

# **HOMICIDE IN ABUSIVE RELATIONSHIPS: A REPORT ON DEFENCES**

**Prepared for the Attorney-General and Minister for  
Industrial Relations**

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# CHAPTER 1: INTRODUCTION

## A. Terms of Reference

1.1 Our terms of reference have been to prepare an initial discussion paper and eventual report on: ‘the development of a separate defence to murder for persons who have been the victims of a seriously abusive relationship who kill their abusers’.

1.2 In undertaking this reference, we are to have particular regard to:

- a) Recommendation 21-4 of the Queensland Law Reform Commission Report No 64, *A review of the excuse of accident and the defence of provocation*;
- b) the best current knowledge about the effects of seriously abusive relationships on victims;
- c) ensuring that such a defence is applicable to an adult or a child and is not gender-specific;
- d) whether the defence should provide a complete defence to murder or a partial defence only (that is, reducing murder to manslaughter);
- e) legislative reforms in other jurisdictions designed to address the position of people in seriously abusive relationships who kill their abusers in circumstances in which existing defences do not apply; and
- f) whether any ancillary evidentiary provisions are required to facilitate the operation of any new defence.

1.3 The background to this reference is a recommendation made in Report No 64 of the Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, (2008). The Commission made several recommendations with respect to the defence of provocation in the law of homicide.<sup>1</sup> The Commission also made the following recommendation (Recommendation 21-4) about the victims of seriously abusive relationships who eventually respond with violence against their abusers:

Additionally, the Commission recommends that consideration should be given, as a matter of priority, to the development of a separate defence for battered persons which reflects the best current knowledge about the effects of a seriously abusive relationship on a battered person, ensuring that the defence is available to an adult or a child and is not gender-specific.

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<sup>1</sup> Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, Report No 64 (2008) Recommendations 21-1 – 21-3, 21-5. It was recommended that the partial defence of provocation should be retained as a partial defence to murder in light of the Government’s stated intention to retain the mandatory penalty of life imprisonment for this offence; that it should not be possible to base the defence upon provocation wholly or substantially in the form of words, except in circumstances of an extreme or exceptional character; that it should not be possible to base the defence upon provocation in the form of the deceased’s choice about a relationship, except in circumstances of an extreme or exceptional character; and that the onus of proof with respect to the defence should be reversed, with the defendant being required to establish it on a balance of probabilities.

1.4 In April 2009, our Discussion Paper was released.<sup>2</sup> The paper examined what is known about the effects of seriously abusive relationships on victims and about the states of mind of victims who kill or use other violence against their abusers. It explored how a complete defence against all criminal liability might be formulated and how a partial defence to murder, reducing the offence to manslaughter, might be formulated. It also addressed some ancillary evidentiary issues. Finally, it charted the direction of law reform in other Australian jurisdictions.

1.5 For the purposes of the Discussion Paper, the terms of reference were interpreted broadly in two respects:

- The terms of reference referred to victims of seriously abusive relationships who kill their abusers. A partial defence would presumably be designed only for cases that would otherwise be murder. However, a complete defence could also be made available for cases of attempted killing and for cases where non-fatal injuries were inflicted or attempted. The Discussion Paper therefore considered the option of a complete defence as an option for any criminal charge relating to violence by a victim against an abuser.
- The terms of reference referred to a separate defence for persons who have been the victims of a seriously abusive relationship. In its report, the Queensland Law Reform Commission recommended that consideration be given to developing a separate defence as an alternative to accommodating such persons by distorting the defence of provocation.<sup>3</sup> Another option, however, would be to amend the general law of self-defence. In recent years, substantial amendments to this defence have been made in other Australian jurisdictions. One of the factors underlying these amendments has been a sense that the defence should be made more useful to victims of seriously abusive relationships who respond with violence against their abusers.<sup>4</sup> The option was therefore considered in the Discussion Paper.

1.6 Several other Australian jurisdictions have introduced discretionary sentencing for murder. This development could assist victims of abuse who kill their abusers by allowing reduced culpability to be reflected in a sentence at the lower end of the sentencing range. We did not examine this option in the Discussion Paper because it has been expressly excluded by the Queensland Government.<sup>5</sup> Several respondents to the Discussion Paper indicated a wish for sentencing discretion to be reconsidered. However, in view of the Government's position, we have not addressed the option in this Report. There is however a compelling argument for the inclusion of a specific provision in s 9(2) *Penalties and Sentences Act* 1992 (Qld), expressly providing that the court must have regard to the circumstances of a party to an abusive relationship who has suffered violence in that relationship, and who causes the death of another, or who is guilty of an offence against the person to another party to that abusive relationship.

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<sup>2</sup> Geraldine Mackenzie and Eric Colvin, *Victims Who Kill Their Abusers: A Discussion Paper on Defences* (2009) Queensland Department of Justice < <http://www.justice.qld.gov.au/509.htm>>.

<sup>3</sup> Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, Report No 64 (2008) [21.138].

<sup>4</sup> See Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) Chapters 3-4; Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Report No 97(2007) Chapter 6.

<sup>5</sup> See Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, Report No 64 (2008) [1.4], specifying the matters taken into account by the Attorney-General in referring the review to the Commission.

**1.7** Our terms of reference referred only to a defence for persons who have been the victims of a seriously abusive relationship and not for any other persons who might act on the behalf of victims. Our Discussion Paper maintained this focus. However, subsequent consultations about the Discussion Paper suggested that consideration should be given to extending a defence to persons who act in aid of victims. This issue is addressed in this Report.

**1.8** The remainder of this chapter outlines the issues to be addressed in the report, the main themes of the responses to the Discussion Paper, and the general approach we recommend to answering the challenges presented by the terms of reference.

## **B. Strategic issues**

**1.9** Victims of seriously abusive relationships (often called ‘battered persons’) who respond with violence against their abusers are widely considered to deserve at the very least some mitigation of punishment to reflect reduced culpability.<sup>6</sup> In cases where they acted for reasons of self-preservation with a genuine belief in the necessity of the action, mitigation might be thought deserved even if the perception of the danger or of the options for escaping it was wrong.

**1.10** Victims of seriously abusive relationships who respond with violence against their abusers are sometimes thought to merit a complete defence against criminal liability, at least where there were reasonable grounds for fear and desperation. In some such cases, a defence of self-defence might be available under existing law.

**1.11** If a victim of abuse kills the abuser in fear and desperation but the conditions for a defence of self-defence are not satisfied, a conviction of murder might still be unjust. A conviction of some lesser offence such as manslaughter might more appropriately reflect the degree of culpability. This argument could be made on the basis of the stigma attaching to the offence of murder, regardless of its penal liability. It could be further argued that a murder conviction would be a particularly grave injustice in jurisdictions, such as Queensland, where the offence carries a mandatory sentence of life imprisonment. In some such cases, where anger has caused loss of self-control, the partial defence of provocation might reduce the offence from murder to manslaughter under existing law.

**1.12** Yet, potential defences such as self-defence and provocation are subject to stringent conditions in some jurisdictions, including Queensland. These conditions can limit their usefulness for victims of seriously abusive relationships. Hence, it is sometimes suggested that there should be a separate defence or defences, specifically geared to the circumstances of such persons.

**1.13** There are two possible roles for a separate defence for battered persons who kill their abusers.

- There could be a complete defence against all criminal liability on the model of the defence of self-defence. Such a defence could be confined to cases where the abuser is killed. Alternatively, a complete defence could be made available for any charge of criminal violence. There is no obvious reason for distinguishing killing from attempted killing or the infliction or attempted infliction of non-fatal injuries.
- There could be a partial defence to murder alone, on the model of the defence of provocation, which is recognised in Queensland, or the defence of excessive force in self-defence, which has been introduced in some other Australian

<sup>6</sup> See discussion in *R v McKenzie* (2000) 113 A Crim R 534, [19]-[23] (McMurdo P).

jurisdictions. In the event of such a partial defence succeeding, the person would still be guilty of manslaughter.

These options are not mutually exclusive: both a complete defence and a partial defence could be made available. Moreover, on a charge of murder, a defendant could argue not only for a complete defence but also for a partial defence in the alternative.

**1.14** The idea of a separate defence or defences for battered persons has been discussed in reports from several jurisdictions. However, the idea has not generally found favour in Australia and New Zealand. In recent years, the New Zealand Law Commission, the Victorian Law Reform Commission and the Law Reform Commission of Western Australia have all conceded problems with the available range of defences but have concluded that there are better ways of reforming the law than by creating any separate defence.<sup>7</sup>

**1.15** In rejecting the idea of any separate defence, these Commissions have sought to assist battered persons through amendments to the general law of self-defence and also through the introduction of sentencing discretion for murder. Proposals for the general law of self-defence have encompassed both relaxing the conditions for the complete defence and also introducing a partial defence to murder for cases where excessive force was used in an honest belief that it was necessary. Reforms to the complete defence of self-defence have been made in all other Australian jurisdictions and some have introduced excessive force in self-defence as a partial defence to murder. Most Australian jurisdictions now also allow sentencing discretion for murder.

**1.16** The Queensland Government has excluded the option of introducing sentencing discretion for murder.<sup>8</sup> However, amending the general law of self-defence is an option which might be considered as an alternative to the creation of a separate defence or defences. Our Discussion Paper examined these alternative routes to reforming the law in relation to both a complete defence against all criminal liability and a partial defence to murder.

**1.17** The English Law Commission has made some radical proposals with respect to the defence of provocation which would in effect create a new partial defence to murder for a person who acts in response to fear of serious violence, gross provocation causing a justifiable sense of being seriously wronged, or a combination of the two.<sup>9</sup> This proposal recognises that the psychology of killing can be complex, with several emotions working together. The Commission acknowledged that its proposal would allow the defence to be grounded in 'anger, fear or a combination of the two'.<sup>10</sup> The proposal has been characterised by the Victorian Law Reform Commission as moving the basis for the defence of provocation from the traditional 'anger as loss of self-control' to 'anger as outrage'.<sup>11</sup>

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<sup>7</sup> New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73 (2001) 27-30. Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) 64-84; Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Report No 97(2007) 285-295.

<sup>8</sup> See above, note 5.

<sup>9</sup> Law Commission, *Partial Defences to Murder: Final Report* (2004) [3.168]. See also Law Commission, *Murder, Manslaughter and Infanticide*, LC No 304 (2006) [5.1]-[5.82]. A version of this proposal has now been adopted by the British Government: Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law*, Consultation Paper CP 19/08 (2008) 10-12.

<sup>10</sup> Law Commission, *Partial Defences to Murder: Final Report* (2004) [3.101].

<sup>11</sup> Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) [2.89].

**1.18** Provocation in any form has not been viewed as a suitable defence for most battered persons in any of the recent reports in Australia and New Zealand.<sup>12</sup> Moreover, the Queensland Law Reform Commission has specifically recommended against trying to adapt the provocation defence for the circumstances of victims of seriously abusive relationships.<sup>13</sup> Against this background, our Discussion Paper did not examine whether and how the general defence of provocation could be developed to assist the victims of seriously abusive relationships who kill their abusers. The proposals of the English Law Commission were considered in relation to models for a separate partial defence for such persons but did not elicit any support among the respondents to the Discussion Paper. The idea is therefore not pursued in the Report.

## C. Responses to the Discussion Paper

**1.19** Submissions were received from 13 individuals and interested organisations, and these are listed in Appendix 1. Consultations were also held with as many stakeholder organisations as possible, in particular judges, lawyers, representatives of the Queensland Law Society and Bar Association of Queensland, community legal centres, and other relevant community support organisations, and these are listed at Appendix 2. There were inevitably a variety of views expressed in response to the Discussion Paper. There was far from unanimity about how the law should develop. However, a number of major themes were discernible in the views expressed.

**1.20** There was widespread agreement with the idea of amending the Criminal Code to provide some additional protection against or limitation on the criminal liability of victims of seriously abusive relationships who use violence against their abusers in fear and desperation.

**1.21** There was particularly strong support for some kind of partial defence to murder for cases where victims intentionally killed their abusers but, despite acting in fear and desperation, could not meet the conditions for a complete defence of self-defence.<sup>14</sup> The effect of such a partial defence would be to reduce the offence to manslaughter and thereby allow for the exercise of sentencing discretion. The preponderance of opinion was that the defence should be based on principles of self-defence, although some

<sup>12</sup> See New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No 73 (2001) [114]-[120]; Victorian Law Reform Commission: *Defences to Homicide: Final Report* (2004) [2.102-2.103]; Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Report No 97 (2007) 279-280.

<sup>13</sup> Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, Report No 64 (2008) [21.138].

<sup>14</sup> Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009); Heather Douglas, TC Beirne School of Law, The University of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 May 2009); Justice Atkinson & Claire Riethmuller, Queensland Law Reform Commission, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (11 June 2009); Legal Aid Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009); Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009); Queensland Centre for Domestic and Family Violence Research, Central Queensland University, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009); Queensland Law Society & Bar Association of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009); Zoe Rathus, Griffith University Law School, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (16 June 2009); Women's Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009).

respondents preferred principles of diminished responsibility.<sup>15</sup> There was no clear consensus on whether the conditions respecting the defendant's state of mind should be wholly subjective (with requirements relating only to the defendant's own beliefs), or some mixture of subjective and objective (with reasonable grounds being required for any relevant belief).

**1.22** There was also some support for a complete defence to criminal liability, for murder or for any other offence of violence, subject to appropriate safeguards being attached.<sup>16</sup> However, there was also considerable opposition to such a development within the legal community, based on a variety of concerns.<sup>17</sup>

**1.23** There was a strong preference within the legal community for the introduction of a separate defence or defences for the victims of seriously abusive relationships rather than for the reform of the general law of self-defence.<sup>18</sup> Respondents were generally opposed to the models for a reformed general law of self-defence which have been developed in other Australian jurisdictions. The concern was that widening the net of the general law of self-defence might protect unmeritorious defendants as well as those who deserve a defence.

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<sup>15</sup> Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009); Legal Aid Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009).

<sup>16</sup> Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009); Consultation with Aboriginal and Torres Strait Islander Women's Legal Service, Jodie Vincent, Cathy Periera and Melanie Busato (Telephone interview, Mackay, 14 June 2009) 1; Heather Douglas, TC Beirne School of Law, The University of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 May 2009); Queensland Centre for Domestic and Family Violence Research, Central Queensland University, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009); Zoe Rathus, Griffith University Law School, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (16 June 2009); Women's Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009).

<sup>17</sup> Legal Aid Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009); Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009); Queensland Law Society & Bar Association of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009); Neil Roberts MP, Minister for Police, Corrective Services and Emergency Services, *Submission to Victims Who Kill Their Abusers: A Discussion Paper of Defences* (5 June 2009).

<sup>18</sup> Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009); Consultation with Aboriginal and Torres Strait Islander Women's Legal Service, Jodie Vincent, Cathy Periera and Melanie Busato (Telephone interview, Mackay, 14 June 2009) 1; Justice Atkinson & Claire Riethmuller, Queensland Law Reform Commission, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (11 June 2009); Consultation with Gold Coast Domestic Violence Prevention Centre, Donna Justo (Southport, 21 May 2009); Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009); Queensland Centre for Domestic and Family Violence Research, Central Queensland University, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009); Queensland Law Society & Bar Association of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009).

**1.24** There was general agreement that, although any defence might mainly be used by women with respect to violence against abusing male intimate partners, a defence should be expressed in terms that are neutral with respect to age, gender and sexual orientation. There was, however, concern that the target group of victims of seriously abusive relationships should be carefully defined, in order to avoid misuse of any defence by unmeritorious defendants.

**1.25** There was a widespread sense that a defence should extend beyond the victims of seriously abusive relationships to encompass at least some other persons who act in order to preserve the lives or safety of victims.<sup>19</sup>

**1.26** The Queensland Law Reform Commission has recommended the reversal of the burden of proof for the partial defence of provocation. In the Discussion Paper, we raised the issue of whether the burden of proof for a partial defence for the victims of abusive relationships should also be reversed. There was, however, no substantial support for this idea among the respondents.

**1.27** In the Discussion Paper, we also asked whether the current Queensland rules of evidence adequately provide for the introduction of relevant evidence relating to abusive relationships in general and to a defendant's own relationship. Responses from some in the legal community suggested that it would be preferable to leave any reforms to the law on the admissibility of evidence to be considered in a wider context. There was, however, also significant support for the inclusion of evidentiary provisions clarifying the relevance of particular kinds of evidence to the issues to be determined by juries.

## **D. Summary of principal recommendations**

**1.28** Our principal recommendations are designed to reflect the main themes we identified in the responses to the Discussion Paper or to resolve issues identified in the responses. Further details our recommendations are discussed in subsequent chapters.

**1.29** We recommend the introduction of a separate, partial defence to murder based on principles of self-defence. It would be available to victims of seriously abusive relationships who kill in fear and desperation believing their action is necessary for self-defence. We also recommend that the defence be made available to some other persons who act out of fear and desperation for such victims. We consider that, as a safeguard against its misuse, the defence should contain an objective as well as a subjective component. The belief in the necessity of the action would have to be held on reasonable grounds. It should, however, be clearly indicated that reasonableness is to be assessed from the standpoint of the person involved, with due consideration of the predicament which the person faced.

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<sup>19</sup> Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009); Consultation with Aboriginal and Torres Strait Islander Women's Legal Service, Jodie Vincent, Cathy Periera and Melanie Busato (Telephone interview, Mackay, 14 June 2009) 4; Department of Communities Qld, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (26 May 2009); Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009); Queensland Centre for Domestic and Family Violence Research, Central Queensland University, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009); Zoe Rathus, Griffith University Law School, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (16 June 2009); Women's Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009).

**1.30** In light of the concerns expressed within the legal community, we do not recommend that a complete defence to all criminal liability for victims of seriously abusive relationships be introduced at this time. Moreover, we do not recommend the expansion of the general defence of self-defence at this time. Nevertheless, we believe there could be some merit to making one or the other of these developments. We therefore suggest that they be reconsidered when sufficient time has passed to permit assessment of the impact of the developments in other Australian jurisdictions.

**1.31** We believe that a wide range of evidence may be relevant to the defence we recommend. We have made suggestions respecting matters which may be considered relevant. Nevertheless, we endorse the view expressed by the legal respondents to the Discussion Paper, that any reforms to the law on the admissibility of evidence should be considered in a context wider than this Report.

