

CONCLUSIONS AND RECOMMENDATIONS

This thesis examines the treatment of women who kill their violent male partners within the Australian criminal justice system.

As stated in the Introduction, the primary aim of my research is to evaluate the treatment of women by considering the circumstances in which women kill their partners and exploring the ability of the criminal law to have proper regard to these circumstances.

In order to achieve this primary aim, there are three subsidiary aims. The first is to critically examine reliance on the various defences to murder (diminished responsibility, provocation, lack of the requisite intent for murder, self-defence, insanity and automatism). The second is to analyse the relationship between the defence of self-defence and the rules of evidence, and the third is to assess the judicial approach in sentencing women who kill their violent partners.

My analysis makes an important and novel contribution to the existing literature that has considered the issue of battered women who kill as it is based on an assessment of a relatively large sample of cases, including all relevant decisions of the New South Wales Supreme Court between 1990 and August 1998. My thesis expands upon the insights of this existing research by locating my analysis of the law's response to battered women (and the feminist analysis generally) within a broader empirical framework. My research explores the gendered operation of the criminal law in a practical sense by ascertaining the defences to murder that women are successfully and unsuccessfully relying upon, and within this context critically assessing the operation of the criminal law.

CHAPTER ONE

In Chapter One, I outlined the incidence and circumstances of spousal homicide in Australia. This discussion considered the gendered nature of homicide, in particular spousal homicide, as well as cultural and racial factors that impact on the incidence of spousal homicide. I then examined the legal outcomes in cases identified in my research where men and women kill their partners, and compared my findings to previous research.

This discussion highlighted five matters which were important to the aims of my thesis and the arguments developed. First, the fundamental masculinity of spousal homicide was shown. In the context of spousal homicide, men are most commonly the offender and women most commonly their victim. I argued that it is important to bear in mind the infrequency with which women kill their male partners. Secondly, the essential differences in the circumstances in which men and women kill in the domestic context was demonstrated. While men kill in circumstances of jealousy and/or rejection, women usually kill in circumstances of self-preservation. Thirdly, the close link between domestic violence and spousal homicide was revealed. In cases where men or women kill their partner, domestic violence frequently provides the background to the killing. And the prior violence is usually one way – male to female – regardless of who ultimately kills. Fourthly, there is a demonstrated increased risk of spousal homicide for Aboriginal or Torres Strait Islander men and women.

The final matter raised in this chapter was the legal outcome in the 76 cases identified in my research where women killed their male partners. This systematic examination of the cases represents a valuable contribution to the literature in relation to women who kill their partners. My examination of the legal outcome shows that women are most likely to be convicted of manslaughter, rather than acquitted or convicted of murder. This is in conformity with previous research. However, a significant and unique aspect of my findings was the extent of reliance by battered women on lack of intent manslaughter. My findings differed from previous research in relation to the basis of the manslaughter conviction in that I found that the basis of the manslaughter conviction was most frequently lack of intent to kill rather than provocation or diminished responsibility.

CHAPTER TWO

Chapter Two outlined the phenomenon of domestic violence in Australia. In this chapter, I considered the incidence of domestic violence, particularly in the context of gender and race/ethnicity. I then described the nature of domestic violence, the responses of women to domestic violence and the barriers to disclosure of the violence and/or leaving a violent relationship.

My consideration of domestic violence in Australia raised five matters of importance to the aims of my thesis, and the arguments developed in subsequent chapters.

First, this chapter showed the gendered nature of domestic violence. Although recognising that some women are violent in the domestic context, studies consistently show that men are overwhelming the perpetrators of domestic violence and women their victims.

Secondly, although domestic violence is not a 'cultural' or 'racial' issue, and occurs across the Australian community, it appears that racial/cultural factors impact on a woman's experience of domestic violence. Available research reveals the increased risk of domestic violence faced by Indigenous women. Research indicates that cultural and racial factors are not only relevant to the risk of experiencing violence, but also impact on women's responses to and options in relation to domestic violence.

