in Australia: 2005–2006 National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2007). In 2004–2005 the figure was 36 per cent: Mouzos J, *Homicide in Australia: 2004–2005 National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2006).
2. A history of domestic violence was recorded in 65 per cent of intimate partner homicides that occurred in Australia in 2005–2006: Davies & Mouzos, ibid 25. See also Mouzos J, *Homicidal Encounters: A Study of Homicide in Australia 1989–1999* (Canberra: Australian Institute of Criminology, 2000) 64–69, 115–31; Mouzos M & Rushforth C, *Family Homicide in Australia* (Canberra: Australian Institute of Criminology, 2003) 3; Ferrante A, Morgan F, Indermaur D & Harding R, *Measuring the Extent of Domestic Violence* (Sydney: Hawkins Press, 1996) 3.
3. The Commission has observed that, in order to decide if the homicide laws in Western Australia need to be reformed, it is necessary to understand the context in which homicides take place: see Chapter 1, 'The Social Context of Homicide'.
4. Mouzos J, *Homicidal Encounters: A study of homicide in Australia 1989–1999* (Canberra: Australian Institute of Criminology, 2000) 173–74. The motive was 'domestic' in 58 per cent of cases of female homicide in Western Australia in 2005–2006 (domestic is defined to include 'jealousy, desertion/termination of relationship and other domestic altercation'): Davies M & Mouzos J, *Homicide in Australia: 2005–2006 National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2007) 17.
5. Mouzos, ibid. These statistics are limited by the fact that domestic violence is under-reported. In addition, where the victim of previous violence has been killed, there is often no reason for the history of abuse to be revealed. The Australian Bureau of Statistics (ABS) reported in 1996 that 23 per cent of women who have ever been married or in a de facto relationship stated that they had experienced violence by a partner at some time during the relationship; however, only 20.2 per cent of women who had experienced a physical assault by a man in their lifetime (defined as over 15 years old) had reported the incident to the police: ABS, *Women's Safety in Australia* (December, 1996) 28, 32, 50. See also ABS, *Crime and Safety 2005* (2006) 14.
6. In the study conducted by Tarrant in Western Australia of 13 women who had killed (or attempted to kill) their partners, 10 had previously been assaulted by their partner, at least six of them very seriously, and over a long time: Tarrant S, 'Something is Pushing Them to the Side of Their Own Lives: A feminist critique of law and laws' (1990) *University of Western Australia Law Review* 573, 586–87. These figures are reflected in studies from elsewhere in Australia. For example, Wallace A, *Homicide: The social reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986); Esteal P, *Killing the Beloved: Homicide between adult sexual intimates* (Canberra: Australian Institute of Criminology, 1993) 130–45.
7. The expression 'intimate partner' homicide is used by the National Homicide Monitoring Program (NHMP).
8. Ferrante A, Morgan F, Indermaur D & Harding R, *Measuring the Extent of Domestic Violence* (Sydney: Hawkins Press, 1996) 29, 30. This was noted in submissions: Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 13; Women's Law Centre, Submission No. 49 (7 August 2006) 1.
9. Mouzos J, *Homicidal Encounters: A study of homicide in Australia 1989–1999* (Canberra: Australian Institute of Criminology, 2000) 115.
10. Ferrante et al record that of the 1,253 cases of spousal violence reported to police in 1994, females were the victims in 1,145 cases and males in 108 cases. The authors noted that, while females were more likely to be reported victims of domestic violence, males who were the victims were significantly more likely to suffer serious injury than the females: Ferrante A, Morgan F, Indermaur D & Harding R, *Measuring the Extent of Domestic Violence* (Sydney: Hawkins Press, 1996) 29, 20. For further discussion of male victims of domestic violence see: Preston T, *The Men's Project: Exploring responses to men who are victims or perpetrators of family and domestic violence* (Perth: Department for Community Development, 2006) 31–32.
11. The term 'family violence' is often used in respect of violence within Aboriginal communities: see Law Reform Commission of Western Australia (LRCWA), *Aboriginal Customary Laws*, Discussion Paper (2005) 349.

violence can lead to homicide – either of the perpetrator or the victim.<sup>12</sup> However, these cases are much less common than homicides between intimate partners.<sup>13</sup>

In this Report the Commission uses the expressions 'domestic violence' and 'intimate partner' principally because the research and writing in this area focuses on marital and de facto relationships. Nonetheless, the reforms proposed in this Report are not intended to exclude other family relationships. The recommendations are intended to apply to *all* victims of domestic violence, including men,<sup>14</sup> children<sup>15</sup> and people in same-sex relationships.<sup>16</sup> For that

reason, the Commission recommends that any reform to the law of homicide should be gender neutral.<sup>17</sup>

#### **Recommendation 40**

##### **Use of gender-neutral terms**

That any reform to the law of homicide in Western Australia be expressed in gender-neutral terms.<sup>18</sup>

- 
- 12. For a discussion of the link between domestic violence and filicide in Western Australia, see Harris Johnson C, *Come With Daddy: Child murder-suicide after family breakdown* (Perth: University of Western Australia Press, 2005) 35–43.
  - 13. During the period 1989–1990 to 2001–2002: 60 per cent of family homicides involved intimate partners; 17 per cent involved parents killing children; nine per cent involved children killing parents; five per cent involved killing by a sibling and nine per cent involved other family members (cousins, in-laws etc): Mouzos J & Rushforth C, *Family Homicide in Australia* (Canberra: Australian Institute of Criminology, 2003) 2.
  - 14. The fact that men can also be victims of domestic violence was noted in submissions: Carolyn Harris Johnson, Submission No. 27 (15 June 2006); Women's Law Centre, Submission No. 49 (7 August 2006) 1.
  - 15. A study by the Australian Institute of Criminology recorded that the most common motive for parent killing was a domestic argument (49%) and that revenge killings (in response to previous abuse) were much less (9%). However, a motive was not determined in 30 per cent of cases: Mouzos J & Rushforth C, *Family Homicide in Australia* (Canberra: Australian Institute of Criminology, 2003) 4. Research in the United States has shown that in the overwhelming majority of homicides involving the killing of a parent by a child, there is a history of prior physical and/or sexual abuse: Mone P, *When a Child Kills: Abused children who kill their parents* (New York: Simon & Schuster, 1991) 21–47.
  - 16. Research shows that people in same-sex relationships experience domestic violence at a similar rate to women in heterosexual relationships. This was noted in submissions: The Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 13; Women's Law Centre, Submission No. 49 (7 August 2006) 1. For a detailed examination of this topic in Western Australia, see Vickers L, 'The Second Closet: Domestic violence in gay and lesbian relationships: A Western Australian study' (1996) 3(4) *Murdoch University Electronic Journal of Law*, 37.
  - 17. For further discussion see Introduction, 'Guiding Principles for Reform: Principle Seven'.
  - 18. The Women's Law Centre proposed this recommendation in its submission: Women's Law Centre, Submission No. 49 (7 August 2006) Recommendation 1. This recommendation received some support: Domestic Violence Legal Unit, Legal Aid (WA), Submission No. 50 (6 August 2006) 2. Harris Johnson also expressed the view that any reform to this area of the law of homicide should be in broad terms and available to men and children, as well as women: Carolyn Harris Johnson, Submission No. 27 (15 June 2006). Eric Turner and the Men's Confraternity urged the Commission not to recommend laws that discriminate on the basis of gender: The Men's Confraternity Incorporated, Submission No. 20 (12 June 2006); Eric Turner, Submission No. 36 (13 June 2006).

# Nature and Dynamics of Domestic Violence

An appreciation of the nature and dynamics of domestic violence is necessary in order to understand domestic homicide.<sup>1</sup> The community's knowledge of domestic violence has increased over the past 30 years.<sup>2</sup> A 1988 study conducted by the Office of the Status of Women found that one in three people considered that domestic violence was a private matter to be handled within the family; two in three people thought that women could always leave a violent relationship;<sup>3</sup> and one in five condoned the use of force by a man against his wife.<sup>4</sup> A similar survey in 1995 found that the community's understanding of domestic violence had improved. It was observed that the community understood that domestic violence is a criminal (not private) matter.<sup>5</sup> However, the survey noted that 'the community continues to be judgemental of women who experience domestic violence and does not want to get involved'.<sup>6</sup> In 2000 a further survey revealed that the respondents had a good understanding of domestic violence; however, it was noted that although participants recognised that domestic violence includes non-physical abuse, physical violence was the focus of discussions.<sup>7</sup>

Questions remain about how this increased knowledge about domestic violence impacts on the assessment of domestic violence in the context of a homicide trial.<sup>8</sup> In particular, whether the danger faced by victims of domestic violence is properly appreciated by jurors, judges, lawyers

and others in the legal system.<sup>9</sup> If the danger faced by such victims, and the effects of living with long-term abuse, are not properly understood within the legal system it is difficult for that system to deal with domestic homicide.<sup>10</sup> This is the case whether it is the victim or the perpetrator who is killed.

The Commission was assisted by an opinion commissioned from Western Australian academic Stella Tarrant.<sup>11</sup> Tarrant identified three key features of domestic violence that the community and the legal system need to better understand. An appreciation of these features of domestic violence can dispel misconceptions and enable the domestic violence context for homicide to be properly taken into account in the legal system. These features are:

- that domestic violence is multi-faceted and constant;
- that the victim is captive; and
- that domestic violence is hidden.<sup>12</sup>

The extent and seriousness of domestic violence in society makes a better appreciation of these points crucial to the process of reform.<sup>13</sup> Each of them is discussed below.

## DOMESTIC VIOLENCE IS MULTI-FACETED AND CONSTANT

The Western Australian Family and Domestic Violence State Strategic Plan defines domestic violence as:

1. Tarrant S, *Women Who Kill their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 8.
2. Ferrante et al observed that since International Women's Year in 1975 much more attention has been placed on domestic violence by the media, law enforcement agencies and the general public, and there has been demand for prevention and control of this problem: Ferrante A, Morgan F, Indermaur D & Harding R, *Measuring the Extent of Domestic Violence* (Sydney: Hawkins Press, 1996) 1.
3. Office of the Status of Women, *Community Attitudes Towards Domestic Violence in Australia* (1988) 3.
4. Ibid 4.
5. Office of the Status of Women, Department of the Prime Minister and Cabinet, *Community Attitudes to Violence Against Women*, Executive Summary (1995) 12.
6. Ibid.
7. Office of the Status of Women, *Partnerships Against Domestic Violence, Attitudes to Domestic Violence and Family Violence in the Diverse Australian Community* (2000) 17, 18.
8. Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 289. Bradfield noted that there has been little Australian research about the community's knowledge of domestic violence in the context of a woman killing her partner: at 290. One exception is the study conducted by Reddy et al in 1997 which found that the respondents did not believe that women were responsible for violence or that the 'victim of domestic violence could extricate herself from the situation if she were a real victim': Reddy P, Knowles A, Mulvany J, McMahon M & Freckleton I, 'Attributions About Domestic Violence: A Study of Community Attitudes' (1997) 4 *Psychiatry, Psychology and Law* 125, 144. However, Bradfield observes that the examples in that study provided a stereotyped or 'Cinderella type' character as the victim; they did not explore the complexities of race, ethnicity and attitudes towards women who use drugs and alcohol or women who are not passive: at 289–91.
9. Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 15. See also: Chief Justice of the Supreme Court of Western Australia's Taskforce, *Report on Gender-Bias* (1994) 133–34, 159; Rathus Z, *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) 1.
10. Office for Women's Policy, Submission No. 44 (17 July 2006).
11. Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006). Tarrant conducted a study of all the women prosecuted in Western Australia for the murder (or attempted murder) of their partners between 1983 and 1988: see Tarrant S, 'Something is Pushing Them to the Side of Their Own Lives: A feminist critique of law and laws' (1990) *University of Western Australia Law Review* 573, 587.
12. Tarrant, 'Something is Pushing Them to the Side of Their Own Lives', ibid 8.
13. Mouzos explains that '[c]ontrary to media portrayals of intimate homicide that it is a sudden spontaneous act of extreme violence, research indicates that a majority of incidents occur in the context of a previous, usually escalating, history of abuse': Mouzos J, *Homicidal Encounters: A study of homicide in Australia 1989–1999* (Canberra: Australian Institute of Criminology, 2000) 118.

[B]ehaviour which results in physical, sexual and/or psychological damage, forced social isolation, economic deprivation, or behaviour which causes the victim to live in fear.<sup>14</sup>

This definition emphasises that domestic violence can take a variety of forms, all of which cause the victim to be fearful.<sup>15</sup> It is the fear of future violence that makes the abuse constant.

### **Domestic violence can take many different forms**

The key characteristic of domestic violence is that one 'person in a relationship maintains power and control over the other person'.<sup>16</sup> Power and control can be attained in a variety of ways. Accounts of specific physical acts of violence include punching, kicking, hitting with objects, poking in the eyes, strangling, being dragged by the hair, being shot at, killing of pets, threatening with guns and knives, forced vaginal and anal sex, and physical and sexual abuse of children.<sup>17</sup> A number of submissions emphasised the importance of recognising that domestic violence includes sexual assault: 'frequent, unwanted, forced and painful sexual activity that forced the woman to feel that she had no control even over her own body'.<sup>18</sup>

Control can also be attained by non-physical means. Submissions described psychological abuse, which can be 'more damaging than hits and punches because [it] communicates worthlessness'.<sup>19</sup> Examples of non-physical abuse include financial control, surveillance of activities,

forbidding contact with family, behaving in an anti-social or humiliating way in front of the victim's family and friends, threats to take children away, and insults and degrading comments.<sup>20</sup>

### **THE 'CONSTANT' NATURE OF ABUSE**

Domestic violence is said to be constant because of the ever-present fear and stress it instils in the victim.<sup>21</sup> Fear is used in abusive relationships to control the victim.<sup>22</sup> Submissions described fear in the following way: 'fear is heightened ... because of familiarity [with] the abuser and understanding that almost anything could trigger another violent cycle'.<sup>23</sup> The fact that fear can be a form of constant abuse was recognised recently by a judge of the Queensland Supreme Court:

To live in an atmosphere where there is a constant threat of violence, you might think, is a very hard thing and must be very emotionally wearing. And, of course, after a while it becomes a case where not only is there physical violence, but the mere endurance of the threat also becomes a form of psychological violence as well.<sup>24</sup>

Tarrant stressed the importance of recognising that domestic violence is not a series of discrete physical assaults with neutrality and freedom in between.<sup>25</sup> An appreciation of the constant nature of domestic violence enables a better understanding of one of the least understood aspects of domestic violence: that the victim may be captive.

- 
- 14. Family and Domestic Violence Unit (FDVU), *Western Australian Family and Domestic Violence State Strategic Plan 2004–2008* (Perth: Department for Community Development, 2004) 5.
  - 15. The variety of forms domestic violence can take is reflected in the definition of family and domestic violence in s 6 of the *Restraining Orders Act 1997* (WA).
  - 16. Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 2.
  - 17. These examples have been taken from the Commission's examination of Western Australian cases and from Tarrant's research. See Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 9.
  - 18. Joy & Neil Moore, Submission No. 5 (6 June 2006); G Davis, Submission No. 6 (6 June 2006); Doris Schutt, Submission No. 7 (8 June 2006); Donalee Heseltine, Submission No. 8 (8 June 2006); Julia Lacey, Submission No. 10 (8 June 2006); Mrs R Leckie, Submission No. 11 (8 June 2006); Elaine Bassile, Submission No. 13 (11 June 2006). This issue was also addressed by: E D'Olia, Submission No. 12 (12 June 2006); Fiona Aitken, Submission No. 17 (12 June 2006).
  - 19. Ibid. Violence in homosexual relationships can include forms of abuse specific to those relationships including 'outing' or threatening to 'out' and telling a partner that he or she deserves the abuse, or will not be helped, because of his or her homosexuality: Vickers L, 'The Second Closet: Domestic violence in gay and lesbian relationships: A Western Australian study' (1996) 3(4) *Murdoch University Electronic Journal of Law* 37 [10].
  - 20. Victorian Law Reform Commission (VLRC), *Defences to Homicide: Final Report* (2004) 164; Mouzos J & Makkai T, *Women's Experience of Male Violence: Findings from the Australian component of the international violence against women survey* (Canberra: Australian Institute of Criminology, 2004) 47.
  - 21. Leader-Elliott described the constant nature of the violence in the relationship between his mother and his step-father as terrorism: 'the essence of terrorism was to be found in the unpredictability of the attack': Leader-Elliott I, 'Battered But Not Beaten: Women who kill in self defence' (1993) 15 *Sydney Law Review* 403, 430, also 443–44.
  - 22. VLRC, *Defences to Homicide: Final Report* (2004) 162.
  - 23. Joy & Neil Moore, Submission No. 5 (6 June 2006); G Davis, Submission No. 6 (6 June 2006); Doris Schutt, Submission No. 7 (8 June 2006); Donalee Heseltine, Submission No. 8 (8 June 2006); Julia Lacey, Submission No. 10 (8 June 2006); R Leckie, Submission No. 11 (8 June 2006); Elaine Bassile, Submission No. 13 (11 June 2006); Fiona Aitken, Submission 17 (12 June 2006).
  - 24. Stjernquist (Unreported, Cairns Criminal Court, Derrington J, 30 March 1992), as cited in Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 276.
  - 25. Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 21. This was also noted by the Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 3.

### THE VICTIM OF DOMESTIC VIOLENCE IS CAPTIVE

#### Why doesn't she leave?

A common response to domestic violence is to question why the victim doesn't leave the relationship.<sup>26</sup> The survey of community attitudes by the Office of the Status of Women in 1995 found that 77 per cent of respondents found it hard to understand why women stay with violent partners.<sup>27</sup> Lack of understanding of this aspect of domestic violence is the most significant barrier to a proper appreciation of domestic violence within the legal system. This was recognised by the Canadian Supreme Court in the landmark case of *Lavallee*:

The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called 'battered wife' syndrome. We need help to understand it.<sup>28</sup>

There are many reasons victims do not leave violent relationships: fear for their safety or the safety of others;<sup>29</sup> their children;<sup>30</sup> emotional attachment or love for their partner;<sup>31</sup> financial dependence;<sup>32</sup> isolation;<sup>33</sup> lack of assistance;<sup>34</sup> lack of faith in other people's ability to help;<sup>35</sup> shame and embarrassment;<sup>36</sup> lack of access to alternative housing;<sup>37</sup> and a hope that their partner's behaviour will change.<sup>38</sup> Research has shown that women experience domestic violence at the same rate regardless of their financial circumstances; however, women who are financially dependent and have children are far more likely to remain in abusive relationships.<sup>39</sup> It can be both difficult and dangerous for a woman to leave a violent relationship.