**1.32** In summary, the principal recommendations of this Report are that:

1. sentencing discretion should generally be available for victims of seriously abusive relationships who use violence against their abusers, believing their action is necessary for self-defence;
2. in order to extend sentencing discretion to cases that would ordinarily be murder, there should be a partial defence reducing the offence to manslaughter for victims who believe that killing their abusers is necessary for self-defence;
3. the defence should be available not only to the victims of seriously abusive relationships but also to family members of the victim who are or have been parties to the domestic relationship in which the abuse has occurred and who act in defence of the victim;
4. the defence should be framed as a separate defence, applicable only where homicide occurs in the context of an abusive relationship, rather than as a general amendment to the law of self-defence;
5. the existence of an assault should not be a condition for the defence;
6. the conditions respecting the mental state of the defendant should be:
  - a subjective belief in the necessity of the action for self-defence or the defence of another person who is a victim of an abusive relationship;
  - reasonable grounds for this belief in the circumstances known to the person;
7. there should be an express provision that certain factors are not to be taken to exclude a finding of reasonable grounds for a belief in the necessity of the action;
8. guidelines should be included to assist juries in determining whether there was a genuine belief in the necessity of the action and reasonable grounds for this belief;
9. the traditional burdens with respect to defences should be maintained, with the evidentiary burden on the defendant but the Crown carrying the persuasive burden to defeat the defence once the evidentiary burden has been discharged.

**1.33** Our report comprises five more chapters. Chapter 2 examines what is known about the experiences and motivations of victims of seriously abusive relationships who defend themselves by killing or using other serious violence against their abusers and why they should receive any special consideration in criminal law. Chapter 3 analyses the path of

law reform relating to the use of defensive force in other jurisdictions and the strategic choices available for Queensland. Chapter 4 addresses specific issues which arise in the design of a partial defence to murder for the victims of seriously abusive relationships. In Chapter 5 addresses evidentiary issues. In Chapter 6, we summarise our recommendations for a new defence in the form of a draft statutory provision.

## CHAPTER 2: VIOLENCE BY VICTIMS OF ABUSIVE RELATIONSHIPS

2.1 Some persons who have suffered violence<sup>20</sup> in a domestic relationship ('persons who have suffered violence') respond by killing or using other serious violence against their abusers. This chapter summarises what we know about violence by victims of abusive relationships. Ultimately, on the basis of the literature outlined in this chapter, we note the following:

- A defence should not be age or gender specific. In addition to any issues respecting potential discrimination, a defence should be neutral with respect to these and other variables because of the diversity of abusive relationships in which there is a potential for violence by the victim. This topic is canvassed in Part A.
- Abuse in domestic relationships, where a sufferer of violence has responded with violence against their abuser, can take many different forms, including psychological abuse. Part B outlines the nature of abuse in domestic relationships where victims of violence have responded with violence.
- Any defence should develop from the foundation that the violent response is typically a product of a rational decision rather than psychological malfunctioning. This rational decision though must be looked at through the lens of the person who has suffered violence in the relationship. In addition, the diversity of victims means that different people may have different motives and/or perceptions within which they frame their response. These issues are covered in Part C.

### A. Persons who have suffered violence in a domestic relationship

2.2 The Discussion Paper noted that early literature about persons who have suffered violence in a domestic relationship centred around so-called battered wives.<sup>21</sup> However, the literature has more recently acknowledged that persons who have suffered violence in domestic relationships can be conceived more broadly than these earlier formulations referring to heterosexual married women. Any defence should be broad enough to avoid discrimination against particular categories of people.

2.3 Persons who have suffered violence are not confined to a particular gender, age, sexual preference or culture, nor to a particular type of domestic relationship. It is widely recognised that the majority of victims of intimate partner or domestic violence are women.<sup>22</sup> However, men too can suffer violence.<sup>23</sup> Further, persons who have suffered

<sup>20</sup> Some respondents to the Discussion Paper and some writers in this area are uncomfortable with the use of the word 'violence' in a domestic relationship as it may inadvertently restrict the discussion of abuse to physical abuse. We have used the words 'violence' and 'abuse' in this chapter interchangeably as our proposed definition uses the word 'violence' to incorporate various types of abuse: see discussion in Chapter 4, and draft defence in Chapter 6.

<sup>21</sup> Geraldine Mackenzie and Eric Colvin, *Victims Who Kill Their Abusers: A Discussion Paper on Defences* (2009) Queensland Department of Justice  
<<http://www.justice.qld.gov.au/509.htm>> [2.2].

<sup>22</sup> See, for example, in the Australian context, the summary of findings from the Australian Bureau of Statistics, *Personal Safety Survey* (2005) 9, 11 and the statistics drawn from the National Homicide Monitoring Program Data Base cited in Betty

violence may be in a heterosexual, homosexual<sup>24</sup> or familial relationship<sup>25</sup> or a relationship of care with the abuser.<sup>26</sup>

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Taylor, *"Dying To Be Heard": Domestic and Family Violence Death Reviews*, Discussion Paper, Domestic Violence Death Review Action Group (2009) 10 that 'Women were far more likely to be killed by someone they knew within an intimate or family relationship.' In the Queensland context note the statistics available from the Queensland Police Service DV Index, cited in Crime and Misconduct Commission, *Policing Domestic Violence in Queensland: Meeting the Challenges* (2005) 35. Note that there is some scholarly dispute as to whether males and females perpetrate domestic violence equally, however it seems to be accepted that coercive controlling violence is largely male-perpetrated: see discussion in Michael Johnson and Joan Kelly, 'Differentiation Among Types of Intimate Partner Violence' (2008) 46 *Family Court Review* 476, 480 to 482. For further discussion of coercive controlling violence see below [2.9].

<sup>23</sup> See for example, Denise Hines, Jan Brown and Edward Dunning, 'Characteristics of Callers to the Domestic Abuse Helpline for Men' (2007) 22 *Journal of Family Violence* 63; Todd Miggiaccio, 'Abused Husbands: A Narrative Analysis' (2002) 23 *Journal of Family Issues* 26 and Jane Mulroney and Carrie Chan, 'Men as Victims of Domestic Violence', Australian Domestic and Family Violence Clearinghouse Topic Paper (2005) Australian Domestic and Family Clearinghouse <[http://www.adfvc.unsw.edu.au/PDF%20files/Men\\_as\\_Victims.pdf](http://www.adfvc.unsw.edu.au/PDF%20files/Men_as_Victims.pdf)> at 21 February 2009.

<sup>24</sup> Catherine Simone, "'Kill(er) Man was a Battered Wife" the Application of Battered Woman Syndrome to Homosexual Defendants: The Queen v McEwen' (1997) 19 *Sydney Law Review* 230; Carrie Chan, 'Domestic Violence in Gay and Lesbian relationships' Australian Domestic and Family Violence Clearinghouse Topic Paper (2005) Australian Domestic and Family Clearinghouse <[http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Gay\\_Lesbian.pdf](http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Gay_Lesbian.pdf)> at 21 February 2009; Sandra Lundy, 'Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts' (1993) 28 *New England Law Review* 273 notes at 277 that '[m]ost researchers agree that the incidence of battering in lesbian and gay couples is about the same as it is for heterosexual couples' citing Claire Renzetti, *Violent Betrayal: Partner Abuse in Lesbian Relationships* (1992) and David Island and Patrick Letellier, *Men Who Beat the Men Who Love Them* (1991). This statement is also supported in Vallerie Coleman, 'Lesbian Battering: The Relationship Between Personality and the Perpetration of Violence' (1994) 9 *Violence and Victims* 139, 140. See also Lee Vickers, 'The Second Closet: Domestic Violence in Lesbian and Gay Relationships: A Western Australian Perspective' (1996) 3 *Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v3n4/vickers.html>> at 29 June 2009 citing Janice Ristock, 'And Justice for All?...The Social Context of Legal Responses to Abuse in Lesbian Relationships' (1994) 7 *Canadian Journal of Women and the Law* 415; Gwat-Yong Lie and Sabrina Gentlewarrior, 'Intimate Violence in Lesbian Relationships: Discussion of Survey Findings and Practice Implications' (1991) 15 *Journal of Social Service Research* 41 and Michael Szymanski, 'Battered Husbands - Domestic Violence in Gay Relationships' Fall 1991 *Genre Magazine* 35.

<sup>25</sup> See Lawrie Moloney et al, 'Family Law Children's Proceedings: A Pre-Reform Exploratory Study' (Research Report No 15, Australian Institute of Family Studies, 2007) for a discussion of the origins of 'battered child syndrome' and statistics on the prevalence of child abuse in Australia, including a detailed review of the research. Regarding abuse by adolescent or grown children upon parents see Kelly-Anne Collins, *Non-Spousal Domestic Violence*, Research Bulletin No 10/98, Queensland Parliamentary Library (1998) 21-22 and Natasha Bobic, 'Adolescent Violence towards Parents' Australian Domestic and Family Violence Clearinghouse Topic Paper (2004) Australian Domestic and Family Clearinghouse <[http://www.adfvc.unsw.edu.au/PDF%20files/adolescent\\_violence.pdf](http://www.adfvc.unsw.edu.au/PDF%20files/adolescent_violence.pdf)> at 21 February 2009.

<sup>26</sup> For a discussion of abuse in a care relationship see the discussion of elder abuse in Kelly-Anne Collins, *Non-Spousal Domestic Violence*, Research Bulletin No 10/98,

**2.4** Familial relationships may also be conceived differently in certain cultures. For example, in the Aboriginal and Torres Strait Islander Legal Service submission in response to our Discussion Paper, it was noted that there are extended 'familial relationships germane to indigenous culture - where Uncles, Aunts, sisters, brothers and cousins are not necessarily of direct lineage'.<sup>27</sup> These extended familial relationships present in indigenous culture, as well as some communities from non-English speaking backgrounds, have been recognised in the *Domestic and Family Violence Protection Act 1989* through a provision widening the concept of a 'relative'.<sup>28</sup>

**2.5** As we noted in Chapter 1, many of the responses to the Discussion Paper raised the possibility of the defence for persons who have suffered violence being extended to provide protection for other parties who act to preserve the lives or safety of the victim.<sup>29</sup> This would encompass situations where a third party has witnessed the abuse inflicted on another person and responded with violence against the abuser. Often it will be a child defending a parental sufferer of violence. Witnessing violence can lead to 'behavioural, emotional, physical and cognitive functioning, attitudes and long-term development problems'.<sup>30</sup>

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Queensland Parliamentary Library (1998) 10-15 and the discussion of abuse of the disabled at 15-19. See further discussion of elder abuse by carers in Paul Sadler, 'Patterns of Elder Abuse' (Paper presented at the Crime and Older People Conference, Adelaide, 23-25 February 1993) and Prevention of Elder Abuse Taskforce, *The Strategic Plan for the Prevention of Elder Abuse in Queensland* (2001) Department of Families Qld

<sup>27</sup> <[http://www.un-instraw.org/en/docs/ageing/Strategic\\_Plan.pdf](http://www.un-instraw.org/en/docs/ageing/Strategic_Plan.pdf)> at 28 June 2009. Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009). This point was also raised in Consultation with Aboriginal and Torres Strait Islander Women's Legal Service, Jodie Vincent, Cathy Periera and Melanie Busato (Telephone interview, Mackay, 14 June 2009) who noted specifically the practice of traditional adoption within the Torres Strait Islander Community and the practice in Aboriginal communities of women bringing up children of their relatives or other people in the community (sometimes without a blood relationship). In addition, some responses to the Discussion Paper raised the possibility of a defence for persons who have suffered violence being extended to provide protection where the victim of abuse acts to preserve the lives or safety of other parties. The various issues respecting the involvement of third parties are discussed in Chapter 4.

<sup>28</sup> *Domestic and Family Violence Protection Act 1989* (Qld) s 12B(4).

<sup>29</sup> Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009); Consultation with Aboriginal and Torres Strait Islander Women's Legal Service, Jodie Vincent, Cathy Periera and Melanie Busato (Telephone interview, Mackay, 14 June 2009); Phil Reeves MP, Minister for Child Safety and Minister for Sport, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (16 June 2009); Department of Communities Qld, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (26 May 2009); Justice Atkinson & Claire Riethmuller, Queensland Law Reform Commission, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (11 June 2009); Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009); Zoe Rathus, Griffith University Law School, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (16 June 2009) 7 and Women's Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009).

<sup>30</sup> Natasha Bobic, 'Adolescent Violence towards Parents' Australian Domestic and Family Violence Clearinghouse Topic Paper (2004) Australian Domestic and Family Violence Clearinghouse  
<[http://www.adfvc.unsw.edu.au/PDF%20files/adolescent\\_violence.pdf](http://www.adfvc.unsw.edu.au/PDF%20files/adolescent_violence.pdf)> at 21 February 2009, 7 citing Jeffrey Edleson, 'Children's Witnessing of Adult Domestic

## B. The nature of abuse

**2.6** The abuse suffered in a domestic relationship can be of various types, on a scale of severity. Abuse can be physical, sexual, verbal, psychological or emotional. It can comprise forced isolation, use of children, threats, stalking and/or economic deprivation. For example, Queensland legislation defines domestic violence as an act or threat, within the context of a domestic relationship, of: (a) wilful injury; (b) wilful damage to the other person's property; (c) intimidation or harassment of the other person; and/or (d) indecent behaviour to the other person without consent.<sup>31</sup>

**2.7** Laurie Mackinnon has contended that physical or sexual abuse is often accompanied by a form of psychological abuse.<sup>32</sup> In addition to these types of abuse being used in tandem, sometimes they might be used separately. Finally, she notes that 'the long-term effects of [non-physical contact] abuse can be just as devastating if not more devastating than the long-term effects of physical abuse.'<sup>33</sup>

**2.8** Some researchers have claimed that battering or domestic violence can occur without the elements of domination and control often present in psychological abuse.<sup>34</sup> However, in her response to the Discussion Paper, Heather Douglas argued that for relationships characterised by domestic violence to fall within the ambit of a separate defence they should involve domination and control.<sup>35</sup> The Queensland Centre for Domestic and Family Violence Research supported this view, stating that domestic violence is 'characterised by a pattern of controlling and abusive behaviour.'<sup>36</sup> Women's Legal Service agreed, contending that the definition of domestic violence should include

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Violence' (1999) 14 *Journal of Interpersonal Violence* 839 and Jerome Kolbo, 'Children Who Witness Domestic Violence: A Review of Empirical Literature' (1996) 11 *Journal of Interpersonal Violence* 281 in David Finkelhor and Kimberly Mitchell, 'Risk of Crime Victimization Among Youth Exposed to Domestic Violence' (2001) 16 *Journal of Interpersonal Violence* 944, 944.

<sup>31</sup> *Domestic and Family Violence Protection Act 1989* (Qld) s 11.

<sup>32</sup> Laurie Mackinnon, 'Hurting Without Hitting: Non-physical Contact Forms of Abuse' Australian Domestic and Family Violence Clearinghouse Stakeholder Paper (2008) Australian Domestic and Family Violence Clearinghouse <[http://www.adfvc.unsw.edu.au/PDF%20files/Stakeholderpaper\\_4.pdf](http://www.adfvc.unsw.edu.au/PDF%20files/Stakeholderpaper_4.pdf)> at 3 July 2009, 2.

<sup>33</sup> Laurie Mackinnon, 'Hurting Without Hitting: Non-physical Contact Forms of Abuse' Australian Domestic and Family Violence Clearinghouse Stakeholder Paper (2008) Australian Domestic and Family Violence Clearinghouse, <[http://www.adfvc.unsw.edu.au/PDF%20files/Stakeholderpaper\\_4.pdf](http://www.adfvc.unsw.edu.au/PDF%20files/Stakeholderpaper_4.pdf)> at 3 July 2009, 2.

<sup>34</sup> For example Michael Johnson, 'Conflict and Control: Symmetry and Asymmetry in Domestic Violence' (2006) 12 *Violence Against Women* 1003 notes that some violence in intimate relationships can occur outside of the framework of control. He categorises these relationships as situational couple violence. See also Emerson Dobash and Russell Dobash, 'Women's Violence to Men in Intimate Relationships: Working on a Puzzle' (2004) 44 *British Journal of Criminology* 324, 343. Their analysis of research revealed that women who used violence in intimate relationships 'did not use intimidating or coercive forms of controlling behaviour'.

<sup>35</sup> Heather Douglas, TC Beirne School of Law, The University of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 May 2009).

<sup>36</sup> Queensland Centre for Domestic and Family Violence Research, Central Queensland University, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009)

two limbs: the first being a pattern of controlling behaviour and the second being the cumulative effect of that behaviour.<sup>37</sup>

**2.9** Research also reveals that those who experience violence within an overarching structure of domination and control<sup>38</sup> are more likely to be exposed to frequent and severe violence that is less likely to stop.<sup>39</sup> This type of domestic violence has recently been described as 'coercive controlling violence'.<sup>40</sup>

**2.10** As noted in the Discussion Paper, the Victorian Law Reform Commission attempted to incorporate this concept of coercive control into a model for a separate defence.<sup>41</sup> In line with the Commission's view,<sup>42</sup> the Office of the Director of Public Prosecutions' submission responding to our Discussion Paper expressed concern about such a new concept being introduced into the law.<sup>43</sup>

**2.11** Nevertheless the concept is indirectly incorporated. As Kelly and Johnson state:

The major psychological effects of Coercive Controlling Violence are fear and anxiety, loss of self-esteem, depression and post-traumatic stress. The fear and anxiety are well documented in many qualitative studies of Coercive Controlling Violence and quantitative studies confirm that fear and anxiety are frequent consequences of intimate partner violence.<sup>44</sup>

The idea of the victim being fearful of the abuser is certainly not foreign to criminal law and supports our recommendation that a separate defence should be based on self-defence principles.

**2.12** The Discussion Paper reproduced a typology outlined in the literature.<sup>45</sup> In relationships where both parties use violence the primary perpetrator is the one with intent to control or dominate the other. The partner who uses violence in self-defence, out of fear 'would be identified as a victim, albeit one who is engaging in active resistance'.<sup>46</sup>

<sup>37</sup> Women's Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009).

<sup>38</sup> Michael Johnson and Janel Leone, 'The Differential Effects on Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey' (2005) 26 *Journal of Family Issues* 322, 323.

<sup>39</sup> Michael Johnson and Janel Leone, 'The Differential Effects on Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey' (2005) 26 *Journal of Family Issues* 322, 344.

<sup>40</sup> Michael Johnson and Joan Kelly, 'Differentiation Among Types of Intimate Partner Violence' (2008) 46 *Family Court Review* 476

<sup>41</sup> Geraldine Mackenzie and Eric Colvin, *Victims Who Kill Their Abusers: A Discussion Paper on Defences* (2009) Queensland Department of Justice <<http://www.justice.qld.gov.au/509.htm>> [3.11].

<sup>42</sup> Victorian Law Reform Commission, *Defences to Homicide: Options Paper* (2003) [4.175-4.176].

<sup>43</sup> Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009).

<sup>44</sup> Michael Johnson and Joan Kelly, 'Differentiation Among Types of Intimate Partner Violence' (2008) 46 *Family Court Review* 476.

<sup>45</sup> Geraldine Mackenzie and Eric Colvin, *Victims Who Kill Their Abusers: A Discussion Paper on Defences* (2009) Queensland Department of Justice <<http://www.justice.qld.gov.au/509.htm>> [2.5].

