Chapter Four

THE ‘APPROPRIATE’ WOMAN – INTENTION, DIMINISHED RESPONSIBILITY, INSANITY AND HOMICIDE

4.1 INTRODUCTION

Chapter One demonstrated that a history of domestic violence typically provides the context for cases where women kill their male partners.¹ A primary aim of my thesis is to investigate the ability of the criminal justice system to accommodate this reality, and this chapter examines the application of the mental state defences in cases where women kill their male partners: diminished responsibility,² insanity, lack of the necessary intent for murder and automatism.

This chapter is divided into three main parts. In the first section, I seek to contextualise my discussion of battered women who kill by outlining the existing theoretical engagement with the ‘violent woman’ which outlines the pathologising of women who kill and femininity/domesticity as measures of normality that undermine criminality.

Next, I examine in detail the application of diminished responsibility and lack of intent to women who kill their partners. In this part I seek to explain the shift from diminished responsibility to reliance on the lack of the necessary intent for murder. In my consideration of lack of intent, I argue that lack of intent appears to be used as a ‘defacto’ defence of domestic violence for women who kill their male partners, and I consider the implications of this construction of women who kill their partners.

¹ See 1.3.2.
² It is noted that the defence of diminished responsibility has been amended in New South Wales and is now called ‘substantial impairment by abnormality of mind’, see 4.3.1. In this chapter, I will refer to the defence as the defence of diminished responsibility, as this is the nomenclature used in the majority of jurisdictions.
In many cases, the nature of the act causing death would seem to enable an inference to be drawn that the accused had the requisite intent for murder. Instead, a finding of lack of intent is maintained by viewing the act of the accused as resulting from the highly charged emotional situation in which the killing occurred, rather than from an intention on the part of the accused to harm the deceased. This construction of the killing rests on stereotyped notions of femininity and the pathologisation of women’s response to and experiences of domestic violence.

The concerning aspect of the construction of the killing endorsed in the lack of intent cases is that the focus on the woman’s lack of agency diverts attention from the alternative ‘rational’ account of the woman’s conduct. Although this argument may bear similarities to arguments advanced by those who would argue that stereotyped construction of the female offender means that women are ‘getting away with murder’, it is important that my argument is not misconstrued. My argument is the opposite – that women are not being acquitted. My concern is that the distortion of experience and actions necessitated by the subversion of the rationality and agency operates to preclude any consideration of the ‘rational’ defence of self-defence.

In the final part of the chapter, I examine the other mental state defences of insanity, the Hawkins defence and automatism. This discussion is included for the sake of completeness, in recognition of the theoretical availability of these defences rather than to suggest any widespread practical reliance on these other defences in the context of women who kill their partners.

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3 See P Pearson, When She was Bad: Violent Women & the Myth of Innocence, New York: Viking, 1997; P Pearson, When She was Bad: How and Why Women Get away with Murder, Toronto: Random House, 1998.
4.2 THEORETICAL ENGAGEMENT WITH WOMEN WHO KILL

4.2.1 THE ‘APPROPRIATE’ WOMAN

Feminist literature addressing the issue of women who kill their partners has highlighted the difficulties that battered women encounter in seeking to have the reality of their situation accommodated within the legal categories. Women who kill their violent partner ‘encounter ... a court system that ignores or misunderstands their actions and motivations’.\(^4\) In view of the rarity of women who kill, instead of treatment based upon a proper evaluation of the circumstances, their treatment within the legal system rests on long standing myths and stereotypes about women and their criminality.\(^5\) The argument is that a woman’s treatment within the criminal justice system is largely dependent on the extent to which a female offender fits within ‘traditional notions of femininity and a conservative family ideology’\(^6\) – the touchstones of appropriate femininity being domesticity and pathology.\(^7\)

Previous research has suggested that the treatment of women by the criminal justice system is dependent on their ‘domesticity’ – their positioning as wife and mother.\(^8\) In explaining the concept of domesticity, Nicolson observes that ‘the notion of domesticity requires women to be good and caring mothers, loyal and

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\(^5\) *Ibid* at 22.
supportive wives, competent housewives'.9 If a woman is 'domesticated'
('maternal, nurturing and loyal')10 then she is viewed as a 'normal' woman.
Conformity with this stereotype serves to undermine her dangerousness and
criminality as 'crime is a masculine characteristic, rather than a feminine one'.11
The 'normal' woman – the woman who conforms to appropriate femininity - is
viewed as not 'really criminal'.12

In addition to domesticity as a key criterion in the criminal law’s assessment of
the 'normal' woman, writers have argued that the criminal justice system tends
to 'pathologise' criminal women.13 The female offender is presented as passive
and as acting without agency, and this discourse serves to distance her from
criminal responsibility for the offence.14 The female offender is thus 'rendered
harmless' and punishment deemed unnecessary and inappropriate.15 An
influential writer in this regard, Hillary Allen has asserted that:

Instead of counting against the offender, as a morally reprehensible action for which she must
be punished, the 'tragic event' of the crime may actually come to be added to the sum of her
involuntary and undeserved troubles, for which, if anything, she deserves public
compensation.16

The association of female criminality with notions of irrationality and instability
is not a unique phenomenon observable only in the treatment of women who kill
their male partners. It is evident in commentary concerning women who kill their
children,17 the availability of the defence of 'pre-menstrual tension'18 and in
connection with female offenders more generally.19

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9 D Nicolson, 'Telling Tales: Gender Discrimination, Gender Construction and Battered Women
who Kill' (1995) 2 Feminist Legal Studies 185 at 188.
10 C Keenan, 'The Same Old Story: Examining Women's Involvement in the Initial Stages of the
Criminal Justice System', in D Nicolson & L Bibbings (eds), Feminist Perspectives on Criminal
Law, London: Cavendish Publishing Limited, 2000 at 31; N Naffine, Female Crime - The
11 C Keenan, ibid at 32.
12 C Keenan, ibid.
13 See H Allen, 'Rendering them Harmless', above n 8; H Allen, Justice Unbalanced, above n 8;
A Worrall, above n 7 at 6; D Nicolson, 'Telling Tales', above n 9.
14 See H Allen, 'Rendering them Harmless', ibid; H Allen, Justice Unbalanced, ibid.
15 See H Allen, 'Rendering them Harmless', ibid.
16 ibid at 85.
587 – 589; M Flick, 'Frailty Thy Name is Woman: An Evaluation of the New South Wales

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4.2.2 GENDER AND PSYCHIATRY

An allied concern in feminist literature has been to highlight the extent to which medical discourse positions women as aberrant. Research suggests that mental health professionals tend to associate women more readily with mental illness and mental health problems. In Australia, there has been acceptance by the National Health and Medical Research Council that gendered assumptions about women mean that they are more likely to be classified as ‘in need of mental health care or identified as having mental health problems’. This is supported by the findings of the study by Boverman et al, where the researchers found that for mental health professionals ‘femininity itself is seen as pathological’. Boverman et al’s study demonstrated that a healthy adult female was ‘more likely to be described as being more submissive, less independent, less adventurous, less aggressive, more emotional and less objective than a healthy man’. Paradoxically, these characteristics were also associated with the description of an unhealthy adult (either male or female). It was the healthy male


21 See discussion in W Chan, ibid.


(with ‘masculine’ characteristics) that conformed to the description of a *healthy* adult. It appears then that medicine’s claim to neutrality and objectivity (as with the law’s) is undermined by gendered conceptions of normal (or reasonable) behaviour.

The ready association of women with notions of irrationality and madness, and the tendency to regard the causes of mental illness in women as ‘natural and internal’ has implications for the assessment of women who have suffered violence at the hands of their male partner. The Human Rights and Equal Opportunity Commission (HREOC) has observed that:

Research indicates that many women referred by GPs to psychologists, with diagnoses such as neurotic depression and anxiety and depression, may in fact be experiencing a normal reaction to stressful events in their lives.

It appears that ‘many women caught in ... [a] situation [of domestic violence] are labelled as “mentally ill” when they are simply reacting ... to a highly traumatic situation’. The HREOC Report comments that ‘it is important for clinicians and community workers to acknowledge the reality of their experiences, rather than trying to “fit them into the disease model”’.  

4.2.3 THE VIOLENT WOMAN

Feminist scholars are not alone in challenging stereotyped constructions of the female offender. However, while feminists (in the context of women who kill) have argued for a recognition of the complexity of experiences of women in order to facilitate access to the ‘rational’ defences of provocation and self-defence, the alternative view holds that women have capitalised on gendered stereotypes to mask their ‘true criminality’. The perceived ‘leniency’ afforded to female offenders by their portrayal within the criminal justice system as a

26 See H Allen, *Justice Unbalanced*, above n 8. See 5.3.3 and 6.3.3.
27 J Astbury, above n 70 at 30.
30 *Ibid*.
31 See Chapters Five and Six.
‘victim’ - emotional, weak and helpless - has led to a backlash. Writers, such as Pearson, have argued that violence is not a gender issue and that women are ‘getting away with murder’. Pearson asserts that:

Under the circumstances, which suggest a widening diversity in women’s aggressive behaviour, it is increasingly urgent that our culture acknowledge violence as a human, rather than a gendered phenomenon. This is true not only as it applies to family violence research and biocriminology, and studies of youth crime, but also in the way that is applies to women themselves ... We are acquitted in the courts and by the community for lashing out at our husbands and lovers, at strangers, at men as symbols of our oppression.

Pearson has sought to emphasize the intentionality and rationality of female offenders to show that ‘women, like men, are capable of injuring those who thwart them’. Similarly, as discussed at 2.3, some researchers have challenged the gendered nature of domestic violence and have asserted that women are equally as violent as men.

4.2.4 BEYOND THE ‘APPROPRIATE’ WOMAN/VIOLENT WOMAN

The contemporary feminist analysis of women who kill their abusive partners has sought to reveal the diversity of women’s experience and has challenged the simplistic construction of women according to the dichotomy of ‘bad’ or ‘mad’ based on an assessment of conformity (or non-conformity) with gendered stereotypes. Traditionally, there has been a division drawn in the criminal justice system between ‘offender’ and ‘victim’. As Chan has observed, ‘criminal and victim are seen as separate and incompatible identities by advocates who believe that a harsher approach is necessary to combat the problem of crime’.

33 See W Chan, ibid at 27. See also P Pearson, When She was Bad: How and Why, above n 3; P Pearson, When She was Bad: Violent Women, above n 3.
34 P Pearson, When She was Bad: Violent Women, ibid at 232. For a critique of Pearson’s thesis, see M San Roque, above n 32; W Chan, ibid at 25 – 33.
35 P Pearson, When She was Bad: Violent Women, ibid at 32.
36 A related area of academic debate exists at the sentencing stage. There is voluminous literature that has debated the ‘chivalry’ thesis, that is whether women are treated more leniently or harshly than men at the sentencing stage, see 8.1.
37 See W Chan, above n 4 at 33 – 37.
38 W Chan, ibid at 32.
Recent feminist research has directed attention to the limitations that are created by the need to position women who kill their partner’s as either ‘victim’ or ‘offender’.\(^\text{39}\)

Contemporary feminist analysis has also shown that the construction of women in terms of ‘appropriate’ femininity is based not only on gendered stereotypes, but also on assumptions based on race and ethnicity.\(^\text{40}\) Previous Australian studies have investigated the intersection of race and gender in cases where women have killed their male partner. Stubbs and Tolmie have examined the intersectionality of race and gender in the context of Aboriginal women who have killed their violent partners\(^\text{41}\) and Tolmie has analysed the intersectionality framework in the context of Pacific-Asian Immigrant and Refugee Women.\(^\text{42}\) Both studies highlighted that the convergence of gender and race meant that significant barriers existed to prevent these women accessing alternatives to end the violence (other than the use of violence).\(^\text{43}\) However, the authors noted that there has been a corresponding failure to acknowledge the uniqueness of the women’s circumstances in their construction within the legal system.\(^\text{44}\)

\(^{39}\) See below n 196 and 6.3.3.2.

\(^{40}\) P Carlen, 'Against the Politics of Sex Discrimination: For the Politics of Difference and a Woman-Wise Approach to Sentencing', in D Nicolson & L Bibbings (eds), Feminist Perspectives on Criminal Law, London: Cavendish Publishing Limited, 2000 at 76. See also 2.6.4, 7.4.1.3 and 7.4.2.3.