#### Leaving a violent relationship can be difficult

It can be difficult for a woman to leave a violent relationship. In many cases, the perpetrator of the violence does not want the relationship to end. The Western Australian Chief Justice's Taskforce on Gender-Bias found that such men 'are known for relentless pursuit of their victims and are resistant to court control'.<sup>40</sup> Further, there is often insufficient outside assistance to support women in these

26. This view was expressed in submissions: Festival of Light Australia, Submission No. 16 (12 June 2006); Eric Turner, Submission No. 36 (8 June 2006).
27. Office of the Status of Women, Department of Prime Minister and Cabinet, *Community Attitudes to Violence Against Women* (1995) 30. See also VLRC, *Defences to Homicide*, Final Report (2004) 163–65; Reddy P, Knowles A, Mulvany J, McMahon M & Freckleton I, 'Attributions about Domestic Violence: A study of community attitudes' (1997) 4 *Psychiatry, Psychology and Law* 125, 144.
28. *Lavallee* [1990] 1 SCR 852; 1990 CanLII 95 (SCC) (Wilson J) 14.
29. Harris Johnson's research shows that common reasons for not leaving a violent relationship are 'knowledge that they are incapable of physically overcoming the abuser in any altercation, and threats made by the perpetrator of the abuse, that should the person leave the relationship, their loved ones including pets and other family members, including children will be killed': Carolyn Harris Johnson, Submission No. 27 (15 June 2006).
30. See eg Stubbs J, 'Domestic Violence and Women's Safety: Feminist challenges to restorative justice' in Strang H & Braithwaite J (eds), *Restorative Justice and Family Violence* (Cambridge: Cambridge University Press, 2002) 42, 43–44, as cited in Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 8.
31. Seuffert N, 'Domestic Violence, Discourses of Romantic Love and Complex Personhood in the Law' (1999) *Melbourne University Law Review* 8; Leader-Elliott I, 'Battered But Not Beaten: Women who kill in self defence' (1993) 15 *Sydney Law Review* 403, 418; Lempert L, 'Women's Strategies for Survival: Developing Agency in Abusive Relationships' (1996) 11 *Journal of Family Violence* 269, 270.
32. Family and Domestic Violence Unit, *Western Australian Family and Domestic Violence State Strategic Plan 2004–2008* (2004) 5.
33. The Western Australian Family and Domestic Violence Unit notes that women in rural and remote areas are particularly vulnerable because of the absence of services to those areas, and the higher prevalence of firearms: ibid, 8. This was also noted in the submission from the Women's Council: Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 4.
34. The failure of the state to protect victims of domestic violence was noted in submissions: Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 2; Domestic Violence Legal Unit (Legal Aid WA), Submission No. 50 (6 August 2006) 3. This failure has also been the subject of a number of Western Australian reports: Ombudsman (Western Australia), *An investigation into the Police Response to Assault in the family home* (September 2003); Office of the Auditor General for Western Australia, *A Measure of Protection: Management and Effectiveness of Restraining Orders*, Report No. 5 (October 2002); Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into responses by government agencies to complaints of family violence and child abuse in Aboriginal communities* (July 2002).
35. Tarrant observes that this is a particular problem for some women in rural or close-knit communities where members of the community may be well known to each other. Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 13.
36. Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 11.
37. FDVU, *Western Australian Family and Domestic Violence State Strategic Plan 2004–2008* (Perth: Department for Community Development, 2004) 5.
38. Stubbs J & Tolmie J, 'Falling Short of a Challenge? A Comparative Assessment of the Australian Use of Expert Evidence of the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709, 740–41; Seuffert N, 'Domestic Violence, Discourses of Romantic Love, and Complex Personhood in the Law' (1999) 23 *Melbourne University Law Review* 8; Rathus Z, *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) 3.
39. D Russell, *Rape in Marriage* (revised edition, 1990) 170–71, as cited in Leader-Elliott I, 'Battered But Not Beaten: Women who kill in self defence' (1993) 15 *Sydney Law Review* 403, 417. Wallace found that the victims of domestic homicide are most often women who do not have the financial means to escape: see Wallace A, *Homicide: The social reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986) 88–90.
40. Chief Justice of the Supreme Court of Western Australia's Taskforce, *Report on Gender-Bias* (30 June 1994) 162. The 2005–06 NHMP annual report reveals that there were 10 homicides in that year where there was a current or expired legal intervention order between the accused and the deceased: Davies M & Mouzos J, *Homicide in Australia 2005–2006: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2007) 23.

circumstances.<sup>41</sup> The submission from the Domestic Violence Unit of Legal Aid described the failure of the legal system to adequately respond to domestic violence, stating: 'it is difficult for victims of domestic violence to leave a relationship and if they do, the formal response is often embarrassingly poor'.<sup>42</sup> The effect of these difficulties can also be seen in the number of women who leave, and then reconcile with violent partners. Rathus has noted that:

In many cases the women actually separate from their abusive partners on a number of occasions but later reconcile – usually as a result of a combination of threats, promises and hope. This happens partly because of the general failure of the legal and welfare systems to properly support victims of domestic violence. Unsympathetic or unhelpful responses from agencies such as the Police service, welfare services, lawyers and the court system are all common experiences for victims of domestic violence. Such women are usually suffering from low self-esteem, and the point of separation is a time of increased vulnerability for them as they endeavour to build a new life often with few resources. The fear of pursuit and attack by their abuser can be overwhelming.<sup>43</sup>

In her submission, Justice Wheeler recounted discussions with experienced police officers who expressed frustration at their inability to protect victims of domestic violence, particularly in circumstances when the victim and offender had separated:

They expressed the view ... that unless there were sufficient police resources to assign an officer to follow either the victim or the perpetrator around 24 hours a day for very many years, further serious violence was inevitable, and death probable.<sup>44</sup>

41. The Chief Justice's taskforce described the difficulties that such women face in dealing with the violence by peaceful means such as getting out or calling the police. They noted that '[r]ecent studies in New South Wales and similar complaints in Western Australia, reveal that victims of domestic violence still face significant practical and procedural problems in getting effective protection from the police and through the criminal justice system'. The report made a number of recommendations designed to overcome these problems, many of which have been implemented in recent years. Chief Justice of the Supreme Court of Western Australia's Taskforce, *ibid* 210. Nonetheless the Commission noted in its review of cases that in a number of matters where women had killed their violent partners that submissions were made to the court about the failure of the legal system to protect the woman from the previous violence.
42. It is noted that '[a]ctual cases of poor responses abound. Our Unit sees such examples on a weekly, if not daily, basis': Domestic Violence Legal Unit, Legal Aid (WA), Submission No. 50 (6 August 2006) 3. This was also noted by the Women's Council: The Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 11.
43. 'Rathus Z, *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) 4. Zoe Rathus, who has represented women in domestic violence situations for 25 years, was the Director of Women's Legal Services in Brisbane for 15 years and Deputy Chair of the Taskforce on Women and Criminal Code.
44. Justice Christine Wheeler, Supreme Court of Western Australia, Submission No. 43 (23 June 2006) 3.
45. Office for Women's Policy, Submission No. 44 (17 July 2006).
46. One quarter of the intimate partner homicides in Australia occur between separated, former or divorced couples (with women victims in 84 per cent of cases): Mouzos J & Rushforth C, *Family Homicide in Australia* (Canberra: Australian Institute of Criminology, 2003) 2. In Western Australia, Ferrante et al found that divorced or separated women are most at risk of domestic violence: Ferrante A, Morgan F, Indermaur D & Harding R, *Measuring the Extent of Domestic Violence* (Sydney: Hawkins Press, 1996) 67. On the link between loss of control, separation and domestic homicide, see also Esteal P, *Killing the Beloved: Homicide between adult sexual intimates* (Canberra: Australian Institute of Criminology, 1993) 85–87; Cohen J, 'Regimes of Private Tyranny: What do they mean for morality and the criminal law?' (1996) 57 *University of Pittsburgh Law Review* 757, 777–78.
47. Rathus Z, *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) 3.
48. Wallace A, *Homicide: The social reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986) 83, 89.
49. Justice Christine Wheeler, Supreme Court of Western Australia, Submission No. 43 (23 June 2006) 3. Wheeler J further stated 'the reality is that, in a very large number of cases involving prolonged domestic violence, a woman's perception that she has a choice either to remain in a violent relationship, where she will be frequently assaulted and at risk of being killed, or that she can attempt to leave and in so doing will almost certainly be killed, is entirely in accordance with reality.'

The Office for Women's Policy asserted that 'the practical limits to which the law can protect an individual from another needs to be recognised'.<sup>45</sup>

### **Leaving a violent relationship can be dangerous**

It must be acknowledged that a victim seeking to leave a violent relationship faces real danger. Violence and attempts to control often increase if the victim threatens or tries to leave.<sup>46</sup> Rathus observes that it is

crucial to remember that she cannot and should not believe that leaving will bring an end to the violence ... It is clear that when women say that they are too terrified to leave their relationship they may be very accurately assessing their own risk.<sup>47</sup>

A New South Wales study of homicides between 1968 and 1981 found that 46 per cent of intimate partner homicides occurred at a time when the women had left or were in the process of leaving their partners.<sup>48</sup> In her submission Justice Wheeler puts women's failure to leave violent relationships into this context:

The reality that confronts women who are subject to domestic violence is frequently brought home to judges of this court who preside over wilful murder trials, in which, in a depressing number of cases, the victim is a woman who has been killed by her husband or de facto, very often in circumstances in which she is seeking to assert herself and to separate from him, or to continue to live separately from him.<sup>49</sup>

In order to understand the fear experienced by women seeking to leave a violent relationship it is necessary to

recognise that many women who do leave such relationships are killed.

## THE HIDDEN NATURE OF DOMESTIC VIOLENCE

The hidden nature of domestic violence is a key difference between domestic violence and other forms of violence. Domestic violence occurs within the home and so is rarely observed by people outside the family. Furthermore, less than 20 per cent of women who have experienced violence report it to authorities.<sup>50</sup> It has been noted that '[b]oth the victims/survivors and perpetrators conceal it – victims/survivors because of their sense of shame and embarrassment, perpetrators, through denial and probably their own sense of shame and fear of public exposure'.<sup>51</sup>

Victims often deny that domestic violence has occurred.<sup>52</sup> This can mean that it is difficult for a history of domestic violence to be properly considered in a court hearing.<sup>53</sup> It has also been observed that some lawyers do not appreciate the importance of a history of violence (or do not believe that it can be used to establish a defence) and therefore do not seek detailed instructions about the violence.<sup>54</sup> The hidden nature of domestic violence can, therefore, have important ramifications in the homicide

context. Where a woman has been killed it may not be known that she had been a victim of domestic violence. Where a woman kills, the extent to which she has discussed the previous violence may impact significantly on her ability to defend herself at trial.<sup>55</sup>

## DOMESTIC VIOLENCE IN ABORIGINAL FAMILIES

Domestic (or family) violence is frequently the context in which homicides occur in Aboriginal communities.<sup>56</sup> Although Aboriginal people make up just over two per cent of Australia's population, they account for nearly 25 per cent of intimate partner homicides (as both offender and victim).<sup>57</sup> This reflects the very high rate of violence in Aboriginal communities. Aboriginal women are 45 times more likely to be the victims of domestic violence than non-Aboriginal women.<sup>58</sup> Aboriginal women also suffer more serious non-lethal violence: they are many times more likely to be admitted to hospital than non-Aboriginal victims of domestic violence.<sup>59</sup>

There are several aspects of violence in Aboriginal families that set it apart.<sup>60</sup> First, it must be noted that Aboriginal women find it more difficult to find and access assistance from authorities.<sup>61</sup> Second, in Aboriginal families, domestic

50. Australian Bureau of Statistics (ABS), *Women's Safety in Australia* (December 1996) 28, 32, 50. See also ABS, *Crime and Safety 2005* (2006) 14; Office for Women, Department of the Premier and Cabinet, *Report of the Taskforce on Violence Against Women and the Criminal Code* (Brisbane, 2000) Ch 1; Chief Justice of the Supreme Court of Western Australia's Taskforce, *Report on Gender-Bias* (30 June 1994) 132.
51. Rathus Z, *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) 2.
52. VLRC, *Defences to Homicide*, Final Report (2004) 167–68, 'Myth 6' and 'Myth 7'.
53. Carolyn Harris Johnson, Submission No. 27 (15 June 2006); Robyn Westgate, Submission No. 22 (12 June 2006) 1–2; Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 15; Bradfield R, 'Is Near Enough Good Enough? Why Isn't Self-Defence Appropriate for the Battered Woman?' (1998) 5 *Psychiatry, Psychology and Law* 71, 72.
54. Rathus Z, *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) 6. See also Ross S, 'Battered Wife Syndrome and the Role of Lawyers' (Nov 1998) *Law Institute Journal* 39.
55. An example is the case of *Kina* (Queensland Court of Appeal, 29 November 1993). Kina killed her de facto partner and was convicted of his murder after a trial that lasted less than one day. She appealed, and was unsuccessful. Although Kina had been subjected to extreme violence by her partner (including repeated vaginal and anal rape and forced intercourse with his workmates) she did not communicate the full history of the relationship to her lawyer. Therefore, the extent of the violence was not presented to the court in her defence. After she had served six years' imprisonment Kina's case was reviewed upon a petition of mercy and her conviction quashed. The Court of Appeal found that a miscarriage of justice had occurred because of the difficulties in communication between the accused and her lawyers (based on cultural and psychological differences). See Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 289.
56. The FDVU notes that Aboriginal people prefer the term 'family violence' because 'it describes a matrix of harmful, violent and aggressive behaviour'. However, they caution that 'the use of this term should not obscure the fact that Indigenous women and children bear the brunt of family violence': FDVU, *Western Australian Family and Domestic Violence State Strategic Plan 2004–2008* (Perth: Department for Community Development, 2004) 5.
57. FDVU, ibid 3, citing Mouzos J & Rushforth C, *Family Homicide in Australia* (Canberra: Australian Institute of Criminology, 2003).
58. Ferrante A, Morgan F, Indermaur D & Harding R, *Measuring the Extent of Domestic Violence* (Sydney: Hawkins Press, 1996) 34. This problem is amplified in regional areas. See also LRCWA, *Aboriginal Customary Laws*, Discussion Paper (December 2005) 349; Department of Indigenous Affairs, *Overcoming Indigenous Disadvantage in Western Australia* (Perth, 2005) 79–80.
59. Gavin A & Gillam C, *Hospital Admissions Due to Intimate Partner Violence in Western Australia 1994–2003* (Perth, 2005), as cited in Department for Community Development, Submission No. 42 (7 July 2006) 2.
60. The Commission examined the issue of Aboriginal family violence in detail in its recent report on Aboriginal customary law. See LRCWA, *Aboriginal Customary Laws*, Discussion Paper (December 2005) 349–62; LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 18–30; 283–98.
61. The Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 4. See also FDVU, *Western Australian Family and Domestic Violence State Strategic Plan 2004–2008* (Perth: Department for Community Development, 2004) 6; Chief Justice of the Supreme Court of Western Australia's Taskforce, *Report on Gender-Bias* (30 June 1994) 112–29, 176.

violence is often more likely to be carried out in public.<sup>62</sup> The Commission's review of domestic homicide files undertaken as part of this reference<sup>63</sup> showed that because of the public nature of the violence it had more often come to the attention of people outside the family, including police and welfare authorities. It was less difficult for Aboriginal women to satisfy the court that they had previously been victims of violence than non-Aboriginal women, because there was more often a record of the history of violence (for example, police and hospital records.)

It was also apparent from the files that Aboriginal women were less likely to be passive in their relationships. So that

while it was recognised that Aboriginal women were the victims of domestic violence, the violence that they retaliated with meant that they were often described as 'also violent' or 'gave as good as she got'. Although some Aboriginal women who had killed their partners had been violent to the deceased, they had also invariably been the victims of very serious violence committed by the deceased. The fact that some Aboriginal women respond on occasion with violence must not be allowed to mask the reality that Aboriginal women are subjected to appalling levels of violence in their communities, and that the violence is typically directed at women and children by men.

62. Office of Women's Policy, Indigenous Women's Congress, Submission No. 41 (12 July 2006).

63. The Commission reviewed all files located by the Office of the Director of Public Prosecutions for Western Australia (DPP) in which a woman was charged with wilful murder, murder, manslaughter or attempted murder between January 2000 and June 2007. The Commission then identified and examined the files of the women who had killed their intimate partners (where there was evidence of a history of domestic violence).

# Defences and Domestic Violence

There is a substantial amount of empirical research on how intimate partner homicides occur in Australia;<sup>1</sup> however, there is less information available about how these incidents are dealt with by the courts.<sup>2</sup> In Western Australia the most significant study of intimate partner homicide is that conducted by Tarrant.<sup>3</sup> In order to supplement that research the Commission examined reported and unreported decisions of Western Australian courts dealing with homicide in the context of domestic violence. It also reviewed case files at the Office of the Director of Public Prosecutions (DPP) in which a woman had killed her intimate partner and there was a noted history of domestic violence.<sup>4</sup> In this chapter, the Commission sets out its observations on the way that the present defences operate in the context of domestic violence homicides. The Commission then explains how its proposed regime will better provide for that context to be taken into account by the courts.

## SELF-DEFENCE

Self-defence is rarely relied upon by accused who commit domestic homicide. The Commission is only aware of one case in Western Australia in which a man has attempted to rely on self-defence at his trial for killing his intimate partner: he was not successful.<sup>5</sup> It is not surprising that

men seldom seek to rely on self-defence in domestic homicide given that domestic violence is frequently the backdrop to such homicides, and that men are generally the perpetrators of that violence. However, it is notable that women also rarely rely on self-defence in domestic homicide. The Commission's review of files at the DPP revealed three cases in which women who killed their intimate partners relied on self-defence: only one was acquitted. This observation is consistent with Tarrant's findings,<sup>6</sup> Bradfield's research<sup>7</sup> and other Australian studies on this issue.<sup>8</sup>

There are several barriers to women successfully relying on self-defence when they kill their intimate partners. They are:

- the test for self-defence in the *Criminal Code* (WA) (the Code) reflects male, not female, behaviour;<sup>9</sup>
- the application of the test for self-defence is affected by assumptions about the kinds of circumstances where lethal force is justified;<sup>10</sup> and
- the violence that is the context for the homicide may not be well understood and therefore may not be properly taken into consideration when women are dealt with by the legal system.