<sup>46</sup> L Kevin Hamberger, 'Men's and Women's Use of Intimate Partner Violence in Clinical Samples: Towards a Gender-Sensitive Analysis' (2005) 20 *Violence and Victims* 131, 133.

**2.13** Using this typology, if a person has suffered a history of serious violence in their current or previous domestic relationship and is afraid of their partner, the defence should become available, despite the person also having engaged in violence in the past. This avoids the difficulty identified in *R v Mallott*<sup>47</sup> for 'women who have demonstrated too much strength ... women of colour ... or women who might have fought back against their abusers on previous occasions ...[being excluded from such a defence as they do not] accord with the stereotypical image of the archetypal battered woman'.<sup>48</sup>

## C. The responses of victims of abuse

### Motivations for violence

**2.14** As mentioned previously, fear and desperation are prevalent images in psychological studies of battered persons who kill their abusers.<sup>49</sup> Such persons often act for reasons of self-preservation, expecting the abuse to continue and fearing for their lives or safety.<sup>50</sup> Moreover, they act in desperation, seeing no other viable way of escaping the danger. The option of leaving the relationship is seen as unrealistic, either because there are domestic ties that cannot be abandoned (for example, to children), because of the danger that an attempt to leave will generate an attack from the abuser,<sup>51</sup> because the abuser is likely to track down the victim and renew the abuse,<sup>52</sup> or simply because there is nowhere to go.<sup>53</sup>

**2.15** Research also indicates that some persons who have suffered violence react with anger, want to retaliate or seek retribution.<sup>54</sup> However, this motivation for their subsequent violent response does not necessarily preclude a state of fear.<sup>55</sup> Thus, if fear was a motivating factor in the conduct of the person who suffered the abuse, ultimately killing their abuser, the defence need not necessarily fail due to evidence that anger was also a motivating factor. This type of mixed motive was not challenged in the responses

<sup>47</sup> [1998] 3 SCR 123.

<sup>48</sup> [1998] 3 SCR 123, 142.

<sup>49</sup> Emerson Dobash and Russell Dobash, 'Women's Violence to Men in Intimate Relationships: Working on a Puzzle' (2004) 44 *British Journal of Criminology* 324, 340 and Michael Johnson and Joan Kelly, 'Differentiation Among Types of Intimate Partner Violence' (2008) 46 *Family Court Review* 476, 483.

<sup>50</sup> Ola Barnett, 'Why Battered Women Do Not Leave, Part 2: External Inhibiting Factors - Social Support and Internal Inhibiting Factors' (2001) 2 *Trauma, Violence and Abuse* 3, 10.

<sup>51</sup> Wilson J in *R v Lavallee* [1990] 1 SCR 852 cited the environmental factors of both 'presence of children to care for [and] fear of retaliation by the man' listed by Charles Ewing, *Battered Women Who Kill* (1987) as other reasons a battered woman would not leave the relationship.

<sup>52</sup> Ola Barnett, 'Why Battered Women Do Not Leave, Part 1: External Inhibiting Factors Within Society' (2000) 1 *Trauma, Violence and Abuse* 343, 346 notes that 'leaving may provoke some batterers to kill their partners...'. Further it discusses US research that found that women who were killed by their male partners were often separated or trying to terminate the relationship at the time. See also Karen Gray and Jinseok Kim, 'Leave or Stay?: Battered Women's Decision After Intimate Partner Violence' (2008) 23 *Journal of Interpersonal Violence* 1465, 1467.

<sup>53</sup> Ola Barnett, 'Why Battered Women Do Not Leave, Part 1: External Inhibiting Factors Within Society' (2000) 1 *Trauma, Violence and Abuse* 343, 346, 348.

<sup>54</sup> Susan Swan et al, 'A Review of the Research on Women's Use of Violence with Male Intimate Partners' (2008) 23 *Violence and Victims* 301, 309.

<sup>55</sup> Emerson Dobash and Russell Dobash, 'Women's Violence to Men in Intimate Relationships: Working on a Puzzle' (2004) 44 *British Journal of Criminology* 324, 339-340. See further in Geraldine Mackenzie and Eric Colvin, *Victims Who Kill Their Abusers: A Discussion Paper on Defences* (2009) Queensland Department of Justice <<http://www.justice.qld.gov.au/509.htm>> [2.7].

to the Discussion Paper, however some submissions stressed that protection should not be afforded to persons who act on anger alone.<sup>56</sup>

**2.16** Early literature discussed the responses of persons who had suffered violence in domestic relationships within the framework of Battered Women's Syndrome and the underlying theory of learned helplessness.<sup>57</sup> We provided an outline of this theory by way of historical background in the Discussion Paper.<sup>58</sup> In its response to the Discussion Paper, the Office of the Director of Public Prosecutions continued to rely on concepts of learned helplessness and Battered Spouse/Women's Syndrome.<sup>59</sup> We reiterate that recent literature criticises the concept of Battered Women's Syndrome.<sup>60</sup> The syndrome has effectively been rejected as a general explanation of why battered persons sometimes respond by killing or using other serious violence against their abusers.<sup>61</sup>

**2.17** The theory of Battered Women's Syndrome has been rejected because it suggests that persons who have suffered violence, who go on to respond with violence, are somehow psychologically dysfunctional or maladjusted, whereas the reality is that they are usually responding rationally to their situation.<sup>62</sup> The Women's Legal Service accepted this view in its response to our Discussion Paper, stating that:

[T]he syndrome has largely been discredited and, as used mainly by psychiatrists, tends to pathologise the victim without looking at the context of the behaviour. It also does not take into account that there are a wide variety of effects on those who are victims of a seriously abusive relationship. The particular symptoms of BWS do not apply to all victims.<sup>63</sup>

The joint submission by the Bar Association of Queensland and the Queensland Law Society also rejected a defence against criminal liability based upon supposed mental disorder of the accused person.<sup>64</sup> Instead, it was said that a defence against criminal

<sup>56</sup> Queensland Law Society & Bar Association of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (Brisbane, 5 June 2009) and Queensland Centre for Domestic and Family Violence Research, Central Queensland University, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (Mackay, 25 May 2009).

<sup>57</sup> Lenore Walker, *The Battered Woman* (1979); Lenore Walker, *The Battered Woman Syndrome* (1984).

<sup>58</sup> Geraldine Mackenzie and Eric Colvin, *Victims Who Kill Their Abusers: A Discussion Paper on Defences* (2009) Queensland Department of Justice <<http://www.justice.qld.gov.au/509.htm>> [2.8-2.14].

<sup>59</sup> Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009).

<sup>60</sup> For further discussion see particularly Geraldine Mackenzie and Eric Colvin, *Victims Who Kill Their Abusers: A Discussion Paper on Defences* (2009) Queensland Department of Justice <<http://www.justice.qld.gov.au/509.htm>> [2.12-2.13].

<sup>61</sup> Mary Ann Dutton, 'Validity of "Battered Woman Syndrome" in Criminal Cases Involving Battered Women', in U.S. Department of Justice and US, Department of Health and Human Services, *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials: Report Responding Section 40507 of the Violence Against Women Act* (1996) Part I, 17.

<sup>62</sup> See, for example, Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations' (1992) 16 *Criminal Law Journal* 369, 384-5.

<sup>63</sup> Women's Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009).

<sup>64</sup> Queensland Law Society & Bar Association of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009).

liability should focus on the predicament faced by the victim of a seriously abusive relationship.<sup>65</sup>

**2.18** Those persons who suffer violence which does result in a brain injury or psychological impairment are not prevented from relying on other possibly applicable defences, such as insanity or diminished responsibility.<sup>66</sup> As stated in the Discussion Paper, persons who suffer violence may be at risk of depression, anxiety disorders, substance abuse problems and post-traumatic stress disorder.<sup>67</sup> The prevalence of depression and post-traumatic stress disorder within this group has been found to be over half.<sup>68</sup> However, even if a degree of mental disorder is present in some cases, it does not necessarily follow that it explains the motivations of victims of abuse in resorting to violence.

## Perceptions of circumstances

**2.19** It has been suggested that exposure to a cycle of violence or pattern of abuse heightens the awareness of persons who have suffered violence, shaping their perception of harm.<sup>69</sup> Although on a purely objective view the possibility of imminent harm may be obvious when killing occurs during a confrontation, it may be more difficult to explain objectively why killing occurs when the violence or identifiable threat has abated or is apparently absent.<sup>70</sup> Nevertheless, the experience of a history of abuse can sometimes allow a person who has suffered violence to read cues and note changes in the abuser's behaviour which signal the onset of escalating violence.<sup>71</sup> Decisive action for self preservation can then be taken before the abuser is in a position to physically overpower them.<sup>72</sup>

**2.20** Research indicates that persons who suffer violence may perceive a lack of alternatives (particularly the inability to leave the relationship) due to such factors as economic dependence on the abuser, isolation and fear for themselves and their family, coupled with the perceived inadequacy of the criminal justice system in providing protection.<sup>73</sup> Leaving is not seen as a viable alternative given the risk of separation

<sup>65</sup> Queensland Law Society & Bar Association of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009) referred to the statement in Geraldine Mackenzie and Eric Colvin, *Victims Who Kill Their Abusers: A Discussion Paper on Defences* (2009) Queensland Department of Justice <<http://www.justice.qld.gov.au/509.htm>> [2.14].

<sup>66</sup> See further discussion of these issues in Geraldine Mackenzie and Eric Colvin, *Victims Who Kill Their Abusers: A Discussion Paper on Defences* (2009) Queensland Department of Justice <<http://www.justice.qld.gov.au/509.htm>> [2.15-2.18].

<sup>67</sup> Edna Foa et al, 'Psychological and Environmental Factors Associated with Partner Violence' (2000) 1 *Trauma, Violence and Abuse* 67, 73.

<sup>68</sup> Michael Johnson and Joan Kelly, 'Differentiation Among Types of Intimate Partner Violence' (2008) 46 *Family Court Review* 476, 484.

<sup>69</sup> David Faigman and Amy Wright, 'The Battered Woman Syndrome in the Age of Science' (1997) 39 *Arizona Law Review* 67, 73.

<sup>70</sup> Rebecca Bradfield, 'Understanding the Battered Woman Who Kills her Violent Partner - The Admissibility of Expert Evidence of Domestic Violence in Australia' (2002) 9 *Psychiatry, Psychology and Law* 177, 178.

<sup>71</sup> Julie Blackman, 'Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill' (1986) 9 *Women's Rights Law Reporter* 227, 229 as cited by Wilson J in *R v Lavallee* [1990] 1 SCR 852.

<sup>72</sup> Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Report No 97 (2007) 272.

<sup>73</sup> Karen Gray and Jinseok Kim, 'Leave or Stay?: Battered Women's Decision After Intimate Partner Violence' (2008) 23 *Journal of Interpersonal Violence* 1465.

abuse which may result in serious injury or even death. This may be an accurate risk assessment.<sup>74</sup>

**2.21** Further, the person who has suffered violence may reasonably feel forced to use a weapon for self-preservation, even when the abuser is unarmed, because of the inequality of power in the relationship and often the inequality of bodily strength compared to the abuser.<sup>75</sup>

**2.22** Admittedly, in some instances of prolonged abuse, cognitive processes may become so distorted that other options than using violence are not recognised. In such cases, there may be no reasonable grounds for believing that the violence used is necessary for self-preservation. In other cases, however, the perception that there are no other viable options for self-preservation may be either correct or at least reasonable under the circumstances as the person who has suffered violence perceives them to be.

**2.23** Moreover, persons facing threats to their lives or safety must sometimes make quick decisions. Assessments of the reasonableness of their beliefs and actions must be made from the standpoint of the position in which they were placed. As it has often been said in the context of the general law of self-defence, persons fearing for their lives or safety cannot be expected to 'weigh to a nicety' the exact measure of action necessary for self-preservation.<sup>76</sup>

### Diversity of experience

**2.24** The inability to consider the diversity of persons who suffer violence was one of the main criticisms of the concept of Battered Women's Syndrome. As Kirby J stated in *Osland v The Queen*:<sup>77</sup>

As a construct, BWS may misrepresent many women's experiences of violence. It is based largely on the experiences of Caucasian women of a particular social background.<sup>78</sup>

**2.25** The differences between the genders were articulated in the Discussion Paper. Recent research reports that male victims of domestic violence are less likely to be afraid of their partner.<sup>79</sup> Further, unlike female victims, male victims will generally not be disadvantaged in body size and strength relative to their abusers. This is supported somewhat by research revealing that male victims are less likely to suffer injury when

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<sup>74</sup> Zoe Ratush, *There Was Something Different About Him That Day: The Criminal Justice System's Response to Women Who Kill Their Partners* (2002) 4 and Michael Johnson and Joan Kelly, 'Differentiation Among Types of Intimate Partner Violence' (2008) 46 *Family Court Review* 476, 483 note that it is 'well established that homicide rates are higher for women who have separated from their partners than for women in intact relationships.'

<sup>75</sup> Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Report No 97 (2007) 279.

<sup>76</sup> See, for example, *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645, 662–3.

<sup>77</sup> *Osland v The Queen* (1998) 197 CLR 316.

<sup>78</sup> *Osland v The Queen* (1998) 197 CLR 316, [161].

<sup>79</sup> Emerson Dobash and Russell Dobash, 'Women's Violence to Men in Intimate Relationships: Working on a Puzzle' (2004) 44 *British Journal of Criminology* 324, 340; L Kevin Hamberger, 'Men's and Women's Use of Intimate Partner Violence in Clinical Samples: Towards a Gender-Sensitive Analysis' (2005) 20 *Violence and Victims* 131, 139.

they are subjected to domestic violence.<sup>80</sup> There may also be differences in the levels of control exercised by males and females in abusive relationships.<sup>81</sup>

**2.26** In their submission, Legal Aid Queensland alluded to important differences arising from particular sexual preference. They noted that in same sex relationships 'some of the factors often cited as militating against the victim simply removing themselves from the relationship – such as responsibilities for children, financial dependence etc, may not exist.'<sup>82</sup> This issue has been expressed in the literature, along with the notion that persons in same sex relationships, who have suffered violence, are more likely to be similar in physical size to their partner and are more likely to retaliate.<sup>83</sup> However, it has also been expressed that persons in same sex relationships may face an additional sense of isolation given, for example, less availability of support structures and possible fear of coming out, which may limit their perceived lack of alternatives.<sup>84</sup>

**2.27** Variety in age also provides a point of distinction between sufferers of abuse. For example, the Department of Communities note that 'the cognitive and development differences of children may alter their perception of imminent danger and influence their behaviour against their abuser.'<sup>85</sup> As well as the possibility that a child sufferer of violence may be at a disadvantage in terms of size and strength to their abuser<sup>86</sup> it has been argued that the natural inclination of parental attachment and the difficulties experienced by children in having their word believed over an adult provide additional barriers to perceived alternatives.<sup>87</sup> In addition, as stated by a member of the judiciary in the United States of America, children:

<sup>80</sup> L Kevin Hamberger, 'Men's and Women's Use of Intimate Partner Violence in Clinical Samples: Towards a Gender-Sensitive Analysis' (2005) 20 *Violence and Victims* 131, 137.

<sup>81</sup> See Emerson Dobash and Russell Dobash, 'Women's Violence to Men in Intimate Relationships: Working on a Puzzle' (2004) 44 *British Journal of Criminology* 324, 343 for the position that there is a difference, that is, women are less likely to cite control as a motivation for their abuse. But compare the findings in Richard Felson and Maureen Outlaw, 'The Control Motive and Marital Violence' (2007) 22 *Violence and Victims* 387.

<sup>82</sup> Legal Aid Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009).

<sup>83</sup> Denise Bricker, 'Fatal Defence: An Analysis of Battered Women's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners' (1993) 58 *Brooklyn Law Review* 1379 cited in Marilyn McMahon, 'Battered Women and Bad Science: The Limited Validity and Utility of Battered Woman Syndrome' (1999) 6 *Psychiatry, Psychology and Law* 23, 42.

<sup>84</sup> Appendix A to New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73 (2001) 84; Catherine Simone, "'Kill(er) Man was a Battered Wife" the Application of Battered Woman Syndrome to Homosexual Defendants: The Queen v McEwen' (1997) 19 *Sydney Law Review* 230, 237; Lee Vickers, 'The Second Closet: Domestic Violence in Lesbian and Gay Relationships: A Western Australian Perspective' (1996) 3 *Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v3n4/vickers.html>> at 29 June 2009, [17] and Sandra Lundy, 'Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts' (1993) 28 *New England Law Review* 273, 282.

<sup>85</sup> Department of Communities Qld, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (26 May 2009).

<sup>86</sup> This is noted in Phil Reeves MP, Minister for Child Safety and Minister for Sport, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (16 June 2009).

<sup>87</sup> Paul Mones, *When a Child Kills: Abused Children Who Kill Their Parents* (1991) cited in Catherine Ryan, 'Battered Children Who Kill: Developing an Appropriate Legal

have virtually no independent ability to support themselves, thus preventing them from escaping the abusive atmosphere. Further, unlike an adult who may come into a battering relationship with at least some basis on which to make comparisons between current and past experiences, a child has no such equivalent life experience on which to draw to put the battering into perspective. There is therefore every reason to believe that a child's entire world view and sense of self may be conditioned by reaction to that abuse.<sup>88</sup>

At the other end of the age scale, elderly people may also be at a disadvantage in terms of size and strength to their abuser. Further, they may have high levels of dependency upon them.<sup>89</sup>

**2.28** Different relationship types may also provide different nuances for sufferers of abuse. For example, relationships between a disabled or elderly person and their abusive carer may exhibit high levels of dependency, sometimes physically and sometimes financially. In addition, physical disabilities may limit escape options.<sup>90</sup>

**2.29** Dating relationships also have unique issues. While it may be suggested that the lack of a shared residence allows for greater possibility of escape from the abusive relationship, in some such relationships a level of dependence may exist and one party can seek to exploit the trust of the other.<sup>91</sup>

**2.30** Further, it has been argued that Aboriginal persons and persons from non-English speaking backgrounds who suffer violence may experience a greater sense of isolation and shame, further restricting their perception of alternatives.<sup>92</sup>

**2.31** As articulated above the diversity of persons who have suffered violence has been recognised in the research and literature. And, as mentioned in the Discussion Paper the design of any defence against criminal liability needs to allow for this diversity.<sup>93</sup>

## D. Conclusions

**2.32** The discussion of the literature supports any defence to victims of abuse of domestic relationships being neutral with respect to age, gender, sexual preference and other variables. The literature also outlines clearly that abuse in domestic relationships can take on various forms and that psychological abuse is particularly prevalent and can cause great suffering. The literature details how the experience of domestic violence shapes the victim's perceptions and how their levels of fear and desperation are raised. The victim's response then is not necessarily impacted upon by a mental impairment but

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Response' (1996) 10 *Notre Dame Journal of Law, Ethics and Public Policy* 301, 328-329.