Thirdly, the complexity of domestic violence and the range of behaviours that are employed to maintain power and fear in a violent relationship were shown in this chapter. As the 'Power and Control Wheel' shows, physical violence is one of a number of behaviours, and so domestic violence cannot be properly assessed or understood by focusing on physical violence alone or on isolated incidents of violence.

Fourthly, the diversity of women's responses to domestic violence – including a range of formal and informal strategies – challenges assumptions that women either 'stay' or 'leave'.

Finally, this discussion has shown the barriers that exist that may prevent a woman from disclosing the existence of domestic violence or leaving a violent partner. Significantly, research suggests that considerable practical barriers (lack of resources, and the danger of separation) impact on a woman's decision to leave, as well as internal feelings of shame and embarrassment, denial and disbelief and a sense of commitment to the family.

CHAPTER THREE

My analysis of the operation of the defences to murder in cases where battered women kill their partners needs to be positioned within its legal and social context. Chapter One began my consideration of the legal context by considering legal outcomes and Chapters One and Two provided information in relation to the social context of homicide in Australia. Chapter Three continued my discussion of the legal context by considering the structural and theoretical framework of the law of homicide and the defences to murder.

There were three main themes advanced in Chapter Three that were important for the purposes of my thesis. First, an understanding of the arguments advanced in my thesis required an appreciation of the masculinity of the origins of provocation and self-defence, and this is apparent from my discussion of the history of homicide and the defences.

Secondly, this chapter foreshadowed my argument in Chapter Four that concepts of intention and motive are not divided by any 'bright-line' test as suggested by legal principle. Rather, in practical terms, the concepts are fluid, not mutually exclusive, and the classification of intention and motive may involve the exercise of value judgments by judges.

Thirdly, my discussion of the theoretical framework of the defences engaged in the current debate in relation to the rationale for the defences of provocation and self-defence in the context of battered women who kill. In Chapter Three, I contended that the 'capacity view' with its focus on whether self-defence is a justification and an excuse is unlikely to be a useful framework to advance the self-defence claims of battered women. Rather, I have suggested that the 'reasons view' – with the focus on the evaluation of accused's reason for acting (motive) and emotions – accords with the modern operation of self-defence. The 'reasons view' also provides a more promising framework to allow self-defence to take account of the circumstances and motivation of battered women who kill. Related to the 'reasons view' is the concept of agent-relative permission, a concept which I contend should inform the modern approach to self-defence. Within the framework of 'agent-relative permission', the

issue is not whether the killing was the 'right or proper thing to do' but whether it would have been unreasonable to require any further self-sacrifice.

RECOMMENDATION 1 – That the concept of 'agent-relative permission' provide the theoretical framework for the defence of self-defence.

In relation to the defence of provocation, Chapter Three began my case for the abolition of provocation (developed in Chapter Five) by assessing the theoretical basis for the defence. My contention is that the defence of provocation must allow an assessment to be made of the accused's reasons for losing self-control and only provide a partial defence where there are 'good' reasons for losing control.

CHAPTER FOUR

In Chapter One, my research findings showed that women who kill their partners only relied upon diminished responsibility infrequently and that the most frequent basis for manslaughter conviction was lack of the requisite intent for murder. Chapter Four built upon these findings by exploring in detail the cases where women successfully relied on diminished responsibility and lack of intent.

My analysis found that while there has been a shift from reliance on diminished responsibility to lack of intent in Australia, there is still support for the view that women are psychologised in legal discourse. In particular, the psychologisation of women's responses to violence is evident in the lack of intent cases where the focus on the accused's emotional state obscures questions of intentionality. It appears that stereotypes and assumptions based on gender are central to the construction of intention in legal discourse, so that while the objective circumstances of the offence – the nature of the act causing death – would appear to enable an inference to be drawn that the accused had the necessary intent for murder, this inference is not drawn.