1. In 1990 the National Homicide Monitoring Project (NHMP) was established at the Australian Institute of Criminology. This project records data about each homicide that has occurred in Australia since 1989 from police forces throughout Australia. This data has since provided the basis for large amount of analysis (by the Australian Institute of Criminology and others) about the way that homicide occurs in Australia: see <[www.aic.gov.au](http://www.aic.gov.au)>.
2. The Commission referred to an unpublished PhD thesis: Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System*, (PhD thesis, University of Tasmania, 2002). In her thesis Bradfield analyses the way that Australian courts deal with intimate partner homicides. She identified 76 cases where women killed men, and 147 cases where men killed women between 1980 and 2000 in New South Wales. This research was supplemented by a sample of sentencing remarks and decisions on appeals against conviction and sentence from other states in Australia: it was not purported that this sample was exhaustive: at 3.
3. Tarrant examined all the cases in Western Australia where women were charged with a homicide offence between 1983 and 1988 (23 women in total) and the files of 70 randomly selected male homicide offenders. She compared her findings to studies conducted in Victoria and New South Wales: Tarrant S, 'Something is Pushing Them to the Side of Their Own Lives: A feminist critique of law and laws' (1990) *University of Western Australia Law Review* 573, 585–87.
4. The Commission reviewed all the files identified by the Office of the Director of Public Prosecutions in which a woman was charged with wilful murder, murder, attempted murder or manslaughter between January 2000 and June 2007 (74 in total). From that group of 74 case files, the Commission located and examined the matters in which women had killed their intimate partners where a history of domestic violence was noted (25 files).
5. Meko [2004] WASCA 159, 146. In that case the accused entered his former wife's house approximately a year after they had separated, using an axe to open a window. The accused claimed that as he climbed through the window his wife struck him and a fight developed. There was a struggle for the axe, during which the accused was bitten severely by his former wife on the lip and elsewhere. She suffered fatal injuries, but the accused claimed that he had only hit the deceased with the axe to defend himself. He was convicted at trial. Examples of men relying on self-defence in circumstances of domestic homicide in other jurisdictions include: Stojkovic [2004] VSCA 84; Merino [2001] SASC 54.
6. Tarrant located 13 cases in which women killed their intimate partners. She notes 'self-defence was relied on in two cases and was raised in two others. In only one of these cases was the woman acquitted'. See Tarrant S, 'Something is Pushing Them to the Side of Their Own Lives: A feminist critique of law and laws' (1990) *University of Western Australia Law Review* 573, 589.
7. Bradfield reported that self-defence was left to the jury in 21 of the 65 cases she identified in which a woman killed her violent partner. Nine of these women were acquitted. However, she notes that her acquittal figures need to be approached with some caution because her research method precluded her from locating of all the cases that resulted in acquittals. See Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 194.
8. Esteal P, *Killing the Beloved: Homicide Between Adult Sexual Intimates* (Canberra: Australian Institute of Criminology, 1993) 115; Stubbs J & Tolmie J, '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.
9. See Chapter 4, 'Self-Defence: The law of self-defence is gender-biased'.
10. These concepts are not expressly included in the Code test; but they nonetheless discourage judges, jurors and lawyers from seeing the actions of women as 'proper' examples of self-defence. For further discussion see Chapter 4, 'Self-Defence: Proportionality', 'Imminence' and 'Duty to Retreat'.

## Problems with the Code test in the domestic violence context

The test for self-defence was developed to deal with the circumstances in which men, not women, might be justified or excused for killing. The test for self-defence can therefore be difficult to apply to the circumstances in which women kill. The three problematic aspects of the Code test are:

- the requirement for an apprehension of death or grievous bodily harm;
- the requirement for an assault; and
- the concept of reasonableness.<sup>11</sup>

### The requirement for an apprehension of death or grievous bodily harm

The Code test requires that an accused who uses force intending to kill or do grievous bodily harm in self-defence must have a reasonable perception of suffering death or grievous bodily harm at the hands of their attacker.<sup>12</sup> Some forms of harm arising from domestic violence—including some serious sexual assaults—may not come within the definition of grievous bodily harm.<sup>13</sup> The Commission notes that a history of ongoing sexual assault has been the context for a number of homicides committed by victims of domestic violence in Western Australia.<sup>14</sup>

In addition, if an accused is not able to show an actual threat at the time that the responsive force was used, the apprehension of the threat may not be viewed as reasonable. This is the case even where an accused has a

legitimate fear for her life (or her children's lives)<sup>15</sup> based on past experience of life-threatening harm.

### The requirement for an assault

In order to fall within the provisions of the Code, it is necessary for an accused to have been assaulted before he or she is able to respond in self-defence. The requirement for an assault means that there must be an existing confrontation or an immediate threat before self-defence can be relied upon.<sup>16</sup> However, many women who are victims of domestic violence do not respond during a confrontation because they recognise that they are not likely to physically overcome their partners.<sup>17</sup> Moreover, some women must remain passive during a confrontation in order to survive. If they do fight back then they are likely to face even greater danger.<sup>18</sup> The Victorian Law Reform Commission (VLRC) asserted that:

Requiring a woman who is subjected to serious abuse to wait until she is under attack to act may increase the risk that she will be killed, or as one commentator has suggested, sentence her to 'murder by instalment'.<sup>19</sup>

### The concept of reasonableness

The Code test for self-defence requires that the accused must have a *reasonable* apprehension of death or grievous bodily harm before using lethal force; and that the accused must have a belief on *reasonable* grounds that they cannot otherwise defend themselves. Bradfield contends that there have been problems with applying the standard of reasonableness to the circumstances of women in violent relationships.

11. The test for self-defence in the Code is found in ss 248 & 249. See further discussion of these aspects of the Code test, and self-defence generally in Chapter 4, 'Self-Defence: The law of self-defence is gender-biased'.
12. See Chapter 4, 'Self-Defence: The nature of the threat'.
13. Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 26. Grievous bodily harm is defined as 'any bodily injury of such a nature to endanger or be likely to endanger, life or to cause permanent injury to health': *Criminal Code (WA)* s 1. In the study conducted by the VLRC of homicide prosecutions between 1996 and 2001, two of the 19 people who raised self-defence at their trial were women. Both of them alleged that they had killed the deceased because they had been sexually assaulted. In both cases the defence was unsuccessful and the women were convicted of murder.
14. For example, in one case the accused and her son killed her husband (the son's stepfather). The accused was regularly raped by the deceased and gave evidence that she believed that he would kill her if she left him. At her trial her counsel said 'I have looked long and hard at self-defence and there is not enough there, I don't think ... I would like there to be, but there's not': *Dowling* (Unreported, Supreme Court of Western Australia, transcript 356, 29 April 1996). In another case the accused killed his partner who he alleged had raped him throughout their relationship. At his trial for wilful murder the accused relied on provocation and 'battered women's syndrome' and the jury were unable to reach a verdict – he later pleaded guilty to manslaughter: *McEwen* (Unreported, Supreme Court of Western Australia, 18 March 1996).
15. Women's Law Centre, Submission No. 49 (7 August 2006) 2. Section 250 of the Code provides that '[i]n any case in which it is lawful for any person to use force of any degree for the purpose of defending himself against an assault, it is lawful for any other person acting in good faith to use a like degree of force for the purpose of defending such first-mentioned person'.
16. See Chapter 4, 'Self-Defence: Imminence' and 'Requirement for an assault under the Code'. When self-defence is raised successfully by women, the killing usually occurred during a confrontation. In the Commission's review of files the only woman who was acquitted on the basis of self-defence, killed during a confrontation: *Dzuiba* (Unreported, Supreme Court of Western Australia, 14 May 2007). Likewise, in Tarrant's study the one woman acquitted on the basis of self-defence killed her partner in the course of a confrontation: *Zupec* (Unreported, Supreme Court of Western Australia, 21 May 1987): Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 18.
17. Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 6.
18. Leader-Elliott I, 'Battered But Not Beaten: Women Who Kill in Self-Defence' (1993) 15 *Sydney Law Review* 403, 443.
19. VLRC, *Defences to Homicide*, Final Report (2004) [3.54], citing Eber J, 'The Battered Wife's Dilemma: To kill or be killed' (1981) 32 *Hastings Law Journal* 895, 928, as cited in *Lavallee* [1990] 1 SCR 852, 883 (Wilson J).

The concept of reasonableness, in its application, is an inherently male standard. It is based on the way that men perceive events. A woman, living in a violent intimate relationship, may respond in ways that a man would not and she may perceive danger in a situation where there would be no extreme threat evident to an outsider. This means that reasonable grounds may be difficult to establish.<sup>20</sup>

The assessment of the reasonableness of a victim's actions in using lethal force is problematic, mainly because of a lack of understanding about the nature of violent relationships. In particular, it is not properly appreciated that the threat may not diminish or disappear if the woman leaves the relationship, and that the danger may in fact increase.<sup>21</sup>

### Problems with the 'general concept' of self-defence

The Australian Law Reform Commission observed that it is the 'general requirements' of the law of self-defence that are problematic for women.<sup>22</sup> The circumstances in which women kill do not fit within the *general concept* of self-defence, or society's assumptions about when lethal force is justified. Tarrant describes the general concept of self-defence as the 'one-off physical attack model'.<sup>23</sup> Under this model the kind of threat a 'typical' person who acts in self-defence is faced with is a sudden, unexpected, one-off, physical attack by a stranger of roughly the same size, strength and power. The attack occurs in public, and the feared outcome is immediate death or very serious harm.<sup>24</sup>

This model can be contrasted with the nature of the threat faced by a victim of domestic violence; that is, anticipated and constant. It may be physical, sexual, psychological, or

take the form of some other controlling behaviour. It is from an intimate partner, and someone who is often of greater size, strength and power than the victim. The attack occurs in private, surrounded by shame and secrecy, and the feared outcome is death or the continuation of very serious harm.<sup>25</sup>

In Chapter 4 the Commission described the general concepts traditionally associated with self-defence: proportionality, imminence and the duty to retreat.<sup>26</sup> These concepts reflect the one-off physical attack model. The way that these concepts apply to the circumstances of victims who kill their abusive partners is discussed below.

### Proportionality

Self-defence generally requires that a person can only respond with the same kind of force used (or threatened) against them. This concept is known as proportionality.<sup>27</sup> Proportionality does not adequately reflect the circumstances of victims in violent relationships. In many cases, the difference in size and strength between a woman and her partner makes any notion of proportionality unrealistic.<sup>28</sup> Moreover, it is the dynamics of the relationship that determines the nature of the threat.<sup>29</sup> So even where the perpetrator of the violence is not of greater size and strength, the perpetrator may still exert control over the victim, and the victim may fear for his or her safety. This is particularly important to note when considering violent same-sex relationships.<sup>30</sup> Assumptions about notions of a 'fair fight' do not apply to relationships in which there is ongoing violence and controlling behaviour.

20. Bradfield R, 'Is Near Enough Good Enough? Why Isn't Self-Defence Appropriate for the Battered Woman?' (1998) 5 *Psychiatry, Psychology and Law* 71, 78.
21. Mouzos J & Rushforth C, *Family Homicide in Australia* (Canberra: Australian Institute of Criminology, 2003) 2; Ferrante A, Morgan F, Indermaur D & Harding R, *Measuring the Extent of Domestic Violence* (Sydney: Hawkins Press, 1996) 67; Esteal P, *Killing the Beloved: Homicide between adult sexual intimates* (Canberra: Australian Institute of Criminology, 1993) 85–87. This point is discussed further in Chapter 4, 'Self-Defence: Duty to retreat'.
22. Australian Law Reform Commission, *Equality Before the Law: Justice for women*, Final Report No.69 (Vol. 1, 1994) [12.3].
23. Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 15.
24. Ibid.
25. Ibid, 16.
26. At common law there is no express or separate requirement that the accused must have retreated from the attack or threatened attack; however, it is one factor which may be taken into account when determining if the accused believed on reasonable grounds that what was done was necessary in self-defence. For a further discussion of the 'duty to retreat' in Western Australia, see Chapter 4, 'Self-Defence: Duty to retreat'.
27. The concept of proportionality may be imported into the Code test by the requirement for a reasonable perception of suffering death or grievous bodily harm before lethal force can be used: see Chapter 4, 'Self-Defence: Proportionality'.
28. This is because women in these circumstances may respond to the abuse at a time when the violence has ceased, or arm themselves in anticipation of an attack: see Bradfield R, 'Is Near Enough Good Enough? Why Isn't Self-Defence Appropriate for the Battered Woman?' (1998) 5 *Psychiatry, Psychology and Law* 71, 76. See also discussion in Chapter 4, 'Self-Defence: The nature of the threat' and 'Proportionality'.
29. Where the man is a stranger, the circumstances may be viewed differently: see eg *Walden* (1986) 19 A Crim R 444. In that case the accused was a woman who operated a sheep station in a remote country district. She shot and killed her neighbour who was cutting down her telephone line. Just before the shooting the man (who was physically much bigger than the accused) had approached her in a menacing manner. He was not armed. On appeal, the Court of Criminal Appeal in New South Wales held that self-defence could have succeeded at trial.
30. Violence in homosexual relationships is complicated by misconceptions about 'mutual combat' and that the perpetrator must be physically bigger than the victim: Vickers L, 'The Second Closet: Domestic violence in gay and lesbian relationships: A Western Australian study' (1996) 3(4) *Murdoch University Electronic Journal of Law* 37, [15].

The difficulties posed by proportionality are illustrated by cases in which a woman uses a weapon against an unarmed man. Research shows that women invariably use a weapon when they kill in response to domestic violence.<sup>31</sup> But by arming themselves, women have been seen to be responding in a disproportionate manner. In *Taylor*,<sup>32</sup> there was a history of violence in the relationship between the accused and deceased. On the night the accused killed her partner, he had punched, kicked and attempted to strangle her. Medical evidence described her as the 'victim of a major assault'. She shot him with a rifle, killing him. The accused pleaded guilty to manslaughter. Bradfield suggested that the use of the weapon may have influenced her decision not to go to trial and plead not guilty on the basis of self-defence.<sup>33</sup>

### **Imminence**

Self-defence also requires that a person can only respond with lethal force to an imminent threat. Imminence is hard to reconcile with the constant nature of domestic violence. As noted above in relation to the requirement for an assault, to require someone who has suffered abuse and controlling behaviour for some time to nominate a single point of confrontation as the reason for his or her retaliation, misunderstands the nature of violent relationships.

*Bradley*<sup>34</sup> has been used to explain how the concept of imminence may affect women in these circumstances. In that case the accused shot and killed her partner while he was asleep. Although there was no imminent threat at the time of the killing, throughout their 25-year relationship

the accused had been subjected to extreme violence, threats of violence and humiliating behaviour.<sup>35</sup> Yet the focus during her trial for his murder was that on the day of the killing he had insulted her and called her a 'dog'. The trial judge did not leave self-defence to the jury. Rather, the killing was characterised as provoked<sup>36</sup> and the accused was convicted of manslaughter. It has been observed that to describe the danger that the accused was responding to as the insult that she received on the day of the killing ignores the reality of the relationship.<sup>37</sup>

### **Duty to retreat**

The reasonableness of an accused's actions in killing an abusive partner is often assessed in terms of whether there was a way of avoiding the killing. This is sometimes known as the 'duty to retreat'.<sup>38</sup> Commentators have observed that in trials involving victims who have killed violent partners there is often a focus on whether there was any other way that the victim could have resolved the conflict in the relationship.<sup>39</sup>

With the one-off physical attack model the situation is clear: if the accused could have taken a non-violent course of action, the law will not excuse their violent behaviour.<sup>40</sup> However, the concept of retreat presents a problem for victims in violent relationships because the relationship is ongoing and retreat will not resolve the conflict. It may be assumed that such victims can leave the relationship to resolve the conflict. However, the question 'why didn't she leave?' does not take into account the captive nature of domestic violence. The dangerousness of the situation faced by victims who do not feel able to leave (or do

31. The 2005–06 NHMP annual report reveals that every female offender who killed her intimate partner used a weapon: Davies M & Mouzos J, *Homicide in Australia 2005–2006: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2007) 25. In Bradfield's study all of the women had used a weapon: Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 204. The VLRC noted that in 56 cases where women had killed abusive partners a knife was used in 38 cases, a firearm was used in 12 cases, and a blunt instrument in five cases: VLRC, *Defences to Homicide*, Final Report (2004) [3.11].
32. *Taylor* (Unreported, Supreme Court of South Australia, February 1994), as cited in: Bradfield R, 'Is Near Enough Good Enough? Why Isn't Self-Defence Appropriate for the Battered Woman?' (1998) 5 *Psychiatry, Psychology and Law* 71, 78.
33. Ibid.
34. *Bradley* (Unreported, Supreme Court of Victoria, 14 December 1994), as cited in: Bradfield, ibid 73.
35. Ibid. The acts of violence included forcing her to drink urine; assaulting her with fists and sticks; attempting to run her over; attempting to strike her with a tomahawk; raping her; procuring an abortion with a teaspoon; attacking her with a wheel brace and a monkey wrench; striking her to the face with a gun butt; applying lit cigarettes to her legs; throwing knives at her; threatening to kill her; and trying to drown her. The Crown expressly acknowledged in this case that the accused was 'in reality' a prisoner of the deceased for 25 years: Stubbs J & Tolmie J, 'Feminisms, Self-Defence and Battered Women: A response to Hubble's "straw feminist"' (1998–1999) 10(1) *Current Issues in Criminal Justice* 75, 76.
36. The trial judge stated: 'you were ... experiencing fear and panic at what you perceived as your own imminent death' and in 'those final days you feared for your life'. This fear was said to have led to the 'dam of self control that [she] had built up over the years burst[ing]'.
37. Bradfield R, 'Is Near Enough Good Enough? Why Isn't Self-Defence Appropriate for the Battered Woman?' (1998) 5 *Psychiatry, Psychology and Law* 71, 77.
38. There is no express requirement to retreat in s 248 of the Code (dealing with self-defence against an unprovoked assault). However, s 249 of the Code (dealing with self-defence against a provoked assault) includes a requirement to retreat. The Western Australian Court of Criminal Appeal has held that whether there is an opportunity to retreat is relevant to whether the accused had a 'reasonable apprehension of death or grievous bodily harm inducing a belief on reasonable grounds that it was necessary for self-preservation to use force in self-defence': *Randle* (1995) 81 A Crim R 113, 120. For further discussion see Chapter 4, 'Self-Defence: Duty to retreat'.
39. Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 22.
40. See further discussion in Chapter 4, 'Self-Defence: Duty to retreat'.

leave, only to return to the relationship under threat) is shown in the statistics recorded at the start of this chapter.

