Chapter Six

THE ‘FRIGHTENED’ WOMAN - THE DEFENCE OF SELF DEFENCE AND HOMICIDE

6.1 INTRODUCTION

A central argument in my thesis is that the usual circumstances in which women kill their partners presumptively raises the issue of self-defence. While my argument is certainly not that every battered woman who kills does so in self-defence, I do argue that the law of self-defence should have sufficient flexibility to accommodate the self-defence claims of some of these women – more than are currently accommodated. Yet, as Chapters Four and Five have shown, while the criminal justice system has been relatively receptive to arguments that these women lacked the requisite intent for murder or that they were acting under provocation, the current approach has precluded a proper consideration of the application of self-defence in cases where women kill their violent partners. In this chapter, I examine the application of the defence of self-defence in the context of women who kill their violent partners and in advancing my critique I draw on the wealth of literature (Australian1 and elsewhere2) that has reviewed

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the operation of self-defence in cases where battered women kill their violent partners.

My analysis of self-defence is divided into four parts. In the first section, I consider the extent of reliance by battered women on the defence of self-defence. This expands the existing body of literature by exploring the gendered operation of self-defence in a practical sense. This section builds upon my earlier evaluation of the application of legal defences where women kill their violent partners in support of my argument that self-defence operates in a discriminatory way. The analysis of the cases where women have relied on self-defence (successfully or unsuccessfully) reveals the barriers that women have encountered in arguing that their act of self-preservation amounts to an act of lawful self-defence.

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3 See Chapters Four and Five. See also W Chan, *Women, Murder and Justice*, *ibid* for a similar approach.
Next, I address the current legal requirements in each Australian jurisdiction that have restricted access to self-defence for battered women. The existing feminist review of self-defence has highlighted the essential masculinity of the paradigm case of self-defence (the once-off encounter between two males of equal strength), and argued that if a woman's actions in self-defence do not conform to the paradigmatic male scenario, then reliance on self-defence has largely been precluded. In Australia, there have been developments in the law of self-defence, and I evaluate whether these changes have enabled the law to take account of the circumstances in which women kill their abusive partners. In this analysis, the argument I develop is that (in most jurisdictions) it is not the formal legal rules per se, but the informal rules of legitimate self-defence that sit uncomfortably with women's claims to self-defence. In other words, the shadow of the paradigm case influences the interpretation of the defence. Next, I consider other constraints that may impact on reliance by battered women on self-defence.

In the final part of this chapter, I argue that legislative intervention is necessary to ensure that the defence of self-defence can be sensitively applied to the cases of battered women who kill. In this way, my research extends the feminist critique by advancing a proposed framework for the operation of the modern defence, a framework that enables the criminal justice system to be more receptive to battered women's actions in self-defence. In advancing a new legislative framework, the theoretical constraints of the defence need to be kept in mind. The law of self-defence is concerned to limit when it is lawful for an individual to place his or her own interests above the interests of another person. As I argued in Chapter Three, the concept of agent relative permission should provide the framework for self-defence, as it focuses on the value that each person attaches to his or her own life, rather than engaging in the problematic

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4 Edwards observes that 'what judges and juries consider constitutes justification for ... self-defence, whilst being hailed as an objective legal standard making claims to neutrality and universality, is instead a masculinist construct encapsulated within a legal form,' S Edwards, above n 2 at 366.

5 A similar point has recently been made by McCollan, see A McCollan, 'General Defences', above n 2 at 154.

6 See 3.4.
task of weighing the value of respective lives. Agent-relative permission enables an assessment to be made as to whether the accused has attained a socially acceptable standard of behaviour. A person who kills in legitimate self-defence has attained the acceptable standard where to require further self-sacrifice would be unreasonable.\(^8\)

### 6.2 BATTERED WOMEN AND RELIANCE ON SELF-DEFENCE

Women who kill their violent partners are only infrequently acquitted on the grounds of self-defence. In 21 of the 65 cases identified where women killed their violent partners, the defence of self-defence was left for the consideration of the jury at trial.\(^9\) Of these 21 women, I found that 9 women were acquitted on the grounds of self-defence,\(^10\) 11 were convicted of manslaughter, and 1 woman was convicted of murder.\(^11\) These acquittal figures need to be approached with caution as the research method utilised in my thesis precludes an identification of all the cases in which the accused was acquitted in respect of killing their male partner.\(^12\) However, I would argue that the assertion that women are not frequently successful in obtaining an acquittal on the basis of self-defence is

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\(^7\) See 3.4.2.1.