My examination of the application of diminished responsibility and lack of intent provided a unique and important insight into the judicial system's treatment of battered women who kill. In my consideration of lack of intent, my argument was that lack of intent is being used as a 'defacto' defence of domestic violence for women who kill their violent partners. In 25 of the 31 cases where women successfully relied on lack of intent, there was a history of violence and/or an actual or impending assault

as the precipitating event. In 21 of the 25 cases where male violence provided the backdrop to the killing, the woman's plea of guilty was accepted. In my view, the acceptance of pleas of guilty to manslaughter reveals sympathy for the circumstances in which battered women kill. It is a recognition that the circumstances in which battered women kill do not conform to the socially endorsed construct of the 'murderer'. This is a positive development. However, the negative aspect of this approach is that there is not recognition of the possibility of self-defence in these circumstances. The circumstances of the killing are rewritten so that the accused is the 'victim' (helpless, passive and lacking in agency) rather than the 'offender' (deliberate and intentional). And, in the process the male violence is obscured as its relevance is to explain the accused's emotional state at the time of the killing. In these circumstances, it makes it difficult to recognise the accused's agency and rationality – her claim to self-defence.

As a result of my analysis of the operation of lack of intent, I suggested that a possible solution within the current legal framework to address the disparity between the circumstances in which women kill and the legal outcome may be for the Crown to give consideration to allowing women to rely on self-defence in response to a charge of manslaughter, in cases where it would be willing to accept a plea to manslaughter. This would enable the self-defence aspects of the accused's behaviour to be explored at trial, while not exposing the woman to the risk of a murder conviction.

RECOMMENDATION 2 – That the Crown give consideration to charging women at the level of manslaughter (instead of murder) in cases where it would be willing to accept a plea to manslaughter

CHAPTER FIVE

Chapter Five evaluated the operation of the provocation defence in the context of spousal homicide. Previous literature has examined reliance on provocation by battered women who kill. However, my research makes a valuable contribution by providing a contemporary detailed examination (based on an empirical study) of the extent of reliance on the defence by battered women who kill, and the circumstances in which battered women utilise the provocation defence.

This analysis shows that changes to the law of provocation have made it more receptive to the claims of battered women who kill. In my study, I found that provocation was the basis of the manslaughter conviction in 22 of the 55 cases where women were convicted of manslaughter. There was only one case where a woman unsuccessfully relied on provocation and was convicted of murder. In contrast, men were not as successful in their reliance on the provocation defence (19 unsuccessful cases).

And, while it may be suggested that these figures indicate that the defence of provocation is not gender-biased (against women), my contention was that it is necessary to look beyond the numbers to the circumstances of reliance. In my argument, the inherent gender-bias of the defence of provocation is found in the fundamental and qualitative difference in the circumstances in which men and women rely on provocation. My study confirms previous research which found that provocation for men is associated with issues of jealousy, separation and infidelity, while women who utilise the provocation defence are relying on a history of domestic violence as providing the content of the provocative act.

The principal reforms to the defence that have allowed greater access for battered women have been the recognition of cumulative provocation, the modification of the requirement of suddenness and the recognition that fear is an emotion capable of causing a loss of self-control. However, my analysis of the operation of the provocation defence showed that these legal developments have only been a tinkering at its masculinist edges and have failed to challenge the fundamental masculinity of provocation. In particular, my discussion showed the essential masculinity of the requirement of suddenness and showed that the ordinary person test which endorses a white, heterosexual male view of what amounts to provocation has remained unaltered.

Ultimately, I contended that the fundamental masculinity of the defence is so entrenched that it should be abolished. Chapter Five demonstrated that the provocation defence serves to condone male violence against women by providing a partial excuse when men kill their female partners following separation, infidelity or rejection. It also distorts women's acts of self-preservation by placing them within the framework of sudden anger.

RECOMMENDATION 3 – That the defence of provocation be abolished.

My recommendation to abolish the defence of provocation is linked to Recommendation 11 which provides that mandatory sentencing for murder be abolished.