\(^{43}\) See also 2.6.4.

\(^{44}\) J Tolmie, above n 42 at 512 – 513; J Stubbs & J Tolmie, above n 41. It is noted that a significant criticism that has been directed at feminist discourse has been its failure to acknowledge the intersectionality of race and gender. see K Crenshaw, 'Mapping the Margins: Identity Politics, Intersectionality and Violence Against Women' (1991) 43 Stanford Law Review 1243; K Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour', in M Fineman & R Mykituk (eds), The Public Nature of Private Violence, New York: Routledge, 1994; M Matsuda, 'Affirmative Action and Legal Knowledge: Planting Seeds in Plowed Up Ground' (1988) 11 Harvard Women's Law Journal 1; A Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 43 Stanford Law Review 581. As Stubbs and Tolmie observe, '[t]his silence on race does not mark the absence of race, but rather the unarticulated presumption of white race. Where race is explicitly acknowledged it is by way of the use of qualifiers to mark out as “other” women who are not white', J Stubbs & J Tolmie, above n 41 at 127.
4.3 THE LAW OF DIMINISHED RESPONSIBILITY

4.3.1 OVERVIEW OF THE LAW

In Australia, the law of diminished responsibility is governed by statute. The defence is only available in four Australian jurisdictions: New South Wales, the Australian Capital Territory, Queensland and the Northern Territory. In these jurisdictions, the defence operates as a partial defence to murder. Although having the requisite intent for murder, an accused may be convicted of manslaughter, if the accused is able to establish the requirements of the defence of diminished responsibility. The law of diminished responsibility differs between Australian jurisdictions. In particular, there is a divergence between the defence of diminished responsibility in Queensland, the Northern Territory and the Australian Capital Territory and the defence of ‘substantial impairment by abnormality of mind’ that operates in New South Wales. It is possible, however, to identify three elements that are similar between the jurisdictions:

(1) the accused must have been suffering from an abnormality of mind;

(2) the abnormality must arise from a particular cause or causes;

(3) the abnormality must substantially impair the accused’s responsibility for the act or omission causing death.

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46 Crimes Act 1900 (NSW) s 23A.

47 Crimes Act 1900 (ACT) s 14.

48 Criminal Code (Qld) s 302A.

49 Criminal Code (NT) s 37.

50 The new defence of substantial impairment by abnormality of mind is contained in section 23A of the Crimes Act 1900 (NSW). Section 23A was introduced in 1997 by the Crimes Amendment (Diminished Responsibility) Act 1997 (NSW). The former section 23A was the diminished responsibility defence and was in the same terms as the current ACT provision, see Crimes Act 1900 (ACT), s 14.

51 See Model Criminal Code Officers Committee of the Standing Committee of the Attorney-General, Offences Against the Person Chapter 5, Discussion Paper, 1998 at 115.
4.3.1.1 Abnormality of mind

The accepted legal definition of ‘abnormality of mind’ was laid down by Lord Parker in *R v Byrne*:

A state of mind so different from that of ordinary human beings that a reasonable man would term it abnormal. It appears ... to be wide enough to cover the mind’s activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment.52

In the context of the defence of diminished responsibility, ‘abnormality of mind’ is a broad concept that has encompassed a range of conditions, including: ‘psychosis, organic brain disorder, schizophrenia, psychopathy, epilepsy, hypoglycaemia, depression (reactive and endogenous), post-traumatic stress syndrome, chronic anxiety and personality disorders’.53 Despite legal acceptance ‘abnormality of mind’ is not a concept in medical use, and the consequent uncertainty created by its use has brought controversy to the operation of the defence of diminished responsibility.54

4.3.1.2 Cause of abnormality

In Queensland, the Australian Capital Territory, and the Northern Territory, the accused’s abnormality of mind must arise from at least one of the three causes that are specified in the legislation.55 The abnormality of mind must arise from a condition of arrested or retarded development of mind, from an inherent cause, or be induced by disease, illness or injury. The need to identify the cause of the

53 New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, above n 45 at 83. There has been controversy as to whether an accused who is suffering from an antisocial personality disorder or premenstrual tension can rely on the defence, see New South Wales Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility*, Report No 82, 1993 at 27.
55 *Criminal Code* (Qld) s304A; *Crimes Act 1900* (ACT) s 14; *Criminal Code* (NT) s 1 and s 37.
impairment has been the source of criticism directed towards the defence of diminished responsibility.\textsuperscript{56}

This controversy has been addressed by legislative change in New South Wales. In New South Wales, the reformulation of the defence replaces the reference to specified causes with a requirement that the abnormality of mind must arise from an ‘underlying condition’.\textsuperscript{57} ‘Underlying condition’ is defined as ‘a pre-existing mental or physiological condition, other than a condition of a transitory kind’.\textsuperscript{58}

4.3.1.3 \textit{Substantial impairment}

The abnormality of mind must substantially impair the accused’s responsibility for the act or omission causing death. In Queensland and the Northern Territory, the abnormality of mind must substantially impair any of three listed capacities: the capacity to understand what the person is doing; the capacity to control the person’s action; or the capacity to know that the person ought not do the act or make the omission.\textsuperscript{59} The provision in New South Wales is to a similar effect. The reformulated defence is defined in terms of a substantial impairment in a person’s capacity to ‘understand events, or to judge whether the person’s actions were right or wrong, or to control himself or herself’.\textsuperscript{60} In contrast, the Australian Capital Territory provision specifies that there must be substantial impairment of the accused’s ‘mental responsibility’.\textsuperscript{61}

The requirement of substantial impairment means that there must be more than ‘trivial or minimal’ impairment but there does not need to be total impairment.\textsuperscript{62}

\textsuperscript{56} The objections include: (1) disagreement between expert witness as to the cause of an impairment; (2) complexity of applying criteria; (3) arbitrary inclusion or exclusion of conditions; see New South Wales Law Reform Commission, \textit{Partial Defences to Murder: Diminished Responsibility}, above n 53 at 47 – 49. See also the comments of Gleeson CJ in \textit{Chayna} (1992) 66 A Crim R 191 at 188 – 190.

\textsuperscript{57} \textit{Crimes Act 1900} (NSW) s 23A(1).


\textsuperscript{59} \textit{Criminal Code} Qld s 304A(1); \textit{Criminal Code} (NT) s 37.

\textsuperscript{60} \textit{Crimes Act 1900} (NSW) s 23A(1). See New South Wales Law Reform Commission, \textit{Partial Defences to Murder: Diminished Responsibility}, above n 53 at 56.

\textsuperscript{61} \textit{Crimes Act 1900} (ACT) s 14(1). The accepted definition of ‘mental responsibility’ is that provided by Lord Parker in \textit{Byrne} [1960] 2 QB 396 at 403 and approved by the New South Wales Court of Criminal Appeal in \textit{Tumanako} (1992) 64 A Crim R 149.

\textsuperscript{62} \textit{Lloyd} [1967] 1 QB 175.
Although medical evidence is relevant, 'substantial impairment' is a jury question. The question for the jury has been expressed in the following terms - whether 'looking at it broadly as common-sense people, there was a substantial impairment'.

4.3.2 DIMINISHED RESPONSIBILITY AND SPOUSAL HOMICIDE

It has been argued in English literature looking at women who kill their partners, that the tendency of the criminal justice system to construct women in terms of pathology and abnormality means that diminished responsibility is the defence most closely associated with female offenders. As Edwards comments,

A defence of diminished responsibility is considered in popular conceptions to be more congruous with a woman’s defence, conflating with perceptions of women as inherently unstable and certainly so when they come to kill.

The association of battered women who kill with the defence of diminished responsibility appears as a dominant theme in the English critique of the criminal justice system’s response to battered women who kill. In this context, central to the critique is the argument that provocation is a more appropriate plea for most battered women, as diminished responsibility is suggestive of abnormality and mental illness.

In England, available research suggests that the link between battered woman and diminished responsibility exists at a practical as well as theoretical level. As

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63 Byrne [1960] 2 QB 396 at 404 per Lord Parker CJ. In New South Wales, 'evidence of an opinion that an impairment was so substantial as to warrant liability for murder being reduced to manslaughter is not admissible', Crimes Act 1900 (NSW) s 23A(2).
66 S Edwards, ibid.
outlined at 1.3, Chan found that diminished responsibility was the defence successfully relied on most frequently by female offenders who were convicted of manslaughter (43%) in respect of killing their male partner.68 This is supported by other English research.69

Similarly, earlier Australian research conducted by Bacon and Lansdowne in respect of women who were imprisoned in New South Wales between July 1979 and March 1980 for homicide offences in respect of killing their husbands or boyfriends found considerable reliance by women on the defence of diminished responsibility. Bacon and Lansdowne found that of the ‘13 substantive defences raised in these 16 cases, self-defence was argued twice; provocation five times; and defences of mental impairment six times’.70 In the six cases where women relied on defences of mental impairment, five women relied on diminished responsibility and one woman relied on insanity.71

In view of this body of literature, I expected to find some degree of reliance on diminished responsibility in cases where women killed their violent male partner, in those Australian jurisdictions where the defence is available. However, I was surprised to find that in only two cases, the conviction for manslaughter was based on the defence of diminished responsibility.72 It appears that currently in Australia, in cases where women kill their violent partners, their conduct is not assessed according to the framework of diminished responsibility. Instead, my research has demonstrated that there is more substantial reliance on the defence of provocation and lack of the necessary intent for murder.73

A further difference, which can be observed between my research findings on the one hand and the English research and the earlier Australian research on the other, is the context of the cases where women rely on the defence of diminished responsibility. In Bacon and Lansdowne’s research, diminished responsibility

68 W Chan, ibid at 53.
69 See 1.4.
71 W Bacon & R Lansdowne, ibid at 90.
72 See 1.4.
was used in circumstances where women were responding to the violence perpetrated by their male partner.\textsuperscript{74} Reliance on the defence by battered women also appears to reflect the operation of the defence in England.\textsuperscript{75} In contrast, this does not appear to reflect the current operation of the defence in Australia. In the two cases identified in my research, the women had not been subjected to physical abuse by their male partners. Rather the women killed in circumstances of separation or breakdown of the relationship with the deceased – circumstances in which men have traditionally been successful in their reliance on the defence of provocation.\textsuperscript{76}

In \textit{Lalor},\textsuperscript{77} the accused killed her husband after twenty years of marriage. The accused’s plea of guilty to manslaughter on the grounds of diminished responsibility was accepted. It appears that the accused’s mental abnormality was depression caused by her inability to cope with the recent disclosure that her husband had previously (before their marriage) had an affair with his brother’s wife (C). The issue from ‘prenuptial and relatively ancient history’ had arisen as a result of doubts raised by C as to the paternity of her son (then twenty-one). The dispute was whether the son was the deceased’s or his brother’s (C’s husband’s) child. In \textit{Troja},\textsuperscript{78} the accused shot her husband after he formed a relationship with another woman and wanted a divorce. At trial, the accused relied on provocation and diminished responsibility and was convicted of manslaughter. The accused was sentenced on the basis that the jury had returned the verdict of manslaughter on the grounds of diminished responsibility.

The greater reliance on the apparently ‘rational’ defences of provocation and lack of intent might provide the basis for an argument that women who kill their violent partners have successfully escaped the pathologising of their response to

\textsuperscript{72} See 1.4.
\textsuperscript{74} See W Bacon & R Lansdowne, above n 70 at 89 – 90.
\textsuperscript{75} See W Chan, above n 4 at 93 – 97; A McColgan, ‘General Defences’, above n 67 at 140 – 141.
\textsuperscript{76} See Chapter Five.
\textsuperscript{77} Unreported, SC NSW, 21 Jul 1995.
male violence. In my view, this argument (unfortunately) is not borne out by reality. In Australia, in recent years at least, the ‘helpless’, ‘emotional’ and ‘irrational’ female offender, the woman whose mental capacities have been ‘unable to cope’ with the years of violence, has found resonance within the framework of lack of intent or the provocation defence. My argument is that these defences have been ‘psychologised’.