<sup>88</sup> *State v Janes*, 882 P 2d 1238, 1243 (Wash Ct App, 1993) affirmed 850 P2d 495 (Wash, 1993) cited in Catherine Ryan, 'Battered Children Who Kill: Developing an Appropriate Legal Response' (1996) 10 *Notre Dame Journal of Law, Ethics and Public Policy* 301, 333.

<sup>89</sup> See discussion in Kelly-Anne Collins, *Non-Spousal Domestic Violence*, Research Bulletin No 10/98, Queensland Parliamentary Library (1998) 10-15.

<sup>90</sup> See discussion in Kelly-Anne Collins, *Non-Spousal Domestic Violence*, Research Bulletin No 10/98, Queensland Parliamentary Library (1998) 10-19.

<sup>91</sup> Kelly-Anne Collins, *Non-Spousal Domestic Violence*, Research Bulletin No 10/98, Queensland Parliamentary Library (1998) 19-21.

<sup>92</sup> Kelly-Anne Collins, *Non-Spousal Domestic Violence*, Research Bulletin No 10/98, Queensland Parliamentary Library (1998) 24-27.

<sup>93</sup> Geraldine Mackenzie and Eric Colvin, *Victims Who Kill Their Abusers: A Discussion Paper on Defences* (2009) Queensland Department of Justice <<http://www.justice.qld.gov.au/509.htm>> [2.30].

instead they are said to be responding rationally to the situation in which they find themselves. The death of the abuser is seen as the only option the victim of abuse can take to defend themselves. This then impacts upon their culpability, at least to the extent suggested by Neil Roberts to 'militate against the harshness of a murder conviction.'<sup>94</sup>

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<sup>94</sup> Neil Roberts MP, Minister for Police, Corrective Services and Emergency Services, *Submission to Victims Who Kill Their Abusers: A Discussion Paper of Defences* (5 June 2009)

## CHAPTER 3: DIRECTIONS FOR LAW REFORM

**3.1** In Chapter 1, we noted widespread support among respondents to the Discussion Paper for the idea of amending the *Criminal Code* to provide some additional limitation on the criminal liability of victims of seriously abusive relationships who, acting in fear and desperation for reasons of self-preservation, use violence against their abusers, and also for extending any defence to at least some persons who act to protect the victims of abusive relationships.

**3.2** We also noted a strong preference within the legal community for the introduction of a separate defence or defences relating to abusive relationships rather than for the reform of the general law of self-defence. Moreover, we noted that the idea of a partial defence to murder, leaving the defendant guilty of manslaughter, received greater support within the legal community than did the idea of a complete defence which would eliminate all criminal liability.

**3.3** There was therefore substantial opposition to, although also some support for, the direction of law reform in other Australian jurisdictions. In modern times, the general law of defensive force has been subject to reforms in all Australian jurisdictions except Queensland. The reforms extend to all measures of defensive force, except in Victoria where they are confined to homicide. In New South Wales,<sup>95</sup> South Australia,<sup>96</sup> Victoria,<sup>97</sup> and Western Australia,<sup>98</sup> the reforms encompass both revision of the complete defence of self-defence and introduction of a partial defence to murder for cases where excessive force is used in self-defence. In Tasmania,<sup>99</sup> the Australian Capital Territory,<sup>100</sup> and the Northern Territory,<sup>101</sup> they are confined to the complete defence.

**3.4** This chapter reviews the current law of self-defence in Queensland, the developments in the law of other Australian jurisdictions, the issues underlying these developments, the concerns expressed by some of the Queensland respondents and the reasons for our recommendations respecting the broad direction for law reform in Queensland.

### A. A complete defence

#### Self-defence in Queensland

**3.5** Historically, self-defence has been conceived primarily as a defence of justification. In the Australian jurisdictions with criminal codes, defences have generally been framed so that either the conduct is made 'lawful' or the person is made 'not criminally responsible for' it. The courts have expressly identified the distinction between these phrases with the distinction between justification and excuse.<sup>102</sup> In the formulations of self-defence, the

<sup>95</sup> *Crimes Act 1900* (NSW) ss 418-422.

<sup>96</sup> *Criminal Law Consolidation Act 1935* (SA) ss 15,15B.

<sup>97</sup> *Crimes Act 1958* (Vic) ss 9AC-9AH.

<sup>98</sup> *Criminal Code* (WA) s 248.

<sup>99</sup> *Criminal Code* (Tas) s 46.

<sup>100</sup> *Criminal Code 2002* (ACT) s 42.

<sup>101</sup> *Criminal Code* (NT) s 43BD.

<sup>102</sup> *R v Prow* [1990] 1 Qd R 64, 68. In Canada, which has effectively the same substantive provisions on self-defence as Queensland, the use of defensive force is expressly said to be 'justified': *Criminal Code R.S.C. 1985*, c. C-46, ss 34-35. This terminology is used even for a defence by someone who was the initial aggressor.

language of justification has traditionally been adopted. It has been said that 'it is lawful to' use force rather than that 'a person is not criminally responsible for' using force.<sup>103</sup>

**3.6** The provisions of the Queensland *Criminal Code* on self-defence have often been criticised by the judiciary for their complexity and obscurity. For example, in *R v Gray*, McPherson JA said:

As it has been said on more than one occasion in the past, the provisions of s 271 are by no means a model of clarity or simplicity.<sup>104</sup>

**3.7** The *Criminal Code* recognises several forms of self-defence, all of which provide a complete defence. The provision which is most relevant to victims of abuse who use serious violence against their abusers is s 271(2), which specifies the conditions for the use of lethal force (that is, force intended or likely to cause death or grievous bodily harm) in self-defence against an unprovoked assault:

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

**3.8** However, some features of the defence of self-defence in Queensland limit its value to victims of abuse who respond with violence against their abusers:

- In all its forms, the defence requires that there have been an assault. An assault may take the form of a threat or attempt to apply force as well as a use of force. Nevertheless, the condition requires that the defender be responding to some specific action of an assailant. The defence is not available to someone who acts in anticipation of an attack or a series of attacks which has not materialised into an assault at the relevant time, even where there has been a previous history of violence which may provide reasonable grounds for a belief that defensive violence is necessary to avert the danger.
- Where the force used was intended or likely to cause death or grievous bodily harm, the person must have believed on reasonable grounds that preservation from death or grievous bodily harm cannot otherwise be achieved. This might focus inquiry on the narrow question of whether there was any other option for escaping the danger, regardless of the risks associated with the other option. If there was such an option, the defence might be excluded even though the use of lethal force was a reasonable choice in all the circumstances, including the risks attaching to the other option.
- The issue of the reasonableness of a person's response to abuse could become confused with the issue of its proportionality to the violence involved in that abuse. This is particularly relevant to victims of abusive relationships who kill their abusers. The disparities of physical strength between male and female partners may force the weaker person to resort to a weapon for defence, with the risk of using force that might unfairly be judged excessive.

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<sup>103</sup> See *Criminal Code* (Qld) s 271. Nevertheless, some limited recognition has been given to the idea of excusable self-defence. Under the *Criminal Code* (Qld) s 272, a person is said to be 'not criminally responsible for' using defensive force against a provoked assault.

<sup>104</sup> (1998) 98 A Crim R 589, 592.

## Developments in other Australian jurisdictions

**3.9** The restrictive features of the defence in Queensland reflect the common law on self-defence. The terminology of justifications and excuses was generally ignored by the courts when determining the scope of self-defence at common law.<sup>105</sup> However, the traditional conditions for the defence were of a kind that would be appropriate for a defence of justification. Killing in self-defence was permitted only where ‘the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him’.<sup>106</sup> The High Court of Australia eventually dispensed with such specific restrictions in 1987. The test was said to be simply whether ‘the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did’.<sup>107</sup> The point of this simple test was to have the issues addressed through analysis of the evidence rather than through rules of law.<sup>108</sup> The High Court intimated that it expected juries to apply the test in a conservative manner where the use of force in self-defence had caused death or serious bodily harm.<sup>109</sup> The High Court also encouraged judges to offer guidance to juries on how to apply the test: for example, by inviting them to consider whether the force used by the accused was proportionate to the threat offered.<sup>110</sup>

**3.10** In recent years, all Australian jurisdictions with the exception of Queensland have enacted new statutory versions of the self-defence. One of the considerations underlying the reforms has been concern about how the law should respond when the victims of serious abuse respond by using violence against their abusers.<sup>111</sup>

**3.11** Labels for the defence now vary. Under the Model Criminal Code, and in New South Wales, the Australian Capital Territory, the Northern Territory and the Commonwealth, the language of excuse has been adopted: a person ‘is not criminally responsible’ when the conditions for the defence are met. South Australia and Victoria use neutral terminology: in South Australia, the conditions prescribe ‘a defence’ to a charge; in Victoria, a person ‘is not guilty’ under the specified conditions. However, the design of the defence in these States now extends further in some respects than might appear appropriate for a defence of justification. Tasmania still expressly uses the term ‘justified’. Moreover, Western Australia has retained the language of justification: it ‘is lawful to’ use force when the conditions for the defence are met. However, the scope of the defence in these states has some similarities to that in the other reform jurisdictions.

<sup>105</sup> See the denial of ‘any practical distinction between justifiable homicide and excusable homicide’ in *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 658.

<sup>106</sup> *Viro v The Queen* (1978) 141 CLR 88, [31] (Mason J).

<sup>107</sup> *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 661.

<sup>108</sup> *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 662.

<sup>109</sup> *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 662: ‘However, a person who kills with the intention of killing or of doing serious bodily harm can hardly believe on reasonable grounds that it is necessary to do so in order to defend himself unless he perceives a threat which calls for that response. A threat does not ordinarily call for that response unless it causes a reasonable apprehension on the part of that person of death or serious bodily harm.’

<sup>110</sup> *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 662: ‘For example, it will in many cases be appropriate for a jury to be told that, in determining whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds, it should consider whether the force used by the accused was proportionate to the threat offered.’

<sup>111</sup> See Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) Chapters 3-4; Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Report No 97 (2007) Chapter 6.

**3.12** The major reform movement began in the early 1990s with the Model Criminal Code, an initiative of staff of the various State and Territory Attorneys-General. The draft provision on self-defence was as follows:

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.
- (2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:
  - (a) to defend himself or herself or another person; ...

and the conduct is a reasonable response in the circumstances as he or she perceives them.<sup>112</sup>

**3.13** This provision has been adopted with only minor variations of drafting in New South Wales<sup>113</sup> the Australian Capital Territory<sup>114</sup> the Northern Territory<sup>115</sup> and the Commonwealth of Australia.<sup>116</sup> Major revisions to the law of defensive force have also been introduced in South Australia,<sup>117</sup> Victoria,<sup>118</sup> and Western Australia.<sup>119</sup> There had previously been reforms in Tasmania.<sup>120</sup> In most of these jurisdictions, the reforms extend to all measures of defensive force whereas they are confined to homicide in Victoria.

**3.14** The reform jurisdictions have adopted relatively simple conditions for self-defence. There is some variation in the particular formulations. However, in most of them, a person using defensive force is protected against criminal liability subject to the person believing the force used is necessary and subject to some objective test of reasonableness with respect to the use of the force.<sup>121</sup>

**3.15** The objective test that the use of the force be reasonable is expressed in general terms in most of the reform jurisdictions: it must be a reasonable response under the Model Criminal Code and in New South Wales, the Australian Capital Territory, the Northern Territory and the Commonwealth, and also in Western Australia; it must be reasonably proportionate in South Australia; it must simply be reasonable in Tasmania. In these jurisdictions, there are no specific restrictions on the use of a lethal degree of defensive force. In Victoria, however, there is a more specific provision with respect to murder: a person who kills in self-defence has a complete defence to murder only where there were reasonable grounds for believing killing was necessary to avert death or

<sup>112</sup> Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapters 1 and 2: General Principles of Criminal Responsibility* (1992), s 10.4. The full version of the draft provision includes paragraphs on the use of defensive force for other purposes such as protection of property, with restrictions on the degree of force permissible for these other purposes. These restrictions do not apply to self-defence.

<sup>113</sup> *Crimes Act 1900* (NSW) ss 418-422.

<sup>114</sup> *Criminal Code 2002* (ACT) s 42.

<sup>115</sup> *Criminal Code* (NT) s 43BD.

<sup>116</sup> *Criminal Code* (Cth) s 10.4.

<sup>117</sup> *Criminal Law Consolidation Act 1935* (SA) ss 15,15B.

<sup>118</sup> *Crimes Act 1958* (Vic) ss 9AC-9AH. The Victorian scheme applies only to cases of 'family violence'.

<sup>119</sup> *Criminal Code* (WA) s 248.

<sup>120</sup> *Criminal Code* (Tas) s 46.

<sup>121</sup> Tasmania amalgamates the two tests by simply requiring that the force must be reasonable to use: *Criminal Code* (Tas) s 46. This follows the model developed in New Zealand: see *Crimes Act 1961* (NZ) s 48.

'really serious injury'.<sup>122</sup> If there were reasonable grounds for believing that some, but not this, degree of force was necessary, manslaughter has been committed.<sup>123</sup>

**3.16** In South Australia and Victoria, there are specific provisions to the effect that the defence is not excluded merely because a person responds with greater force than that threatened or hitherto experienced.<sup>124</sup> One of the considerations underlying this innovation is the position of women who use defensive force against men. The concern is that, when disparities of physical strength between male and female partners force the female to resort to a weapon for defence, there is a risk that the force used might unfairly be judged excessive.

**3.17** None of the reform jurisdictions require that defensive force be used in response to an assault or that there be a danger which is imminent or which necessitates an immediate response. Victoria and Western Australia have even included express provisions to the effect that the defence may be available for self-defence against violence that is not immediate (in Victoria)<sup>125</sup> or not imminent (in Western Australia).<sup>126</sup> With the absence of any temporal requirement, it is conceivable that the defence could be even available for a planned homicide.

**3.18** The predicaments faced by battered persons have been a concern underlying this development.<sup>127</sup> The objective has been to make the defence available in cases where the victim of a previous history of violence uses force in anticipation of an inevitable attack or a series of attacks even though an assault has not materialised at the relevant time and there is no other reason why immediate defensive action is required. In Victoria, the express provision that force may be used to defend against harm that is not immediate is specifically geared to the situation of the victims of abusive relationships. The provision applies only to cases of 'family violence'. 'Family violence' is defined broadly in this context to mean physical, sexual and psychological abuse.<sup>128</sup> It is provided that a single act may amount to abuse and that a pattern of abuse may comprise or include acts that, when viewed in isolation, might appear minor or trivial.<sup>129</sup>

**3.19** Many of the reform jurisdictions have also deviated from the model of a defence of justification by allowing self-defence to be based on the actor's own subjective assessment of the danger posed and the options available for dealing with it.

**3.20** The traditional, pre-reform position in all Australian jurisdictions was that an objective test applied to all elements of the defence including the person's perception of the danger and the options. Reasonable grounds were required for any belief relevant to the defence, regardless of the offence in issue.

**3.21** Under the Model Criminal Code, and in New South Wales, South Australia, Tasmania and the Territories, the objective reasonableness of using the force is now assessed on the circumstances as the person subjectively perceived them to be. This is not limited to any particular kinds of offence. The Tasmania Code simply provides that a person can use as much force as it is reasonable to use in the circumstances as he believes them to be. The other jurisdictions use a more complicated formula but the effect is similar: the person must have genuinely believed the force was necessary and

<sup>122</sup> *Crimes Act 1958* (Vic) s 9AC. If this condition is not met, but the person believed the force used was necessary for self-defence, there is liability for manslaughter: s 9AE.

<sup>123</sup> *Crimes Act 1958* (Vic) s 9AE.

<sup>124</sup> In Victoria, this provision applies only to cases of 'family violence'.

<sup>125</sup> *Crimes Act 1958* (Vic) s 9AH(1)(c).

<sup>126</sup> *Criminal Code* (WA) s 248(4)(a).

<sup>127</sup> See above, note 17.

<sup>128</sup> *Crimes Act 1958* (Vic) s 9AH(4)(a)-(c).

<sup>129</sup> *Crimes Act 1958* (Vic) s 9AH(5)(a)-(b).

the assessment of whether it was reasonable to use the force is made with respect to the circumstances as they were perceived to be.

**3.22** In Victoria and Western Australia, the traditional, objective character of the defence has been maintained. Western Australia, however, has recently adopted a highly individualised approach to objective tests. Personal characteristics of a person can be taken into account in determining what might have been a reasonable belief, as long as the characteristics are not within the control of the person. It has been said: ‘...reasonableness is to be judged by reference to the personal attributes and characteristics of the accused that are capable of affecting his or her appreciation or perception of the circumstances in which he or she found himself or herself’.<sup>130</sup>

### Options for Queensland

**3.23** Under the current law, a victim of a seriously abusive relationship who chooses to respond with violence will be relieved of all criminal liability if the conditions for a defence of self-defence are met. Is there any good reason why a defence should be made available on less stringent conditions: for example, in cases where the victim acts in fear and desperation but is not responding to a threat of immediate harm?

**3.24** Joshua Dressler has argued that the value we place on human life must prevent us allowing killing in ‘non-confrontational’ cases on the basis that the abuser has forfeited his or her right to life: in other words, on the basis that the abuser ‘deserved’ it.<sup>131</sup> However, while conceding that the abuser did not deserve to die, we might also maintain that the victim does not deserve to be convicted of an offence like murder (or like manslaughter or any other serious offence), with all that this entails for penal liability and stigma. A conviction of a serious offence might be thought unjust because it would be a disproportionate response to the wrong which has been committed when all the circumstances, including the suffering experienced in the abusive relationship, are taken into account.

**3.25** This kind of reasoning might be used to justify the creation of a special defence of self-defence for the victims of seriously abusive relationships, subject to appropriate safeguards but without the stringent conditions of the traditional defence. An argument might also be made for the reform of the general law of self-defence, on the ground that its stringent conditions are too rigid and prevent issues of culpability being addressed with sufficient sensitivity to the circumstances of particular cases. This kind of argument has prevailed in other Australian jurisdictions. Although the general reforms which have been enacted elsewhere have not been designed just for the victims of seriously abusive relationships, the reforms could benefit them.

**3.26** Yet, in the design of any defence, there is the challenge of achieving an appropriate balance between ensuring that it includes those persons who deserve it and excludes

<sup>130</sup> *Aubertin v State of Western Australia* [2006] 33 WAR 87, [43]. Intoxication and ‘a person’s values’ were excluded as relevant factors in assessing the reasonableness of a belief: *ibid*, [44-46]. *Aubertin* concerned the defence of reasonable mistake of fact. However, there have been similar rulings in Queensland on self-defence as well as reasonable mistake of fact: *Julian* [1998] QCA 119; *Mrzljak* [2004] QCA 420.