The difficulty in reconciling the clash between the captive nature of domestic violence and the concept of retreat can also been seen in the court's reluctance to countenance planning as part of a self-defence killing. This is because the opportunity to plan would suggest that there were other options available to the accused. Tarrant has likened planning to the use of weapons: it is a way in which women 'equalise' the fight.<sup>41</sup> A comparison may be made with a hostage situation: a person kept captive would be expected to plan his or her escape.<sup>42</sup> In a recent case in Victoria a woman was acquitted of killing her husband on the basis of self-defence where it was clear that she had planned the killing.<sup>43</sup> At the accused's trial there was evidence of physical, psychological and sexual abuse by the deceased over a period of 17 years. The accused told the police 'if I didn't do it now, I would be the one who would be dead'. The accused dressed in camouflage clothes and concealed herself in a 'sniper's nest' before she shot her husband several times with a high-powered rifle.<sup>44</sup> Tarrant asserts that a proper understanding of the reality of domestic violence requires consideration of the possibility that a killing may be planned.<sup>45</sup>

Related to the issue of planning is whether it is ever justified for a woman to enlist another person to carry out or assist

with the murder of her violent partner.<sup>46</sup> In Mouzos' study of 56 homicides between 1989 and 2000, where females had killed their abusive partners, there were three cases in which the women had enlisted assistance with the killing.<sup>47</sup> The person who assisted was usually the accused's son, and he had also suffered abuse at the hands of the deceased.<sup>48</sup> The assertion that two people acting together could commit murder as an act of self-defence is a significant challenge to traditional concepts of self-defence. Nonetheless, the Commission's view is that accused who kill in these circumstances should not be precluded from relying on self-defence; a jury should be informed about the circumstances that led to the killing in order to determine if the apprehension of the need to use lethal force was justified.<sup>49</sup>

### Lack of understanding about domestic violence in the legal system

If the nature and dynamics of domestic violence are not properly appreciated by those who deal with victims of domestic violence who kill, it is less likely that self-defence will be raised or be successful. Submissions asserted that the legal system has a poor understanding of domestic violence.<sup>50</sup> The Women's Council for Domestic and Family Violence Services (WA) (the Women's Council) identified the following misconceptions about domestic violence:<sup>51</sup>

41. Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 24.
42. Cohen compares the circumstances of a victim of serious and prolonged domestic violence with that of a person (or population) living in a tyrannical regime. She asserts that 'a single escapee from a tyrannical regime ... is surely entitled to free herself by force': Cohen J, 'Regimes of Private Tyranny: What do they mean to morality and for the criminal law' (1996) 57 *University of Pittsburgh Law Review* 757, 791–94.
43. McDonald (Unreported, Supreme Court of Victoria, March 2006), as cited in Kirkwood D, 'Elizabeth Scott – The First Woman Hanged in Victoria: How far have we come?' (2006) 1 *Domestic Violence and Incest Resource Centre Quarterly* 14, 18.
44. Kirkwood notes that the recent changes to the law of self-defence in Victoria did not apply in McDonald because the homicide occurred before the laws had come into effect. However, she observes that 'there was an awareness by barristers, judges and the broader community that the laws were being changed because they had failed women in family violence situations': ibid, 19.
45. Tarrant recommended change to the law of self-defence to make it clear that the defence is not precluded because a person has planned to use force: Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 24.
46. There have been several recent cases in Western Australia where a woman acted with another person to kill or injure her abusive partner. The Commission notes that in a number of these cases the accused had suffered serious, long-term violence at the hands of the deceased and had tried other ways of making the deceased stop the violence, including separation and police intervention. See eg Constantine (Unreported, Supreme Court of Western Australia, 26 November 2004); Muncott (Unreported, Supreme Court of Western Australia, 15 December 2005).
47. Mouzos J, *When Women Kill: Scenarios of lethal self help in Australia 1989–2000* (PhD thesis, University of Melbourne, 2003) 118, as cited in: VLRC, *Defences to Homicide*, Final Report (2004) [3.11] footnote 197.
48. Ibid.
49. Rathus reports that in *Yakich* (a case in the United States in 1988) a woman was acquitted on the basis of self-defence after hiring someone to kill her violent intimate partner: Rathus Z, *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) 9.
50. The Women's Council stated that 'it is the experience of our membership that victims of domestic violence are often judged and disbelieved by members of the community and professionals. It is common for women to be disbelieved at all levels of the legal system's response from a police officer, to a magistrate whilst applying for a restraining order and by a judge in a criminal trial': Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 15. That there is a lack of understanding of some aspects of domestic violence was also submitted by: Mr & Mrs N Moore, Submission No. 5 (6 June 2006); Mrs G Davis, Submission No. 6 (6 June 2006); Ms Doris Schutt, Submission No. 7 (8 June 2006); Ms Donalee Heseltine, Submission No. 8 (8 June 2006); Ms Julia Lacey, Submission No. 10 (8 June 2006); Mrs R Leckie, Submission No. 11 (8 June 2006); E D'Olia, Submission No. 12 (12 June 2006); Ms Elaine Bassile, Submission No. 13 (11 June 2006); Fiona Aitken, Submission No. 17 (12 June 2006); Robyn Westgate, Submission No. 22 (12 June 2006).
51. Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 15. This list of misconceptions reflects the eight myths about domestic violence explained by the VLRC, *Defences to Homicide*, Final Report (2004) 161–69.

- that domestic violence is not serious or dangerous;<sup>52</sup>
- that women could just leave violent relationships if they wanted to;
- that domestic violence only occurs in some cultures or socio-economic groups; and
- that domestic violence is caused by relationship problems or external issues such as alcohol or stress.<sup>53</sup>

Misconceptions or lack of understanding about domestic violence can have an impact at all stages of the criminal justice process, from the charges laid by police to the verdict or sentence. A study by Walker of the way the criminal justice system dealt with women who killed their family members in the 1970s revealed a poor appreciation of the nature of domestic violence and the way that a history of domestic violence might be relevant to cases where women kill their partners.<sup>54</sup> However, from the Commission's review of files from 2000–2007, it is apparent that some lawyers and judges are aware of issues about domestic violence, although in some cases stereotypical or misconceived assumptions about domestic violence were apparent. Nonetheless, where victims of domestic violence came before the courts for sentencing, most were shown understanding and compassion for their difficult circumstances.

## PROVOCATION

In the context of intimate partner homicide, both men and women have been more successful in relying on the partial defence of provocation than the complete defence of self-defence.<sup>55</sup> However, it is important to recognise

the very different circumstances in which men and women rely on provocation, particularly in the context of domestic violence homicide.<sup>56</sup> The VLRC compared the circumstances in which men and women rely on provocation:

When many men who kill their partner successfully raise provocation, the provocation is often their partner's alleged infidelity and/or their partner leaving or threatening to leave. Their actions are therefore primarily motivated by jealousy and a need for control. In comparison, when women kill their partners and successfully raise the defence, there is often a history of physical abuse in the relationship.<sup>57</sup>

The way provocation applies in domestic violence homicides reveals significant problems with the partial defence: whether it is the victim or the perpetrator of the domestic violence who is killed.

### When the victim of the previous violence is killed

For the reasons noted above in the Commission's discussion of the hidden nature of domestic violence, it may not be known whether a homicide victim has previously been the victim of violence perpetrated by the accused. However, the link between domestic violence and homicide has been observed in homicide statistics. The Australian homicide statistics for 2005–2006 show that there were 74 intimate partner homicides in that period: 26 per cent of all homicides. Eighty per cent of these homicides involved a man killing his female partner.<sup>58</sup> The statistics reveal that the majority of female victims of intimate partner homicide (and homicide in general) were killed because of a domestic altercation. This included arguments based on jealousy; separation or termination of the relationship; infidelity;

52. Bradfield observed that 'despite research indicating that a significant proportion of killings occur in a domestic setting, there is a reluctance to accept that domestic violence is as serious as other violence. There is a perception that "stranger danger" is more threatening'. Bradfield R, 'Is Near Enough Good Enough? Why Isn't Self-Defence Appropriate for the Battered Woman?' (1998) 5 *Psychiatry, Psychology and Law* 71, 79.

53. A survey by the Office of the Status of Women in 1995 found that most people thought that external factors were the cause of domestic violence: financial pressure (57 per cent), alcohol (42 per cent) and relationship problems (36 per cent): Office of the Status of Women, Department of the Prime Minister and Cabinet, *Community Attitudes to Violence Against Women* (Canberra, 1995) 31, 109. A further study conducted in 2000 found that view remained. Office of the Status of Women, *Partnerships Against Domestic Violence, Attitudes to Domestic Violence and Family Violence in the Diverse Australian Community* (Canberra, 2000) 19.

54. Walker S, 'Women Charged With Violent Crimes Against Family Members in Western Australia 1970–1980: Early constructions of the female offender' (1998) 3 *Sister-In-Law* 75, 90–94.

55. Bradfield identified 54 cases in which women killed their intimate partners in New South Wales between 1979 and 1997; provocation was raised as a defence or referred to in sentencing comments in 35 cases, compared to self-defence in 24 cases (both defences were raised in five cases). She identified 147 cases in which men killed their female partners; provocation was the basis for a plea of guilty to manslaughter in seven cases and in eight cases the basis of a verdict of manslaughter at trial. She did not locate any cases in which a man relied on self-defence when he had killed his intimate partner. See Bradfield R, 'Is Near Enough Good Enough? Why Isn't Self-Defence Appropriate for the Battered Woman?' (1998) 5 *Psychiatry, Psychology and Law* 71, 72; Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 26.

56. See discussion in VLRC, *Defences to Homicide*, Final Report (2004) [2.22]; Queensland Taskforce, *Women and the Criminal Code* (Brisbane, 1999) ch 6 (unpaginated).

57. VLRC, *Defences to Homicide*, Final Report (2004) [2.22]. See also Bradfield R, 'Domestic Homicide and the Defence of Provocation: A Tasmanian perspective on the jealous husband and the battered wife' (2000) 19 *University of Tasmania Law Review* 5, 7–8; Coss G, 'The Defence of Provocation: An acrimonious divorce from reality' (2006) 18(1) *Current Issues in Criminal Justice* 51, 51.

58. Davies M & Mouzos J, *Homicide in Australia 2005–2006: National Homicide Monitoring Program National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2007) 24.

children and custody issues; and alcohol fuelled domestic altercations.<sup>59</sup> Notably, the majority (65%) of intimate partner homicides was 'associated with some form of [past] domestic violence, indicated by the presence of legal intervention orders or a recorded history of domestic violence'.<sup>60</sup>

The prevalence of intimate partner homicide—in particular where domestic violence is the background to the homicide—has led to concerns about provocation being relied on in intimate partner homicides. Studies conducted on the operation of the defence of provocation are not likely to reveal when men have relied on provocation where their act of homicide is the final act in a pattern of domestic violence. Such men have no reason to reveal the background of domestic violence where it is not known, and in many circumstances the courts have no other way of finding out that there has been violence in a relationship. The fact that statistically many intimate partner homicides occur against a background of past violence is highlighted because it makes it probable that in some cases where provocation is raised, the killing is not necessarily a one-off, out of character reaction to provocative behaviour.<sup>61</sup> Instead, the use of lethal violence may be consistent with previous acts against the deceased.<sup>62</sup>

Studies have shown that the breakdown in a relationship is frequently relied upon by men as the basis of a provocation defence. In Tarrant's research, provocation was relied upon by three of the 16 men who killed their partners; however, in none of these cases was the provocation violence.<sup>63</sup> Bradfield's study of homicides committed in the context of sexual intimacy between 1980 and 2000 revealed that in more than half of the cases in

which men successfully raised the defence, the provocative conduct was either infidelity or separation.<sup>64</sup> The Commission is not aware of any research into the way that provocation is relied upon by men in the context of domestic homicide in Western Australia.

It is argued that provocation reduces the culpability of some men who kill their partners in circumstances that do not reflect current community standards of behaviour.<sup>65</sup> Historically, the community may have accepted that an offender was less culpable when the offender killed his or her partner in the context of difficulties in the relationship. In *Hart*,<sup>66</sup> Steytler J observed that:

The older cases (and many of the more modern ones) show a willingness to leave open the defence of provocation in a case in which a person (usually the husband) finds his or her spouse in an act of adultery.<sup>67</sup>

However, more recently it has been asserted that relationship difficulties do not constitute a proper reason for the reduction in culpability of an offender. This attitude was reflected in submissions to the Commission. The DPP contended that it is no longer appropriate for infidelity or a threat to leave a relationship to be the basis for provocation.<sup>68</sup> Other submissions suggested that the breakdown of a relationship, or relationship difficulties, should never be permitted to form the basis of a reduction in culpability for homicide.<sup>69</sup>

This change in community attitudes coincides with the increased recognition that many domestic homicides may not simply be precipitated by jealousy or the breakdown in a relationship (although that is the way they may be characterised for the courts). Rather, they are 'the end

- 
59. *Ibid* 17 & 25.  
60. *Ibid* 25.  
61. The New South Wales Judicial Commission noted that very few male homicide offenders with a history of perpetrating domestic violence rely on provocation; it identified one in the last 11 years of the study, four between 1990 and 1992. However, the Judicial Commission observes that 'these findings must be read against the recognition that domestic violence is present in a wide range of offences against women, of which homicide is the most extreme. Many crimes against women, such as assault, are often never reported'. See Indyk S, Donnelly H & Keane J, *Partial Defences to Murder in New South Wales 1990–2004* (Sydney: Judicial Commission of New South Wales, 2006) 45.  
62. Coss G, 'The Defence of Provocation: An acrimonious divorce from reality' (2006) 18(1) *Current Issues in Criminal Justice* 51, 58.  
63. Tarrant S, 'Something is Pushing Them to the Side of Their Own Lives: A feminist critique of law and lives' (1990) 20 *University of Western Australia Law Review* 573, 589.  
64. Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 145. This is consistent with other Australian research. See Wallace A, *Homicide: The social reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986); Indyk S, Donnelly H & Keane J, *Partial Defences to Murder in New South Wales 1990–2004* (Sydney: Judicial Commission of New South Wales, 2006) 42.  
65. Tarrant asserts that provocation is 'used inappropriately by men who kill in response to their spouse leaving them or being sexually unfaithful or as the final act in a history of provocation'. Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 38.  
66. *Hart* [2003] WASCA 213.  
67. *Ibid* [71] (McLure J concurring).  
68. Office of the Director of Public Prosecutions, Submission No 51A (16 August 2006) 6. The Department for Community Development also submitted that sexual jealousy and separation do not constitute provocation: Department for Community Development, Submission No. 42 (7 July 2006) 8.  
69. Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 18–19; Women's Law Centre, Submission 49 (7 August 2006) 4–5. See also Federation of Community Legal Centres (Victoria), Violence Against Women and Children Working Group, Submission to VLRC's *Defences to Homicide* Options Paper (December 2003) 10–11.

result of a culmination of numerous prior incidents of domestic violence'.<sup>70</sup> The Law Commission (England and Wales) stated that provocation

operates as a concession not to human frailty but to male temperament and, as a result, operates in a discriminatory manner. It serves to perpetuate male violence.<sup>71</sup>

Where the victim of previous violence in a relationship is killed, it is argued that the test for provocation does not allow the history of violence in the relationship to inform the jury's decision about the accused's loss of self-control. The families of victims, victim support services and women's advocacy groups have pointed out cases in which they consider that the court did not properly take into account the history of domestic violence in a relationship.<sup>72</sup> This is because the test for provocation turns on the effect that the actions or words of the victim had on the accused immediately prior to the killing. The emphasis on the words or actions of the victim, and the attempt to partially excuse the killing because of those words or actions, has been seen as 'blaming the victim'.<sup>73</sup> Where the victim is a person who has previously been the subject of repeated violence at the hands of his or her killer, this is hard for families of victims (and the community) to accept.

### **When the perpetrator of the previous violence is killed**

Tarrant's study of Western Australian cases between 1983 and 1988 led her to conclude that provocation was successfully relied on by women who killed their partners

in the context of domestic violence.<sup>74</sup> There was a background of domestic violence in 10 of the 13 cases she identified. Provocation was raised in seven of those cases; in two others it was not available because the charge was attempted murder.<sup>75</sup> Bradfield's research also showed that women frequently rely upon provocation. In 40 per cent of cases where women killed their partners, provocation was the basis for a manslaughter conviction;<sup>76</sup> there was a history of domestic violence in all of these cases.<sup>77</sup> The Commission's examination of 25 Western Australian cases showed much less reliance on provocation by women who kill their abusive partners. Provocation was not relied upon by any women who pleaded not guilty and went to trial.<sup>78</sup> It was the sole basis of only one plea of guilty to manslaughter, and mentioned in three other pleas in mitigation.<sup>79</sup>

### **Problems with the Code test**

The Code test requires a triggering incident inducing a sudden loss of self-control that results in the accused forming an intention to cause death or grievous bodily harm.<sup>80</sup> It has been observed that this is more descriptive of male patterns of behaviour,<sup>81</sup> and that women generally do not respond to provocative conduct in that way.<sup>82</sup> The test for provocation is particularly problematic for women who kill in the context of domestic violence. The Chief Justice of Western Australia's taskforce on gender-bias identified four aspects of the Code test that create difficulties for victims of domestic violence who kill:

70. Davies M & Mouzos J, *Homicide in Australia 2005–2006: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2007) 25.
71. Law Commission (England and Wales), *Partial Defences to Murder*, Consultation Paper No. 173 (2003) [12.21].
72. See eg Cleary P, *Just Another Little Murder: A brother's pursuit of justice* (Sydney: Allen & Unwin, 2002); Women's Coalition Against Family Violence, *Blood on Whose Hands: The killing of women and children in domestic homicides* (Melbourne, 1994). This was also noted in submissions: Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 18–19; Domestic Violence Legal Unit, Legal Aid (WA), Submission No. 50 (6 August 2006) 4.
73. This point was made in submissions: Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 18–19; Women's Law Centre, Submission No. 49 (7 August 2006) 4; Domestic Violence Legal Unit, Legal Aid (WA), Submission No. 50 (6 August 2006) 4.
74. Tarrant also based this conclusion on research from other Australian jurisdictions: Tarrant S, 'Something is Pushing Them to the Side of Their Own Lives: A feminist critique of law and lives' (1990) 20 *University of Western Australia Law Review* 573, 586.
75. Ibid 586. A recent New South Wales study supports this finding: New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No. 83 (1997) [2.115].
76. There was only one case in which a woman tried to rely on provocation at trial and was convicted of murder: Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 144.
77. Ibid 146.
78. The Commission is aware of some older cases in which provocation was relied on in circumstances where a victim of domestic violence killed the perpetrator. In *Gilbert* (Unreported, Supreme Court of Western Australia, 4 November 1993) the accused relied on self-defence, provocation and lack of intent (and led evidence of battered women's syndrome) at trial. The accused was an Aboriginal woman from a remote community who killed her partner. He had been violent to her and her children for a number of years. She was convicted of manslaughter. In *McEwen* (Unreported, Supreme Court of Western Australia, 18 March 1996) the accused pleaded guilty on the basis of provocation, constituted by 'anal rape and domination over all aspects of his life'. He also led evidence of 'battered women's syndrome'.
79. Therefore, provocation was raised in four out of a total of 19 sentencing hearings where women had pleaded guilty to manslaughter (in the other cases the basis of the plea was lack of the requisite intention for murder or wilful murder).
80. See Chapter 4, 'Provocation: Gender-bias'.
81. VLRC, *Defences to Homicide*, Issues Paper (2002) [6.11].
82. The Model Criminal Code Officers Committee (MCCOC) questioned the appropriateness of the defence of provocation for women, noting that it 'was never designed for them': MCCOC, *Fatal Offences Against the Person*, Discussion Paper (1998) 89. See also comments by Gleeson CJ in *Chhay* (1994) 72 A Crim R 1, 17.

- suddenness;
- proportionality;
- the requirement for a specific triggering incident; and
- the self-control of the ordinary person.<sup>83</sup>

When these factors are contrasted with the nature and dynamics of domestic violence (discussed earlier in this Chapter) the problems are apparent.