In Australia, modifications to the defence of provocation have meant that it has become a more flexible defence and this may account for the increased reliance on it by battered women who kill. The defence of provocation is fully considered in Chapter Five, and at this point, I wish to highlight that this discussion shows that the greater reliance on provocation has not been mirrored by a corresponding shift from viewing battered women’s actions in terms of abnormality and irrationality to a framework of normality and rationality. Although provocation is supposed to be a ‘rational’ defence, as Henning has observed, in cases of women relying on provocation there was a ‘tendency to de-emphasise provocation or subsume it into the psychological explanation given for the offence’. The psychologisation of provocation also finds resonance in the reception of expert evidence of ‘battered woman syndrome’ (BWS).

As will be explored at 4.4.2, the ‘psychologising’ of women’s violent response to domestic violence is also evident in the context of lack of intent, where the stereotype of the ‘passive’ female offender has served to deny the agency and intentionality of the conduct of women who kill their violent partners.

An alternative explanation for the demise of diminished responsibility in cases where women kill their male partner might simply be that the defence is ‘out of favour’ and no longer fits philosophically and politically in neoliberal societies.

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79 See discussion of literature at 4.2.
80 See Chapter Five.
82 See Chapter Seven.
where 'rational choice' is one of the key discourses.\textsuperscript{83} There is no doubt that the
defence of diminished responsibility fits uneasily with concepts of individual
responsibility as it occupies a 'contradictory middle ground between
responsibility and non-responsibility'.\textsuperscript{84} However, in the context of spousal
homicide in Australia there is evidence that diminished responsibility is still
utilised. For example, in New South Wales, it is the defence successfully relied
on most frequently by male offenders (39%) who kill their female partners.\textsuperscript{85}
Reliance on diminished responsibility in cases where men kill women provides
support for Edward's observation that a different (male) account of diminished
responsibility can be found 'just below the surface of the popular stereotype' of
diminished responsibility as a 'female' defence.\textsuperscript{86}

In contrast to the infrequent reliance by women on the defence of diminished
responsibility in the context of spousal homicide, the Australian reality is that
men make use of the defence in these circumstances.\textsuperscript{87} In the cases identified in
my research where male offenders successfully relied on the defence of
diminished responsibility, the most common scenario was where the husband
killed following the deterioration in the relationship, in the context of emotional
stress caused by separation and/or jealousy.\textsuperscript{88} This finding is supported by
research undertaken overseas that has highlighted separation, jealousy and
possessiveness as dominant themes in cases where men kill their female partners
and rely on diminished responsibility.\textsuperscript{89} A blurring of the distinction between
provocation and diminished responsibility has been observed, so that whether

\textsuperscript{83} I am indebted to an anonymous reviewer of R Bradfield, 'Women who Kill: Lack of Intent and
Diminished Responsibility as the other 'Defences' to Spousal Homicide' (2001) 13 Current Issues
in Criminal Justice 143 for pointing out the possibility of this argument.
\textsuperscript{84} P Fraser, 'Still Crazy After All These Years: A Critique of Diminished Responsibility', in S
\textsuperscript{85} See R Bradfield, above n 83.
\textsuperscript{86} S Edwards, above n 65 at 400.
\textsuperscript{87} See R Bradfield, above n 83 and 1.4.
\textsuperscript{88} This was the factual context in 6 out of the 16 cases: see Miguel, unreported, CCA Qld, 25 Oct
1994; Brown, unreported, CCA Qld, 13 Sept 1993; Bourke, unreported, CCA NSW, 20 Sept
1989; Sokol, unreported, CCA NSW, 2 Feb 1989; Keceski, unreported, CCA NSW, 10 Aug
1993; Kable, unreported, SC NSW, 1 Aug 1990.
\textsuperscript{89} See S Edwards, above n 65 at 401, 406; S Dell, Murder into Manslaughter, Institute of
Psychiatry, Maudsley Monographs, Oxford University Press, 1984 at 11; P Mullen, 'The Crime
of Passion and the Changing Cultural Construction of Jealousy' (1993) 3 Criminal Behaviour and
Mental Health 1; W Chan, above n 4 at 100-102.
reasonable (provocation) or unreasonable (diminished responsibility), a violent
response to jealousy and possessiveness (the inability to let go) finds legal
recognition in a partial defence to murder. It appears that male possessiveness
remains the universal excuse for men who kill their spouses.

4.4 INNOLUNTARY MANSLAUGHTER: LACK OF INTENT

4.4.1 OVERVIEW OF THE LAW

The law governing the mental (fault) element for murder is laid down by
legislation in New South Wales,1 the Australian Capital Territory,2
Queensland,3 Western Australia,4 Tasmania,5 and the Northern Territory6 and
governed by the common law in South Australia and Victoria.7 The law differs
between jurisdictions in Australia. In all jurisdictions, an intention to kill meets
the requisite mental state for murder.8 In all jurisdictions, except the Australian
Capital Territory, an intention to cause grievous bodily harm is also sufficient.9
In Tasmania, an intention to cause bodily harm is a sufficient mental state for
murder provided the accused knew that the act or omission was such as to "be
likely to cause death in the circumstances." 10 Recklessness as to death is also

90 See S Edwards, ibid; P Mullen, ibid at 9.
91 Crimes Act 1900 (NSW) s 18.
92 Crimes Act 1900 (ACT) ss 12, 15.
93 Criminal Code (Qld) ss 300, 302, 303.
94 Criminal Code (WA) ss 277, 278, 279, 280.
95 Criminal Code (Tas) ss 156, 157, 159.
96 Criminal Code (NT) ss 161, 162, 163.
98 Crimes Act 1900 (NSW) s 18(1)(a); Crimes Act 1900 (ACT) s 12(1)(a); Criminal Code (Qld) s
302(1)(a); Criminal Code (WA) s 278; Criminal Code (Tas) s 157(1)(a); Criminal Code (NT) s
162(1)(a). In Victoria and South Australia, the common law position is set out in Crabbe
3315]; S Bronitt & B McSherry, Principles of Criminal Law, Sydney: LBC Information Services,
99 Crimes Act 1900 (NSW) s 18(1)(a); Criminal Code (Qld) s 302(1)(a); Criminal Code (WA) s
279; Criminal Code (NT) s 162(1)(a) refers to 'grievous harm' rather than grievous bodily harm.
In Tasmania, the position is more limited. Section 157(1)(d) provides that 'culpable homicide is
murder if it is committed with an intention to inflict grievous bodily harm for the purpose of
facilitating the commission of any of the crimes hereinafter mentioned or the flight of the
offender upon the commission, or attempted commission, thereof'. A number of serious offences
are then listed in section 157(2). The common law applies in South Australia and Victoria, see
Crabbe (1985) 156 CLR 464.
100 Criminal Code (Tas) s 157(1)(b).
sufficient in New South Wales, the Australian Capital Territory, Tasmania, and in Victoria and South Australia. Recklessness as to causing grievous bodily harm is a sufficient mental element for murder in South Australia and Victoria.

As discussed at 3.3, the fault requirement for murder is subjective which means that it must be established that ‘the accused possessed the requisite state of mind’. If the accused does not have the necessary mental element to constitute murder at the time of killing the deceased, the accused may nonetheless be found guilty of a crime – manslaughter.

The analysis of lack of intent cases presents difficulties due to the need to ‘get into the mind of the accused’ to determine the accused’s subjective state of mind at the time of the killing. How do we determine subjective intention? If the accused does not make an admission, inferences need to be drawn from the circumstances of the case and on this basis a state of mind attributed to the accused. In the absence of contrary evidence, the accused’s actions and words (‘the external features of the accused’s conduct’) are taken to be indicative of the accused’s state of mind. The attribution of intention based on the act of

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101 **Crimes Act 1900 (NSW) s 18(1)(a).** In Queensland, Western Australia and the Northern Territory, ‘recklessness is not included in the definition of murder. However, in some cases recklessness may still allow actual intention to commit murder to be inferred’, *Halsbury’s Laws of Australia*, above n 98 at [130-3275], See *Willmot (No 2)* [1985] 2 Qd R 413 at 418 per Connolly J.

102 **Crimes Act 1900 (ACT) s 12(1)(a).**

103 **Crimal Code (Tas) s 157(1)(b) or 156(1)(c).**

104 Common law (Victoria and South Australia), see *Crabbe* (1985) 156 CLR 464 at 468 per Gibbs CJ, Wilson, Brennan, Deane & Dawson JJ.

105 *Crabbe* (1983) 156 CLR 464 at 468 per Gibbs CJ, Wilson, Brennan, Deane & Dawson JJ.

106 S Brummitt & B McSherry, above n 98 at 173.

107 See *Crimes Act 1900 (NSW) s 18(1)(b); Crimes Act 1900 (ACT) s 15(1); Criminal Code (Qld) s 303, Criminal Code (WA) s 280; Criminal Code (NT) s 163; Criminal Code (Tas) s 159. In Victoria and South Australia, there is no statutory definition of manslaughter.

108 *Peters* (1998) 192 CLR 493 at 550 per Kirby J.

109 See 3.3. See also *Peters* (1998) 192 CLR 493 at 550 per Kirby J; *Shepherd* (1990) 170 CLR 573 at 580 per Dawson J (with the concurrence of Mason CJ, Toohey and Gaudron JJ).

110 J Hunter & J Bargon, above n 78 at 126.

111 As Allen has observed ‘in the ideal and ‘normal’ case, the conceptual distinction between the behaviour and the mentality of the criminal subject (the actus reus and mens rea of the offence) are for all practical purposes reunified. In the absence of evidence to the contrary, the wrongful deed can be assumed to be simply the concrete expression of a wrongful mind, whose natural presence behind the deed can be simply ‘read off’ from the surface of the subject’s behaviour’, H Allen, *Justice Unbalanced*, above n 8 at 41.
killing reflects our common sense understanding of human behaviour and our everyday sense of ‘what makes people “tick”’. In some cases, the act of the accused ‘may be so strong as to compel an inference of what his intent was, no matter what he may say about it afterwards’. For example, ‘a loaded gun directed at the victim’s heart and discharged at point blank range indicates that the accused intended to kill the victim’. Similarly, a knife used to slit the deceased’s throat shows that the accused had a murderous intent.

Aside from the nature of the physical act, motive (the reason for acting) enables inferences to be drawn as to the accused’s state of mind at the time of the killing. The accused’s motive may make it more believable that the accused possessed the requisite intention for murder. For example, as Mueller points out:

If A took out a large insurance policy on B with A listed as the beneficiary a few months before B was killed, A’s motive (collecting insurance proceeds) may help to establish her involvement in B’s murder.

In this example, the accused’s motive fits within the framework of one of the accepted narratives for murder: the killer motivated by greed. Alternatively, if the accused’s motive is ‘worthy’, the accused’s motive appears to be substituted for intent, and so any exploration of the issue of intent is precluded.

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112 J Bruner, *Acts of Meaning*, Cambridge, Mass: Harvard University Press, 1990 at 35. This is known as ‘folk psychology’. Bruner describes ‘folk psychology’ as a ‘system by which people organise their experience in, knowledge about, and transactions with the social world’, at 35. Bruner argues that ‘all cultures have as one of their most powerful constitutive instruments a folk psychology, a set or more or less connected, more or less normative descriptions about how human beings “tick,” what our own and other minds are like, what one can expect situated action to be like, what are possible modes of life, how one commits oneself to them’, at 35. Churchland says that ‘folk psychology’ is a ‘common-sense conception of what conscious intelligence is. It embodies the accumulated wisdom of thousands of generations’ attempts to understand how we humans work’, P Churchland, *Matter and Consciousness*, Cambridge, Massachusetts: MIT Press, 1988 at 59.

113 *Parker* (1963) 111 CLR 610 at 648 per Windeyer J.

114 J Hunter & J Bargen, above n 78 at 126.

115 *Parsons* [2000] VSCA 15 at 31 per Brooking JA.

116 See 3.3.


119 See 3.3 and 4.4.3
4.4.2 LACK OF INTENT AND SPOUSAL HOMICIDE

As shown at 1.4, the lack of the requisite mental state for murder was the most frequent basis for a manslaughter conviction for women who kill their male partners: 56% were convicted of manslaughter on the basis of 'unlawful and dangerous act' manslaughter. Male offenders successfully relied on the lack of the requisite intent for murder in 44% of spousal homicide cases.