CHAPTER SIX

My analysis of self-defence in Chapter Six has expanded the existing literature that has considered the operation of self-defence and battered women by exploring the extent of reliance on self-defence by battered women and highlighting the gendered operation of self-defence in a practical sense. My analysis showed that women only infrequently rely on the defence. Self-defence was successfully relied upon in only 9 out of the 65 cases where women killed their violent partners (14%). The defence was left for the consideration of the jury in 21 of the 65 cases (32%). In view of the circumstances of violence that surround the killings, I have questioned this infrequency and contended that the disparity between the circumstances in which women kill and the legal outcome suggests that there is a reluctance to accept that the circumstances in which women kill gives rise to a situation of self-defence.

In my discussion of reliance by battered women on self-defence, I highlighted the limited number of reported decisions considering the issue of battered women and self-defence. Further, I demonstrated the need for greater dissemination of information about cases where battered women are acquitted on the basis of self-defence in respect of killing their violent partner. This led to the following recommendations.

RECOMMENDATION 4 – That there be greater reporting of decisions which involve battered women who kill their violent partners.

RECOMMENDATION 5 – That there be greater dissemination of information about cases where battered women are acquitted on the basis of self-defence in respect of killing their violent partner.

In cases of acquittals, my suggestion is for the publication of case comments in significant criminal law publications (such as the Criminal Law Journal) and for

relevant parts of the transcript to be available from on-line services (such as AUSTLII or Butterworths Online).

My analysis of the development and operation of the law of self-defence has shown that there have been a number of expansions in the defence in recent years. At common law, in Tasmania and under the new legislation in New South Wales, there is no longer any legal requirement that the accused's act be proportionate to the threat faced, there is no legal duty to retreat, and the concept of imminence has been expanded to recognise a pre-emptive strike. In jurisdictions where the law of self-defence is more prescriptive, there have also been expansions to the law of self-defence. In particular, there has been recognition of the legitimacy of a pre-emptive strike, as well as a more liberal interpretation of the need for a current threat. Yet, these expansions have not been translated into widespread reliance on self-defence by battered women who kill.

My conclusion is that, despite the expansions in the law, the importance placed on the existence of (and the construction of) an imminent assault has restricted the availability of self-defence to women who are the victims of ongoing violence. In particular, the construction of domestic violence as a series of discrete assaults and the pre-eminence of the 'assault' that is identified in temporal proximity to the killing means that the entirety of the accused's experience of violence is minimised and suppressed in the criminal trial.

In seeking to ameliorate some of the difficulties faced by battered women in relying on self-defence, I have proposed statutory reforms to self-defence that aim to clarify the law of self-defence as it applies to battered women. In particular, my proposed defence specifically addresses the concepts of imminence, retreat and proportionality that have restricted access to self-defence by battered women who kill.

RECOMMENDATION 6 – That the following statutory reform to the defence of self-defence proposed in Chapter Six be adopted.

- A person is not criminally responsible for an offence if the conduct constituting the offence is carried out by him or her in self-defence or in defence of another.
- Conduct is carried out by a person in self-defence or in defence of another if the person believed that the conduct was necessary to defend himself or herself or another person and his or her conduct was a reasonable response in the circumstances as perceived by him or her.
- In considering whether a response was reasonable in the circumstances as perceived by a person, that person's personal history, attributes and characteristics are relevant.
- For the purpose of determining whether a person was acting in self-defence or defence of another, there is no rule of law that self-defence is negatived if –
 - (a) the person was responding to a history of personal violence against himself or herself or another rather than a single isolated attack;
 - (b) the person has not pursued other options other than the use of force; or
 - (c) the person used a weapon against an unarmed person.
- If a person is responding to a history of violence against himself or herself or another person, consideration should be given to the cumulative effect of such violence in assessing whether the force used was reasonable.

This recommendation must be accompanied by changes to the approach to evidence adduced at trial and reforms to the sentencing regime.