A victim of domestic violence who kills is often responding to a threat of future violence, which is understood in the context of past violence. Such a threat cannot always be described in terms of a specific incident that is 'triggering' or 'sudden'. Although it is recognised in Western Australia that provocation may be 'cumulative',<sup>84</sup> there is still a need for a 'sudden and temporary loss of self control'.<sup>85</sup> Tarrant observes that this 'model of immediacy ... directly contradicts the response patterns of women who are repeatedly beaten'.<sup>86</sup> The Law Commission (England and Wales) stated:

An angry strong man can afford to lose his self-control with someone who provokes him, if that person is physically smaller and weaker. An angry person is much less likely to 'lose self-control' and attack another person in circumstances in which he or she is likely to come off worse by doing so. For this reason many successful attacks by an abused woman on a physically stronger abuser take place at a moment when that person is off-guard.<sup>87</sup>

Tarrant has described the precipitating events or 'turning points' that can lead a woman who has previously been passive to respond with violence, including a serious escalation in violence; when the abuse becomes visible to the outside world; and the discovery that a child of the relationship has also been abused.<sup>88</sup> Such incidents may be 'in an immediate physical sense unrelated to the

abuser'<sup>89</sup> and, therefore, not satisfy the test for provocation.<sup>90</sup>

Although no longer a separate requirement for provocation, the concept of proportionality is relevant when assessing if an ordinary person could have lost self-control in the circumstances.<sup>91</sup> The concept of proportionality does not easily fit with the dynamics of a violent relationship. The victim of domestic violence is often smaller and weaker than the perpetrator. Even where both parties are physically evenly matched, the control the perpetrator has over the victim can make the victim feel powerless. Consequently, when victims of domestic violence strike back, they typically do so with a weapon.<sup>92</sup> If the nature of the relationship is not understood, it might appear that an attack with a weapon (particularly where the deceased is unarmed) is not proportional to the conduct of the deceased.

In determining whether an accused satisfies the Code test, a jury must consider the content and extent of the provocative conduct from the point of view of the accused.<sup>93</sup> But the power of self-control that the accused must exercise is that of the 'ordinary person'.<sup>94</sup> The 'ordinary person' test has often been criticised because 'the ordinary person test reflects the standard of self-control of an ordinary male'.<sup>95</sup> The 'ordinary person' test rests on the assumption that a jury will understand, and have sympathy for, an accused who has lost self-control in circumstances in which it is 'ordinary' for people to do so.<sup>96</sup> It has been argued that this test is problematic for women: an angry and violent response contradicts what the community expects of women.<sup>97</sup>

To some extent provocation has developed to accommodate victims of domestic violence.<sup>98</sup> For example,

- 
83. Chief Justice of the Supreme Court of Western Australia's Taskforce, *Report on Gender-Bias* (30 June 1994) 214.
84. *Mehmet Ali* (1957) 59 WALR 28. See Chapter 4, 'Provocation: The elements of provocation do not reflect female patters of behaviour'.
85. *Chhay* (1994) 72 A Crim R 1, 10.
86. Tarrant S, '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, 592.
87. Law Commission (England and Wales), *Partial Defences to Murder*, Final Report (2004) [3.28].
88. For example in *R* (1981) 28 SASR 321, 323 the accused, who had suffered violence and ill-treatment for many years, killed her abusive partner after discovering that he had sexually abused all of their daughters.
89. *Ibid.*
90. Bradfield observed that the requirement for 'sudden provocation' under the Tasmanian Code and other Australian codes operates as a barrier to women who kill in response to domestic violence: Bradfield R, 'Domestic Homicide and the Defence of Provocation: A Tasmanian perspective on the jealous husband and the battered wife' (2000) 19 *University of Tasmania Law Review* 5, 20.
91. *Masciantonio* (1995) 183 CLR 58, 7.
92. In 2005–2006 all the female homicide offenders who killed their intimate partners used a weapon: Davies & Mouzos, *Homicide in Australia: 2005–06 National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2007) 25.
93. *Stingel* (1990) 171 CLR 312, 327; *Green* (1997) 191 CLR 334, 340.
94. See further discussion in Chapter 4, 'The Partial Defence of Provocation: The ordinary person test – the objective element'.
95. Morgan J, 'Provocation Law and Facts: Dead women tell no tales, tales are told about them' (1997) 21 *Melbourne University Law Review* 237, 258–59.
96. Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 169.
97. *Ibid.*, 172.
98. Fairall and Yeo observed that Australian courts have relaxed some of the requirements of the defence to better reflect the circumstances of 'battered women'. Fairall P & Yeo S, *Criminal Defences in Australia* (Sydney: LexisNexis Butterworths, 4th ed., 2005) 191.

it has been recognised that provocation may be cumulative<sup>99</sup> and fear, as well as anger, has been included as a basis for loss of self-control.<sup>100</sup> Further, in some jurisdictions the requirement for an immediate reaction has been removed.<sup>101</sup> However, it is questionable whether the extension of this defence is desirable. To broaden the circumstances in which provocation applies (in order to reduce the culpability of victims of domestic violence who kill) may result in the broader test being applied in other, inappropriate, circumstances.<sup>102</sup>

### Problems with the underlying rationale of provocation

Studies have concluded that women who kill their abusive partners are more successful in relying on provocation than self-defence.<sup>103</sup> This has led to some commentators questioning the rationale of such verdicts. Concern has been expressed that by characterising the circumstances of such homicides as the result of provocation, the focus of the legal system is on the loss of self-control of the accused, rather than on their need to use force as a means of self-preservation.<sup>104</sup> Tarrant has observed that:

Provocation is inappropriate because it concerns, fundamentally, an excusable loss of control and over-reaction to the 'human behaviour' of the deceased. It does not concern, as does self defence, a necessary reaction to a very dangerous situation. Thus, provocation addressed the loss of emotional control suffered by the accused when she killed. Self defence addressed the danger the accused was in when she killed.<sup>105</sup>

The Queensland Taskforce on Women and the Criminal Code observed that many of the cases where women

99. In Western Australia the courts have recognised that provocation can be cumulative: *Mehmet Ali* (1957) 59 WALR 28, 39 (Jackson J), as cited in *Ellis v Ellis* [1999] WASCA 30, [16] (Templeman J).
100. *Masciantonio* (1995) 183 CLR 58, 68. See also discussion in Chapter 4, 'The Partial Defence of Provocation: The elements of provocation do not reflect female patterns of behaviour'.
101. A number of Australian jurisdictions have amended their laws with a view to removing aspects of the test that are said to operate in a gender-biased way. For example, in New South Wales s 23 of the *Crimes Act 1900* (NSW) was amended (in response to a report from a taskforce on domestic violence) to provide that an act could be done under provocation whether the provocative conduct by the deceased occurred 'immediately before the act or omission causing death or at a previous time'. It was also provided that there is 'no rule of law that provocation is negated if there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission'. See NSWLRC, *Partial Defences to Murder: Provocation and Infanticide*, Report No. 83 (1997) [2.5].
102. Bradfield observed that while the acceptance of cumulative provocation may have assisted women, it has also assisted men who have relied on provocation in circumstances involving infidelity or rejection: Bradfield R, 'Domestic Homicide and the Defence of Provocation: A Tasmanian perspective on the jealous husband and the battered wife' (2000) 19 *University of Tasmania Law Review* 5, 13.
103. Bradfield observes that 'the defence of provocation has been one of the principal means by which the criminal justice system in Australia has responded to the predicament of battered women who kill their abusive partner'. Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 142.
104. Bradfield R, 'Is Near Enough Good Enough? Why Isn't Self-Defence Appropriate for the Battered Woman?' (1998) 5 *Psychiatry, Psychology and Law* 71, 80.
105. Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 37.
106. Queensland Taskforce, *Women and the Criminal Code* (Brisbane, 1999) ch 6 (unpaginated).
107. VLRC, *Defences to Homicide*, Final Report (2004) [2.103].
108. Leader-Elliott I, 'Battered But Not Beaten: Women who kill in self defence' (1993) 15 *Sydney Law Review* 403, 456; Tolmie J, 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation' [2005] *New Zealand Law Review* 25, 41–42.
109. Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 5. For this reason, the Chief Justice's Taskforce expressed the view that provocation should not be abolished because it may remove a necessary and appropriate defence for victims of domestic violence who kill: Chief Justice of the Supreme Court of Western Australia's Taskforce, *Report on Gender-Bias* (30 June 1994) 217.

have successfully relied on provocation are, in fact, cases where the woman has killed in self-defence.<sup>106</sup> Because of the restrictive nature of the test for self-defence, the actions of the woman who kills are made to fit within the test for provocation. That this is not an appropriate way for the legal system to deal with the circumstances of such women was recognised by the VLRC:

The retention of provocation and the continued distortion of women's experiences to fit within the defence, or the distortion of the defence to fit women's experiences, are in our view neither sustainable nor satisfactory solutions.<sup>107</sup>

### Problems with provocation in practice

It was noted in submissions that provocation may operate as a compromise position. That is, juries may convict an abused woman of the lesser offence of manslaughter in order to show mercy for her difficult situation. Thus, provocation may deprive women of acquittals for self-defence.<sup>108</sup> On the other hand, it can be seen as a 'safety-net' for women who kill in the domestic violence context.<sup>109</sup> From a practical point of view, women may be advised to plead guilty to manslaughter on the basis of provocation, because if they proceed to trial they risk a conviction for murder and life imprisonment.

## LACK OF INTENTION TO KILL OR DO GRIEVOUS BODILY HARM

In a homicide trial the prosecution must prove beyond reasonable doubt that the accused intended to kill (or cause grievous bodily harm to) the deceased. Many accused

charged with the homicide of their intimate partners defend the charge on the basis that they did not have the requisite intention for wilful murder or murder.<sup>110</sup> It is also commonly relied upon in negotiations with the DPP, with the result that lack of the requisite intention is often the basis of a plea of guilty to manslaughter. In the cases reviewed by the Commission in which women killed their intimate partners in the context of domestic violence, lack of intention was the basis of 14 out of 19 guilty pleas.

There are three broad, sometimes overlapping, categories of cases in which lack of intention is relied upon to reduce a charge of wilful murder or murder to manslaughter:<sup>111</sup>

- where the accused, and usually also the deceased, are intoxicated;
- where the act causing death is not considered likely to cause death (but death is not an accident); and
- where the accused was experiencing emotional turmoil.

### Intoxication

Intoxication can have an important impact on the assessment of an accused's intention.<sup>112</sup> Research shows that intoxication is a common precursor to the use of deadly force in domestic killing.<sup>113</sup> Bradfield's analysis of cases in New South Wales indicated that men rely on intoxication more often than women.<sup>114</sup> However, the Commission's review of DPP files showed that women in Western Australia regularly rely on intoxication. Ten of the 25 women whose files the Commission examined were heavily intoxicated at the time they killed their partners. More than half of these women used their level of intoxication to explain that they did not have the requisite intention for wilful murder or murder and facilitate a plea of guilty to manslaughter.

### Nature of the act causing death

In some cases the nature of the act causing death may indicate that the accused did not have the intention for wilful murder or murder. It has been argued that men are more likely to rely on the nature of the act to show that they did not intend to kill. This is because when men kill their intimate partners (who are often smaller, weaker and younger than them)<sup>115</sup> they have in many cases (22 per cent) beaten them to death with their hands or feet.<sup>116</sup> Thus 'the method [of killing] itself serves to obscure and conceal the "intent" for practical purposes'.<sup>117</sup> On that basis, it might seem less likely that women could rely on the nature of the act causing death, because women typically use a weapon to kill.<sup>118</sup> Nonetheless, in the files reviewed by the Commission, the nature of the act causing death was the most common reason provided by women for a lack of intention. Seven of the 14 manslaughter pleas entered on the basis of a lack of intent relied on the nature of the act causing death to demonstrate their lack of intention. In five of those cases the nature of the act was a stab in the leg; in one case the woman hit her partner over the head and he died some days later (having not received medical assistance); and in one case the deceased was stabbed once in the chest with a knife.

### Emotional turmoil

Bradfield's research in New South Wales found that women most commonly rely on the emotional turmoil of the circumstances that led to the killing as the basis for their lack of intention.<sup>119</sup> In the Commission's review of files, emotional turmoil was noted as an explanation (often combined with one or both of the other categories) in five of the 14 pleas of guilty to manslaughter on the basis

110. Bradfield reported that lack of intent was relied upon by 24 out of 147 men (15 in a plea of guilty, nine at trial) and 30 out of 76 women (22 in a plea of guilty, eight at trial): Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 27. These findings in New South Wales are consistent with the Commission's observations about the reliance on lack of intent in Western Australia.

111. Bradfield, *ibid* 111.

112. Section 28 of the Code provides that consideration may be given to intoxication for the purposes of ascertaining whether an accused had a specific intent. That does not mean that where an accused is intoxicated that intention cannot be proved. In fact, Miller J commented that there is 'a scepticism on the part of juries about the suggestion that by reason of intoxication a person was unable to form a specific intent': Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 7.

113. Wallace A, *Homicide: The social reality* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1986) 93.

114. Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 111.

115. The majority of men who kill their intimate partners are older than them (71 per cent): Davies M & Mouzos J, *Homicide in Australia 2005–2006: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2007) 24.

116. *Ibid* 25.

117. Edwards S, *Sex and Gender in the Legal Process* (London: Blackstone Press Ltd, 1996) 411, as cited in Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 111.

118. In the NHMP 2005–2006 annual report it is noted that no women beat their partners to death with hands or feet: Davies M & Mouzos J, *Homicide in Australia 2005–2006: National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2007) 25.

119. Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 114.

of lack of intent. Emotional turmoil is often ascribed to the background of domestic violence in the relationship, and provides the basis for the admission of evidence about previous violence.

## A DE FACTO DEFENCE OF DOMESTIC VIOLENCE?

There was a history of violence in 23 out of 31 (74%) lack of intent cases Bradfield identified in her research.<sup>120</sup> This led her to describe lack of intent as the 'de-facto defence of domestic violence'.<sup>121</sup> She observed that in many of these cases the nature of the homicide incident suggested that the accused had the requisite intent for murder; however,

a finding of lack of intent is maintained by viewing the act of the accused as resulting from the highly charged emotional situation in which the killing occurred, rather than from an intention on the part of the accused to harm the deceased.<sup>122</sup>

Bradfield's contention is that the extent of reliance on lack of intent, particularly by women, indicates a problem in fitting the circumstances of intimate partner homicide within the available defences. She argues that the court has used lack of intent as a way to show sympathy for the plight of victims of domestic violence,<sup>123</sup> but

for women who kill 'sympathy' may have been obtained at a significant cost. Women whose violent action is precipitated by their partner's violence and abuse have a rational explanation for their conduct. The cost of pleading guilty to manslaughter on the basis of a lack of intent for women who kill violent partners is that the reality of the motive of self-preservation is obscured and any opportunity to argue self-defence is lost.<sup>124</sup>

The Commission's study of Western Australian cases also revealed that where victims of domestic violence kill the perpetrator, the result is often a conviction for manslaughter on the basis that the accused did not have an intention to kill or do grievous bodily harm. The Commission notes that in some of these cases the nature

of the incident might have suggested that the accused had the requisite intention to kill; for example, where a weapon was used against an unarmed person. However, in others the nature of the incident did not necessarily show the requisite intention; for example, where the deceased was stabbed in the leg.

In sentencing these accused, the court took into account the history of domestic violence in the relationships. In a number of such cases, counsel urged the court to impose a merciful sentence and non-custodial sentences were sometimes imposed. As noted previously, in some cases counsel submitted to the court that the case 'did not fall within the Code test for self-defence', but described the actions of the accused as self-preservation. The Commission's observations tend to support Bradfield's argument: the courts are showing sympathy for the circumstances of victims of domestic violence who kill, but their circumstances are not being assessed within the framework of self-defence.

## DIMINISHED RESPONSIBILITY

In Australia, the partial defence of diminished responsibility is available in New South Wales, Queensland, the Northern Territory and the Australian Capital Territory.<sup>125</sup> Diminished responsibility may be relied upon by accused who have committed domestic homicide if some 'abnormality of mind' can be shown to have existed at the time of the killing. Abnormality of mind includes depression (both reactive and endogenous), post-traumatic stress disorder and anxiety.<sup>126</sup>

### When men rely on diminished responsibility

Research demonstrates that diminished responsibility is relied on 'typically by men who have killed their partners or wives'.<sup>127</sup> Bradfield has noted that 'the most common scenario was where the husband killed following the deterioration in the relationship, in the context of emotional

120. Ibid.

121. Ibid 114.

122. Ibid 93.

123. Bradfield R, 'Women Who Kill: Lack of Intent and Diminished Responsibility as the Other "Defences" to Spousal Homicide' (2001) 13 *Current Issues in Criminal Justice* 146.

124. Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 125.

125. For a full discussion of the partial defence of diminished responsibility, see Chapter 5, 'Diminished Responsibility'.

126. See discussion in Chapter 5, 'Diminished Responsibility: Abnormality of mind'.

127. See VLRC, *Defences to Homicide: Final Report* (2004) [5.118]; Indyk S, Donnelly H & Keane J, *Partial Defences to Murder in New South Wales 1990–2004* (Sydney: Judicial Commission of New South Wales, 2006) 23. The Queensland government's report on women and the Criminal Code stated that it received no information on the use of diminished responsibility in Queensland and that little has been written about it in the Queensland context. However, it suggests that diminished responsibility is mainly relied upon by men who kill their intimate partners: Queensland Taskforce, *Women and the Criminal Code* (1999) ch 6 (unpaginated).

stress caused by separation and/or jealousy'.<sup>128</sup> The prevalence of intimate partner homicide committed by men requires that the defences relied upon by accused in these circumstances be carefully scrutinised. Bradfield observed that provocation and diminished responsibility are frequently relied upon by men who kill their partners, and that the distinction between the two partial defences has become blurred,

so that whether reasonable (provocation) or unreasonable (diminished responsibility), a violent response to jealousy and possessiveness (the inability to let go) finds legal recognition in a partial defence to murder.<sup>129</sup>

As noted in the Commission's discussion on provocation,<sup>130</sup> it is questionable whether current community standards accept that jealousy, and stress related to relationship breakdown, should be the basis for a reduction in culpability for homicide. Submissions suggested that such reasons should never be permitted to reduce murder to manslaughter.<sup>131</sup>

### When women rely on diminished responsibility

Diminished responsibility is also sometimes relied upon by women who kill their abusive partners.<sup>132</sup> The Judicial Commission of New South Wales has observed that these types of cases 'emphasise the serious effects of domestic violence on mental health'.<sup>133</sup> However, relying on diminished responsibility in these cases has been criticised for 'medicalising' a person's response to domestic violence.<sup>134</sup>

The Commission acknowledges that victims of domestic violence may suffer mental health issues as a consequence

of the violence they have suffered. The Office for Women's Policy submitted that '[f]amily and domestic violence is associated with poorer mental health among younger and mid-age women'.<sup>135</sup> However, it is important to note that 'battered women's syndrome'<sup>136</sup> is not a diagnosable mental disorder capable of satisfying the requirement for an 'abnormality of mind' for the purposes of the defence of diminished responsibility.<sup>137</sup> For this reason, the Law Commission (England and Wales) has recently recommended broadening the application of the defence so that it would include 'neurotic' disorders; for example, 'a post-traumatic stress disorder suffered by a woman due to violent abuse suffered over many years'.<sup>138</sup> The Commission recognises that in some cases where victims of domestic violence kill the perpetrator, the reliance on diminished responsibility may simply have been the means by which a merciful outcome was obtained (where self-defence was not available). Nonetheless, the focus on the psychology of the victim of domestic violence who kills can obscure the true reason the victim killed the deceased: the history of domestic violence.