The unlawful and dangerous act spousal manslaughter cases identified in my research were a seemingly disparate collection of cases. This is due to the diversity of situations in which it is accepted that the accused did not possess the requisite mens rea for murder and the lack of specificity in the judgments as to the basis on which it was accepted that the accused lacked the requisite intent for murder. Despite this diversity, it is possible to group the cases in which lack of intent is successfully relied into three broad categories: 1) those cases where intoxication counters the inference of intention; (2) those cases in which the act that causes death is not considered likely to cause death (although death is not an accident); and (3) those cases where the emotional turmoil of the situation accounts for the accused’s lack of intent. As will be shown, in cases where women killed their male partner, reliance on the accused’s emotional state is most frequently taken to explain the accused’s lack of intent.\(^{120}\)

4.4.2.1 Intoxication

In the context of the murder/manslaughter distinction, evidence of self-induced intoxication is relevant to the issue of whether the prosecution have established beyond reasonable doubt that the accused formed the 'specific' intent for murder.\(^{121}\) As Brooking JA recognised in \textit{Parsons},\(^{122}\) evidence that the accused

\(^{120}\) In contrast, in cases where men relied on lack of intent, there appeared to be greater reliance on the intoxication defence and the nature of the act causing death to negate the finding of the requisite intent for murder. In the context of the men who kill their partner by means of a manual attack, Edwards has observed that 'men who use the body to perpetrate deadly force, find that method itself serves to obscure and conceal the 'intent' for practical legal purposes', S Edwards, above n 63 at 411.

\(^{121}\) The law relating to intoxication is set out as follows: common law - O'Connor (1980) 146 CLR 64 (Victoria; South Australia - supplemented by the \textit{Criminal Law Consolidation Act 1935 Part 8, ss 267A - 269; and the Australian Capital Territory}; New South Wales - \textit{Crimes Act 1900 Pt 11A, ss 428A - 428I}; Western Australia and Queensland - \textit{Criminal Code s 28};
was ‘affected by drugs or drink’ may amount to contrary evidence that displaces the common-sense understanding that a person’s actions are a reliable indicator of their intentions.\textsuperscript{123}

Alcohol and/or drugs was a factor present in several cases where men and women killed their partners and were convicted of manslaughter based on lack of intent. However, the presence of alcohol as a factor in a case does not necessarily correspond with an acceptance of the ‘intoxication’ defence to reduce murder to manslaughter. In the context of ‘unlawful and dangerous act’ manslaughter, the offender had consumed alcohol and/or drugs in 17 of the 24 cases in which male offenders killed their female partner and 18 of the 31 cases in which female offenders killed their male partner. Although it can be difficult to ascertain the precise basis of a manslaughter conviction based on lack of intent, it appeared that in cases involving female offenders, intoxication was the basis of the plea of manslaughter in only three cases\textsuperscript{124} and possibly in one other case.\textsuperscript{125} This finding should be approached with some caution, as it is based on my subjective assessment of the sentencing comments.

4.4.2.2 The nature of the fatal act

In many of the cases where female offenders kill their male partners, the construction of intention (and the accused and the killing) is ambiguous. The nature of the act causing death (‘the stark facts of the killing’)\textsuperscript{126} would seem to enable the inference to be drawn that the accused had the requisite intent to kill (or recklessness as to that result) or at least to cause grievous bodily harm. Table 4.1 shows the acts causing death in cases where women successfully relied on lack of intent manslaughter in respect of the killing of their male partner.

\footnotesize
\textit{Tasmania - Criminal Code} s 17 supplemented by \textit{Attorney-General’s Reference No 1 of 1996 Re Weideman} (1997) 7 Tas R 293. See further, S Bronitt & B McSherry, above n 98 at 238 - 247.\textsuperscript{122} \textsuperscript{[2000] VSCA 15.}
\textsuperscript{123} \textsuperscript{[2000] VSCA 15 at [32].}
\textsuperscript{125} In Rogers, unreported, SC Vic, 11 Dec 1995, the accused’s intoxication and the ambiguity of the forensic evidence (whether the wound was the result of a stabbing action or a movement of the deceased onto the knife firmly held or a combination of both) accounted for the accused’s plea.
\textsuperscript{126} \textit{Parsons} [2000] VSCA 15 at [30] per Brooking JA.
Table 4.1 Act causing death: female offenders: ‘lack of intent’ manslaughter.

<table>
<thead>
<tr>
<th>NAME</th>
<th>WEAPON</th>
<th>ACT CAUSING DEATH</th>
</tr>
</thead>
<tbody>
<tr>
<td>Billeley</td>
<td>Knife</td>
<td>Stabbed on left side of body a little below waist level</td>
</tr>
<tr>
<td>Birch</td>
<td>Hammer</td>
<td>Struck several times to head</td>
</tr>
<tr>
<td>Bobach</td>
<td>Knife</td>
<td>Stabbed in chest and punctured lung, stab wound to forearm and wrist</td>
</tr>
<tr>
<td>Bogunovich</td>
<td>Knife</td>
<td>Unclear beyond stabbing</td>
</tr>
<tr>
<td>Brauer</td>
<td>Knife</td>
<td>Stabbed with vitally placed blow</td>
</tr>
<tr>
<td>Britten</td>
<td>Knife</td>
<td>Stabbed in chest and penetrated heart</td>
</tr>
<tr>
<td>Broadrick</td>
<td>Knife</td>
<td>Stabbed in chest and penetrated heart</td>
</tr>
<tr>
<td>Buzzacott</td>
<td>Knife</td>
<td>Unclear beyond stabbing</td>
</tr>
<tr>
<td>Edwards</td>
<td>Knife</td>
<td>Stabbed in chest and face</td>
</tr>
<tr>
<td>Finn</td>
<td>Knife</td>
<td>Stabbed in chest and penetrated heart</td>
</tr>
<tr>
<td>Hona</td>
<td>Knife</td>
<td>Stabbed five times, including transection of jugular and carotid artery</td>
</tr>
<tr>
<td>Kelly</td>
<td>Knife</td>
<td>Stabbed in chest</td>
</tr>
<tr>
<td>Kennedy (2000)</td>
<td>Knife</td>
<td>Stabbed in chest penetrating heart</td>
</tr>
<tr>
<td>Kennedy (1998)</td>
<td>Knife</td>
<td>Stabbed in stomach</td>
</tr>
<tr>
<td>Moore</td>
<td>Knife</td>
<td>Stabbed in chest and penetrated lung</td>
</tr>
<tr>
<td>Nichols</td>
<td>Knife</td>
<td>Stabbed in chest and penetrated heart</td>
</tr>
<tr>
<td>Owen</td>
<td>Knife</td>
<td>Stabbed in chest and penetrated heart</td>
</tr>
<tr>
<td>Ratcliffe</td>
<td>Knife</td>
<td>Stabbed in chest and penetrated heart</td>
</tr>
<tr>
<td>Rogers</td>
<td>Knife</td>
<td>Stabbed in chest</td>
</tr>
<tr>
<td>Sharpe</td>
<td>Knife</td>
<td>Stabbed in chest and penetrated heart</td>
</tr>
<tr>
<td>Sheppard</td>
<td>Knife</td>
<td>Unclear beyond stabbing</td>
</tr>
<tr>
<td>Varagnolo</td>
<td>Knife</td>
<td>Stabbed in chest</td>
</tr>
<tr>
<td>Woodsey</td>
<td>Knife</td>
<td>Stabbed in chest and penetrated heart</td>
</tr>
<tr>
<td>Wang</td>
<td>Rope &amp; tape</td>
<td>Pulled rope until husband stopped breathing</td>
</tr>
<tr>
<td>Rigney</td>
<td>Fire</td>
<td>Set fire to house which contained the deceased</td>
</tr>
<tr>
<td>Babsck</td>
<td>Gun</td>
<td>Shot through the head from a range of about 3 m</td>
</tr>
<tr>
<td>Coupe</td>
<td>Gun</td>
<td>Fired gun at range of four feet or less from deceased’s face</td>
</tr>
<tr>
<td>Goddard</td>
<td>Gun</td>
<td>Unclear beyond shooting</td>
</tr>
<tr>
<td>Henschke</td>
<td>Gun</td>
<td>Pointed and fired at close range</td>
</tr>
<tr>
<td>Manning</td>
<td>Gun</td>
<td>Fired without aiming</td>
</tr>
<tr>
<td>Roberts</td>
<td>Gun</td>
<td>Fired gun at chest at close range</td>
</tr>
</tbody>
</table>

As Table 4.1 shows, in 15 of the 31 cases the woman stabbed her partner in the chest, the knife penetrating the heart or lungs. In a further four cases we are not told of the location of the stab wound, in two cases the accused stabbed the deceased in the stomach region and in one case the deceased was stabbed in the neck. In six cases the woman shot her husband at close range, and in one case,
the accused tied cord and tape around her husband’s neck and pulled the cord until he stopped moving.\textsuperscript{127}

Although we need to determine the accused’s subjective state of mind, if the “immediate consequence” of the appellant’s act ... was “obvious and inevitable”, the doing of that act ordinarily “imports an intention to produce the consequences”.\textsuperscript{128} The obvious and inevitable consequence of a knife to the upper region of the chest would be death. Our common sense understanding would suggest that a person who fired a gun at close range or stabbed a person in the chest would have intended to kill the victim (or was reckless as to that result) or at the very least intended to cause serious injury to the victim. Yet, in all these cases, it was accepted that the woman did not have the intent to kill (or was reckless as to death) or the intent to cause serious injury to the deceased. The link between the act and intent is disavowed.\textsuperscript{129} So what is happening?

\textbf{4.4.2.3 Emotional turmoil}

It is my argument, from my reading of these cases, that lack of intent was being used as a defacto defence of ‘domestic violence’. As outlined at 1.3.2, in 23 out of the 31 lack of intent cases in my research where women killed their male partner, there was a history of physical violence (74%).\textsuperscript{130} In a further two cases, there was evidence of physical violence preceding the killing. However, there

\textsuperscript{127} In the two remaining cases, in one case, the accused set fire to the house in which the deceased was in a drunken sleep and in the other, she struck him several times to the head with a hammer.

\textsuperscript{128} Cutter (1997) 143 ALR 498 at 514 per Kirby J adapting the words of Windeyer J in Parker (1963) 111 CLR 610 at 649. Kirby J commented that ‘this is not imputed intention disguise. It is actual intention inferred from objective facts’, at 614. Kirby J stated that ‘it is not the law that objective facts of commonsense relevance must be ignored for fear of turning the inquiry into one of presumed intention. It would have been absurd in this case to ignore the site of the wound and the manifest peril of a severe blow to the upper chest of a human being. Such conduct is so obviously and seriously life-threatening that it is highly relevant to the consideration of what, if anything, the assailant intended when he struck,’ at 513.

\textsuperscript{129} See H Allen, Justice Unbalanced, above n 8 at 43.

was no evidence provided that would enable an assessment of whether this assault formed part of a history of violence. This means that there were 25 cases where male violence provided the backdrop to the killing - as a history of violence and/or an actual or impending assault as the precipitating event. And, in 21 out of those 25 cases the women’s plea of guilty to manslaughter was accepted. There is no legal defence of ‘domestic violence’, so the deceased’s violence does not directly provide grounds for reduced culpability. Instead, the violence is appropriated to explain the emotional state of the accused at the time of the killing. It has been accepted that emotional turmoil and anger are factors relevant to the issue of whether the accused had the requisite intention for murder. The impact of the history of violence on the accused’s psychological/emotional state, together with the accused’s fear or anger before the killing, are used to explain the finding of lack of intent.