<sup>131</sup> Joshua Dressler, ‘Battered Women and Sleeping Abusers’ (2005) 3 *Ohio State Journal of Criminal Law* 457, 465. Dressler’s alternative option would to grant a defence where the victim did not have a fair opportunity to conform to the law under the circumstances, in the sense that a person of ordinary moral firmness would have similarly succumbed. A problem with this option is that a defence is available only where any ordinary person would have succumbed to the pressure. A defence would not be available where one person made a different choice to that of many other people, even though there might be sympathy with this choice.

those persons who do not. Widening the net of self-defence would involve a degree of risk even if the widening were confined to the victims of seriously abusive relationships. The risk would be increased if there were to be reform of the general law of self-defence.

**3.27** In the Discussion Paper, we asked whether there should be amendments to the law of defensive force in Queensland, similar to those introduced in other States, in order to relax the general conditions for a defence of self-defence. We also asked whether, in the alternative, a separate complete defence should be created for the victims of seriously abusive relationships. Respondents were divided in the answers they gave to these questions.

**3.28** The strongest support for reforming the general law of self-defence came from some individuals with extensive experience in the study of domestic violence. Zoe Rathus argued that self-defence is the essence of the plea for a defence for victims of abuse; that the concept of self-defence is understood by the community and juries; and that the general defence needs reforming in any event because it is complex and unwieldy.<sup>132</sup> She proposed a reformulation of self-defence, applicable to all offences, on the model used in the Model Criminal Code and adopted in several other jurisdictions, with a requirement that an act of self-defence be a reasonable response in the circumstances as the person believed them to be. However, she also proposed the inclusion of special guidelines, similar to those adopted in Victoria, for the assessment of reasonableness in cases where there has been a history of 'family violence'. A similar approach was advocated in 2000 by the Queensland Taskforce on Women and the Criminal Code.<sup>133</sup> In a response to the Discussion Paper, Heather Douglas contended that the Taskforce formula 'is very good'.<sup>134</sup>

**3.29** A separate complete defence was supported by the Aboriginal and Torres Strait Islander Legal Service,<sup>135</sup> by the Women's Legal Service,<sup>136</sup> and by the Queensland Centre for Domestic and Family Violence Research.<sup>137</sup> In a consultation with the Women's Legal Service, it was said that a separate defence would focus the attention of lawyers on the issue of domestic violence and the concern was expressed about the risk that abusers might be able to take advantage of an expanded version of the general defence of self-defence.<sup>138</sup> In their written submission, the Women's Legal Service canvassed the merits of either a re-working of the existing self defence-provisions, or a separate defence, and concluded:

We recommend that whatever decisions are made, they ensure that the result is clear, easy to understand by all and enables whatever evidence is needed to

<sup>132</sup> Zoe Rathus, Griffith University Law School, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (16 June 2009).

<sup>133</sup> Taskforce on Women and the Criminal Code, *Women and the Criminal Code* (2000).

<sup>134</sup> Heather Douglas, TC Beirne School of Law, The University of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 May 2009).

<sup>135</sup> Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009) 6, 9; Consultation with Aboriginal and Torres Strait Islander Women's Legal Service, Jodie Vincent, Cathy Periera and Melanie Busato (Telephone interview, Mackay, 14 June 2009).

<sup>136</sup> Women's Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009).

<sup>137</sup> Queensland Centre for Domestic and Family Violence Research, Central Queensland University, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009).

<sup>138</sup> Consultation with Women's Legal Service & Zoe Rathus (Brisbane, 20 May 2009); Women's Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009).

admissible to ensure that we as a society protect the victims of domestic and family violence.<sup>139</sup>

**3.30** The idea of a new defence providing any form of complete protection against criminal liability for killing was opposed in submissions by the Queensland Law Society and the Bar Association of Queensland,<sup>140</sup> Legal Aid Queensland,<sup>141</sup> the Office of the Director of Public Prosecutions,<sup>142</sup> and the Queensland Police Service.<sup>143</sup> The Office of the Director of Public Prosecutions opposed modifying self-defence on the ground of the risk of extending the defence to unmeritorious defendants, observing: 'It is most important that in advancing a defence to one relatively small class of offenders, one does not inadvertently create problems in the more general run of case'.<sup>144</sup> Legal Aid Queensland expressed concern about the potential unintended consequences of not only a modified general defence of self defence but also a complete separate defence. They suggested that the current law on self-defence is adequate as a complete defence and noted 'several cases where accused persons have successfully used the current law of self-defence to secure an acquittal in murder and attempted murder cases, based on evidence about the existence of a seriously abusive relationship and its impact on the accused'.<sup>145</sup> Similarly, a joint submission by the Queensland Law Society and the Bar Association of Queensland noted that, despite the traditional scope of self-defence, the defence has sometimes been used successfully for battered women.<sup>146</sup>

**3.31** In addition, the Chairperson and the Director of the Queensland Law Reform Commission opposed any amendment to the general law on self-defence on the ground that the stringent conditions of the existing defence are appropriate for a complete defence.<sup>147</sup>

**3.32** In light of the diverse views expressed, we cannot recommend the reform of the general law of self-defence in this Report. While there may be deficiencies in the existing law and lessons to be learned from the experiences of other jurisdictions, a broader inquiry should be conducted before reform is initiated.

**3.33** We have considered whether it would be appropriate to recommend the introduction of a separate version of self-defence, restricted to the victims of seriously abusive relationships. On balance, however, we have concluded that, at this time, there is insufficient support within the legal community for any complete defence outside the conditions of the existing defence of self-defence. We suggest that the options be

<sup>139</sup> Women's Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009).

<sup>140</sup> Queensland Law Society & Bar Association of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009).

<sup>141</sup> Legal Aid Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009).

<sup>142</sup> Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009).

<sup>143</sup> Neil Roberts MP, Minister for Police, Corrective Services and Emergency Services, *Submission to Victims Who Kill Their Abusers: A Discussion Paper of Defences* (5 June 2009)

<sup>144</sup> Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009).

<sup>145</sup> Legal Aid Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009).

<sup>146</sup> Queensland Law Society & Bar Association of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009). Examples given were *R v Secretary* (1996) 131 FLR 124 and *R v Lavallee* [1990] 1 SCR 852.

<sup>147</sup> Justice Atkinson & Claire Riethmuller, Queensland Law Reform Commission, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (11 June 2009).

reconsidered when sufficient time has passed to permit assessment of the impact of the developments in other Australian jurisdictions.

## B. A partial defence to murder

### Partial defences in Queensland

**3.34** At present, the only partial defences to murder under the Queensland *Criminal Code* are provocation under s 304 and diminished responsibility under s 304A. Both defences reduce the offence to manslaughter. The burden of proof for diminished responsibility lies on the defendant. The prosecution currently carries the burden to disprove a defence of provocation but the Queensland Law Reform Commission has recommended that the burden be reversed for this defence too.<sup>148</sup>

**3.35** Under the law of Queensland, the use of objectively excessive force has always excluded any defence of self-defence even if there was a genuine belief that the degree of force used was necessary for self-preservation.<sup>149</sup> The Queensland *Criminal Code* has never included a partial defence to murder for cases of self-defence where the conditions for a complete defence are not satisfied.

### Developments in other Australian jurisdictions

**3.36** At one time, the High Court of Australia recognised a partial defence of excessive force in self-defence as a matter of common law.<sup>150</sup> The defence operated to reduce the offence from murder to manslaughter in cases where there was an honest but unreasonable belief in the necessity of killing in self-defence. The defence was eventually repudiated by the High Court in *Zecevic v Director of Public Prosecutions (Vic)*,<sup>151</sup> because of supposed difficulties in instructing juries. Subsequently, a recommendation against the defence was made by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, on the ground that the concept of excessive self-defence is inherently vague.<sup>152</sup>

**3.37** Nevertheless, a partial defence of excessive force in self-defence has now been introduced by legislation in several Australian jurisdictions: New South Wales,<sup>153</sup> South Australia,<sup>154</sup> Victoria,<sup>155</sup> and Western Australia.<sup>156</sup> The result of a successful defence is a conviction of manslaughter in New South Wales, South Australia and Western Australia and a conviction of defensive homicide in Victoria.

**3.38** The precise terms of the defence of excessive force vary between jurisdictions but the ingredients are very similar. An offence that would otherwise be murder is reduced to a lesser offence, ('defensive homicide' in Victoria and manslaughter in the other jurisdictions) where two conditions are met:

<sup>148</sup> Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, Report No 64 (2008), Recommendation 21-5.

<sup>149</sup> *Criminal Code* (Qld) s 283.

<sup>150</sup> *R v Howe* (1958) 100 CLR 448; *Viro v The Queen* (1978) 141 CLR 88.

<sup>151</sup> (1987) 162 CLR 645.

<sup>152</sup> Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper: Model Criminal Code, Chapter 5: Fatal Offences against the Person* (1998) 113.

<sup>153</sup> *Crimes Act 1900* (NSW) s 421.

<sup>154</sup> *Criminal Law Consolidation Act 1935* (SA) s 15(2).

<sup>155</sup> *Crimes Act 1958* (Vic) s 9AD.

<sup>156</sup> *Criminal Code* (WA) s 248(3).

- The person must have believed that the conduct was necessary for self-defence (which is why a conviction for murder is considered inappropriate).
- There must have been a failure to meet some standard of reasonableness (otherwise the person would be entitled to a complete acquittal rather than a reduction of the offence):
  - in New South Wales and Western Australia, where ‘the act is not a reasonable response’ in the circumstances as they are perceived;
  - in South Australia, where the conduct was not ‘reasonably proportionate to the threat that the defendant genuinely believed to exist’;
  - in Victoria, where the person ‘did not have reasonable grounds for the belief’ that it was necessary to kill.

**3.39** In New South Wales, South Australia and Western Australia, the terms of the partial defence confine it to unreasonable misjudgements about an appropriate response to danger. In Victoria, however, the broad terms of the defence could also permit its use with respect to unreasonable mistakes about whether danger was present and in what form. The Law Reform Commission of Western Australia has recommended against extending the defence in this way.<sup>157</sup> Its reasoning is that the defence should be limited to cases where there was ‘an initial lawful right to use defensive force’; otherwise ‘irrational fears and prejudices’ might form the basis for the defence.

**3.40** Some of the Australian jurisdictions which have introduced a partial defence also have forms of discretionary sentencing for murder. In New South Wales and Victoria, there is simply liability to life imprisonment.<sup>158</sup> In Western Australia, there is a presumption of life imprisonment but the offender is liable for up to 20 years imprisonment if a life sentence would be clearly unjust and the person is unlikely to be a threat to the safety of the community on release.<sup>159</sup>

**3.41** The New Zealand Law Commission has recommended that a defence of excessive force not be introduced, but only because it has proposed sentencing discretion for murder as the best way to accommodate variations in culpability for intentional killing.<sup>160</sup>

**3.42** Several reports in the United Kingdom have recommended the introduction of a partial defence.<sup>161</sup> In its most recent inquiry, the Law Commission made a contrary recommendation. However, this was because it was also recommending a revised partial defence of provocation, incorporating responses to fear as well as provocation, which it believed would cover relevant cases of excessive force.<sup>162</sup> The proposals of the Law Commission for the defence of provocation would give it considerably wider scope than it would have under the proposals of the Queensland Law Reform Commission.<sup>163</sup>

<sup>157</sup> Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Report No 97 (2007) 182.

<sup>158</sup> *Crimes Act 1900* (NSW) s 19A; *Crimes Act 1958* (Vic) s 3.

<sup>159</sup> *Criminal Code* (WA) s 279.

<sup>160</sup> New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No 73 (2001) [52]-[69].

<sup>161</sup> Criminal Law Revision Committee, *Fourteenth Report: Offences against the Person* (1980) Cmnd 7844, [288]; *Report of the Select Committee on Murder and Life Imprisonment (1988-89)* HL 78-1[89].

<sup>162</sup> Law Commission, *Partial Defences to Murder: Final Report* (2004) [3.168], [4.4], [4.25]-[4.31]. See also the proposals in Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law*, Consultation Paper CP 19/08 (2008).

<sup>163</sup> See Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, Report No 64 (2008), Recommendations 21-1 – 21-5.

## Options for Queensland

**3.43** The respondents to our Discussion Paper did not challenge the general proposition that a separate partial defence to murder might sometimes be merited because the victim of seriously abusive relationship who kills in fear and desperation does not deserve to be convicted of murder and sentenced to its mandatory penalty of life imprisonment. At the very least, there should in some cases be sentencing discretion so that the punishment can reflect reduced culpability.

**3.44** It might also be argued that a partial defence should be recognised in the interests of fair labelling, recognising that cases where there is a genuine belief in the need to kill involve an intention to act in a lawful way.<sup>164</sup> This distinguishes these cases from most cases where a defence of provocation is raised. Indeed, Victoria and Western Australia have now both abolished the partial defence of provocation to murder while introducing a partial defence of excessive force in self-defence.

**3.45** There was a divergence of views among the respondents to our Discussion Paper as to the proper foundation for a partial defence. Most respondents accepted that any new partial defence should be grounded in principles of self-defence: that, at a minimum, a person claiming a defence should genuinely believe the use of force is necessary to avoid a risk to life or safety and that the defence should be designed in part to overcome some of the stringent conditions for a complete defence of self-defence. However, Legal Aid Queensland and the Office of the Director of Public Prosecutions both suggested that the claims of victims of abusive relationships might best be considered in relation to the partial defence of diminished responsibility under s 304A of the *Criminal Code*. Legal Aid Queensland suggested that this section could be amended to make specific reference to substantial impairment of one of the relevant capacities as a result of a seriously violent relationship.<sup>165</sup> The Office of the Director of Public Prosecutions contended that a partial rather than a complete defence would be appropriate because the underlying cognitive distortion present in Battered Woman Syndrome fits better with the principles of diminished responsibility.<sup>166</sup>

**3.46** In our view, a partial defence should be based on principles of self-defence rather than principles of diminished responsibility. The essential difference between the two approaches is that principles of self-defence relate primarily to rational choices, even though mistakes may be made in the assessment of the danger or the options for dealing with it, whereas principles of diminished responsibility relate to irrational action which is the product of impaired mental capacity. It may be true that the idea of BWS fits best with principles of diminished responsibility. However, adopting this approach would seem inconsistent with the conclusions of modern research criticising BWS theory and arguing that battered persons who kill their abusers in fear and desperation are usually responding rationally to their predicament rather than expressing psychological dysfunction or maladjustment.<sup>167</sup>

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<sup>164</sup> New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73 (2001) [67]; Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) [3.104]; Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Report No 97 (2007) 181-82.

<sup>165</sup> Legal Aid Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009).

<sup>166</sup> Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009).

<sup>167</sup> See Chapter 2.

**3.47** The aim in developing a partial defence on principles of self-defence would be to substitute a manslaughter conviction for a murder conviction in some cases where the stringent conditions for a complete defence of self-defence under s 271(2) of the *Criminal Code* cannot be satisfied. The cases in which a defence might potentially be made available include:

- Cases where the defendant acted in anticipation of an attack but was not responding to an assault at the relevant time;
- Cases where there were no reasonable grounds either for the belief that an attack was likely and the danger it would present or for the belief that the danger could not be avoided without resort to violence;
- Cases of excessive force in which there were reasonable grounds for believing that it was necessary to use force for self-preservation but not for believing that it was necessary to kill.

**3.48** The respondents to our Discussion Paper generally took the view that it would be inappropriate to include an assault requirement in a partial defence designed for homicide in abusive relationships.

**3.49** There was less agreement about making a defence available in the other two kinds of cases. On the one hand, there was some support for a wholly subjective test for the defence, under which it would be available where the person acted in genuine fear and desperation regardless of whether or not there were reasonable grounds for the belief in the necessity of the action.<sup>168</sup> This is how the partial defence of excessive force has been formulated in the jurisdictions which have introduced this defence.<sup>169</sup> On the other hand, some respondents were reluctant to forego any vestige of an objective test.<sup>170</sup> The main reason was that a requirement for reasonable grounds for a belief in the necessity of killing would help to restrict the defence to persons whose belief was genuine. It would provide a safeguard against the misuse of the defence by unmeritorious defendants who did not genuinely believe that killing was necessary. It was also felt that at least some cases where the belief in the necessity of killing was genuine but unreasonable could be accommodated within the existing partial defence of diminished responsibility.

**3.50** We see substantial merit in the idea of a wholly subjective test, given that a defendant who successfully raises the defence will still be convicted of manslaughter. Nevertheless, in deference to the concerns about the potential misuse of a defence to murder, we have concluded on balance that an objective test should be incorporated in the conditions for the defence. This would mean that there would have to be reasonable grounds for the belief that defence of the victim requires the death of the abuser.

**3.51** However, we also recommend that the objective test be framed to ensure that the special context of an abusive relationship will be taken into account in determining whether or not there were reasonable grounds. It must be clearly indicated that

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<sup>168</sup> Justice Atkinson & Claire Riethmuller, Queensland Law Reform Commission, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (11 June 2009).

<sup>169</sup> *Crimes Act 1900* (NSW) s 421; *Criminal Law Consolidation Act 1935* (SA) s 15(2); *Crimes Act 1958* (Vic) s 9AD; *Criminal Code* (WA) s 248(3).

<sup>170</sup> Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009); Department of Communities Qld, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (26 May 2009).

reasonableness is to be assessed from the standpoint of the person involved, with due consideration of the predicament facing the person.<sup>171</sup> .

**3.52** In our view, a partial defence of this kind could be extended beyond the victims of abusive relationships to cover certain persons who act for the protection of victims. However, the extension should be limited to persons who have personal experience of the abusive nature of the relationship. An extension may be justified to make the defence available to, for example, a parent who acts to protect an abused child. It would be a very different matter however, to allow the defence to a contract killer who is hired by a victim of abuse. We would not support an extension that far.

**3.53** The next chapter examines a number of specific issues arising in the design of a partial defence of the kind we recommend.

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<sup>171</sup> Support for this position was received from Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009); Heather Douglas, TC Beirne School of Law, The University of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 May 2009); Queensland Centre for Domestic and Family Violence Research, Central Queensland University, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009); Queensland Law Society & Bar Association of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009); Zoe Ratus, Griffith University Law School, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (16 June 2009); Women's Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009). See also discussion in Chapter 5 on evidentiary provisions.