## THE PREVALENCE OF GUILTY PLEAS

The Commission's review of files revealed that most women who kill in the context of domestic violence plead guilty to manslaughter: only six out of 25 women went to trial for murder.<sup>139</sup> There are many reasons for an accused to plead guilty, which may not be apparent from a review of the DPP case file. One reason may be that the circumstances of the killing do not fall within the available defences to homicide. Any uncertainty about the applicability of the available defences is compounded by the risk of a

128. Bradfield R, *Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 25, 107.
129. Ibid 107–108.
130. See Chapter 4, 'The Partial Defence of Provocation'.
131. Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 18–19; Women's Law Centre, Submission No. 49 (7 August 2006) 4–5. See also Federation of Community Legal Centres (Victoria), Violence Against Women and Children Working Group, Submission to VLRC's *Defences to Homicide Options Paper* (December 2003) 10–11. This view was also expressed in submissions to the Queensland report on women and the criminal code: see Queensland Taskforce, *Women and the Criminal Code* (1999) ch 6, 'Part Five: Results of consultation'.
132. Bacon W & Lansdowne R, 'Women Who Kill Husbands: The battered wife on trial' in O'Donnell C & Craney J (eds), *Family Violence in Australia* (Melbourne: Longman Cheshire, 1982) 89, as cited in Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 104; Indyk S, Donnelly H & Keane J, *Partial Defences to Murder in New South Wales 1990–2004* (Sydney: Judicial Commission of New South Wales, 2006) 24'.
133. Indyk, Donnelly & Keane, ibid.
134. Edwards S, *Sex and Gender in the Legal Process* (London: Blackstone Press, 1996) 400, as cited in Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 103.
135. Office for Women's Policy, Submission No. 44 (17 July 2006) (unpaginated). See also Women's Health Australia, *The Australian Longitudinal Study on Women's Health: Partner violence and the health of Australian women* (2005).
136. For a full discussion of battered women's syndrome, see below, 'Should There be a Separate Defence for Victims of Domestic Violence: Battered women's syndrome'.
137. For a full discussion of 'abnormality of mind', see Chapter 5, 'Diminished Responsibility: Cause of the abnormality'. See also New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (May 2001) [6].
138. Law Commission (England and Wales) *Murder, Manslaughter and Infanticide*, Final Report (November 2006) [5.116].
139. The high proportion of manslaughter verdicts due to pleas of guilty, particularly by women, was also noted in Esteal P, *Killing the Beloved: Homicide between adult sexual intimates* (Canberra: Australian Institute of Criminology, 1993) 114.

mandatory sentence of life imprisonment if the defence fails.<sup>140</sup> Another matter that may contribute to guilty pleas is the stress involved in giving evidence at trial – particularly in front of children of the relationship and the deceased's family.<sup>141</sup> Further factors include the potential trauma to any children if they are required to testify; remorse about what has occurred; and the fact that there are typically no independent witnesses to domestic homicide to support the accused's version of events.<sup>142</sup>

Although previous violence in a relationship does not automatically entitle an accused to a successful claim of self-defence or provocation, it has been argued that the prevalence of guilty pleas to manslaughter demonstrates that the present law of homicide does not adequately reflect the circumstances in which women kill.<sup>143</sup> It was not possible for the Commission to determine from its

review of DPP case files, the extent to which pleas of guilty might not have been entered if the tests for self-defence and provocation in Western Australia were different. But the Commission notes that only one out of the 25 women who were charged with murder in the domestic violence context was not convicted of an offence. Certainly, the prevalence of guilty pleas in circumstances of domestic homicide means that the limits of the present law of homicide are not being tested. The availability of the defences to homicide to women in these circumstances has not often been considered by appeal courts in Western Australia.<sup>144</sup> There is, therefore, a risk of inconsistency in outcomes; a potential lack of development in the law; and limited guidance for legal advisers and judges about how such cases should be treated.

- 
140. Generally an accused who pleads guilty receives a discounted sentence. For a detailed examination of the effect of mandatory sentences on the defences to homicide for women who kill abusive partners: see Sheehy E, 'Battered Women and Mandatory Minimum Sentences' (2001) 39 *Osgoode Hall Law Journal* 529.
  141. The difficulties for 'battered women' giving evidence at trial in Canada were explained by Judge Ratushny in her examination of the way battered women's syndrome was used in that jurisdiction: Department of Justice Canada, *Self Defence Review*, Final Report (July 1997) 160–61.
  142. Tolmie J, 'Battered Defendants and the Criminal Defences to Murder – Lessons Learned From Overseas' [2002] *Waikato Law Review* 6.
  143. According to Bradfield's research, the motivation for women to kill their partner is predominantly self-preservation; yet women were convicted of manslaughter in 71 per cent of the cases she examined in which there was history of violence: Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 195.
  144. There is only one reported decision in Western Australia where a woman killed her abusive husband: *Falconer* (1990) 171 CLR 30. The defence relied on in that case was non-insane automatism.

# Should There Be a Separate Defence?

The Commission has considered whether, in order to overcome the problems explained above, it is preferable to retain and reform the existing defences to homicide or if it is necessary for a separate defence to be created. Any examination of this issue refers to (or uses the terminology of) battered women's syndrome. Therefore, the Commission sets out its position on battered women's syndrome before dealing with the question of whether there should be a new defence to homicide for victims of domestic violence who kill.

## BATTERED WOMEN'S SYNDROME

Battered women's syndrome is a psychological theory that has been developed in response to the difficulties that women who kill their abusive partners experience when seeking to rely on the available defences.<sup>1</sup> The theory is used to describe the behaviour of a woman who kills her violent partner. It was developed because the behaviour of women in violent relationships was considered to be beyond the understanding of the average juror.<sup>2</sup> Evidence is given by experts in battered women's syndrome (usually psychiatrists or psychologists) to explain why the woman's actions were reasonable. The evidence is provided to show how women may detect the level of danger in a particular situation and to explain why some women believe their only option is to kill their partners.

According to the battered women's syndrome theory, violent relationships go through three stages: a period of mounting tension, an acute battering incident, and a period of loving contrition. Evidence about battered women's syndrome describes these stages.<sup>3</sup> A woman is said to be a 'battered woman' if the relationship has gone through at least two cycles. Evidence of battered women's syndrome is used to show how a woman may detect the

threat of violence in an action, words, or gesture that may seem to others not to be acutely threatening. It has been observed that: '[...] lethal action by a woman is frequently preceded by changes in the man's behaviour which the woman is able to read because of her long experience of his moods and abuse'.<sup>4</sup> This evidence explains how a victim of domestic violence can anticipate the onset of violence and can assess the seriousness of impending violence. This is because the victim is acutely aware of any change in this pattern of behaviour which may indicate increased danger. This evidence has been used to assist juries to determine whether (or to what extent) the accused had a reasonable apprehension of death or serious injury for the purposes of a claim of self-defence. It has also been used to explain an accused's response to a triggering incident for the purposes of a provocation defence.<sup>5</sup>

Battered women's syndrome also focuses on the psychological effect that the abuse has on the victim. That is, that domestic violence renders some victims less able to leave a relationship. This is described as 'learned helplessness'.<sup>6</sup> This evidence explains the effects of continued abuse on a victim's mental state and may be used to counter the suggestion that because a woman stayed in a relationship, the violence must not have been as bad as she claimed.<sup>7</sup> It is also used to assist a jury to determine the reasonableness of an accused's belief that there was no alternative to killing.

## Battered women's syndrome in the courts

The battered women's syndrome theory was developed in the United States. Expert evidence about battered women's syndrome has been regularly led in that country since the 1980s.<sup>8</sup> Battered women's syndrome has also

1. This theory was developed in the United States by psychologist Lenore Walker: Walker L, *The Battered Woman* (New York: Harper & Rowe, 1979); Walker L, *The Battered Woman Syndrome* (New York: Springer, 1985).
2. Evidence cannot be led about the behaviour of people or situations that are within the experience or understanding of ordinary persons because such evidence contravenes the common knowledge rule. This meant that it was easier to introduce evidence about an abnormal mental state than evidence that contravened that rule of evidence: Stubbs J & Tolmie J '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, 723.
3. In most discussions of Lenore Walker's theory it is described as a three phase cycle; however, a more detailed description (with a more complex cycle) of violent relationships in an Australian context is provided by Rathus: Rathus Z, *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) 3.
4. Rathus, *ibid* 5.
5. In *Gilbert* (Unreported, Supreme Court of Western Australia, 4 November 1993) battered women's syndrome evidence was used to explain why the accused feared death or grievous bodily harm, and was fearful and lost self-control, when her violent partner pointed his finger at her and threatened her: Leader-Elliott I, 'Battered But Not Beaten: Women who kill in self defence' (1993) 15 *Sydney Law Review* 403, 416–17.
6. Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 34.
7. It has been argued that 'the invention of battered women's syndrome [is], to a very considerable extent, a response to American restrictions on the law of self-defence and provocation which have no counterpart in Australian common law. Leader-Elliott notes that Australian law may be more malleable, and more able to be adapted to fit the circumstances of victims of domestic violence who kill their abusers than American law. See further discussion in Leader-Elliott I, 'Battered But Not Beaten: Women who kill in self defence' (1993) 15 *Sydney Law Review* 403, 406.

been used in courts in Canada,<sup>9</sup> the United Kingdom,<sup>10</sup> New Zealand<sup>11</sup> and, since 1991, in Australia.<sup>12</sup> Australian courts have heard evidence about battered women's syndrome in the context of self-defence,<sup>13</sup> provocation<sup>14</sup> and duress<sup>15</sup> in at least 20 cases where women have killed violent partners.<sup>16</sup> The Commission is aware of two cases in Western Australia in which an accused has led evidence of battered women's syndrome at trial or in sentencing for murder.<sup>17</sup> However, the Commission is not aware of any case in which battered women's syndrome has been considered by an appellate court in Western Australia.<sup>18</sup> The High Court has dealt with one case involving battered women's syndrome: *Osland*.<sup>19</sup> The decision in that case did not turn on the use of battered women's syndrome; however, some of the problems with battered women's syndrome were recognised in the judgments.

## Problems with battered women's syndrome

Since battered women's syndrome was first introduced a number of problems with the theory have been observed.<sup>20</sup> It has been noted that it does not take into account cultural diversity;<sup>21</sup> and does not adequately recognise the relationship between domestic violence and alcohol abuse.<sup>22</sup> Reliance on battered women's syndrome can exclude women who do not conform to the stereotype of a 'battered wife'. The Commission's review of DPP files provided examples where this stereotype was evident in cases where the women had 'fought back'. For example, a prosecutor commented that one such accused was not a 'helpless victim'.<sup>23</sup> Submissions also noted problems with battered women's syndrome. Some asserted that it is not desirable to 'medicalise' a person's response to violence

9. *Lavallee* [1990] 1 SCR 852. For further discussion of Canadian cases and the impact of *Lavallee*, see Department of Justice Canada, *Self Defence Review*, Final Report (1997) ch 2; Shaffer M 'The Battered Woman Syndrome Revisited: Some complicating thoughts five years after *R v Lavallee*' (1997) 47 *University of Toronto Law Journal* 1.
10. Eg *Ahluwalia* [1992] 4 All ER 889; *Thornton* (No 2) [1996] 1 WLR 1174.
11. Eg *Ruka* [1997] 1 NZLR 154; *Oakes* [1995] 2 NZLR 673; *Wang* [1990] 2 NZLR 529. For further discussion about the use of battered women's syndrome evidence in New Zealand see: NZLC, *Battered Defendants: Victims of domestic violence who offend* (August 2000) 9–10.
12. *Runjanic & Kontinnen* (1991) 56 SASR 114. This case was the first to introduce evidence of battered women's syndrome in Australia; however, it did not involve the killing of a violent partner. Rather, the two female accused were charged with false imprisonment and causing grievous bodily harm (with intent) to another woman. The accused claimed that they had done so at the request of their abusive partner (the man was in a relationship with both women). The defence relied on was duress; the accused said that they had detained the other woman at their partner's request because they were afraid of him. At their trial they sought to call a clinical psychologist as an expert witness. It was proposed that the psychologist should give evidence about battered women's syndrome in order to explain the effect that the violence suffered by the accused had on them and to dispel 'popular myths' about domestic violence. The trial judge did not allow the proposed expert evidence to be led. The women were both convicted. They appealed, and the South Australian Supreme Court allowed their appeal against conviction on the basis that they should have been permitted to call the expert evidence. The court did so in the knowledge that the battered women's syndrome evidence would be used at the re-trial for false imprisonment, and for a further purpose. While awaiting her trial for false imprisonment, Kontinnen had killed the man that had been in the relationship with both women, and had been charged with his murder. At her trial for murder battered women's syndrome evidence was led in support of her claim of self-defence. She was acquitted at trial: see *Kontinnen* (Unreported, Supreme Court of South Australia, 27 March 1992).
13. *Hickey* (Unreported, Supreme Court of New South Wales, 14 April 1992), as cited in Stubbs J & Tolmie J, '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.
14. *Gilbert* (Unreported, Supreme Court of Western Australia, 4 November 1993). In *Gilbert* the accused also relied on self-defence and lack of intent.
15. *Runjanic & Kontinnen* (1991) 56 SASR 114.
16. Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 270.
17. *Gilbert* (Unreported, Supreme Court of Western Australia, 4 November 1993); *McEwen* (Unreported, Supreme Court of Western Australia, 18 March 1996). It is notable that in *McEwen* the accused was a man said to be suffering from battered women's syndrome.
18. Stubbs and Tolmie remarked on the fact that there are few appeal decisions in Australia on the issue: they state that '[mo]st Australian decisions have tended to simply admit battered women's syndrome with little or no debate about its nature or relevance': Stubbs J & Tolmie J, '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, 720.
19. *Osland* (1998) 197 CLR 316.
20. See Stubbs J & Tolmie J, '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, 710–31; Rathus Z, *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) 7; Scutt J, 'Restricted Vision–Women, Witches and Wickedness in the Courtroom' (2001) 6 *Deakin Law Review*, 40, 58–64; Craven Z, *Battered Woman Syndrome* (Australian Domestic & Family Violence Clearinghouse, 2003) 7–12; Freckleton I, 'Contemporary Comment: When plight makes right – The Forensic Abuse Syndrome' (1994) 18 *Criminal Law Journal* 42–48; Leader-Elliott I, 'Battered But Not Beaten: Women who kill in self defence' (1993) 15 *Sydney Law Review* 403, 407–18.
21. Tarrant contends that issues of race are very important in understanding domestic violence homicide. As noted above, ('The Nature and Dynamics of Domestic Violence: Domestic violence in Aboriginal families') Aboriginal women make up a disproportionate number of victims of domestic violence. Similarly, the NZLC observed that Maori women are more often victims of domestic violence, and are likely to be victims of more extreme levels of violence: NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73 (May 2001) [8].
22. Leader-Elliott argues that battered women's syndrome might not properly take account of the interaction of alcohol use and domestic violence. He states that where alcohol is involved it is less likely that the abuser will show contrition and remorse as assumed by the battered women's syndrome theory: there is a tendency to attribute the violence to the use of alcohol. Leader-Elliott, 'Battered But Not Beaten: Women who kill in self defence' (1993) 15 *Sydney Law Review* 403, 413.
23. Women who have previously fought back 'may also run the risk of activating traditional misconceptions of domestic violence as "marital discord" or a situation for which both parties are mutually responsible': Stubbs J & Tolmie J '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, 736.

## ◀ Should There Be a Separate Defence?

where that response may be a reasonable one.<sup>24</sup> It was also noted that the battered women's syndrome model is too restrictive: it excludes other victims of abusive relationships (for example, men, children and people in same sex relationships).<sup>25</sup>

Battered women's syndrome does not necessarily assist women to rely successfully on defences to murder.<sup>26</sup> In fact, it can detract from a woman's ability to argue that she acted in self-defence because it tends to show that her response to violence was not rational.<sup>27</sup> Leader-Elliott has argued that learned helplessness has the 'paradoxical effect of transforming an assertive act of self-defence into a manifestation of weakness and incapacity'.<sup>28</sup> The focus on the internal reasons (learned helplessness) that stopped the woman from leaving the relationship obscures the external reasons that may explain a woman's decision to remain in a relationship.<sup>29</sup>

The Commission is aware of four Australian cases in which women have been acquitted on the basis of self-defence where they have not relied on battered women's syndrome.<sup>30</sup> These cases demonstrate that it is possible to convey to the jury that nature of the threat faced by women in these circumstances, and that their conduct

was reasonable, without recourse to battered women's syndrome. However, it must be noted that in three out of four of these cases the killing occurred during a confrontation.