CHAPTER SEVEN

The ongoing difficulties that women face relying on self-defence were addressed in Chapter Six, where my contention was that successful reliance on self-defence is dependent on conveying the reality of a woman's experience of violence to the jury. Chapter Seven developed this argument by exploring the way in which the substantive rules of self-defence and the procedural rules operate to limit a battered woman's ability to articulate her account of cumulative violence.

In relying on self-defence, the challenge for defence counsel is to communicate to the jury the accused's cumulative experience of violence and to make clear the relevance

of her whole experience (in practical terms) to self-defence. In attempting to convey this broader perspective, defence counsel encounter 'common-sense' assumptions about domestic violence that can be utilised by prosecution counsel to undermine the accused's case. The legal process operates to conceal the potential connectedness of a woman's account of violence as provided by herself and other witnesses by reconstructing events into discrete incidents of violence. This makes it difficult to articulate the complexity and interconnectedness of domestic violence (and the reasonable necessity of the accused's actions) by the use of case specific information alone.

This is the potential value of expert evidence – to make 'whole' the accused's experience of violence and to position her actions within their broader context. The current approach to expert evidence is reliance on BWS evidence and my analysis has shown that this is counterproductive as a means of educating judges and juries in cases where women kill their violent partners. It works against the efforts of defence counsel to make apparent the reality of the accused's situation. My analysis of BWS is fundamentally different from much of the previous writing in relation to BWS. Other feminist writers have critiqued BWS and have identified concerns with reliance on BWS, but there has been a reluctance to advocate its wholesale rejection as the evidentiary model. My approach was quite different.

I have contended that, although there is still value in providing juries with contextual information, in relation to the Australian context, there needs to be a shift from reliance on BWS evidence to the reception of social framework evidence in its own right. It needs to be recalled that BWS was initially conceived in the United States as a means by which to convey to the jury the reality of a battered woman's situation as a response to the operation of the substantive law of self-defence and also the adjectival rules. In advancing my argument that social framework evidence is admissible, I provided a substantial contribution to the development of the literature on this issue by providing an in-depth consideration of the potential to use social framework evidence in cases where battered women kill - separate from BWS evidence.

This finding led to my recommendation that there be a shift from the use of BWS evidence to social framework evidence.

RECOMMENDATION 7 – That social framework evidence replace BWS evidence as the evidentiary model for expert evidence in cases involving battered women.

My thesis provides a detailed examination of the admissibility of social framework evidence. In particular, I considered the need for social framework evidence, the content of the evidence and the rules of evidence that would regulate its admission.

In exploring the need for social framework evidence, I arrived at the following findings. First, that although research indicates that the state of knowledge in the Australian community about domestic violence has improved, there are still significant gaps in knowledge, particularly in relation to the power dynamics of domestic violence and women's decision to remain in a violent relationship. And secondly, that attitudes to domestic violence and women's options for dealing with violence are not constant in the Australian community, and there is a need for culturally and ethnically relevant information.

These findings led to the following recommendation in relation to the content of social framework evidence.

RECOMMENDATION 8 – That the 'Power and Control Wheel' be used as the theoretical framework of domestic violence to explain the dynamics of domestic violence to the fact-finder.

RECOMMENDATION 9 – That social framework evidence address the misconceptions that exist in relation to women's responses in violent relationships.

RECOMMENDATION 10 – That social framework evidence provide culturally relevant information that addresses community attitudes to domestic violence, its prevalence and the availability of avenues to deal with violence.

The admissibility of social framework evidence is dependent on its relevance, so there would need to be a factual nexus between the general (the social context evidence) and the particular circumstances in the individual case. This would mean that the precise form that social framework evidence would take would be dependent on the particular case. Social framework evidence also needs to comply with the rules of opinion evidence, and my analysis has shown that the broadening of the rules of

expert evidence, in particular the common knowledge rule, means that these rules do not preclude social framework evidence.