## CHAPTER 4: A PARTIAL DEFENCE TO MURDER

4.1 Chapter 3 outlined the directions for law reform which we believe should be pursued for limiting criminal liability when victims of seriously abusive relationships kill their abusers. This chapter examines specific issues relating to the design of the partial defence to murder, based on principles of self-defence, which we have recommended:

- What terminology should be used in the defence? Should reference be made to 'self-defence' and 'defence of a person' or should other terminology be used such as 'self-preservation' and 'preservation of a person'?
- How should seriously abusive relationships be defined for the purposes of the defence? What kinds of relationships should be covered? What kinds and what levels of violence should be required?
- How should the target groups of victims of seriously abusive relationships and their abusers be defined?
- How should the ancillary group of persons who may be entitled to a defence because they acted to protect victims be defined?
- How should the mental state required for the defence be framed? What kind of subjective belief should be required and, if reasonable grounds for this belief are to be required, how should this objective component be framed?
- What should be the burden of proof? Should it be on the prosecution to disprove the defence or on the defendant to prove it?

### A. Terminology for the defence

4.2 There were differences of opinion among the respondents to the Discussion Paper over whether the defence should use the terms 'self-defence' and, where a third party is involved, 'defence of a person' or whether it should use the terms 'self-preservation' and 'preservation of a person'.

4.3 There was some support for the term 'self preservation' in the consultations, in particular because it could involve the notion of the battered person preserving themselves and their sanity, including the aspect of psychological distress.<sup>172</sup> References to self-preservation have sometimes been used in the literature on violence by battered persons.<sup>173</sup> However, it has no legal heritage. In contrast, the meaning of 'defence', as a legal concept referring to the defence of physical integrity, is well understood.

4.4 Some respondents to the Discussion Paper expressed concern that using the term 'self defence' might risk the stringent conditions of the existing complete defence of self-defence under ss 271 or 272 of the *Criminal Code* being read into the new defence. According to Justice Atkinson and Claire Riethmuller:

<sup>172</sup> Consultation with Women's Legal Service & Zoe Rathus (Brisbane, 20 May 2009); Zoe Rathus, Griffith University Law School, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (16 June 2009).

<sup>173</sup> See discussion in Chapter 2.

The use of the term 'self-defence' [in subsections (2) and (4)]<sup>174</sup> runs the risk of incorporating the law in relation to that defence. It may be better to define that term for the purpose of this provision.

The Women's Legal Service also expressed concern that the traditional interpretation of 'self-defence' (in ss 271 and 272) would colour any re-working of the defence.<sup>175</sup>

**4.6** Any risk in using the term 'self-defence' would presumably be lower in relation to a partial defence which, because it would only reduce murder to manslaughter, would not be expected to have such stringent conditions. Moreover, the risk could be eliminated altogether if, as we will propose, the defence includes a provision effectively stating that there may be reasonable grounds for a belief in the necessity of killing even though the conditions of s 271(2) are not satisfied. On balance, we recommend that the terms 'self-defence' and, where a third party is involved, 'defence of a person' be used, because of the familiarity of 'defence' as a legal concept.. This terminology is consistent with the 'family violence' provision in s 9AH *Crimes Act 1958* (Vic).

## B. Seriously abusive relationships

**4.7** Our terms of reference referred to a defence for persons who have been the 'victims of a seriously abusive relationship'. Relationships can take many forms, and abuse can take many forms and levels. In this part, we examine some definitional issues.

### Abusive relationships

**4.8** The defence which we propose is not a defence simply for having killed in response to abuse or even serious abuse. It is defence for have killed in response to the special circumstances of an abusive relationship. It is the context of a relationship of which abuse is an integral feature that can make the traditional law of self-defence an unsuitable vehicle for dealing with issues of culpability. However, defining the kinds of relationship which should permit the defence is not easy matter and we do not believe that it can be done with precision.

**4.9** We recommend that the defence include two definitional provisions with respect to the kinds of relationship which will fall within its scope:

- A provision defining 'abusive relationship' as meaning a 'a current or past domestic relationship in which there is a history of serious violence';
- A provision defining 'domestic relationship' as including 'spousal, intimate, family and care relationships'.

**4.10** The kind of relationships which have been the focus of the literature on battered persons and have generated concern for law reformers have been relationships in which persons are close together for substantial parts of their lives. We have attempted to capture this idea by using the term 'domestic relationship'. Domestic relationships do, however, take various forms, as has been recognised in the *Domestic and Family Violence Protection Act 1989* (Qld). They may be spousal or otherwise intimate relationships. They may also involve family members living together. There may even be

<sup>174</sup> Referring here to an earlier draft provision discussed in the oral consultations. That draft used the term self defence.

<sup>175</sup> Women's Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009). But note that this comment was made in the context of a discussion on whether any new provision should be a separate defence, or a reworking of ss 271 and 272.

cases in which elderly or disabled people become dependent on carers. We do not believe that there should be a prescriptive definition of a domestic relationship. Instead we recommend a provision stating that ‘domestic relationship’ *includes* certain kinds of relationships. Our suggestion of ‘spousal, intimate, family and care relationships’ is adapted from the definition in the *Domestic and Family Violence Protection Act 1989*.

**4.11** The *Domestic and Family Violence Protection Act 1989* further defines spousal and intimate personal relationships<sup>176</sup> Under this Act, spousal and intimate personal relationships continue to fall within the definition of domestic relationships despite separation. *Former* spouses and persons who *have* dated and whose lives *were* enmeshed are included. In Chapter 2, we noted the likelihood of increased levels of violence upon separation. We have therefore defined domestic relationship to include both current and past spouses and intimates.

**4.12** The proposed definition is neither age nor gender specific. In most instances, it may be expected that an abusive relationship would involve an adult male person abusing a female spouse or other intimate partner. The definition is, however, sufficiently broad to cover many other kinds of relationships.<sup>177</sup> In the consultations and submissions, it was pointed out that the traditional understanding of a relationship tends to be a very Western construct,<sup>178</sup> and that there are many different types of domestic and family relationships among immigrants, people from a non-English speaking background, indigenous people who may have a wider sense of family, and same sex couples.<sup>179</sup>

**4.13** Abuse can occur within relationships without the relationships themselves being characteristically abusive. Moreover, characteristic abuse may not be at a sufficiently serious level to affect the determination of issues of culpability for violent action. In order to capture the idea that the relationship should be abusive and that the abuse should be serious, we propose that an ‘abusive relationship’ be defined as meaning a domestic relationship ‘in which there is a history of serious violence’. Although our terms of reference referred to ‘seriously abusive relationship’, we have used the term ‘abusive relationship’ and incorporated a reference to ‘serious violence’ within the definition.<sup>180</sup>

## Kinds and levels of violence

**4.14** The violence involved in an abusive relationship can be of various kinds. We recommend that it be defined in this way:

- ‘violence’ means (i) physical abuse; (ii) sexual abuse; or (iii) psychological abuse, including but not limited to intimidation, harassment, damage to property, and threats of physical abuse, sexual abuse or psychological abuse.

<sup>176</sup> *Domestic Violence and Family Protection Act 1989* (Qld) ss 12 and 12A, respectively.

<sup>177</sup> See discussion in Chapter 2.

<sup>178</sup> Consultation with Women’s Legal Service & Zoe Rathus (Brisbane, 20 May 2009).

<sup>179</sup> *Ibid*, Consultation with Aboriginal and Torres Strait Islander Legal Service, Greg Shadbolt (Brisbane, 8 May 2009); Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009); Consultation with Legal Aid Queensland, Tracey de Simone, Catherine Morgan & Fiona Fairbrother (Brisbane, 29 May 2009). See also discussion in Chapter 2.

<sup>180</sup> It should also be noted that some respondents felt that the use of the descriptor ‘seriously’ was unnecessary, and too restrictive: Consultation with Women’s Legal Service & Zoe Rathus (Brisbane, 20 May 2009); Queensland Law Society & Bar Association of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009).

This definition is adapted from the definition of 'violence' in the Victorian scheme for self-defence against family violence in homicide cases.<sup>181</sup>

**4.15** There was support amongst a number of respondents for the inclusion of psychological abuse,<sup>182</sup> For example, the Aboriginal and Torres Strait Islander Legal Service contended:

[A]ny reform should have some kind of inclusive reference to ensure coverage for psychological, mental and intimidating abuse (possibly by way of a footnote in the legislation).<sup>183</sup>

Zoe Rathus also noted the 'reality that some of the most damaging and distressing forms of family violence attack the inner-self of the victim'.<sup>184</sup> Heather Douglas made similar comments in relation to concepts of domination and control being central to a label of 'serious abuse'.<sup>185</sup>

**4.16** The Aboriginal and Torres Strait Islander Legal Service pointed out a particular problem with 'shaming' in indigenous communities:

There are other aspects which are particularly germane to Aboriginal culture. For example, the occurrence of continual 'shaming' – that is to say, where a perpetrator embarrasses, belittles or 'puts down' the victim in front of family (which culturally extends to individuals from the 'same mob') - is a very real form of mental abuse. In Aboriginal cultural, 'shaming' has a much more profound effect on victims compared to the non-indigenous community. What might be viewed as minimal abuse from a non-indigenous perspective may be a significant and more severe form of abuse for the indigenous victim; particularly in remote indigenous communities where the population is small and everyone is known to each other.

Such is in no way intended to detract from those instances of mental abuse, in the form of continual public humiliation accompanied by private derogating treatment, suffered by some victims in the non-Indigenous community. Rather, it is simply intended to illicit the fact that seemingly lesser forms of humiliation to the non-Indigenous community, can be of greater impost for Aboriginal victims in very small communities.<sup>186</sup>

<sup>181</sup> *Crimes Act 1958* (Vic) s 9AH(4). The proposed definition repeats the words of the Victorian scheme, except that it does not incorporate an additional part of the Victorian scheme extending the definition of violence in relation to a child. We do not believe the extension would suit the more limited context of our proposed defence.

<sup>182</sup> Women's Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009). However, the Office of the Director of Public Prosecutions warned that the inclusion of mere psychological abuse might lead to misuse of the defence by the abusive person who kills and blames the victim.

<sup>183</sup> Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009).

<sup>184</sup> Zoe Rathus, Griffith University Law School, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (16 June 2009).

<sup>185</sup> Heather Douglas, TC Beirne School of Law, The University of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 May 2009).

<sup>186</sup> Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009). Referred to also in consultation with Aboriginal and Torres Strait Islander Women's Legal Service: Consultation with Aboriginal and Torres Strait Islander Women's Legal Service, Jodie Vincent, Cathy Periera and Melanie Busato (Telephone interview, Mackay, 14 June 2009).

**4.17** In our view, psychological abuse should be included, not the least because of the implied and express threats that it may carry. It will ultimately be required that the person believes that killing is necessary for self-defence or the defence of another person. Therefore, the defence will not be available simply for killing in response to 'mere' psychological abuse. It will have to be psychological abuse of a kind which gives rise to a belief in the necessity of killing for self-defence or the defence of another person. Note however the warning from the Office of the Director of Public Prosecutions in relation to mere psychological abuse, and possibility of misuse by the abusive person who kills and blames the victim.<sup>187</sup>

**4.18** We have not defined 'serious' for the purposes of the definition of 'serious violence'. Seriousness is a matter of degree and we believe that such matters are ordinarily best to the judgment of juries. We do, however, suggest the inclusion of a provision making it clear that seriousness is to be assessed by reference to the pattern of violence rather than to the nature of any particular acts making up the pattern. We would recommend that this be done by adopting another provision from the Victorian scheme for self-defence against family violence in homicide cases:<sup>188</sup>

- a number of acts that form part of a pattern of behaviour may amount to a history of serious violence even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

## C. Victims and abusers

**4.19** Our terms of reference referred to 'victims' of abusive relationships who kill their 'abusers'. 'Victims' and 'abusers' are emotive terms which are perhaps best avoided in statutory provisions. Moreover, use of the term 'victim' to describe the person who has suffered violence in the relationship might cause confusion with the status of the deceased abuser as the victim of a homicide.

**4.20** Our suggestions are:

- An abuser be termed a 'party to an abusive relationship', defined as meaning 'a person who has engaged in serious violence in an abusive relationship';
- A victim be described as a person 'who has suffered violence in the relationship'.

**4.21** It is not uncommon for both parties to have engaged in violence in abusive relationships, particularly when the victim of ongoing abuse retaliates.<sup>189</sup> The Aboriginal and Torres Strait Islander Legal Service commented in its response to the Discussion Paper:

For example, it is a well documented fact that violence on Aboriginal communities more often than not involves severe alcohol abuse. Aboriginal women, in situations where they are uninhibited due to the affects of alcohol, often attempt to lash out or fight back against the perpetrator – only to experience a much more severe bashing. For such victims who are the subject of continual antecedent abuse, invariably there will be instances in that history where they have

<sup>187</sup> Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009).

<sup>188</sup> *Crimes Act 1958* (Vic) s 9AH(5)(b).

<sup>189</sup> Consultation with Aboriginal and Torres Strait Islander Women's Legal Service, Jodie Vincent, Cathy Periera and Melanie Busato (Telephone interview, Mackay, 14 June 2009); Consultation with Women's Legal Service & Zoe Rathus (Brisbane, 20 May 2009).

attempted to ‘fight back’, particularly when inebriated. Yet when viewed holistically, it becomes clear that in the vast majority of occasions, the male of the relationship is the dominant perpetrator. Considerable care must therefore be taken, in any reform of the law addressing victims who injure (or kill) their abusers, to ensure the reform is not constrained to situations of otherwise ‘passive’ victims; or victims where there is no history of attempts at retaliation.<sup>190</sup>

**4.22** We believe that it should be made clear that a person is not disqualified from invoking the defence merely because that person has previously acted violently within the relationship. The central issues in determining the availability of the defence should be the defendant’s state of mind and the grounds for this state of mind, not the defendant’s behaviour in the relationship.

**4.23** We therefore suggest that the following provision be included to clarify who is entitled to claim the defence:

- a person may have suffered violence in an abusive relationship even though that person may himself or herself have engaged in violence within the relationship.

## D. Third parties

**4.24** As we noted in Chapter 1, many of the responses to the Discussion Paper raised the prospect of widening any defence of self-defence for victims of abuse to incorporate defence of some other persons.

**4.25** In discussing defence of others, the responses raised two different possibilities:

1. Some indicated that other parties who act to preserve the lives or safety of the victim of abuse may deserve protection.<sup>191</sup>
2. Others considered that victims of abuse should be afforded protection where they act to preserve the lives or safety of certain other persons.<sup>192</sup>

<sup>190</sup> Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009).

<sup>191</sup> Phil Reeves MP, Minister for Child Safety and Minister for Sport, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (16 June 2009); Consultation with Aboriginal and Torres Strait Islander Women’s Legal Service, Jodie Vincent, Cathy Periera and Melanie Busato (Telephone interview, Mackay, 14 June 2009); Zoe Rathus, Griffith University Law School, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (Nathan, 16 June 2009); Department of Communities Qld, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (Brisbane, 26 May 2009).

<sup>192</sup> Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009); Department of Communities Qld, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (Brisbane, 26 May 2009); Justice Atkinson & Claire Riethmuller, Queensland Law Reform Commission, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (11 June 2009); Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009); Zoe Rathus, Griffith University Law School, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (Nathan, 16 June 2009); Women’s Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009).

### Third parties who act to protect victims of serious abuse

**4.26** Given the impact that witnessing the suffering of victims of serious abuse can have on third parties, we believe that in some instances it is appropriate for other persons to be protected by this separate defence.

**4.27** The possibility of a defence extending to defence of others was raised by Phil Reeves, the Minister for Child Safety:

[a]ny defence should not necessarily be limited by a requirement for an assault against that person. In this way, protection could be extended to people who kill or inflict serious injury in circumstances where they have witnessed abuse being inflicted on another person.<sup>193</sup>

The Aboriginal and Torres Strait Islander Women's Legal Service was in favour of extending protection to family members in such situations, using the example of a child who retaliates against an abuser in support of their abused parent.<sup>194</sup> This same example was provided in the submission by the Office of the Director of Public Prosecutions.<sup>195</sup>

**4.28** Any broadening of the defence for victims of abuse is fraught with risks. The categories of persons that may be able to utilise such a defence should therefore be carefully confined to those who are impacted by the abuse. The Chairperson and Director of the Queensland Law Reform Commission use the term 'family members'.<sup>196</sup> The Office of the Director of Public Prosecution speaks of a person with whom the abused person has a close relationship.<sup>197</sup> The Aboriginal and Torres Strait Islander Legal Service suggests the phrase 'significant other', noting that this should include 'not only directly related familial others but also those who are culturally considered to be familial relations'.<sup>198</sup>

**4.29** We recommend that the defence be available to 'family members' of victims of abuse who act in defence of those persons. We suggest that family members be defined in the following way:

- 'family member', in relation to a person, means another person who is or has been ordinarily a party to the domestic relationship in which the history of serious violence has occurred.

We do not see value in being highly prescriptive, because of the risk of inadvertently excluding persons with a valid claim to the defence. However, we do suggest the

<sup>193</sup> Phil Reeves MP, Minister for Child Safety and Minister for Sport, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (16 June 2009).

<sup>194</sup> Consultation with Aboriginal and Torres Strait Islander Women's Legal Service, Jodie Vincent, Cathy Periera and Melanie Busato (Telephone interview, Mackay, 14 June 2009).

<sup>195</sup> Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009).

<sup>196</sup> Justice Atkinson & Claire Riethmuller, Queensland Law Reform Commission, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (11 June 2009). Note however that this reference to family members was used in the context of victims of abuse protecting other family members.

<sup>197</sup> Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009). Note however that this reference was used in relation to victims of abuse who act to protect another person with whom they have a close relationship.

<sup>198</sup> Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009). Note again that this submission was referring to the victim of abuse defending a significant other.

application of the defence be limited to a person who is or has been 'ordinarily a party to the domestic relationship'.

**4.30** Our definition would afford protection to a child who has left the family home, or a parent who has separated from the perpetrator of their child's abuse, as parties to the domestic relationship who were directly impacted by the suffering inflicted upon the victim of abuse. The defence would not, however, be available on the facts of the Victorian case of *R v Kell*.<sup>199</sup> Sarah Kell had previously been the victim of serious abuse from her estranged partner. This partner attended at her residence on evening and her brother and current boyfriend became aware that he was there. They then attended the residence and the estranged partner was fatally stabbed by one of the two men. In that case both accused qualified as family members under s 9AH(4) of the *Crimes Act 1958* (Vic). In our definition of family members that would not be the case, as they would not have been a party to the domestic relationship between Sarah and her estranged partner.

**4.31** The phrase 'ordinarily a party to the domestic relationship' is also included to ensure that a person engaged to act on behalf of the victim of an abusive relationship (e.g. a contract killer) is not afforded protection.

### **Victims of abuse who act to protect third parties**

**4.32** A number of submissions sought further consideration of this issue, given the likelihood of victims of abuse acting to protect others, such as their children.<sup>200</sup> In its response our Discussion Paper, the Office of the Director of Public Prosecutions states: 'many people are abused in circumstances where the abuse is spread to their children as well, and they kill not necessarily to protect themselves but their children'.<sup>201</sup> While this may be true, we do not recommend the inclusion of any specific provision with respect to the problem.