### IS A SEPARATE DEFENCE NECESSARY?

The Commission invited submissions on whether it is necessary to introduce a separate defence for victims of domestic violence who kill,<sup>31</sup> and received 35 responses. The majority of submissions (28) recognised that there was a need for reform and supported either change to the existing law, or the introduction of a new defence. There was strong support (22 out of 35 responses) for changes to the law of self-defence so that it could accommodate the experiences of abused women.<sup>32</sup> Few responses considered that provocation was the appropriate defence for women in these circumstances.<sup>33</sup> Six submissions opposed reform;<sup>34</sup> for reasons including that the present defences are adequate<sup>35</sup> and that 'the area is too problematic'.<sup>36</sup>

There was considerable support in submissions for the concept of a separate defence for women who kill their

24. Domestic Violence Legal Unit, Legal Aid (WA), Submission No. 50 (6 August 2006) 6; Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 5; Women's Law Centre, Submission No. 49 (7 August 2006) 3.
25. Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 5.
26. In neither of the cases in which it was relied on in a defence to homicide in Western Australia was the accused acquitted.
27. Women's Law Centre, Submission No. 49 (7 August 2006) 3.
28. Leader-Elliott I, 'Battered But Not Beaten: Women who kill in self defence' (1993) 15 *Sydney Law Review* 403, 411.
29. In the language of battered women's syndrome a woman is said to 'perceive' a threat or 'perceive' that she cannot otherwise escape the violence. This implies that her perception is not real. In *Kontinnen* the judge referred to evidence given by an expert witness that the accused had 'no safe place to go', 'no other support' and found that she had an 'absolute fear that if she leaves the person will find her and that the violence and brutality will be worse than before she left.' This evidence was used to demonstrate her 'psychological dysfunction' (Unreported, Supreme Court of South Australia, 30 March 1992) as cited in Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002) 280.
30. Bradfield located three cases in which women had been acquitted without reference to battered women's syndrome: *Ibid*, 276. In the recent Western Australian case of *Dzuiba* (Unreported, Supreme Court of Western Australia, 14 May 2007) a woman was acquitted on the basis of self-defence after she had killed her violent ex-boyfriend.
31. LRCWA, *Review of the Law of Homicide: Issues Paper* (2006) 8, Question 18.
32. Joy & Neil Moore, Submission No. 5 (6 June 2006); G Davis, Submission No. 6 (6 June 2006); Doris Schutt, Submission No. 7 (8 June 2006); Donalee Heseltine, Submission No. 8 (8 June 2006); Julia Lacey, Submission No. 10 (8 June 2006); R Leckie, Submission No. 11 (8 June 2006); E D'Olia, Submission No. 12 (12 June 2006); Elaine Bassile, Submission No. 13 (11 June 2006); Women Justices' Association of Western Australia, Submission No. 14 (7 June 2006); Fiona Aitken, Submission No. 17 (12 June 2006); Janette Wheare, Submission No. 18 (12 June 2006); Robyn Buller, Submission No. 22 (12 June 2006) & 22A (29 June 2006); Carolyn Harris Johnson, Submission No. 27 (15 June 2006); Indigenous Women's Congress, Submission No. 41 (12 July 2006); Department for Community Development, Submission No. 42 (7 July 2006); Justice Christine Wheeler, Supreme Court of Western Australia, Submission No. 43 (23 June 2006); Office for Women's Policy, Submission No. 44 (17 July 2006); Women's Council for Domestic and Family Violence Services (WA), Submission No. 46, (25 July 2006); Angelhands, Submission No. 47 (3 August 2006); Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 10; ; Women's Law Centre, Submission No. 49 (7 August 2006); Domestic Violence Legal Unit, Legal Aid (WA), Submission No. 50 (6 August 2006).
33. Each of these submissions argued that provocation should be available to any victim who kills their abuser (not only women): Law Society of Western Australia, Submission No. 37 (4 July 2006) 8; Bar Association Member (name withheld), Submission No. 31 (15 June 2006) 1; Paul Ritter, Submission No. 4 (29 May 2006).
34. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006); Festival of Light Australia, Submission No. 16 (12 June 2006) 6; Men's Confraternity Incorporated, Submission No. 20 (12 June 2006); Western Australian Bar Association Member (name withheld) Submission No. 31 (15 June 2006); Coalition for the Defence of Human Life, Submission No. 32 (16 June 2006); Eric Turner, Submission No. 36 (8 June 2006); Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 10. A further submission specifically opposed a separate defence for victims of domestic violence; however made no comment on reforms to other defences: Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 8.
35. Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 5.
36. Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 10.

abusive partners.<sup>37</sup> The majority of these responses also said that a defence of this kind should apply to *any* person in an abusive relationship, not only to women. The main reason stated in favour of a separate defence was that it would allow the history, characteristics and effects of abuse on the accused to be taken into account. Some submissions expressed concern about the introduction of a separate defence.<sup>38</sup> There was opposition to gender-based defences on principle,<sup>39</sup> and reservations about the use of battered women's syndrome as the model for a separate defence.<sup>40</sup>

Other law reform bodies have considered the introduction of a separate defence.<sup>41</sup> In 1994 the Chief Justice of Western Australia's taskforce on gender-bias decided that reform to this area of the law was necessary. Although it was recommended that Western Australia should adopt the Model Criminal Code test for self-defence,<sup>42</sup> it concluded that this test would not address all of the problems posed by the existing law for women who kill violent partners. The test would still require an imminent threat, it would still hinge on an assessment of reasonableness, and 'circumstances' might still be interpreted narrowly.<sup>43</sup> It

therefore also recommended that a new defence should be created. The taskforce suggested that a person would act in self-defence if that person is

responding to a history of personal violence against herself or himself or another person and the person believes that the conduct is necessary to defend himself, herself or that other person against the violence.<sup>44</sup>

The introduction of a separate defence of this kind would ensure that the history of violence in a relationship is taken into account; in particular, how that history affected the accused's assessment of the nature of the threat responded to.<sup>45</sup> The Commission received strong submissions from the Women's Council and the Women's Law Centre recommending the introduction of a separate defence. They argued that such a defence would counteract bias and stereotypes;<sup>46</sup> bring clarity to the law;<sup>47</sup> educate judges, lawyers and the community about the dangers faced by women;<sup>48</sup> and redress inequality in the law.<sup>49</sup> The Women's Law Centre suggested that a separate defence might also be preferable to broadening the general law of self-defence, because a wider test might be applied in other, inappropriate, circumstances.<sup>50</sup>

37. Many of these submissions expressed support for this concept in addition to reform to provocation and self-defence. Joy & Neil Moore, Submission No. 5 (6 June 2006); G Davis, Submission No. 6 (6 June 2006); Doris Schutt, Submission No. 7 (8 June 2006); Donalee Heseltine, Submission No. 8 (8 June 2006); Julia Lacey, Submission No. 10 (8 June 2006); R Leckie, Submission No. 11 (8 June 2006); E D'Olia, Submission No. 12 (12 June 2006); Elaine Bassile, Submission No. 13 (11 June 2006); Women Justices' Association of Western Australia, Submission No. 14 (7 June 2006); Fiona Aitken, Submission No. 17 (12 June 2006); Janette Wheare, Submission No. 18 (12 June 2006); Michael Bowden, Submission No. 39 (11 July 2006); Indigenous Women's Congress, Submission No. 41 (12 July 2006); Department for Community Development, Submission No. 42 (7 July 2006) 8; Office for Women's Policy, Submission No. 44 (17 July 2006); Women's Council for Domestic and Family Violence Services (WA), Submission No. 46, (25 July 2006); Angelhands, Submission No. 47 (3 August 2006); Women's Law Centre, Submission No. 49 (7 August 2006); Domestic Violence Legal Unit, Legal Aid (WA), Submission No. 50 (6 August 2006).
38. The introduction of a separate defence for women who kill their abusive partners was opposed in five submissions: Justice Geoffrey Miller, Supreme Court of Western Australia, Submission No. 3 (22 May 2006) 5; Festival of Light Australia, Submission No. 16 (12 June 2006) 6; Eric Turner, Submission No. 36 (8 June 2006); The Law Society of Western Australia, Submission No. 37 (4 July 2006) 9; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 8; Office of the Director of Public Prosecutions, Submission No. 51A (16 August 2006) 10.
39. The Law Society of Western Australia, Submission No. 37 (4 July 2006) 9; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 8; Aboriginal Legal Service, Submission No. 45 (26 July 2006) 2.
40. Justice John McKechnie, Supreme Court of Western Australia, Submission No. 9 (7 June 2006) 5; Carolyn Harris Johnson, Submission No. 27 (15 June 2006); Justice Christine Wheeler, Supreme Court of Western Australia, Submission No. 43 (23 June 2006); Office of the Commissioner of Police, Submission No. 48 (31 July 2006) 10; Women's Law Centre, Submission No. 49 (7 August 2006) 3; Office of the Director of Public Prosecutions, Submission No 51A (16 August 2006) 10; Domestic Violence Legal Unit, Legal Aid (WA), Submission No. 50 (6 August 2006) 6.
41. The VLRC considered three different models for a separate defence (the battered women's syndrome model, the self preservation model and the coercive control model). See discussion in VLRC, *Defences to Homicide*, Final Report (2004) [3.15]–[3.29]. See also NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73 (May 2001) [70]–[86].
42. See discussion in Chapter 4, 'Self-Defence: Model Criminal Code'.
43. The taskforce noted that the other scenarios listed in the provision envisaged one-off situations such as protecting property, removal from land and preventing imprisonment: Chief Justice of the Supreme Court of Western Australia's Taskforce, *Report on Gender-Bias* (30 June 1994) 214.
44. Ibid.
45. A similar defence was suggested by the Women's Legal Service in Queensland in 1996: see Women's Legal Service Queensland, *Rougher than Usual Handling: Women and criminal justice system* (1996). This report was the precursor to the report by the Queensland Taskforce on Women and the Criminal Code, *Women and the Criminal Code* (1999). The later report concluded that no legislative change was necessary, although significant disagreement on this point among members of the taskforce was noted. The taskforce also states that in a 1995 report for Status of Women, Canada Elizabeth Sheehy proposed a new defence of 'self-preservation' which would allow the history of violence in a relationship to be taken into account: Queensland Taskforce, *Women and the Criminal Code* (1999) ch 6 (unpaginated).
46. Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 9.
47. Ibid, 10.
48. Ibid, 10. See also, Women's Law Centre of Western Australia, Submission No. 49 (7 August 2006) 4.
49. Ibid, 11.
50. The Women's Law Centre stated that because such a defence is effectively sanctioning a 'pre-emptive' action it should be restricted as much as possible. They asserted that restricting the ambit of the defence and allowing evidence of appropriately qualified experts would reduce the risk of misapplication: Women's Law Centre of Western Australia, Submission No. 49 (7 August 2006) 4.

## ◀ Should There Be a Separate Defence?

There are persuasive reasons *not* to introduce a separate defence. The Commission notes the objection to gender-based defences expressed in submissions.<sup>51</sup> As set out in Chapter 1, the Commission is of the view that the law of homicide should be of general application.<sup>52</sup> For that reason, it has not recommended the introduction or retention of any offences or defences that are directed to particular groups in the community. Victims of domestic violence who kill their abusers should only be acquitted when they satisfy the test for self-defence as it applies to every member of the community. However, it is necessary to change the law of self-defence so that it is not biased against women or other victims of domestic violence and enables appropriate evidence to be led.

The Commission recognises the need to ensure that stereotypes and misconceptions about domestic violence are not perpetuated in the legal system. It also understands the concerns expressed in submissions that judges, juries, lawyers and the community need more awareness about the dangers faced by victims in abusive relationships.

However, in the Commission's view, this goal would not be achieved by creating a special category for self-defence for such victims. Such a defence might give the impression that such persons did not act *genuinely* in self-defence, only in a special category of it.<sup>53</sup> This would not encourage recognition that such victims are legitimately acting in self-defence, and would detract from an understanding of the very real danger faced by victims.

Of further concern to the Commission is that a defence based on women's experiences might exclude others in abusive relationships; for example, children, parents, grandparents, male partners and people in same-sex relationships.<sup>54</sup> The Commission notes that the majority of submissions supporting the concept of a separate defence considered that such a defence should not be available only to women. Like other law reform bodies that considered this issue, the Commission has concluded that, rather than introduce a separate defence, it is preferable to amend the law so that it better accommodates the experiences of victims of domestic violence who kill.<sup>55</sup>

- 
51. The Law Society of Western Australia, Submission No. 37 (4 July 2006) 9; Criminal Lawyers' Association, Submission No. 40 (14 July 2006) 8; Aboriginal Legal Service, Submission No. 45 (26 July 2006) 2.
  52. See Introduction, 'Guiding Principles for Reform'.
  53. VLRC, *Defences to Homicide*, Final Report (2004) [3.17].
  54. *Ibid.*
  55. The VLRC and the NZLC also concluded that the introduction of a separate defence was not the most appropriate way to overcome the problems for women who kill their abusive partners. The VLRC recommended that the test for self-defence should be reformed so that it applied fairly to all accused people: *ibid* [3.17] & [3.26]. See also NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (May 2001) [84].

# How Will the Commission's Reforms Apply?

## SELF-DEFENCE

The Commission's reformulated test for self-defence<sup>1</sup> has removed the two elements of the existing test that have been problematic for women who kill in response to domestic violence. These are, the requirement for an assault and the requirement that the accused feared death or grievous bodily harm. By not including these aspects of the Code test, the Commission recognises that a victim of domestic violence may be responding to a continuous threat or series of events and that domestic violence can take many forms, some of which may not satisfy the test for grievous bodily harm.

However, the Commission recognises that these amendments to the Code test alone will not overcome the problems discussed in this chapter. Even with a revised test, there is a risk that lawyers, judges and juries will continue to assess the actions of accused persons according to the standard of the 'one-off physical attack model'. In particular, the concepts of proportionality and imminence may continue to influence the assessment of self-defence. Further, the reformulated test still requires an assessment of reasonableness: the accused's belief about the need to use defensive force must be reasonable and the use of lethal force must be a reasonable response in the circumstances. The pervasive misconceptions about the nature of domestic violence may impact on the assessment of reasonableness and mean that lawyers, judges and juries are reluctant to view domestic homicide within the framework of self-defence. This will be of particular concern when a victim of domestic violence kills the perpetrator in non-confrontational circumstances,<sup>2</sup> or circumstances in

which the history of domestic violence has formed a crucial part of the accused's belief about the need to use force.

One way that has been suggested to overcome the problems that juries may have with the application of the test for self-defence is to set out in the test what factors should be considered,<sup>3</sup> and which factors should not be considered,<sup>4</sup> in determining whether a person acted in self-defence. Such lists of factors can ensure that any relevant history of domestic violence in a relationship is taken into account, and that issues such as proportionality and imminence do not present unnecessary hurdles. However, reservation about the appropriateness of lists of factors of this nature has often been expressed: in *Zecevic* the High Court said that 'there is a danger of appearing to elevate matters of evidence to rules of law'.<sup>5</sup> That is, lists of factors that were meant to simply provide guidance on how a test is to be applied might be given undue weight, and become unnecessarily prescriptive or restrictive.<sup>6</sup>

The Commission has concluded that it is not desirable to specify in the test for self-defence the factors that should or should not be considered when applying the test.<sup>7</sup> However, unlike the Victorian Law Reform Commission (VLRC), the Commission does not consider that proportionality and imminence should be specifically referred to in the reformulated test for self-defence. The Commission considers that to do so introduces unnecessary complexity into the test (noting that the need for simplification is one of the principal reasons for reform to the test of self-defence in Western Australia).<sup>8</sup> It also risks unduly broadening the scope of the defence. For these reasons, the Commission has determined that the best way of dealing with the concepts of imminence and

1. See Chapter 4, 'Self-Defence', Recommendation 23.
2. The Victorian Law Reform Commission (VLRC) expressed a similar concern in their report: VLRC, *Defences to Homicide*, Final Report (2004) [3.27].
3. This approach was suggested by Judge Ratushny in Canada in 1997 following a review of every case in which a woman was serving prison sentence for murdering her partner – the recommendations were therefore focused on the particular aspects of the law that had led to injustice. Judge Ratushny's proposed test for self-defence sets out what is meant by 'reasonable' and lists the factors that are to be considered in determining reasonableness. The factors suggested were: the defender's background, including any past abuse suffered by the defender; the nature, duration and history of the relationship between the defender and the other person, including prior acts of violence or threats, whether directed to the defender or to others; the age, race, sex and physical characteristics of the defender and the other person; the nature and imminence of the assault; and the means available to the defender to respond to the assault, including the defender's mental and physical abilities and the existence of options other than the use of force. See Department of Justice Canada, *Self Defence Review*, Final Report (July 1997) Recommendation: A Model Self Defence Law (4)(a)–(e).
4. See also discussion in VLRC, *Defences to Homicide*, Final Report (2004) [3.31]–[3.35].
5. (1987) 162 CLR 645, 662 (Wilson, Dawson and Toohey JJ).
6. Concerns about lists of this nature were noted in the reports by Queensland Taskforce, *Women and the Criminal Code* (1999) ch 6 (unpaginated) and the VLRC, *Defences to Homicide*, Final Report (2004) [3.39], [3.44]–[3.48].
7. The VLRC also concluded that it is not appropriate to list the factors that are relevant to the test for self-defence in the substantive provision on self-defence. It concluded that it was preferable for a separate provision on evidence to set out the factors which may be referred to in assessing whether a person's conduct falls within the scope of self-defence. However, it also concluded that because the concepts of proportionality and imminence have had such an impact upon how self-defence is viewed they should be specifically addressed in the proposed new provision on self-defence. See VLRC, *ibid* [3.45], Recommendations 4 & 5. The recent amendments to the *Crimes Act 1958* (Vic) substantially enact the VLRC's recommendations. The new sections provide that for the purposes of the test for self-defence in circumstances of family violence (as defined in the legislation) a person may have reasonable grounds for believing that the use of force is necessary even if he or she is responding to harm that is not immediate or the response involves a use of force in excess of the harm or threatened harm. The legislation also sets out the kinds of evidence that may be used to determine whether the use of force was necessary, or whether the accused had reasonable grounds for using force: see *Crimes Act 1958* (Vic) s 9AH.
8. See Chapter 4, 'Self-Defence: The law of self-defence is complicated'.

## ◀ How Will the Commission's Reforms Apply?

proportionality is to require trial judges to appropriately direct juries about these issues.

### Directions by the trial judge

The Commission has recommended that trial judges will be required to give juries some direction on the way that the test of self-defence should be applied. Under the Commission's proposal, trial judges will explain to juries that defensive force may be reasonable even where it is *not proportional* to the threat faced. Further, they must direct the jury that an act may be carried out in self-defence even though there was no *immediate* threat of harm: as long as the threat of harm was *inevitable*.<sup>9</sup>

This is in line with the way that the law of self-defence is developing in other jurisdictions.<sup>10</sup> Some Australian courts have already recognised that self-defence may apply in circumstances where there is no immediate threat.<sup>11</sup> Although some concerns have been expressed about the use of 'inevitability',<sup>12</sup> the Commission considers that the concept of inevitable harm more accurately reflects the reality faced by women in abusive relationships.<sup>13</sup> It does not mean that any woman who has killed her partner where there is a background of domestic violence will automatically be entitled to rely on self-defence. In her submission, Justice Christine Wheeler stated that:

[I]t is important to understand that there is a relatively small, but significant, proportion of victims of domestic violence (almost invariably female) who correctly perceive that their choices are limited to the following:

- (1) Remain in an abusive relationship, with inevitable violence and the possibility of their own death resulting;
- (2) Leave the relationship, in which case their own death will be inevitable, or nearly so; or
- (3) Kill the perpetrator of violence.<sup>14</sup>

The benefit of having the concept explained by the trial judge (rather than set out as part of the legislative test) is that it will allow the judge to direct how the concepts of imminence or inevitability apply in each individual case. The Commission considers that this will prevent any undue broadening of the scope of the defence.