The ‘Missing’ Intent: The Shift between Motive and Intention

The accused’s claim that she did not mean to kill the deceased is often supported by the presentation of the killing as an impulsive act, taking place in the context of either a verbal argument or a physical confrontation. The intentional nature of the accused’s action is subverted by viewing the act of the accused that caused death as resulting from the highly charged emotional situation in which the killing took place, rather than from any intention on the part of the accused to seriously harm the deceased. For example in Britten, the accused had stabbed her husband in the chest and the knife penetrated the heart. The accused ‘claim[ed] that this was done without any real intent and in a reflex way’. In support of the accused, the psychiatrist concluded that:

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132 The domestic violence cases where the manslaughter conviction followed a trial were Buzzacott, unreported, SC SA, 21 Jul 1993; Coupe, unreported, SC NSW, 28 Jun 1990; Nichols, unreported, SC Tas, 15 Dec 1986; Raycliffe, unreported, CCA WA, 20 Feb 1990. In the remaining six manslaughter cases based on lack of intent (those that did not involve domestic violence), there was a trial in four cases and a plea of guilty in one case. In the final case of Finn, unreported, CA Qld, 4 Feb 1994, the appeal court substituted the verdict of guilty of manslaughter following a successful appeal against a murder conviction.
133 See Cutter (1997) 143 ALR 498 at 503 per Brennan CJ and Dawson J.
134 Unreported, SC NSW, 26 Mar 1993 at 4 per Finlay J.
I do not believe Mrs Britten deliberately set out to kill her husband. I think it was something that happened in the course of one of their fights. I think the fight, at the time it occurred, was typical of those which had occurred over many years, a fight which left Mrs Britten humiliated and angry, with feelings of helplessness. There was a build-up of rage which translated itself into the act of stabbing her husband. The act led to his death.\(^{135}\)

Although the accused may not have set out to kill her husband - the crucial issue remains what was her intention at the time that she stabbed him? The climax of the killing is presented by means of the juxtaposition of two seemingly irreconcilable findings: that the accused did not intend to kill her husband or cause him grievous bodily harm and her act of stabbing her husband in anger and rage.

Typically, a knife thrust in anger and rage into the chest and penetrating the heart would be suggestive of a murderous intent. However, it appears that intention can be a slippery concept. The accused’s reason for acting (built up rage and anger) can be variously constructed as ‘intent’ (no intent to harm) or ‘motive’ (providing a possible reason to want to harm the deceased and so supporting a finding of intent) depending on the merits of the case.\(^{136}\) The conduct of the deceased (both on the night of the killing and during the relationship) was seen in this case to have had such an impact on the accused’s emotions as to impugn any notion that the accused had acted with a blameworthy intent.

Another example is found in Buzzacott, where the accused stabbed her partner twice, causing his death. The accused was tried by judge alone and was convicted of manslaughter on the ground that she did not intend to hurt the deceased. It was accepted that the accused’s intent in waving the knife in the vicinity of her partner ‘was to frighten him and to gain access to her daughter, or to frighten the deceased into permitting access to the daughter’.\(^{137}\) Justice Bollen formed the view that:

At the fatal moment or moments she struck out and stabbed twice without having in mind any defined intention to cause harm to him. ... She was under tension. ... She had a mind free

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\(^{135}\) Unreported, SC NSW, 26 Mar 1993 at 17 per Finlay J.

\(^{136}\) See 3.3.

\(^{137}\) Unreported, SC SA, 21 Jul 1993 at 5 per Bollen J.
from intention. As I say, she had no defined intention, at any rate other than to get to her baby or get permission to be with that baby. Her mind had not formed any intention to harm.\textsuperscript{138}

The ‘female subject is presented as being driven from outside,’\textsuperscript{139} and so the accused is seen to act without reflection and seemingly, without any ‘real’ intention at all.\textsuperscript{140} Again, it appears that intention can be a slippery concept. The accused’s reason for acting (to get the baby back) could have been constructed as either ‘intent’ (no intent to harm) or ‘motive’ (providing a possible reason to want to harm the deceased and so supporting a finding of intent).

In the case of lack of intent, the description of the killing is moulded around the impact of external events on the emotional state of the female offender thus rebutting the inference ‘that she had murdered the deceased’.\textsuperscript{141} In Bogunovich, the history of the relationship between the accused and the deceased is recounted, detailing the deceased’s ‘persistent and violent physical attacks’ upon the accused and his ‘repetitive sexual attacks upon her’. These facts are powerful, for as the trial judge observed, the ‘bald facts [of the killing] unassociated with any knowledge of the past relationship between the deceased and the prisoner would of course justify the conclusion that she had murdered the deceased’.\textsuperscript{142} The history of violence caused the accused to suffer from severe depression and from a ‘severe level of chronic psychological stress’.\textsuperscript{143} It was her emotional/psychological state that accounted for the lack of intent. In developing this account, the narrative was anchored by pervasive gendered stereotypes that construct violent female offenders as lacking agency and rationality.

Despite the pivotal nature of the accused’s state of mind at the time of the fatal act, any reference to the accused’s state of mind is often noticeably absent in the account provided of women who kill their partners and successfully rely on lack of intent. In some cases, beyond the statement that it was a case of manslaughter based on lack of intent, there is no explicit reference made to the accused’s state

\textsuperscript{138} Unreported, SC SA, 21 Jul 1993 at 5 – 6 per Bollen J.
\textsuperscript{139} H Allen, Justice Unbalanced, above n 8 at 43.
\textsuperscript{140} See also Sheppard, unreported, SC SA, 26 Aug 1992; Manning, unreported, CCA NSW, 15 Apr 1988; Nichols, unreported, SC Tas, 15 Dec 1986; Brauer, unreported, SC SA, 16 Feb 1988.
\textsuperscript{141} Bogunovich (1985) 16 A Crim R 456 at 457 per Maxwell J.
\textsuperscript{142} Bogunovich (1985) 16 A Crim R 456 at 457 per Maxwell J.
of mind at the critical time. There may be complete silence or it may be accepted that the accused obtained the weapon with some other (less blameworthy) intent, for example an intention to scare), and then that intent is implicitly imputed to the act that caused death. Instead of making a link between the accused’s behaviour and her state of mind at the time of the killing, the accused’s ‘behaviour and inner experiences [are] ... documented in parallel, but any connection between the two is discounted or denied’. The separation of the accused’s actions from concepts of intention, agency and rationality is sustained by the pervasive stereotypes of femininity.

In Woolsey, the accused stabbed her husband in the course of an argument during which he had assaulted her and her plea of guilty to manslaughter was accepted. The accused obtained a knife “just to scare him”. However, she proceeded to stab the deceased in the chest with the knife, its blade ... penetrating his heart. The evidence was that ‘immediately prior to her performing the action which resulted in the knife penetrating his body, he dared her to stab him’. The trial judge accepted that ‘it was not her intention to use the knife either to kill or to cause grievous bodily harm to the deceased, but to scare him’. The emotional state of the accused – her intention to scare - accounted for the accused’s action in picking up the knife. However, there is silence as to the accused’s state of mind at the time of the act causing death – as she stabbed her husband in the chest.

Instead of a focus on the accused’s state of mind at the time of the act causing death, the accused’s vulnerability and mental weakness are at the forefront of the

144 Bogunovich (1985) 16 A Crim R 456 at 460 per Maxwell J.
147 H Allen, Justice Unbalanced, above n 8 at 43.
148 Unreported, SC NSW, 19 Aug 1993 at 4 per Newman J.
149 Unreported, SC NSW, 19 Aug 1993 at 4 per Newman J.
150 Unreported, SC NSW, 19 Aug 1993 at 5 per Newman J.
151 Unreported, SC NSW, 19 Aug 1993 at 6 per Newman J.
account of the killing. In particular, the focus is placed on her ‘battered woman syndrome’. The references to the accused’s (deficient) emotional state, to her ‘learned helplessness’, and her ‘very limited emotional and personality resources’ operate to obscure the intentionality of the accused’s conduct evidenced by the deliberate act of getting the knife, pointing it at her husband and stabbing. The explanatory effect of the accused’s emotional state and the impact of the external circumstances on her internal, emotional condition are taken to explain the ‘absence’ of blameworthy intent.

In Woolsey, the focus on her psychological deficiencies means that action inconsistent with an inability to act, passivity and helplessness are ignored or downplayed. The psychiatrist noted that in sufferers of BWS ‘[t]here is a profound incapacity to act decisively to protect themselves or their children’.\textsuperscript{151} However, I would suggest that the act of stabbing the deceased in the heart following his violence to her son and herself is a decisive act in self-protection and in the protection of her children. A psychologist expressed the view that she ‘has very limited emotional and personality resources to assist her in coping with life and thus would not be able to cope with prolonged stress very well’.\textsuperscript{152} However, such a finding belies her ability to care for her two mentally disabled children (aged seventeen and eighteen) and her four year old daughter in a house that she shared with an unemployed, alcoholic, and violent spouse. The mismatch between the judicially accepted version of the battered woman and the ‘real’ woman means that an accused must be made into the image of the incapable, unreasoning and irrational woman – her experiences stretched and strained – so that in the end the ‘perfect match’ is made.

The tactics of avoidance when dealing with the issue of intent at the critical time are also seen in Henschke. In this case, the accused killed her violent husband and the critical time for assessment was the pointing the gun at the deceased and pulling the trigger. The circumstances of the killing were described as follows:

\textsuperscript{151} Unreported, SC NSW, 19 Aug 1993 at 7 per Newman J.
\textsuperscript{152} Unreported, SC NSW, 19 Aug 1993 at 7 per Newman J.
On the night in question, he spoke and behaved to you in a manner which very reasonably caused you distress, dismay and humiliation. You could endure that less well than could people who are in more robust emotional and psychological and psychiatric health. But you were not deprived of your power to reason.

You went into the spare room. You caught sight of a firearm. No plan to do anything about a firearm had been in your mind up to that moment. But when you saw the firearm, some form of intention formed in your mind. You took the firearm, found the bullets, loaded the firearm with them, and went back to the main bedroom. ...

You did not intend to kill your husband, or to cause him any harm, but you intended, at least, to bear the firearm into the place close to where he was lying. You pointed it at him and fired.153

Although there is a vague reference to the accused’s intention at the time of getting the gun, and we are told what was in her mind as she carried the rifle, the account is frustratingly incomplete. There is silence as to the accused’s state of mind at the time of the act causing death – as she pointed the gun and pulled the trigger.

Instead of addressing the accused’s state of mind at the time of killing, her vulnerability and mental weakness are prominent in the account of the killing. The references to the accused’s emotional state, to her ‘fragile emotional or psychiatric or psychological health at the time of the crime’154 counteract the intentionality of the accused’s conduct evidenced by the deliberate act of getting the firearm, loading the weapon, returning to the room, pointing the gun and pulling the trigger. The explanatory effect of the accused’s emotional state and the impact of the external circumstances on her internal/emotional condition are taken to explain the ‘absence’ of blameworthy intent.

Retrospective Amnesia

Further, the severance of the link between the actions of the accused and her ‘inner experience’ is made by virtue of the fact that the accused cannot remember the details of the actual act causing death. As Allen observes, in cases of ‘retrospective amnesia’ there is ‘a disruption of the subsequent recounting of a

153 Unreported, SC SA, 7 Jul 1992 at 2 – 3 per Bollen J.
relationship between behaviour and intentionality. In ten of the lack of intent cases identified in my research, the accused was suffering retrospective amnesia. In nine of these ten cases the accused’s act of stabbing caused the death of her male partner, and although the accused may have remembered the circumstances surrounding the death of her male partner, she was unclear as to how the knife came to be inserted into the deceased’s body. In the remaining case, the accused shot her partner in the chest at close range. In all ten cases, the prosecution accepted the plea of guilty to manslaughter on the basis of lack of intent and the trial judge was placed in the unenviable position of having to determine the factual basis of the plea in order to impose sentence.

In the absence of direct evidence, the determination of the accused’s state of mind - and even the precise manner in which death was caused - is the product of speculative reconstruction. In Varagnolo, the accused stabbed her violent defacto husband. In the hours that preceded his death, the husband had been abusive over an extended period and had assaulted the accused and their young daughter. The tension of the scene was palpable. As he had assaulted the child, the accused ‘picked up a knife and told him “not to hit my kids again like that”’. He let the child go and came towards the accused. He confronted her and she put the knife down. He took cigarettes from her pockets and she picked the knife up again. Her recollection was not good after taking the knife in her...