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

**4.34** The case of *R v Kina*<sup>202</sup> is illustrative. In that case, Robyn Kina was convicted of murdering her *de facto*.<sup>203</sup> Kina described a history of serious violence in their relationship. On the night of the offence, Kina said that she had been subjected to further violence and during the episode her *de facto* suggested that he would engage in anal intercourse with her niece (who was in Kina's care). Shortly after this Kina went on to stab her *de facto*. The comments made about the niece in that instance formed part of the history of serious violence that Kina suffered.

<sup>199</sup> *R v Kell & Dey (Ruling No. 1)* [2008] VSC 518.

<sup>200</sup> Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009); Department of Communities Qld, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (26 May 2009).

<sup>201</sup> Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009)

<sup>202</sup> *R v Kina* (Unreported, Supreme Court of Queensland, Court of Appeal, Fitzgerald P, Davies and McPherson JAA, 22 November and 29 November 1993).

<sup>203</sup> It should be noted that self-defence was not raised during Kina's trial and that the defence of provocation was not left to the jury, as there was insufficient evidence to support the existence of provocation.

**4.35** Further, it must be remembered that the existence of this partial defence does not prevent the application of other defences, complete or partial, if such defences are made out on the facts of a case.

## **E. The defendant's state of mind**

**4.36** As discussed in Chapter 3, we recommend on balance that there should be both subjective and objective conditions respecting the state of mind of a person claiming the defence. We propose these basic conditions:

- The person should believe that killing is necessary for self-defence or for the defence of another person who is a victim of the relationship;
- There should be reasonable grounds for this belief in the circumstances as they were perceived to be.

Formulated in this way, the defence would reflect the simple conditions set for the complete defence of self-defence at common law by the High Court of Australia in *Zecevic*.<sup>204</sup>

### **Subjective conditions**

**4.37** It would be a minimum requirement for any defence based on principles of self-defence that a person claiming the defence should have believed that killing was necessary for self-defence. More stringent conditions could be written into the defence. For example, it could be required that the person have believed that killing was necessary to defend the person's life rather than necessary for defence generally. However, we do not believe that more stringent conditions are required for what would only be a partial defence, still leaving the person liable for manslaughter. Moreover, the magnitude of the danger faced would be a factor in determining whether killing was genuinely believed to be a necessary response and whether, on our recommendations respecting an objective element to the defence, there were reasonable grounds for such a belief.<sup>205</sup>

### **Objective conditions**

**4.38** As was discussed in Chapter 3, we have concluded on balance that an objective test should be incorporated in the conditions for the defence. There should be a requirement for reasonable grounds for the belief that defence of the victim requires the death of the abuser. However, we have also concluded that the objective test should be framed to ensure that the special context of an abusive relationship is taken into account in determining whether or not there were reasonable grounds. It must be clearly indicated that reasonableness is to be assessed from the standpoint of the person involved, with due consideration of the predicament which the person faced. There was support for this approach among several respondents to the Discussion Paper.<sup>206</sup>

<sup>204</sup> *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 661.

<sup>205</sup> See *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 662.

<sup>206</sup> Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009); Zoe Rathus, Griffith University Law School, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (16 June 2009); Queensland Centre for Domestic and Family Violence Research, Central Queensland University, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009); Women's Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009). It should be noted that there was no unanimity about the need for an objective test. Some respondents were of the view that a subjective test

**4.39** We believe that the best approach to achieving these outcomes involves two qualifications to a straightforward requirement for reasonable grounds for believing that killing was necessary:

- the objective requirement with respect to the belief in the necessity of using lethal force should be for reasonable grounds for the belief *in the circumstances as they were perceived to be*;
- there should be guidelines to assist juries in determining what may be reasonable grounds in the special context of abusive relationships.

**4.40** The expression ‘reasonable grounds for the belief in the circumstances as they were perceived to be’ adopts the formula used for a complete defence of self-defence in the Model Criminal Code and in the legislation of New South Wales, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory.<sup>207</sup> The formula involves mixed subjective and objective elements: subjective for the perception of the circumstances but objective for the judgment about what would be needed to avert the danger. It might be objected that this approach is inconsistent with the general requirement under the s 24 of the *Criminal Code* for mistakes of fact to be reasonable if they are to provide a defence. However, s 24 establishes an excusing defence which can eliminate all criminal liability whereas the present proposal concerns only a partial defence to murder.<sup>208</sup>

**4.41** We believe that it could also be useful to include some direction on what may be reasonable grounds in the special context of abusive relationships. There are, of course, many different factors that might be relevant in determining whether there were reasonable grounds for a belief. In Chapter 5, we discuss the usefulness of an evidentiary provision listing some factors that may be important in the context of abusive relationships. We also recommend the inclusion of an express provision directly addressing certain misconceptions about violent responses in abusive relationships. In particular, it has often been alleged that juries find it difficult to comprehend how there can be reasonable grounds for believing in the necessity of killing when the person was not facing an assault, or used a weapon when the abuser had not, or did not attempt to flee the relationship before ending it by killing the abuser. We recommend that an express provision address this problem, separately from the general evidentiary provision.

**4.42** We suggest the inclusion of this provision:

- A belief that the conduct is necessary for self-defence or the defence of another may be held on reasonable grounds, in the circumstances as the person perceives them to be, even if –
  - (a) a particular act of abuse is not imminent; and

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only was sufficient for a partial defence to murder: Justice Atkinson & Claire Riethmuller, Queensland Law Reform Commission, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (11 June 2009).

<sup>207</sup> Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapters 1 and 2: General Principles of Criminal Responsibility* (1992), s 10.4(2); *Crimes Act 1900* (NSW) s 418; *Criminal Law Consolidation Act 1935* (SA) s 15(1)(b); *Criminal Code* (Tas) s 46; *Criminal Code 2002* (ACT) s 42(2)(b); *Criminal Code* (NT) s 43BD(2)(b).

<sup>208</sup> It may be noted that under the *Criminal Code* of Western Australia, which contains the same provision as 24 of the Queensland Code, reasonable grounds for a belief about the circumstances are required for the complete defence of self-defence but not for the partial defence of excessive force: *Criminal Code* (WA) s 248(3)-(4).

- (b) the force used by the person exceeds the force used in the abuse; and
- (c) the person has not pursued options other than the use of force.

The structure of this provision is taken from the Victorian scheme for self-defence against family violence in homicide cases.<sup>209</sup> The particular specifications of relevant matters have been adapted from the Victorian scheme, from what was proposed by the Queensland Taskforce on Women and the Criminal Code in relation to a revised general law of self-defence, and by Zoe Rathus in a submission responding to our Discussion Paper.<sup>210</sup>

## F. The onus of proof

**4.43** If a new partial defence to murder is to be introduced, the onus of proof must be assigned to one side or the other. The Queensland *Criminal Code* currently includes two partial defences to murder: diminished responsibility and provocation. The *Code* expressly provides that the onus of proof with respect to diminished responsibility lies on the defence.<sup>211</sup> Under common law principles, the standard of proof is the balance of probabilities. For provocation, however, the *Code* is silent. Common law principles therefore apply with respect to the onus of proof as well as the standard. The result is that, when there is evidence putting the defence in issue, the prosecution carries the onus to disprove it beyond reasonable doubt.<sup>212</sup> The onus of proof for the partial defence of excessive force in self-defence has not been reversed in any of the Australian jurisdictions which have already introduced this defence.

**4.44** The Queensland Law Reform Commission has now recommended that the onus of proof for the defence of provocation should be reversed, so that the defendant must prove the defence on the balance of probabilities.<sup>213</sup> Four reasons were given:

- Firstly, the prosecution will very often not be in a position to contest the factual detail of the claim as the only other potential witness will have been killed by the defendant.
- Secondly, if the onus of proof is placed on the party who wishes to rely on provocation, it is likely to result in more clearly articulated claims of provocation.
- Thirdly, if the onus of formulating the claim of provocation is placed on the party who wishes to rely on the claim, the trial judge may have a greater capacity to act as a gatekeeper to prevent unmeritorious claims being advanced before juries.
- Fourthly, a strong analogy exists to the partial defence of diminished responsibility.<sup>214</sup>

**4.45** The first and second of these reasons would also apply to battered persons who kill their abusers. In most cases, the only other potential witness to the details of what happened will be dead and reversing the onus of proof will force the survivor to clearly

<sup>209</sup> *Crimes Act 1958* (Vic) s 9AH(1).

<sup>210</sup> Taskforce on Women and the Criminal Code, *Women and the Criminal Code* (2000); Zoe Rathus, Griffith University Law School, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (16 June 2009).

<sup>211</sup> *Criminal Code* (Qld) s 304A(2).

<sup>212</sup> See *Hart v R* (2003) WASCA 213, 27 WAR 441, [69], and the authorities cited therein.

<sup>213</sup> Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, Report No 64 (2008) Recommendation 21-5.

<sup>214</sup> Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, Report No 64 (2008) [18.19]-[18.22].

articulate the relevant claims. It is not clear, however, that the third and fourth reasons would justify reversing the onus of proof for a separate partial defence for battered persons.

**4.46** The Commission suggested that its recommendation about provocation might be in accordance with general principle.<sup>215</sup> The Commission also said: 'It is difficult to see why a different rule should apply to each of the partial defences.'<sup>216</sup> It might, however, be argued that the best justification for reversing the onus of proof for diminished responsibility and provocation lies in considerations of policy rather than principle and that different considerations of policy would apply to the partial defence under consideration here.

**4.47** Diminished responsibility and provocation have been contentious defences, with concerns sometimes being expressed about their potential for causing unmeritorious reductions from murder to manslaughter. The reversal of the onus of proof for these defences could be viewed as a policy decision aimed at diminishing a known risk of unmeritorious defences. In contrast, the effect of a separate partial defence for battered persons is yet to be assessed. In the absence of experience with such a defence, it could be argued that the best approach is to adhere to the general principle that the onus of proof with respect to all issues of criminal responsibility lies with the prosecution.<sup>217</sup>

**4.48** In addition to any considerations of general principle, reversing the onus of proof for a partial defence would cause practical difficulties in any case where it was raised as an alternative to a complete defence of self-defence. Different onuses of proof for the two defences would require the judge to give very careful instructions to the jury.

**4.49** In Queensland, the onus of proof in the self-defence provisions in sections 271 and 272 lies on the Crown to disprove self-defence, meaning that the evidential burden lies on the defendant, who must point to enough evidence to raise the defence, at which point the burden then shifts to the Crown to negative self-defence beyond reasonable doubt.<sup>218</sup>

**4.50** Respondents who commented on the issue agreed that any new defence should have the same burden of proof as the existing self-defence provisions, so that the Crown has the onus to negative the defence beyond reasonable doubt.<sup>219</sup> According to the joint Queensland Law Society and Bar Association of Queensland submission:

Should a new defence be introduced, our view is that the prosecution should bear the onus to disprove a defence (whether partial or complete) beyond a reasonable doubt once it is raised on the evidence. There is a strong chance that it will be raised in combination with other defences where a reversal of onus does not apply. This position should apply even if the new defence is a partial defence. There is no particular reason to adopt a different approach merely because it is a partial defence. Otherwise, the result will be confusion. If the new defence is raised in combination with self-defence, for example, and the new defence was a partial defence, convoluted directions not able to be easily understood by a jury will emerge. The chances of a misdirection (and therefore an appeal) increase.<sup>220</sup>

<sup>215</sup> Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, Report No 64 (2008) [18.13]-[18.14].

<sup>216</sup> Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, Report No 64 (2008) [18.23].

<sup>217</sup> *Woolmington v DPP* [1935] AC 462, 481-2.

<sup>218</sup> *R v Muratovic* [1967] Qd R 15.

<sup>219</sup> Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009).

<sup>220</sup> Queensland Law Society & Bar Association of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009).

The Women's Legal Service was of a similar view:

The onus should remain on the prosecution. This means that it is not couched in terms of 'being a defence' to a charge but rather in terms of 'not criminally responsible', 'justified; or 'excused'. Unless there are sound policy or practical reasons for changing the general principle that the onus lies with the prosecution, it should not be changed. There were no such policy or practical reasons given in the Discussion Paper.

The recommendation of the QLRC related to changing the onus to the defence in relation to the partial defence of provocation. Such a change in relation to either a stand alone section protecting those who are victims of relationships characterised by domestic violence or a re-worked self-defence providing the same protection, could create difficulties, particularly when the defence seeks to rely on alternate defences with different onuses of proof.<sup>221</sup>

**4.51** We therefore do not recommend that the onus of proof be reversed for the partial defence we have proposed.

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<sup>221</sup> Women's Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009).

## CHAPTER 5: EVIDENTIARY ISSUES

**5.1** Our reference from the Attorney-General required us to have particular regard to ‘whether any ancillary evidentiary provisions are required to facilitate the operation of any new defence’. This chapter therefore examines the evidentiary issues which may arise in relation to a new family violence defence. A victim of an abusive relationship who has been charged with murder and seeks to rely on the proposed new defence may need to introduce:

- Evidence about the relationship or the history of abuse, either provided orally by themselves and/or by other witnesses or in documentary form; and/or
- Evidence about domestic violence generally or its impact on the battered person in particular.

**5.2** Concerns have sometimes been raised about two different issues:

1. whether the rules on the admissibility of evidence allow relevant material to be placed before the jury;
2. whether juries are equipped to make appropriate assessments of the relevance of admissible evidence, given the special circumstances of abusive relationships which may not fall within the experience of most members of the community.

**5.3** It is important to note at the outset that some respondents did not support the introduction of special rules of evidence for any new defence. The joint submission by the Queensland Law Society (QLS) and Bar Association Queensland (BAQ) stated that:

We do not, as a general proposition, support creating special rules of evidence for the proposed defence. Any review of the laws of evidence relating to hearsay evidence of relationship and the qualifications of an expert are best left to any general reform of the laws of evidence, which may in time involve adoption of the uniform evidence laws in Queensland.

We note that we are particularly concerned about any ancillary changes to the laws of evidence and again kindly request to be included in any consultation on those proposals. The Discussion Paper does not contain any significant analysis of the topic and one would assume that it will ultimately require such consideration in its own right.<sup>222</sup>

This position was supported by the separate submission by Legal Aid Queensland (LAQ), on the basis of the likelihood of unintended consequences arising.<sup>223</sup>

**5.4** These objections referred to changes to the rules on the admissibility of evidence. We agree that any such changes should be left to a more wide ranging review of the laws of evidence. We identify some of the issues in Part A of this chapter but we make no specific recommendations for changes in this Report.

**5.5** In Part B of this chapter, we will review the Victorian scheme for guidelines to juries in family violence cases on matters that may be relevant in determining whether there was a genuine belief in the necessity of killing an abuser and whether there were reasonable

<sup>222</sup> Queensland Law Society & Bar Association of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009).

<sup>223</sup> Legal Aid Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009).

grounds for such a belief. We will recommend the adoption of a similar scheme in Queensland.

## A. Admissibility of evidence

### Relationship evidence

**5.6** Section 132B(2) of the *Evidence Act 1977* (Qld) expressly contemplates the possible admission of relationship evidence for particular offences including murder, manslaughter and assault:

Relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding.<sup>224</sup>

As was noted in a recent Queensland Court of Appeal decision, s 132B(2) 'leaves open for decision in each case the question whether particular evidence of that general kind is relevant'.<sup>225</sup>

**5.7** Section 132B(2) was introduced despite criticism that it was circular and did 'nothing more than restate the existing [common] law'.<sup>226</sup> The common law provides that evidence can be admitted to show the nature of the relationship between a complainant and an accused.<sup>227</sup>

**5.8** If the evidence is considered relevant it may still be excluded on other grounds.<sup>228</sup> The most pertinent exclusionary rule to the situation of battered persons would be the rule against hearsay. Some evidence as to the history of the relationship may not rely on hearsay.<sup>229</sup> At times, however, the presentation of hearsay may be necessary. For example, a battered accused may attempt to call witnesses (family members, other acquaintances or service providers) to present evidence of what either the accused or the abuser has told them about the nature of their relationship. Such statements will be subject to the usual rules of evidence, possibly resulting in exclusion.

**5.9** The Discussion Paper asked whether the current Queensland rules of evidence adequately allow for the introduction of evidence of a relationship or a history of abuse. A number of respondents commented on this issue. The Aboriginal and Torres Strait Islander Legal Service (ATSILS) did not agree that the present rules were adequate, and stated that 'hearsay evidence should be admissible in relation to establishing the nature

<sup>224</sup> *Evidence Act 1977* (Qld) s 132B(1) provides that the section applies to offences defined in the Criminal Code, chapters 28 to 30. However, even though s 132B of the *Evidence Act 1977* (Qld) only applies to particular violent offences, this does not automatically render relationship evidence inadmissible for other offences: *R v PAB* [2008] 1 Qd R 184, [28].

<sup>225</sup> *R v Lester* [2008] QCA 354 (Unreported, Fraser JA, Mackenzie AJA and Douglas J, 14 November 2008) [39] (Fraser JA).

<sup>226</sup> Zoe Ratus, *Rougher Than Usual Handling: Women and the Criminal Justice System* (2<sup>nd</sup> ed, 1994) 139; Taskforce on Women and the Criminal Code, *Women and the Criminal Code* (2000), 140-145.

<sup>227</sup> *R v Walker* [2007] QCA 446 (Unreported, McMurdo P, Jerrard JA and Daubney J, 19 December 2007) [22] (McMurdo P) citing various decisions, including *Wilson v The Queen* (1970) 123 CLR 334, 337-340 (Barwick CJ); 344 (Menzies J) with whom McTiernan and Walsh JJ agreed.

<sup>228</sup> *R v Babsek* [1998] QCA 116 (Unreported, Moynihan J, Davies and McPherson JJA, 2 June 1998) 5 (Moynihan J).