As a final matter, I stressed that defence counsel must not use 'social framework' evidence as a rigid construct but carefully consider in each case whether expert evidence is necessary and if so, the content of the evidence. My analysis of reliance on BWS evidence showed that self-defence can succeed in the absence of expert evidence. Significantly in one case, the accused's defence was successful (without BWS evidence) in a non-traditional self-defence situation. These cases show promise. However, it remains that social framework evidence is still potentially helpful in many cases. The value of expert evidence is to tie together the varying accounts of witnesses by providing an overarching conceptual framework of domestic violence within which the individual incidents of violence can be positioned and understood. The necessity of the accused's fatal response can then be assessed on an informed basis.

CHAPTER EIGHT

While Chapters Four to Seven considered the substantive criminal law and the evidentiary rules that apply in the trial process, Chapter Eight furthers our understanding of the judicial approach to women who kill their violent partner by undertaking a critical analysis of the operation of the sentencing discretion. This analysis provides a unique and valuable insight into the practical operation of the sentencing discretion, there being limited other research in this area. Chapter Eight shows that the key discourse apparent in sentencing comments where lenient sentences are imposed on battered women who kill is that of mercy and sympathy. The sympathy felt by judges for the plight of some battered women was apparent in both their sentencing comments and the sentences actually imposed. Non-custodial sentences were imposed in 16 of the 55 cases where women were convicted of manslaughter. In cases where women killed their male partners, the median sentence for manslaughter was 3 years and 10 months.

My analysis of the sentencing discretion has highlighted three main problems associated with the current approach. First, judicial reliance on the concept of mercy places women's claims for mitigation outside the usual mitigatory framework.

Secondly, the merciful approach has led judges to condemn the woman's violence as 'domestic violence', without appreciating the essential difference between a defensive response to domestic violence which is violent, and true 'domestic violence'. Thirdly, mercy is only offered to women who conform to the stereotype of the appropriate victim – pathological, domestic and irrational. The combined impact of this judicial approach is to reinforce existing stereotypes about women and to fail to recognise the rational motivation of self-preservation that underpins many women's actions. The woman is compensated for her difficult life, rather than directly acknowledging the seriousness of domestic violence as providing a rational motivation for her action.

A further deficiency identified is in those jurisdictions where life imprisonment is the mandatory penalty for murder. In my thesis, I have argued that Australian jurisprudence lacks guidance in relation to women's self-defence claims, and part of the problem is that self-defence is only infrequently tested at trial in cases where women kill their violent partner. My contention was that mandatory sentencing poses a significant barrier to women who wish to rely on self-defence at trial, and should be removed. Further, my discussion has shown the potential pressure that the existence of the sentencing discount for a plea of guilty places on battered women to enter a plea.

On the basis of the inadequacies identified in the current approach to sentencing battered women who kill, I recommended three key changes.

RECOMMENDATION 11 – That mandatory sentencing for murder be abolished in those jurisdiction where it exists.

RECOMMENDATION 12 – That the sentencing discount for the bare plea of guilty be removed.

RECOMMENDATION 13 – That judges recognise the legitimacy of the accused's motivation of self-protection as a mitigating factor in the imposition of sentence.

In summary, my thesis has shown that in Australia women usually kill their male partners in response to a history of domestic violence. In the Australian criminal

justice system, these circumstances have been accommodated within the partial defences to murder evidenced in the fact that women who kill their violent partners are most commonly convicted of manslaughter (rather than murder). At the sentencing stage, there is sympathy shown for the position of some women who kill their violent partners reflected by the imposition of non-custodial sentences or short terms of imprisonment. While the partial defences and the sentencing outcomes may provide a comfortable 'half-way' position between the condemnation of the woman as a 'murderer' and the acknowledgment that her conduct was lawful, the challenge remains for the legal system to confront the issue of what self-defence might mean in the context of an ongoing relationship of violence. My thesis has provided a unique and comprehensive analysis of the operation of the criminal justice system in the context of battered women who kill and provides guidance to practitioners, legislators and judges as they continue to grapple with an appropriate solution to this challenging issue.