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154 Unreported, SC SA, 7 Jul 1992 at 1 – 2 per Bollen J.
155 H Allen, Justice Unbalanced, above n 8 at 43.
158 Although it has been my aim to question the construction of intention in these cases, I am mindful of the difficulties faced by judges in reconstructing the events of homicide. In cases of pleas of guilty accepted by the prosecution, the judge is not obliged ‘unquestionably, to accept fact ... which are presented by the prosecution and/or the accused’. But the judge is not entitled to ‘proceed to sentence a person who has been guilty of a lesser charge upon acceptance of the version of the facts which would constitute the more serious offence not charged, or actually abandoned’, Chow (1992) 28 NSWLR 593 at 606 per Kirby J. See also Olbrich (1999) 199 CLR 272; De Simoni (1981) 147 CLR 383. For a further discussion of the factual basis of sentencing, see 8.2.1.
159 Unreported, SC NSW, 21 Mar 1996.
160 Unreported, SC NSW, 21 Mar 1996 at 20 per McInerney J.
hand for the second time. As the narrative unfolds, there is a sense of uncontrollability and even the judge observed ‘in light of his behaviour over the years, his death had an inevitability about it’.161

He kept on at her, calling her such things as a slut. He was very aggressive and she was upset and stressed out, and at that moment she thought he was going to kill her. He was standing up near her as if he wanted to fight her.

She said she picked up the knife because she had had enough of the way he treated her and she told him not to come near her; she did not want him near her. He started banging his chest really hard and saying ‘Kill me, kill me’. She told him to back off. She said her hand started to tighten around the knife. ‘I couldn’t let go. I couldn’t stop it’. He came forward and she said she could not stop it. She does not know how the knife went in.162

The act of killing is ambiguous – the knife wavers in the space between the accused and the deceased. The accused does not stab him but he thrusts his chest onto the knife. It is held that she did not even deliberately stab the deceased. The evidentiary ambiguity is resolved in favour of a construction of the killing that endorses the image of the passive and inert woman, more acted upon than acting. The ‘crime is rewritten as a mere event in nature, a natural disaster in whose devastation the offender has simply been swept away, without either volition or responsibility’.163

The focus on the accused’s psychology assists in the construction of the accused as a person in need of ‘treatment’ rather than punishment.164 In Varagnolo, it was observed that the accused ‘needs extensive therapy and support and counselling so that she can reconstruct and redirect her life’.165 The accused’s presentation as a tragic figure makes her the appropriate subject for assistance and counselling to ‘recover’ from the crime. In this regard, there are references to the weighty self-punishment that the accused has inflicted on herself. It is noted that ‘[she] continues to suffer considerable psychological pain as a result of the death of the

161 Unreported, SC NSW, 21 Mar 1996 at 15 per McInerney J.
162 Unreported, SC NSW, 21 Mar 1996 at 21 per McInerney J.
163 H Allen, ‘Rendering them Harmless’, above n 8 at 85.
164 H Allen, ‘Rendering them Harmless’, ibid; H Allen, Justice Unbalanced, above n 8.
165 Unreported, SC NSW, 21 Mar 1996 at 26 per McInerney J.
deceased'.

She is presented as someone who is 'sick' rather than dangerous, and this reinforces the absence of a need for state punishment.

The persuasiveness of the account of the accused as a passive and harmless victim rests upon her construction in terms of her domesticity and her pathology. In Varagnolo, the accused was an Aboriginal, and this case usefully highlights the convergence of race and gendered stereotypes in the construction of the female offender. It appears that the accused's favourable treatment was dependent on her maintaining the standards of the white, middle class femininity. The accused's housekeeping skills, the way she dressed, and her ability as a mother were all the subject of favourable comment. The accused was described as 'a very good humble mother', 'a wonderful mother'. She was variously described as 'a very caring, gentle and involved mother', 'a woman who 'keeps the home beautifully and ... loves the children', 'a great mum [whose] ... children are always fed and well clothed', a woman 'who seemed to be there for the children always'. Further, reference was made to her membership of a church and her religious involvement. The accused was portrayed as a woman who has succeeded in being a good mother against the odds. In spite of her partner's violence, her deprived circumstances, her BWS, '[s]he had made a valiant attempt to raise her children using whatever skills and resources she had at her disposal'.

The connection between the accused's ability to function in a difficult environment and her agency revealed by her 'coping' skills is obscured when discussion turns to her attempts to deal with her partner's violence. Despite detailed evidence showing the severity of the violence inflicted on the accused,

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166 Unreported, SC NSW, 21 Mar 1996 at 32 per McInerney J.
167 See discussion at 8.3.5.
168 See also discussion at 8.3.3.2.
169 Unreported, SC NSW, 21 Mar 1996 at 30 per McInerney J.
170 Unreported, SC NSW, 21 Mar 1996 at 9 per McInerney J.
171 Unreported, SC NSW, 21 Mar 1996 at 28 per McInerney J.
172 Unreported, SC NSW, 21 Mar 1996 at 28 per McInerney J.
173 Unreported, SC NSW, 21 Mar 1996 at 28 per McInerney J.
174 See also Roberts, unreported, SC NSW, 1 Aug 1989 at 12 – 13 where favourable comment was made by Hunt J in relation to the accused's involvement in church activities.
175 Unreported, SC NSW, 21 Mar 1996 at 6 per McInerney J.
the model of psychological dysfunction was used to explain her responses to her partner's violence. The accused was described as a woman with 'emotional shortcomings', as 'unassertive', and as a 'very quiet, passive, shy person'. The accused's behaviour was explained by reliance on evidence of BWS. This case supports the view expressed by Stubbs and Tolmie that weight is only given to the stories of Aboriginal women where they 'converged with the psychological discourse of dependency, passivity and inability. In turn, this psychological discourse fits best with a legal discourse emphasising victimisation'.

4.4.3 THE IMPLICATIONS OF THE 'DEFACTO' DEFENCE OF DOMESTIC VIOLENCE

Although difficult to verify, my view is that in some cases, reliance on lack of intent was used to account for a manslaughter conviction in circumstances where the accused's circumstances called for a compassionate outcome, rather than a strictly legal one. It was used as a 'defacto' defence of domestic violence. There has been recognition by prosecutors and judges that some women who kill in response to a history of domestic violence (physical and mental abuse) do not conform to the socially endorsed construct of the 'murderer'. In some sentencing comments, there is clearly sympathy for the difficult life that the accused has led as a result of the deceased's physical and psychological abuse. However, while there has been judicial recognition of the battered woman's claim to sympathy, there has been a reluctance to recognise her actions as legitimate self-defence. As was recognised by one psychiatrist:

176 J Stubbs & J Tolmie, above n 41 at 157. These comments are made by Stubbs and Tolmie in the context of their discussion of Hickey, unreported, SC NSW, 14 Apr 1992, where the accused was acquitted on the ground of self-defence based on BWS. However, in my view these comments are equally appropriate in cases where Aboriginal women are convicted of manslaughter in respect of killing their male partner. See further 8.3.5.

177 A concrete example can be found in the case of Broadrick, unreported, SC NSW, 31 Aug 1988, where the trial judge said that: 'One of these factors individually is very strong, but collectively they certainly justify the Crown's acceptance of that plea. I have formed the view that the prisoner simply did not form any intention to kill or to inflict grievous bodily harm or to act with a reckless indifference to life', at 7 per Hunt CJ. The accumulation of 'mitigating' circumstances minimised the blameworthiness of the accused, so that a murder conviction was not considered by the Crown (or the judge) to be warranted.

178 See further in Chapter Eight.

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At a reality level, based on the situation of the marriage, it could be said that she was acting out of self-preservation and self-protection at the time of provocation from her husband.\textsuperscript{179}

This perhaps typifies the confusion. The motive is self-preservation but its form is one that the law does not (or is not willing to) recognise. Yet the accused is not a ‘murderer’, so the conduct of the accused has to be shaped into a partial defence to murder - provocation or lack of intent.

In seeking a favourable outcome for battered women who kill, the focus has been placed on the accused’s status as a ‘victim’, while evidence of intentionality and responsibility have been downplayed. This strategy makes perfect sense due to the socially and legally endorsed construct of the female offender: she is either helpless and weak (the ‘deserving victim’) or she is condemned as a premeditated and ‘cold-blooded’ killer.\textsuperscript{180} As Tolmie has commented, ‘the relevant standards of appropriate femininity privilege women who exhibit passive aspects of femininity over those who display rational agency, aggression and the deviousness of the pathological other’.\textsuperscript{181}

My contention that some cases may have been resolved according to compassionate (the defacto defence of domestic violence) rather than strictly legal principles may lend support to the view that the judicial system treats female offenders ‘sympathetically’.\textsuperscript{182} However, I would argue that for women who kill violent partners ‘sympathy’ may have been obtained at a significant cost. Women whose violent action is precipitated by their partner’s violence and abuse have a rational explanation for their conduct.\textsuperscript{183} The cost of pleading guilty to manslaughter on the basis of lack of intent for women who kill violent partners is that the reality of the motive of self-preservation is obscured and any opportunity to argue self-defence is lost. As Henning has argued:

\textsuperscript{179} Bogunovich (1985) 16 A Crim R 456 at 459.
\textsuperscript{180} A Young, above n 65 at 807.
\textsuperscript{182} See P Pearson, When She was Bad: How and Why, above n 3; P Pearson, When She was Bad: Violent Women above n 3.
\textsuperscript{183} T Henning, above n 81 at 316.
By ignoring or de-emphasising or subsuming these [rational] explanations into a psychological explanation, the offenders themselves are silenced. Their view of their experiences and actions is, at best, redefined and, at worst, denied.\textsuperscript{184}

The concerning aspect of the construction of the killing endorsed in the lack of intent cases is that the focus on the woman's lack of agency diverts attention from the alternative 'rational' account of the woman's conduct. Although this argument may bear similarities to arguments advanced in the backlash against women who use violence, it is important that my argument is not misconstrued. This chapter is not an endorsement of the view advanced by those who would argue that stereotyped construction of female offenders means that women are 'getting away with murder'.\textsuperscript{185} My argument is the opposite - that women are not being acquitted. My concern is that the distortion of experience and actions necessitated by the subversion of rationality and agency operates to preclude any consideration of the 'rational' defence of self-defence.\textsuperscript{186}

In self-defence, we are concerned with the accused's 'internal' state in order to determine if the accused believed that it was necessary to use fatal force. We must get inside her mind to understand the threat she perceived. In self-defence, the accused's 'internal' state is relevant as the accused must believe that it is necessary to use fatal force. But, in relying on self-defence, the accused's assertion is that her fear is rational - it is a direct response to a significant external threat, the violence of the deceased. This is significant, for as Littleton has observed, fear can be:

Irrational or rational. It can be incapacitating and dehumanising, but it can also be the necessary precondition of bravery (to be brave is to act in spite of fear, not in its absence).\textsuperscript{187}

In self-defence, the accused's fear is a rational and reasonable emotion and her action to protect herself is seen as bravery rather than irrationality.

\textsuperscript{184} Ibid.
\textsuperscript{185} See 4.2.
\textsuperscript{186} See Chapter Six.
In contrast, the construction of the killing in terms of lack of intent means that the focus is placed solely on the ‘internal’ – the woman’s highly aroused mental and/or emotional state. The violence of the deceased – the ‘external’ - is not relevant in the same way as it is in the defence of self-defence. The violence is not seen directly – it does not itself provide a rational and reasonable account of the killing. In lack of intent, there is no place to ask whether the accused’s fear was reasonable or rational. The construction of the battered woman who kills her abusive partner in terms of her psychological responses alone has a silencing effect. The denial or subversion of the alternative and ‘rational’ account of the killing and the distortion of experience and actions may operate to preclude any proper consideration of the defence of self-defence. In subverting the intentionality of a woman’s actions where she responds to her partner’s violence, it becomes much more difficult to argue that the woman was acting in reasonable self-defence. The woman’s reasonable fear of serious violence is lost in the account of her (abnormal) psychology and her impulsive response. How can you argue an honest and reasonable belief in the necessity of using fatal force at the time of stabbing or shooting your violent husband, if the construction of your actions and your state of mind serves to deny any intentionality or purposive and directed thought at that critical time?

Significant practical implications arise from urging women to argue that their action of killing their violent partner was an intentional and rational response to their partner’s violence. Under the current ‘de facto’ defence arrangement, most women avoid the experience of a trial, and usually receive a relatively light sentence. Relying on self-defence in response to a murder charge is a risky strategy for battered women who kill, especially in jurisdictions with a mandatory life penalty for murder. Even in jurisdictions with discretionary

185 See discussion at 6.4.4 and 8.4.1.
sentencing for murder, the range of sentences imposed for murder tends to be higher than the range for manslaughter.