<sup>229</sup> For example witnesses may have directly observed altercations between the battered person and their abuser.

of a relationship and the issue of cumulative abuse – albeit with the *weight* to be attached to such evidence then being a matter for the jury'.<sup>230</sup> Other respondents agreed that the current rules of evidence were inadequate.<sup>231</sup> Heather Douglas noted that s 132B *Evidence Act* has been very narrowly interpreted, and has not had the effect that may have been anticipated.<sup>232</sup>

**5.10** The Women's Legal Service raised a specific objection to the presence of the word 'relevant' at the beginning of s 132B(2):

The existing drafting of s 132B(2) of the Evidence Act is not helpful. Unless it comes within one of the exceptions such as hearsay, relevant evidence is always admissible. The purpose of the section is to state that evidence of the history of the domestic relationship is admissible and relevant, not that relevant evidence is admissible and relevant. We recommend removing the word 'relevant' where it appears at the beginning of the section.<sup>233</sup>

**5.11** On the other hand, the submission by the Office of the Director of Public Prosecutions also noted a number of difficulties arising from the broad scope of s 132B and its interpretation:

Making admissible the accused killer's history of complaints about their abuse might serve the accused in some cases, but it is not without risks. First, some battered spouses specifically are too frightened or ashamed to complain, and live with their problems in secrecy. Second, there is a risk of trials becoming royal commissions into the relationship rather than having them focus on the killing. Third, as mentioned in para 7 and 8 above, abusers who kill can be expected to attempt to cast themselves as the victim in most cases.<sup>234</sup>

**5.12** We have included these comments from the submissions to assist in any review of the laws of admissibility. However, as stated earlier, this Report will not make any recommendations for changes in light of the strong body of legal opinion that the issues should be tackled as part of a wider review of the law of evidence.

## Expert evidence

**5.13** At present, the admissibility of expert evidence is largely at the discretion of the court. However, witnesses who possess special skills or knowledge are permitted to express opinions within their field of expertise.<sup>235</sup> Expert evidence about the impact of abuse on a battered person has been accepted in Australia and specifically in Queensland since the 1990s.<sup>236</sup>

<sup>230</sup> Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009).

<sup>231</sup> Justice Atkinson & Claire Riethmuller, Queensland Law Reform Commission, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (11 June 2009).

<sup>232</sup> Heather Douglas, TC Beirne School of Law, The University of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 May 2009).

<sup>233</sup> Women's Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009).

<sup>234</sup> Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009).

<sup>235</sup> JRS Forbes, *Evidence Law in Queensland* (5<sup>th</sup> ed, 2004).

<sup>236</sup> Although in these decisions the references were to battered women's/battered wife syndrome, BWS was first considered in South Australia in *R v Runjanjic*; *R v*

**5.14** If self-defence is raised, Queensland judges may now rely on guidance from the Supreme and District Court Benchbook. The Benchbook provision on s 271(2) of the *Criminal Code* states:

In 'Battered Woman Syndrome' cases, expert evidence may be adduced as to the defendant's heightened awareness of danger, and the jury should be directed to its relevance to the defendant's belief as to the risk of grievous bodily harm or death. (General directions as to evidence of experts will be appropriate in such instances). Equally, the actual history of the relationship may require direction as going to the existence of reasonable grounds for any belief; *Osland* (1998) 197 CLR 316 at 337.<sup>237</sup>

**5.15** Stubbs and Tolmie argue that expert evidence has generally relied upon the historical construct of BWS and how it impacts upon a battered person's pathology.<sup>238</sup> With that frame of reference, the relevant experts have usually been drawn from the realm of psychology or psychiatry.<sup>239</sup> However, the same authors recognise that at least one decision in Queensland has allowed admission of expert evidence from a social worker. The social worker testified about the nature of domestic violence generally, avoiding resort to psychological characteristics of battered persons.<sup>240</sup> Nevertheless, the Queensland Court of Appeal has expressly declined to rule on the admissibility of this kind of evidence when it has had an opportunity to do so.<sup>241</sup>

**5.16** As part of its recommendation to reform the general law of self defence,<sup>242</sup> the Law Reform Commission of Western Australia proposed a series of amendments to the *Evidence Act 1906* (WA). One of its proposals was that '...a person may give opinion evidence about domestic violence where their qualifications in that field are based solely on their experience'.<sup>243</sup> The point of this recommendation was to allow workers in the field of domestic violence to give opinion evidence, as well as psychologists.<sup>244</sup>

**5.17** The Discussion Paper asked: Do the current Queensland rules of evidence adequately provide for the introduction of general evidence about domestic violence and/or opinion evidence particular to the accused's experience of domestic violence? ATSIILS answered in the affirmative, however said that it was 'subject to the issue of so-called 'expert' evidence being *fully* cognisant of cultural considerations'.

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<sup>237</sup> *Kontinnen* (1991) 56 SASR 114, then in Queensland in *R v Babsek* [1998] QCA 116 (Unreported, Moynihan J, Davies J and McPherson JJA, 2 June 1998) 5 (Moynihan J), and by the High Court in *Osland v The Queen* (1998) 197 CLR 316.

<sup>238</sup> Queensland Courts, *Supreme and District Court Benchbook* (at 28 February 2009) No 86A.2, footnote 3.

<sup>239</sup> Julie Stubbs and Julia Tolmie, 'Battered Women Charged With Homicide: Advancing the Interests of Indigenous Women' (2008) 4 *Australian and New Zealand Journal of Criminology* 138, 138, 145-146.

<sup>240</sup> Julie Stubbs and Julia Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709, 730.

<sup>241</sup> Ibid referring to the case of *R v Gadd* (Unreported, Supreme Court of Queensland, Moynihan J, 27 March 1995).

<sup>242</sup> In *R v Kina* [1993] CA No 221 (Unreported, Fitzgerald P, Davies and McPherson JJA, 29 November 1993) 36 (Fitzgerald P and Davies JA).

<sup>243</sup> See above, [3.20].

<sup>244</sup> Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Report No 97 (2007) 294.

<sup>244</sup> See also Victorian Law Reform Commission, Report No 94: *Defences to Homicide: Final Report* (2004) [4.130]-[4.131].

**5.18** In relation to who should be allowed to give expert evidence, the responses were mixed. ATSILS had reservations about what they referred to as ‘non-expert workers in the field of domestic violence’, and foresaw the potential for ‘(unconscious) inbuilt bias’.<sup>245</sup> They stated that opinion evidence ‘should be confined to expert opinion’.<sup>246</sup>

**5.19** On the other hand, LAQ stated: ‘In principle, we would support witnesses such as domestic violence workers – including social workers, being able to give evidence in appropriate cases (if that evidence of course met the primary test of being relevant and probative)’.<sup>247</sup> Heather Douglas also called for the range of experts in the field to be broadened, arguing that a shelter worker with years of experience in working with women in crisis should be able to testify on these issues.<sup>248</sup> Bravehearts submitted that evidence should be accepted from counsellors and child sexual assault experts,<sup>249</sup> as well as more formally qualified psychologists and psychiatrists.<sup>250</sup>

**5.20** LAQ also pointed out the limited access of women in regional areas to experts who could provide reports for consideration in any subsequent proceedings, and secondly noted the difficulties of NESB women in relation to cultural issues and also their isolation, particularly in relation to newly arrived communities, which may limit their access to appropriate support services.

**5.21** The Queensland Centre for Domestic and Family Violence Research, CQ University, submitted that caution should be exercised with expert evidence, and that many ‘experts’ such as psychiatrists, psychologists and social workers have little or no training or practical experience in the area of domestic and family violence, and that such evidence should only be provided by a person with a minimum of three years’ experience in the field and a relevant qualification.<sup>251</sup> Others noted that expertise arises from a combination of formal qualifications and experience.<sup>252</sup>

**5.22** As with relationship evidence, we have included these comments from the submissions to assist in any general review of the law on admissibility of evidence. This Report will not make any recommendations for changes specific to abusive relationships.

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<sup>245</sup> Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009).

<sup>246</sup> Ibid.

<sup>247</sup> Legal Aid Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 June 2009).

<sup>248</sup> Heather Douglas, TC Beirne School of Law, The University of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 May 2009).

<sup>249</sup> Child sexual assault experts were mentioned in the context of the Bravehearts submission for a separate partial defence where the victim of historical child sexual assault harms or murders in the belief that the act is the only way to stop the individual from harming themselves or another.

<sup>250</sup> Bravehearts, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009).

<sup>251</sup> The suggested qualification is a Statement of Attainment in Course in Responding to Domestic and Family Violence (30629 QLD); Queensland Centre for Domestic and Family Violence Research, Central Queensland University, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (25 May 2009).

<sup>252</sup> Justice Atkinson & Claire Riethmuller, Queensland Law Reform Commission, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (11 June 2009).

## B. GUIDELINES ON RELEVANCE

**5.23** Making evidence admissible does not guarantee that its relevance will be assessed in an appropriate way by juries.

**5.24** The Queensland Taskforce on Women and the Criminal Code raised, as an option for discussion, the idea of legislating for a jury direction to counter myths about domestic violence in cases where a domestic violence history forms a background to the offence. In response, the judges of the Supreme Court of Queensland expressed concern about prescriptive legislation on jury directions.<sup>253</sup>

**5.25** We believe there is considerable merit in the more cautious approach adopted for the family violence defence in s 9AH of the *Victoria Crimes Act 1958*. Rather than mandating any particular jury directions, the Victorian scheme prescribes that: certain factors should not preclude a finding of reasonable grounds for a belief in the necessity of killing; and that certain other factors may be relevant in determining whether there was a belief in its necessity and whether there were reasonable grounds for this belief. It is then for the judge to determine what kinds of directions may be appropriate in a particular case and for the jury to determine how to apply guidance which is given.

**5.26** The Victorian provision respecting factors that should not preclude a finding of reasonable grounds for a belief in the necessity of killing was discussed in Chapter 4 and a recommendation was made for the adoption of a similar provision in Queensland.

**5.27** The relevant parts of s 9AH dealing with other factors that may be relevant in determining whether there was a belief in the necessity of killing and whether there were reasonable grounds for this belief read as follows:

### 9AH Family violence

- (2) Without limiting the evidence that may be adduced, in circumstances where family violence is alleged evidence of a kind referred to in subsection (3) may be relevant in determining whether—
- (a) A person has carried out conduct while believing it to be necessary for a purpose referred to in subsection (1)(a) or (b); or
  - (b) A person had reasonable grounds for a belief held by him or her that conduct is necessary for a purpose referred to in subsection (1)(a) or (b); ...
- (3) Evidence of—
- (a) The history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;
  - (b) The cumulative effect, including psychological effect, on the person or a family member of that violence;
  - (c) Social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
  - (d) The general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;

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<sup>253</sup> Taskforce on Women and the Criminal Code, *Women and the Criminal Code* (2000) 144-145.

- (e) The psychological effect of violence on people who are or have been in a relationship affected by family violence;
- (f) Social or economic factors that impact on people who are or have been in a relationship affected by family violence.

**5.28** A number of respondents were supportive of a similar provision being enacted in Queensland.<sup>254</sup> In particular, the submission from ATSILS argued that the provision should:

- expressly provide that the person's social, cultural or economic history (including systemic issues pertaining to a particular culture) is relevant in determining whether the person had reasonable grounds for believing the offence was necessary defensive action, the reasonableness of the responsive offence and in assessing the reasonableness of the person's belief about the circumstances;
- expressly provide that the person's own prior history of exposure to abusive or violent behaviour is relevant in determining whether the person had reasonable grounds for believing the offence was necessary defensive action, the reasonableness of the responsive offence and in assessing the reasonableness of the person's belief about the circumstances;
- expressly provide that the history of the relationship between the person committing the defensive behaviour and the person against whom it is committed is relevant in determining whether the person had reasonable grounds for believing the offence was necessary defensive action, the reasonableness of the responsive offence and in assessing the reasonableness of the person's belief about the circumstances.<sup>255</sup>

**5.29** Zoe Rathus argued that, as with the Victorian provision, an evidentiary provision should be included with the substantive law:

It means that they are not concealed from those who determine questions of law – the judge - and ensure that the evidence is presented to those who determine questions of fact – the jury. Also, there is always a risk that substantive law reform could proceed without the evidentiary provisions. In this area of law both parts are absolutely integral to a system which will operate fairly..<sup>256</sup>

The Women's Legal Service made a similar submission:

Rather than including these evidentiary provisions in the Evidence Act, we recommend they be included in the substantive section/s as they are pivotal to whether or not the aim of the whole exercise well be achieved.<sup>257</sup>

**5.30** We agree with these views. We recommend that an evidentiary provision, based on the Victorian model, be attached to the defence. Our suggestion is as follows;

<sup>254</sup> Heather Douglas, TC Beirne School of Law, The University of Queensland, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 May 2009); Zoe Rathus, Griffith University Law School, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (16 June 2009); Women's Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009).

<sup>255</sup> Aboriginal and Torres Strait Islander Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (21 May 2009).

<sup>256</sup> Zoe Rathus, Griffith University Law School, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (16 June 2009).

<sup>257</sup> Women's Legal Service, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009).

- Without limiting the evidence that may be adduced, in circumstances where an abusive relationship is alleged evidence of a kind referred to in [the next subsection] may be relevant in determining whether-

a person has carried out conduct while believing it to be necessary for self-defence or the defence of a person who has suffered violence; or

a person has reasonable grounds for a belief held by him or her that conduct is necessary for self-defence or the defence of a person who has suffered violence.

- Evidence of-

the history of the relationship including the violence involved;

the cumulative effect, including psychological effect, on the person who has suffered violence or the family member;

social, cultural or economic factors that impact on the person who has suffered violence or the family member;

the general nature and dynamics of abusive relationships, including the possible consequences of separation from the abuser;

the psychological effect of violence on people who are or have been in an abusive relationship or their family members;

social or economic factors that impact on people who are or have been in an abusive relationship or their family members.

We further recommend that this provision form part of the defence as it is set out in the *Criminal Code*.

## CHAPTER 6: A DRAFT PROVISION

**6.1** We can summarise our recommendations for a partial defence to murder in the form of a draft statutory provision. We would stress, however, that our objective has been merely to show how the various recommendations which we have made might be drawn together and form the basis for a statutory provision. We do not propose that the particular words or arrangement of clauses should necessarily be adopted for statutory purposes. Moreover, we have not sought to ensure consistency with current draft styles.

**6.2** We have included two formally separate defences within the provision: one for the victims of abusive relationships; the other for family members who act in aid of the victims of abusive relationships. Essentially, however, these are the same defence. The conditions of the two defences are the same except for the different specifications on who may claim the defence.

1. For the purposes of this section –
  - (a) ‘abusive relationship’ means a current or past domestic relationship in which there is a history of serious violence;
  - (b) ‘domestic relationship’ includes spousal, intimate, family and care relationships;
  - (c) ‘party to an abusive relationship’ means a person who has engaged in serious violence in an abusive relationship;
  - (d) ‘family member’, in relation to a person, means another person who is or has been ordinarily a party to the domestic relationship in which the history of serious violence has occurred;
  - (e) ‘violence’ means (i) physical abuse; (ii) sexual abuse; or (iii) psychological abuse, including but not limited to intimidation, harassment, damage to property, and threats of physical abuse, sexual abuse or psychological abuse.
  - (f) a number of acts that form part of a pattern of behaviour may amount to a history of serious violence even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.
  - (g) a person may have suffered violence in an abusive relationship even though that person may himself or herself have engaged in violence within the relationship.
2. A person who unlawfully causes the death of another, under circumstances which, but for the provisions of this section, would constitute murder, is guilty of manslaughter only, if –
  - (a) the other person is a party to an abusive relationship;
  - (b) the person who causes the death has suffered violence in the relationship; and
  - (c) the person believes, on reasonable grounds in the circumstances as the person perceives them, the conduct is necessary for self-defence.

3. A person who unlawfully causes the death of another, under circumstances which, but for the provisions of this section, would constitute murder, is guilty of manslaughter only, if –
  - (a) the other person is a party to an abusive relationship;
  - (b) the person who causes the death is a family member of a person who has suffered violence in the relationship; and
  - (c) the person believes, on reasonable grounds in the circumstances as the person perceives them, the conduct is necessary for the defence of the person who has suffered violence.
4. A belief that the conduct is necessary for self-defence or the defence of another may be held on reasonable grounds, in the circumstances as the person perceives them to be, even if –
  - (a) a particular act of abuse is not imminent; and
  - (b) the person has not pursued options other than the use of force; and
  - (c) the force used by the person exceeds the force used in the abuse.
5. Without limiting the evidence that may be adduced, in circumstances where an abusive relationship is alleged evidence of a kind referred to in subsection 6 may be relevant in determining whether-
  - (a) a person has carried out conduct while believing it to be necessary for self-defence or the defence of a person who has suffered violence; or
  - (b) a person has reasonable grounds for a belief held by him or her that conduct is necessary for self-defence or the defence of a person who has suffered violence.
6. Evidence of-
  - (a) the history of the relationship including the violence involved;
  - (b) the cumulative effect, including psychological effect, on the person;
  - (c) social, cultural or economic factors that impact on the person;
  - (d) the general nature and dynamics of abusive relationships, including the possible consequences of separation from the abuser;
  - (e) the psychological effect of violence on people who are or have been in an abusive relationship;
  - (f) social or economic factors that impact on people who are or have been in an abusive relationship.

## **APPENDIX 1: WRITTEN SUBMISSIONS**

Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (21 May 2009)

Bravehearts (25 May 2009)

Department of Communities Qld (26 May 2009)

Dr Heather Douglas, TC Beirne School of Law, The University of Queensland ( 5 May 2009)

Justice R Atkinson & Claire Riethmuller, Queensland Law Reform Commission (11 June 2009)

Legal Aid Queensland (5 June 2009)

Neil Roberts MP, Minister for Police, Corrective Services and Emergency Services, (5 June 2009).

Office of the Director of Public Prosecutions (25 May 2009)

Phil Reeves MP, Minister for Child Safety and Minister for Sport (16 June 2009)

Queensland Centre for Domestic and Family Violence Research, Central Queensland University Mackay (25 May 2009)

Queensland Law Society & Bar Association of Queensland (5 June 2009)

Women's Legal Service (6 June 2009)

Zoe Rathus, Griffith University Law School (16 June 2009)

## **APPENDIX 2: ORAL CONSULTATIONS**

Aboriginal and Torres Strait Islander Legal Service, Greg Shadbolt (Brisbane, 8 May 2009)

Aboriginal and Torres Strait Islander Women's Legal Service, Jodie Vincent, Cathy Periera and Melanie Busato (Telephone interview, Mackay, 14 June 2009)

Gold Coast Domestic Violence Prevention Centre, Donna Justo (Southport, 21 May 2009)

Judge A Rafter, District Court (Brisbane, 18 May 2009)

Justice R Atkinson & Claire Riethmuller, Queensland Law Reform Commission (Brisbane, 7 May 2009)

Legal Aid Queensland, Tracey de Simone, Catherine Morgan & Fionna Fairbrother (Brisbane, 29 May 2009)

Michael Byrne QC, Bar Association of Queensland (Brisbane, 22 May 2009)

Office of the Director of Public Prosecutions, Tony Moynihan SC & Ross Martin SC (Brisbane, 8 May 2009)

President of the Court of Appeal, Justice M McMurdo, Queensland Supreme Court (Brisbane, 7 May 2009)

Queensland Homicide Victims Support Group, Jonty Bush (Brisbane, 20 May 2009)

Sean Reidy, Queensland Law Society (Brisbane, 22 May 2009)

Women's Legal Service & Zoe Rathus (Brisbane, 20 May 2009)