### EVIDENCE

It has been contended by some commentators that, in order to ensure the domestic violence context for homicide is properly taken into account by the legal system, it is necessary to do more than change the scope of self-defence; it is also necessary to change the rules about what information the court can receive in a homicide trial.<sup>15</sup> This view was also expressed in submissions and the Commission's attention was drawn to particular cases in which it was suggested that the courts had not been able to properly consider information about domestic violence in a homicide trial.<sup>16</sup>

The rules of evidence govern the kind of information on which the fact-finder in a case bases its decision.<sup>17</sup> As the Commission noted in its review of the criminal and civil justice system in Western Australia:

The laws and rules of evidence require a high degree of formal proof. These exacting standards exist so that only reliable evidence is allowed in court. The integrity of the justice system depends on the fact-finder, whether judge or jury, basing decisions on dependable evidence.<sup>18</sup>

The Commission recognises that the rules of evidence can, in some circumstances, make it difficult to provide information to the court about a history of domestic violence in a relationship. The hidden nature of domestic

9. Chapter 4, 'Self-Defence'; Recommendation 22.
10. In 2001 the New Zealand Law Reform Commission (NZLC) recommended that self-defence should apply in circumstances where the danger or threat is inevitable, not imminent: NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Final Report No. 73 (2001) [32]. As noted above, the recent amendments to the law of self-defence in Victoria include these factors in the provision on self-defence.
11. In *Kontinnen* (Unreported, Supreme Court of South Australia, Legoe J, 30 March 1992) and *Secretary* (1996) 86 A Crim R 119 self-defence was left to the jury (and the accused acquitted) when the victim was asleep when the accused shot him. In *Stjernquist* (Unreported, Queensland Supreme Court, Derrington J, 19 June 1996) the trial judge directed the jury that a continuous threat may give rise to the legitimate use of force in self-defence.
12. The following concerns were stated in a submission to the VLRC reference: that the concept of inevitability unnecessarily widens the scope of the defence, tends to legitimate violent self-help and would expand the scope of honest and reasonable mistake of fact: VLRC, *Defences to Homicide*, Final Report (2004) [3.58].
13. A number of submissions received by the Commission also preferred the concept of 'inevitable' rather than imminent or immediate harm: E D'Olia, Submission No. 12 (12 June 2006) 2; Carolyn Harris Johnson, Submission No. 27 (15 June 2006) 1; Women's Council for Domestic Violence & Family Violence Services, Submission No. 46 (25 July 2006) 13; Women's Law Centre of Western Australia, Submission No. 49 (7 August 2006) 2; Office of the Commissioner of Police, Submission No. 48 (4 August 2006) 10; Domestic Violence Unit, Legal Aid (WA), Submission No. 50 (6 August 2006) 7. The Commission notes that the Western Australia Police stated that it 'might be reasonable to modify the requirement of immediacy in the context of the facts'. Justice Christine Wheeler, Supreme Court of Western Australia, Submission No. 43 (23 June 2006) 4.
14. Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 27; Rathus Z, *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) 6.
15. In order to preserve the anonymity of the accused, the Commission has not described the circumstances of these cases in detail in this part.
16. In Western Australia the *Evidence Act 1906* (WA) and the common law govern the reception of evidence in state courts.
17. Law Reform Commission of Western Australia (LRCWA), *Review of the Criminal and Civil Justice System in Western Australia*, Final Report (September, 1999) 169.

violence means that there will often be no direct witnesses. The silence and shame surrounding domestic violence can mean that the victim has not made a formal report to police or attended for medical treatment.<sup>19</sup> It was noted in a 2004 Western Australian report reviewing legislation relating to domestic violence that:

The courts need to be flexible in inquiring into the homelife of people, as this is an area that is often closed off to the rest of the world.<sup>20</sup>

In recognition of these difficulties, Western Australian courts hearing applications for violence restraining orders are not bound by the rules of evidence.<sup>21</sup> Because of the consequences that flow from the decision of the fact-finder in a homicide trial, it is important that decisions are based on reliable information. It is clearly not appropriate for the rules of evidence to be relaxed generally in homicide trials.

Australia is moving toward uniform evidence legislation.<sup>22</sup> In 1999, the Commission recommended that the *Evidence Act 1906* (WA) be rewritten to incorporate that uniform legislation.<sup>23</sup> The Commission notes that the Western Australian government is presently considering the way that uniform evidence legislation could be incorporated into the Western Australian *Evidence Act*.<sup>24</sup> Stated briefly, the Commission's view is that the adoption of the uniform evidence laws would largely overcome the issues raised in the context of domestic violence.

The Commission notes the concerns raised in submissions and by Tarrant<sup>25</sup> about the limitations on evidence of domestic violence in homicide trials. However, the Commission's review of cases revealed that evidence about the relationship between the accused and the deceased,<sup>26</sup> including previous acts of violence and criminal convictions, was regularly admitted in homicide trials and in sentencing hearings in Western Australia.<sup>27</sup> In some cases, in which the perpetrator of violence had killed the victim, evidence of the previous acts of violence was led to show the 'pattern of violence' and the state of mind of both the deceased and the accused. In other cases, where the victim of the previous violence had killed the perpetrator, evidence was led of the previous violence as the basis of a claim of self-defence (including reasonableness) or to explain the state of mind of the accused.

## **Evidence about reasonableness**

The reformulated Code test retains the requirement of reasonableness. As explained above,<sup>28</sup> the concept of reasonableness has been seen to be a barrier to victims of domestic violence relying on self-defence. Although in some Western Australian cases evidence has been led to show that the accused has experienced domestic violence, the Commission considers that it may be appropriate for *expert* evidence to be led to assist a jury to determine whether the accused's belief of the need to use defensive force and the degree of force used was reasonable.<sup>29</sup>

- 
- 19. See discussion above, 'Nature and Dynamics of Domestic Violence: The hidden nature of domestic violence'.
  - 20. Department of Justice, *Report on a Review of Legislation Relating to Domestic Violence* (June 2004).
  - 21. *Restraining Orders Act 1997* (WA) s 44A.
  - 22. See *Evidence Act 1995* (Cth). This Act has been adopted by New South Wales, Tasmania and Norfolk Island. The Act has recently been comprehensively reviewed in a joint report by the Australian Law Reform Commission (ALRC), the New South Wales Law Reform Commission (NSWLRC) and VLRC. See ALRC, *Uniform Evidence Law Report*, Report No. 102 (December 2005). In the course of that review the governments of Western Australia, Victoria and the Northern Territory stated their intentions to adopt the uniform evidence legislation.
  - 23. LRCWA, *Review of the Criminal and Civil Justice System in Western Australia*, Final Report (September, 1999) 171, Recommendation 221. However, the Commission noted that the specific advantages of the *Evidence Act 1906* (WA) should be retained; for example, the provisions about the evidence of child witnesses and the protection for complainants in sexual assault matters. In 2002 the Commission suggested that the implementation of this recommendation should be a high priority for the Western Australia government: see LRCWA, *30th Anniversary Reform Implementation Report* (June 2002).
  - 24. Office of the Attorney General for Western Australia, email (31 August 2007).
  - 25. Tarrant recommended that the provisions of the uniform evidence legislation relating to hearsay be adopted in Western Australia: Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 27.
  - 26. Evidence of this kind is called relationship evidence. Section 31A of the *Evidence Act 1906* (WA) provides that relationship evidence is admissible where the evidence has significant probative value and the probative value outweighs the risk of an unfair trial. See also *Wilson* (1970) 123 CLR 335; *T (a child)* (1998) 20 WAR 130.
  - 27. The extensive consultations by the VLRC also found that evidence of domestic violence is routinely admitted in that jurisdiction. The VLRC also suggested that the best way of addressing the concerns about the rules of evidence as they apply in homicide trials is for the Victorian government to adopt the uniform evidence legislation: see VLRC, *Defences to Homicide*, Final Report (October 2004) [4.26].
  - 28. See discussion above, 'Self-Defence: Problems with the Code test in the context of domestic violence' and 'Problems with the general concept of self-defence'.
  - 29. The need for expert evidence to explain aspects of domestic violence was recognised in NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No. 73 (May 2001) [84]. It was also noted in submissions: Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 16; Women's Law Centre, Submission No. 49 (7 August 2006) 2. Tarrant proposed that the reformulated test for self-defence should provide that where a killing has occurred in response to domestic violence evidence of the general nature, dynamics and effects of domestic violence, including the possible consequences of leaving, may be relevant: Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 27.

## ◀ How Will the Commission's Reforms Apply?

Expert evidence could be led in relation to a broad range of matters which might assist a jury to determine reasonableness, including:<sup>30</sup>

- the nature and dynamics of abusive relationships;<sup>31</sup>
- the availability of assistance for victims of domestic violence;
- the complex reasons that victims stay in violent relationships;
- any cultural or racial issues that may be relevant in a particular case;<sup>32</sup>
- why victims of domestic violence may not always seem to be 'deserving victims', such that the jury may not feel sympathy for them;<sup>33</sup>
- why victims of domestic violence may sometimes fight back;<sup>34</sup> and
- why there may be limited corroborating evidence of the past domestic violence.<sup>35</sup>

If the homicide occurred in circumstances which do not fall within the one-off physical attack model of self-defence (for example, if it did not occur in the course of a confrontation), expert evidence may be required to explain to the jury the level of danger that a woman may be responding to. Rathus argues that:

Juries need to be informed about the dynamics of domestic violence if they are to understand why battered women act to preserve their lives in ways that do not fit the usual paradigm of self-defence.<sup>36</sup>

There is some doubt about whether the present rules of evidence in Western Australia will always allow evidence

of this type.<sup>37</sup> The rules of evidence place limitations on the way that witnesses can express opinions in a trial. Expert witnesses can only provide their opinion to the court if the opinion relates to a subject that is outside the knowledge of an ordinary juror; if the subject is recognised as part of an established body of knowledge; and if the witness providing the opinion is an expert in the subject. The Commission notes that there has been considerable debate at common law about the operation of these rules.<sup>38</sup> Although some of these issues may be resolved by the adoption of the Uniform Evidence Act, it is, in the Commission's opinion, desirable that it be clarified in legislation that expert evidence can be used to assist a jury to assess the reasonableness of the actions of the accused for the purposes of the reformulated Code test.

### Recommendation 41

#### Expert evidence on question of reasonableness

That the *Evidence Act 1906* (WA) be amended to provide that if an accused seeks to rely on self-defence, opinion evidence about domestic violence may be led where relevant to assist in the determination of:

- (a) the reasonableness of the accused's belief that it was necessary to use force to defend himself, herself or another person; or
- (b) whether the act was a reasonable response to the circumstances as the accused perceived them to be.<sup>39</sup>

30. These broad categories are taken from discussion about expert evidence in Rathus Z, *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) 8–9. They reflect the kinds of evidence the Women's Council asserted might also be relevant: Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 17.

31. In *Osland* Kirby J recognised the value of expert evidence to assist juries to assess evidence of domestic violence: *Osland* (1998) 197 CLR 316, [169].

32. Rathus observes for women who are not from the dominant culture, it may also be necessary to provide the court with an explanation of culturally-based behaviour ... and the extent to which the woman's isolation within the dominant culture contributed both to her belief, and her reality, of having no other form of escape is both relevant and appropriate: Rathus Z, *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) 12.

33. For example, where victims of domestic violence have alcohol and drug problems or use profane language, this may affect a jury's determination of whether the woman is a 'deserving victim.' It has been argued that 'this stereotype may work more harshly against women of colour, Aboriginal women and poor women': Shaffer M, 'The Battered Woman Syndrome Revisited: Some complicated thoughts five years after *R v Lavallee*' (1997) 47 *University of Toronto Law Journal* 1, 4: as cited in Rathus, ibid 8.

34. Rathus, ibid.

35. Tarrant suggested that experts could explain that there may be limited evidence about domestic violence because victims of domestic violence may 'minimise or conceal the level of violence and control they are subjected to save face, or for safety, or because they don't expect to be helped by revealing its existence': Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 27.

36. Rathus Z, *Rougher Than Usual Handling: Women and the criminal justice system* (Brisbane: Women's Legal Service Inc, 2nd ed., 1994) 144.

37. Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 27.

38. See ALRC, *Uniform Evidence Law Report*, Report No. 102 (December 2005) [9.31].

39. A similar legislative amendment would be appropriate in relation to the assessment of reasonableness for the defences of duress and emergency.

It has been argued that expert evidence about the nature and dynamics of domestic violence might be given, not just by psychologists, but also by people working in the field of domestic violence.<sup>40</sup> However, witnesses with this kind of experience might not have formal qualifications. At one time, the rules of evidence did not permit a person to be regarded as an expert on the basis of experience alone: formal training or qualifications were necessary. However, this rule has been relaxed (although there may still be some dispute about who can be a relevant expert in specific situations). The uniform evidence legislation specifically provides for a person to qualify as an expert witness on the basis of experience, training or study. Although the Commission notes that the uniform evidence legislation is likely to be incorporated into the *Evidence Act 1906* (WA), because of the approach that the Commission has taken to expert evidence about reasonableness, it considers that this provision should be enacted as part of the scheme of new homicide laws.

The Commission notes the suggestion by the Women's Law Centre that the peak bodies of domestic violence service providers should develop an accreditation system for such experts to ensure that suitable qualified persons are available to give evidence in court.<sup>41</sup> The Commission supports this proposal. It would assist lawyers to locate suitable experts and provide a method of satisfying the court that the witness is appropriately qualified.

#### **Recommendation 42**

##### **Persons who can give expert evidence about domestic violence**

That the *Evidence Act 1906* (WA) be amended to provide that a person may give opinion evidence about domestic violence where their qualifications in that field are based solely on their experience.

## **EXCESSIVE SELF-DEFENCE**

Under the Commission's recommendations, the partial defences of provocation and diminished responsibility will not apply in Western Australia. However, the Commission has recommended the introduction of a partial defence of excessive self-defence.<sup>42</sup> This has significant implications in the context of domestic violence homicide. Excessive self-defence allows an accused to explain why he or she believed that it was necessary to use force in self-defence, without the risk of an 'all or nothing' outcome. Thus the introduction of excessive self-defence removes the distortion of facts that is presently necessary so that an accused can rely on both self-defence (a rational response to a threat) and provocation (a loss of self-control).

Some submissions expressed concern that excessive self-defence would result in the same compromises that presently occur in respect of provocation. A halfway point between a conviction for murder and an acquittal would result in fewer acquittals for victims of domestic violence who kill.<sup>43</sup> Tarrant also noted this concern and pointed out that the difference between self-defence and excessive self-defence is reasonableness: the exact element of self-defence that judges, juries and the whole community generally has found difficult to comprehend.<sup>44</sup> For this reason, the Commission has recommended that a provision be inserted in the *Evidence Act* clarifying that expert evidence may be led to assist juries to determine the reasonableness of the actions of the accused.

## **CONCLUSION**

The Commission believes that its recommended changes to the substantive law of homicide, together with trial directions by judges and changes to the rules of evidence, will enable the domestic violence context of homicide to be properly taken into account. However, as noted throughout this chapter, some of the problems discussed are the result of a lack of understanding about domestic violence among those that work in the legal system.<sup>45</sup>

40. Chief Justice of the Supreme Court of Western Australia's Taskforce, *Report on Gender-Bias* (30 June 1994) 217–18; Women's Law Centre, Submission No. 49 (7 August 2006) 3; Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 27.
41. Women's Law Centre, Submission No. 49 (7 August 2006) 3.
42. See Chapter 4, 'Excessive Self-Defence', Recommendation 26.
43. Women's Law Centre, Submission No. 49 (7 August 2006) 4.
44. Tarrant S, *Women Who Kill Their Spouse in the Context of Domestic Violence: An opinion for the Law Reform Commission of Western Australia* (August 2006) 39, 40.
45. The Domestic Violence Unit, Legal Aid (WA) submitted that there was a 'critical and urgent need to provide training, education and awareness to police, court staff, lawyers and the judiciary': Domestic Violence Unit, Legal Aid (WA), Submission No. 50 (6 August 2006).

## ◀ How Will the Commission's Reforms Apply?

The Commission notes that the Chief Justice of Western Australia has commissioned an 'Equal Treatment Benchbook' to provide the state's judiciary with reference material to assist them to deal with social and cultural issues. The Commission considers that it may be appropriate for this benchbook to include a section on the nature and dynamics of domestic violence. If this is not considered appropriate, the Commission suggests that this issue be included as part of ongoing judicial training.

It was apparent to the Commission from its examination of the Office of the Director of Public Prosecutions (DPP) files that lawyers who had a good understanding of domestic violence were able to be of significant assistance to the court in dealing with homicides committed in the context of domestic violence. The Commission is aware that in Western Australia (and other jurisdictions) lawyers have worked closely with social workers in preparing trials where a history of domestic violence is relevant. The Commission encourages the Law Society, the DPP and the Criminal Lawyers' Association to work with organisations such as the Women's Law Centre and Women's Council to locate suitable experts to assist them to deal with homicide committed in the context of domestic violence.

The lack of empirical research about the way that domestic homicides are treated in the legal system in Western Australia was of concern to the Commission in its preparation of this Report. In the introduction to this Report, the Commission has recommended that the

Attorney General review the operation of the new scheme of homicide laws five years after implementation of these recommendations.<sup>46</sup> For this review to be effective, it is necessary that data be collected about what defences are being relied on and in what circumstances. Furthermore, in order to ensure that this review properly considers the impact of the new laws on domestic violence homicide, it should be conducted in consultation with government and non-government agencies working in the area of domestic violence, including the Women's Council, the Women's Law Centre and the Domestic Violence Legal Unit of Legal Aid.

If the reforms proposed by this Report are accepted, the Commission notes that the Attorney General, in the interests of fairness, could (upon application)<sup>47</sup> review the case of any person currently serving a sentence of imprisonment for homicide in the context of domestic violence.<sup>48</sup> This review could apply to any person (irrespective of gender or relationship to the deceased) who has committed homicide in circumstances of domestic violence.<sup>49</sup> Eligibility for a review should not be restricted to persons who sought to rely on self-defence at their trial or sentencing hearing. Nor should the fact that they sought to rely on a defence that is inconsistent with a claim of self-defence prevent a review being sought. Further, no person should be prevented from seeking a review of his or her case because he or she has not previously raised the issue of domestic violence with the courts or legal advisors.

- 
46. Introduction, Recommendation 2.
  47. Section 138 of the *Sentencing Act 1995* (WA) provides that a pardon granted by the Attorney General in the exercise of the royal prerogative of mercy has the effect of discharging the accused from the effects of the sentence, but does not quash or set aside the conviction. However, s 140 *Sentencing Act 1995* (WA) provides that a petition for the royal prerogative of mercy may be referred by the Attorney General to the Court of Criminal Appeal for the whole case to be heard and determined as if it were an appeal, or for an opinion on a specific matter. If appropriate, the Court of Criminal Appeal may order a re-trial.
  48. In Canada a review was conducted by Judge Ratushny of the Canadian Supreme Court between 1995 and 1997. The review followed the decision in *Lavallee* [1990] 1 SCR 852 and was prompted by concerns that because evidence of battered women's syndrome had until then been inadmissible that women had been improperly convicted of murder or manslaughter. Her Honour reviewed the cases of 98 women and concluded that seven women should have their cases reconsidered and the women granted pardons, parole or reduced sentences, depending on the circumstances of the case: see Department of Justice Canada, *Self Defence Review*, Final Report (July 1997).
  49. The Women's Council submitted that a review of the convictions and sentences of women who are currently in prison in Western Australia for killing their violent partners as a result of serious and/or long term domestic violence and family violence is needed to ensure fairness and justice for women: Women's Council for Domestic and Family Violence Services (WA), Submission No. 46 (25 July 2006) 18.