In seeking to ameliorate some of the difficulties of relying on self-defence in response to a murder charge within the current framework, a possible solution may be for the Crown to give serious 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. This would remove some of the risks inherent in proceeding to trial for murder. The woman can decide whether to proceed to trial in order to have a plea of self-defence adjudicated without the tremendous pressure of a possible murder verdict. However, this strategy does not address the difficulties associated with the trial process for battered women. It also does not address the sentencing discount that applies to pleas of guilty.

Further, there may be a danger that such a recommendation could be misconstrued by prosecutors. In Canada, it appears that such a recommendation may have been ‘read by prosecutors as a caution against accepting manslaughter pleas from battered women charged with murder’. Sheehy suggests that there is a possibility that prosecutors may now proceed to trial for murder in cases where previously a plea to manslaughter would have been accepted.

Women who kill their violent partners challenge the traditional dichotomy of victim/offender and victim/agent, due to their positioning as both victim and offender/agent. The challenge remains for the law to recognise the diversity of the experiences of women who kill, and the connection between their offending

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190 See 6.4.4 and 8.2.4.
191 See 8.2.4.
193 See 6.3.3. See also Ratusny who has commented on the effect of long-term abuse on women’s willingness and ability to testify in public and the impact of women’s remorse such that they believe they deserve punishment, L Ratusny, ibid at 160 - 161.
194 See 8.2.2.
behaviour and their victimisation in a way that is not dependent on the pathologising or psychologising of women’s experiences.\textsuperscript{197} As I argue in Chapter Eight, there needs to be a shift in the approach to sentencing battered women who kill that facilitates this recognition. There needs to be recognition of the complexity of women’s experiences and that ‘although women are capable of violent acts as gendered beings, that fact has to be understood socially and culturally.’\textsuperscript{198} This recognition may open up the possibility of moving beyond entrenched dichotomies and stereotypes that characterise the judicial system’s treatment of battered women who kill.\textsuperscript{199} The solution may not be easy. However, women should not be unfairly denied the chance of an acquittal and should not be denied the chance to have their bravery recognised.

4.5 OTHER MENTAL STATE DEFENCES

4.5.1 MENTAL IMPAIRMENT (INSANITY)

4.5.1.1 Overview of the law

As discussed at 3.3.2, the defence of mental impairment (or insanity) is concerned with the accused’s mental state at the time the offence is committed.\textsuperscript{200} Although law in Australia concerning insanity differs between jurisdictions, the law continues to reflect the common law origins found in the M’Naghten rules. These state that:

To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such defect of reason, from disease of mind, as not to know the nature and quality of the act he [or she] was doing; or, if

\textsuperscript{197} E Comack, \textit{ibid} at 152.

\textsuperscript{198} S Hekman, \textit{Gender and Knowledge: Elements of a Postmodern Feminism}, Cambridge: Polity Press, 1990 at 140. See also W Chan, above n 4 at 35 – 36.

\textsuperscript{199} W Chan, \textit{ibid} at 36.

he [or she] did know it, that he [or she] did not know he [or she] was doing what was wrong.\textsuperscript{201}

In order to rely on the defence of insanity or mental impairment, it must be established that the accused was suffering from a ‘disease of the mind’ or a ‘mental disease’. The accepted definition of this is found in the judgment of King CJ in \textit{Radford}, where His Honour stated that:

The essential notion appears to be that in order to constitute insanity in the eyes of the law, the malfunction of mental faculties called ‘defect of reason’ in the M’Naghten rules, must result from an underlying pathological infirmity of the mind, be it of long or short duration and be it permanent or temporary, which can be properly termed mental illness, as distinct from the reaction of a healthy mind to extraordinary external stimuli.\textsuperscript{202}

In the Code jurisdictions (Tasmania,\textsuperscript{203} Western Australia,\textsuperscript{204} Queensland\textsuperscript{205} and the Northern Territory),\textsuperscript{206} the M’Naghten rules have been broadened to recognise a ‘volitional component’\textsuperscript{207} – the capacity to control one’s actions\textsuperscript{208} or the capacity to resist an impulse.\textsuperscript{209} In the common law jurisdictions, the M’Naghten rules have been incorporated in legislation in the Australian Capital Territory (mental illness),\textsuperscript{210} South Australia (mental incompetence),\textsuperscript{211} and Victoria (mental impairment).\textsuperscript{212}

In all jurisdictions, the onus of proof in relation to mental impairment or insanity rests on the accused to prove the legal requirements of the defence on the balance of probabilities. If the defence of mental impairment is successfully
raised, the accused is entitled to a conditional acquittal – the verdict is not guilty on the ground of mental illness or insanity.213

4.5.1.2 Insanity and spousal homicide

The extraordinary narrowness of the insanity defence, the introduction of discretionary sentencing for murder and the expansions of other ‘mental abnormality’ defences have seen the decline in reliance on the defence of insanity.214 This is reflected in the paucity of cases where insanity is relied upon in the context of spousal homicide.215 Despite research to the effect that in both legal and medical discourse the violent woman is constructed in terms of pathology and mental incapacity,216 this has not been translated into reliance on the defence of insanity by women who kill their male partners. In my research,217 the defence of insanity was only relied upon in one case where a female offender killed her male partner. In this case, Gomaa,218 the accused killed her de facto husband by bashing him with a wrench and setting fire to him. This is an interesting case, as the trial judge accepted that the accused could have successfully relied on the defences of provocation and diminished responsibility. However, in view of the medical evidence, the ultimate verdict was not guilty on the ground of mental illness, as at the time of killing the accused was suffering from paranoid schizophrenia.

213 See Mental Health (Criminal Procedure) Act 1990 (NSW), s 38; Criminal Law Consolidation Act 1935 (SA) ss 269F and 269G; Criminal Code (WA) s 653; Criminal Code (Qld) s 647(1); Crimes Act 1900 (ACT) ss 428N and O; and Criminal Code (Tas) s 381(1).
215 In my research, there were only three cases in which a male offender relied on the defence of mental illness in respect of killing his female partner. In Kina, unreported, SC NSW, 23 May 1996, the defence was successful. In the remaining two cases, the defence did not succeed. In one case, Byrant, [2000] NSWSC 245, the accused relied on diminished responsibility and mental illness and was convicted of manslaughter on the basis of diminished responsibility. In the other, Obholz, unreported, SC NSW, 18 Sept 1992, the accused relied on diminished responsibility and mental illness and was convicted of murder.
216 See 4.2.
217 See 1.4.2.
4.5.2 MENTAL DISEASE AND INTENTION (THE 'HAWKINS' DEFENCE)

4.5.2.1 Overview of the law

The High Court decision in Hawkins has altered the law concerning the reception of expert evidence on the question of intent. Previously, absent issues of insanity, authority suggested 'that expert evidence on the question of whether a person can form an intention to do an act or a specific intention ... was not admissible'. In Hawkins, the High Court held that if there was evidence that the accused was suffering from a mental disease falling short of insanity, that evidence is 'relevant to and admissible on the issue of formation of the specific intent' once the defence of insanity has been rejected. Since Hawkins, if an accused has a recognised mental illness at the time of the offence, expert evidence as to the accused's mental illness and 'the actual effect upon the reasoning process of the accused' of that mental illness may prove useful to raise a doubt as to whether the accused has the specific intent for murder. The critical issue for reliance on the Hawkins defence (as well as the distinction between insanity and automatism) is the definition of mental illness or mental disease.

The effect of Hawkins is that evidence of a mental disorder (not amounting to insanity) is relevant and admissible to the issue of whether the accused had the requisite intent for murder - the intent to kill or cause grievous bodily harm. The evidence is also relevant to the question of accused's knowledge (actual and imputed) of the likelihood of death under section 157(c) of the Criminal Code (Tas). It is likely that evidence of a mental disorder (not amounting to insanity) would also to be relevant to the issue of subjective recklessness:

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220 *Hawkins* (1994) 179 CLR 500 at 517 per the Court.
221 I Freckelton & H Selby, above n 219 at 177.
222 See 4.5.1.1.
223 This section provides for 'constructive murder': 'culpable homicide is murder if it is committed by means of any unlawful act or omission which the offender knew, or ought to have known, to be likely to cause death in the circumstances'. In *Hawkins* (1994) 179 CLR 500, the
If evidence of mental illness suggests the possibility that the accused failed to realise an obvious risk of harm to the victim, it would be consistent with the spirit of Hawkins to admit [it].

There is little to justify making a differentiation between knowledge (what the accused knows or ought to know as the likely outcome of his/her conduct) and recklessness (what the accused foresees as the probable outcome of his/her conduct).

4.5.2.2 Mental disease and intention (the ‘Hawkins’ defence) and spousal homicide

Subsequent to the acceptance by the High Court in Hawkins of the relevance of mental disease to the question of the necessary intention for murder, there has not been a spousal homicide that has directly considered the issue. However, I located one case where a woman had killed her male partner and her plea of guilty to manslaughter was accepted where expert evidence in relation to a mental illness was relied on to support the accused’s claim of lack of intent. In the South Australian case of Rigney, the accused set fire to a house containing her partner and his brother. The prior mistreatment of the accused at the hands of her partner was appalling. On the day of the fire, the accused had been chased into a shed by her partner. He demanded that she give back all the clothes he had given her. She then ran naked from the shed. As the deceased’s violence increased, the accused ‘became hysterical and starting screaming at him again to leave the house’. It was noted that by this time, she ‘felt sore, embarrassed, humiliated, and not properly recognisable by reason of the bruising on [her] body’. The accused lit the fire and then, told both men to leave the house but

High Court considered that the evidence of mental disorder would be admissible on the issue of whether the accused ‘knew that his conduct was “likely to cause death in the circumstances”, [actual knowledge] at 517. The High Court left unresolved the issue of whether the evidence was relevant and admissible in connection with the second limb of s 157(c) – whether the accused ‘ought to have known’ that his conduct was “likely to cause death in the circumstances” [imputed knowledge]. On remittance, the Tasmanian Court of Criminal Appeal considered that the psychiatric evidence was admissible in regard to the issue of imputed knowledge, Hawkins (No 3) (1994) 4 Tas R 376.


226 Unreported, SC SA, 21 May 1996.
they were very drunk and ignored her pleas. The accused's plea of guilty to manslaughter on the basis of lack of intent was accepted by the prosecution. The psychiatrist's evidence was that when the accused started the fire, she was suffering from 'an abnormal state of mind ... [being] major depression', as a result of the sustained emotional and physical abuse from her defacto husband.\textsuperscript{227} The lighting of the fires (she had lit a small fire the previous day) was viewed as a response to 'desperation stress'.

Despite the 'disoriented' nature of the accused's mind, the expert evidence specified that the insanity defence was not available. However, it was accepted that the accused had a 'significant mental illness, or mental impairment' and this evidence supported the claim that the accused did not intend to kill the two men. Interestingly, Williams J considered that it was the psychiatric evidence rather than the extreme nature of the assault on the accused that satisfied him that 'it would be simplistic and unfair to regard the situation as being simply a long drawn out domestic drunken argument'.\textsuperscript{228} This case was decided in a jurisdiction where the defence of diminished responsibility was not available, and it appears that lack of intent was used to fill the gap between murder and insanity.

4.5.3 AUTOMATISM

4.5.3.1 Overview of law

As discussed at 3.2.2, the law of automatism is concerned with the voluntariness of the accused's act.\textsuperscript{229} The law governing automatism is substantially the same in each Australian jurisdiction.\textsuperscript{230} The common law is reflected in the codification of the law of automatism in Tasmania,\textsuperscript{231} Queensland,\textsuperscript{232} Western Australia\textsuperscript{233} and the Northern Territory.\textsuperscript{234} Although the accused has an

\textsuperscript{227} Unreported, SC SA, 21 May 1996 at 7.
\textsuperscript{228} Unreported, SC SA, 21 May 1996 at 10.
\textsuperscript{229} For a detailed discussion of the law of automatism, see S Bronitt & B McSherry, above n 98 at 222 - 234.
\textsuperscript{230} Falconer (1990) 171 CLR 30 at 37 per Mason CJ, Brennan and McHugh JJ.
\textsuperscript{231} Criminal Code (Tas) s 13(1).
\textsuperscript{232} Criminal Code (Qld) s 23.
\textsuperscript{233} Criminal Code (Qld) s 23.
evidentiary burden to lay a proper foundation of expert medical opinion before the issue of automatism is raised, the ultimate burden of proof does not lie with the accused. If the prosecution does not prove the voluntary and intentional nature of the accused’s act beyond reasonable doubt, the accused is entitled to an acquittal (unless it is found that the ‘reactions of the accused were the product of an unsound mind’).  

Once the accused raises evidence of automatism, it is necessary to determine whether the involuntary nature of the accused’s act is attributable to a condition that is not a mental disease – that is, ‘sane’ automatism. As McSherry argues:

Because automatism raises questions about the consciousness of the accused at the time of the criminal act, the dividing line between mental conditions giving rise to automatism and mental conditions giving rise to insanity has become blurred.

The essence of the distinction between automatism and insanity is the question of whether the accused was suffering from a condition that was a ‘disease of the mind’ or not. If the evidence of involuntariness is attributable to a condition that is a mental disease, then the accused cannot rely upon that evidence to raise a proper foundation for sane automatism – it is not relevant to the issue of voluntariness.

4.5.3.2 Automatism and spousal homicide

In the context spousal homicide, the recognition by the High Court in *Falconer* that a dissociative state caused by an extraordinary psychological blow could give rise to sane automatism (‘psychological blow’ automatism) has expanded the potential operation of automatism. In *Falconer*, the accused killed her estranged husband by shooting him at close range. The accused’s husband had a history of using violence against her. She had recently discovered that he had

234 *Criminal Code* (NT) s 31(1).
238 *Hawkins* (1994) 179 CLR 500 at 510 per the Court.
also sexually interfered with their children and criminal charges had been laid in connection with that conduct. She was in 'great stress and a fear of what her husband might do to her and her daughters when he learned of the charges'. 241 The accused had obtained a non-molestation order, however, she continued to be 'emotional and very frightened'. On the day of the shooting, her husband entered her home unexpectedly, sexually assaulted her, taunted her in relation to the criminal charges and insinuated that he had sexually assaulted another child that had been in their care. He then reached out to pull her hair. Although the accused had no recollection of her actions from this time, she then obtained and loaded a shotgun and killed her husband. The accused was charged with murder.

At her trial, the accused proposed to argue that her actions were involuntary and sought to call psychiatric evidence in support of her claim of non-insane automatism. The psychiatric evidence indicated that the accused was sane at the time she killed her husband. However, it suggested that she was acting in an automatic or dissociative state brought on by the psychological blow. It was said that:

[Her] personality was ... fragmented as a result of excessive emotional stress caused by the discovery of her husband's incestuous relationship with her daughters, the fear of reprisals for the ensuing criminal charged brought against him, and the revelation that he may have been sexually molesting a young child who had been in her care. 242

The trial judge excluded the evidence and the accused was convicted of murder. On appeal, the High Court accepted that the evidence had been wrongly excluded, as 'a state of dissociation caused by a psychological blow can constitute automatism'. 243 Although it was accepted that this case involved sane automatism, a critical question addressed by the High Court was the need to determine whether the accused's condition gave rise to sane or insane automatism.

241 (1990) 171 CLR 30 at 79 per Toohey J.
In cases of dissociation caused by psychological blows, the critical question is whether the accused’s state of mind was attributable to a mental disease? In determining the issue, the High Court in *Falconer* adopted the approach of King CJ in *Radford*, that sane and insane automatism were differentiated by:

The reaction of an unsound mind to its own delusions or to external stimuli on the one hand and the reaction of a sound mind to external stimuli, including stress producing factors, on the other.

This is a refinement of the internal/external test: if the dissociative state was the product of the accused’s ‘psychological or emotional make-up, or in some organic pathology’, then it was an internal and consequently a mental disease. If the accused’s response to ordinary stress was to enter a dissociative state, this is indicative of an unsound mind, as the ‘dissociation is most likely due to an underlying or internal disorder which requires treatment’.

In contrast, if the dissociative state was the result of ‘a malfunctioning of the mind which is the transient effect produced by some specific external factor’, then the cause is ‘external’ and indicative of a sound mind. If an extraordinary psychological shock was involved, this would suggest that the person was not suffering from an underlying disorder and the cause of the automatonic state was entirely external. The High Court considered that the question of sound/unsound mind was to be objectively determined according to the mental

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244 See discussion at 4.5.1.1 for the definition of a mental disease.
248 (1985) 42 SASR 266.
249 *Falconer* (1990) 171 CLR 30 at 76 per Toohye citing with approval the comments of King CJ in *Radford* (1985) 42 SASR 266 at 276. This was also approved in *Falconer* (1990) 171 CLR 30 at 53 - 54 per Mason CJ, Brennan and McHugh JJ. See also *Gaudron J* who stated that ‘the fundamental distinction is necessarily between those mental states which, although resulting in abnormal behaviour, are or may be experienced by normal persons (as, for example and relevant to the issue of involuntariness, a state of mind resulting from a blow to the head) and those which are never experienced by or encountered in normal persons’, at 85.
247 *Rabey* (1980) 114 DLR (3d) 193 at 199 per Ritchie J citing with approval the trial judge.
249 S Yeo, above n 243 at 17. For a thorough discussion of the objective standard and automatism, see S Yeo, above n 243.
250 *Rabey* (1980) 114 DLR (3d) 193 at 199 per Ritchie J citing with approval the trial judge.
252 S Yeo, above n 243 at 17.
strength of the ordinary person. The purpose of the objective standard is to ensure that it is the extraordinary psychological shock alone and not some underlying pathological infirmity which has brought upon the dissociation.

In view of the facts and outcome of *Falconer*, the question has been asked: ‘is automatism the new defence to spouse murder?’ Despite its superficial attraction (an accused who successfully relies on automatism is entitled to an acquittal), the cases identified in my research do not indicate any significant reliance (successful or unsuccessful) on the issue of the voluntariness of the accused’s act. Admittedly, it is difficult to assess the success of the defence of automatism by identifying cases where women are acquitted on the basis of automatism in the context of domestic violence.

In any event, there are serious implications attached to the reliance by battered women on the defence of automatism. The reliance by battered women on automatism in respect of the killing of their violent husband fails to accord with the context of the killings and the ‘lived experience’. The use of automatism by battered women who kill their abusive partners involves a reworking of the approach seen in the provocation and lack of intent cases where the husband’s violence induces a dysfunction in the accused’s mind. In the case of automatism, the accused’s reaction to her husband’s behaviour causes her to enter a dissociative state caused by the ‘psychological blow’ of her husband’s physical and emotional violence. The focus of the judicial inquiry remains on the

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253 As Mason CJ, Brennan and McHugh JJ state, ‘the law must postulate a standard of mental strength which, in the face of a given level of psychological trauma, is capable of protecting the mind from malfunction to the extent prescribed in the respective definitions of insanity. That standard must be the standard of the ordinary person: if the mind’s strength is below that standard, the mind is infirm; if it is of or above that standard, the mind is sound or sane’, *Falconer* (1990) 171 CLR 30 at 55.
254 S Yeo, above n 243 at 17.
256 See B McSherry, ‘Getting Away with Murder?’, above n 248, who comments generally on the difficulty of ascertaining the number of acquittals on the basis of automatism, at 174.
257 S Tarrant, above n 255 at 69.
258 See 4.3.2 and Chapter 5.
259 See 4.4.2.3.
psychological state of the female offender and not the circumstances that might have made her resort to force. As Tarrant writes:

Where retaliatory action is directed against the source of serious and prolonged abuse, even given the occurrence of a dissociative state, why is it easier to characterise the action as meaningless than to consider its context and characterise it as an act of defence or protection?  

The defensive aspect of the killing remains obscured by the assessment of the impact on the accused's mind of the history of violence. The psychology of the female offender, in this case her transient dissociation, remains the subject of interest.

At a practical level, reliance on automatism raises tactical difficulties in connection with the presentation of a battered woman's defence. As Tarrant has observed, there is a 'tension between the evidence which supports the defence and the elements of the defence itself'. Automatism is the:

Ultimate statement of irresponsibility, of an unwilled act ... Yet the evidence supporting a woman's claim of dissociation ... is evidence suggesting, precisely, that she would want and intend retaliation, that she would will and want harm to occur to the person she attacked.

In constructing the account of the killing in terms of automatism, there is the danger that the accused is perceived as a 'liar or as manipulating the facts. Further, reliance on 'psychological blow' automatism involves a consideration of the normality of the accused's state of mind and a battered woman may not wish to raise the spectre of insanity.

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260 S Tarrant, above n 255 at 70 (emphasis in original).
261 Ibid at 69.
262 Ibid (emphasis in original).
263 Ibid.
264 In New Zealand, McDonald has observed that 'recent case law concerning women who have offended in a disassociated state as a result of abuse indicates that insanity rather than automatism should be considered', E McDonald, above n 255 at 693.
4.6 CONCLUSION

This chapter has shown that the defence of diminished responsibility is not often relied upon by women who kill their male partners. Although I found support for the view that women were psychologised in legal discourse, this construction of the female offender was not reflected in substantial reliance on the ‘psy’ defence of diminished responsibility. Rather, many of the women who were convicted of manslaughter in respect of killing their husband were convicted of manslaughter on the basis of a finding that the accused lacked the requisite intent for murder.

In my discussion of the construction of intention in legal discourse, I have shown that assumptions and stereotypes based on gender appear fundamental to the socially accepted account of intentional action and, particularly, to the construction of intention in legal discourse. It appears that despite illusions of universality and neutrality founded on the broad concepts of ‘common sense’ and ‘every day understanding’, the construction of intention cannot be a neutral and value-free process. In many cases where women kill their male partners and successfully rely on a lack of the intent for murder, the nature of the act causing death could enable an inference to drawn that the accused had the requisite intent for murder. However, this inference has not been drawn.

In seeking an explanation for the disruption of the ‘common sense’ attribution of intention that appeared open on the ‘facts’, I found that ‘external’ factors such as alcohol or drugs did not usually explain the outcome. Rather, in the case of female offenders, it was usually ‘internal’ factors associated with emotional turmoil and stress that operated to sever the link between the mind (the mental element) and the body (the act). The finding of lack of intent was sustained by diverting attention from the issue of the accused’s intention at the time of the fatal act by a range of tactics. The focus of the judicial inquiry was predominantly on the emotional response of the accused, and the aspects of her behaviour that showed deliberation and intent were subsumed by her emotionality. There could be complete silence on the question of intent, or the

265 See A Worrall, above n 13 at 18 – 19.
focus could be placed on the accused’s motive for taking up a weapon, rather than her intent at the time that the weapon was used. In these cases, the finding of lack of intent was supported by the fluidity of the concepts of ‘intent’ and ‘motive’. In other cases, the accused’s inability to recall the actual details of the act causing death meant that it was possible to sever the link between the accused’s actions and her mind.

This chapter has shown that stereotypes of ‘appropriate femininity’ (‘domesticity’ and ‘pathology’) are utilised to anchor the finding of lack of the necessary intent for murder. The severance of the link between the accused’s actions and concepts of intentionality and agency relies upon construction of an accused as a ‘victim’ (passive and emotional) rather than as an ‘offender’ (active and rational). In turn, the persuasiveness of an accused’s ‘victim’ status was dependent upon conformity with the tropes of ‘appropriate femininity’ – the extent to which the woman could be assigned to notions of domesticity and pathology.

In this chapter, I have argued that lack of intent was used to create a defacto defence of domestic violence for women who killed their violent partner. 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. Although such an approach may reflect sympathy felt for the circumstances in which battered women kill, my argument has been that this approach is problematic for the potential self-defence claims of battered women who kill. My concern is that the ‘defacto’ defence approach means that the relevance of the history of abuse was only to provide an explanation for her mental instability and emotionality, thus any rational explanation for the killing was subsumed in the accused’s ‘pathology’.

This concern is developed in Chapter Five, where I consider battered women’s reliance on the partial defence of provocation.

266 H Allen, Justice Unbalanced, above n 8 at 41.