\(^8\) See 3.4.2.1.


\(^10\) See 3.4. These cases are Gadd, unreported, SC Qld, 27 Mar 1995; Hickey, unreported, SC NSW, 14 Apr 1992; Kontinnen, unreported, SC SA, 30 Mar 1992; Lock (1997) 91 A Crim R 356; Secretary (1996) 107 NTR 1; Stephenson; unreported, SC Qld, Aug 1992; Stjernqvist, unreported, Cairns CC, 18 Jun 1996; Terare, unreported, SC NSW, 20 Apr 1995; and Zysen, unreported, SC WA, 21 May 1987. There is also the case of R (1981) 28 SASR 321, where the accused was acquitted following a trial where the only defence relied upon was the defence of provocation.

\(^11\) See Table 1.1 and Table 1.3.

\(^12\) See Introduction at p 4.
supported by previous Australian research, which suggests that few women are acquitted on this ground in respect of killing their male partners.\textsuperscript{13}

My study indicates (in conformity with previous research) that the clear trend appears to be for battered women to be convicted of manslaughter.\textsuperscript{14} In my view, an investigation of the manslaughter convictions is revealing in regard to the criminal justice system’s construction of a killing in self-defence – that is, that the circumstances in these cases do not give rise to a legitimate claim to self-defence. I contend that support for a feminist critique of the gendered nature of the law of self-defence can be found in the predominance of manslaughter convictions, when considered in light of the circumstances in which women kill.

As shown at 1.3.2, the motivation for women to kill their male partner is predominately self-preservation. Excluding the two cases where the ultimate outcome was unknown,\textsuperscript{15} women were convicted of manslaughter in 71\% (44) of those cases where there was a history of violence.\textsuperscript{16} And while I am not suggesting that a history of violence automatically entitles a battered woman to a successful claim of self-defence, it is my view the violence that forms the backdrop for these killings would appear to sit uncomfortably with the legal outcome.

The disparity between the circumstances in which women kill and the legal outcome suggests that there is a reluctance to accept that these circumstances give rise to a situation of self-defence. And, this disparity is perpetuated because there is limited judicial consideration of the actions of battered women in the context of self-defence. In 1994, Stubbs and Tolmie commented on the reluctance by defence counsel to argue self-defence.\textsuperscript{17} My research demonstrates

\begin{itemize}
\item \textsuperscript{13} See P Easteal, \textit{Killing the Beloved: Homicide Between Adult Sexual Intimates}, Canberra: Australian Institute of Criminology, 1993 at 115. See also J Stubbs & J Tolmie, ‘Falling Short of the Challenge?’, above n 1.
\item \textsuperscript{14} See 1.4.
\item \textsuperscript{15} \textit{Van den Hoek} (1986) 161 CLR 158; \textit{Falconer} (1990) 171 CLR 30.
\item \textsuperscript{16} See detail in 1.3.2. It is noted that looking at all women who killed their male partner identified in my research (76), 76\% of women were convicted of manslaughter, see 1.4.2.
\item \textsuperscript{17} J Stubbs & J Tolmie, ‘Battered woman syndrome in Australia: A Challenge to Gender Bias in the Law?’, in J Stubbs (ed), \textit{Women, Male Violence}, Sydney: The Institute of Criminology, 1994 at 204.
\end{itemize}
that these comments appear to still be applicable. I found that only 32% of battered women (21) relied on self-defence at trial. This low figure reflects the number of women who plead guilty to manslaughter. As noted in Chapter Four, in 21 out of 25 lack of intent cases where male violence provided the backdrop to the killing, the accuseds pleaded guilty to manslaughter. In provocation cases involving a history of violence, the woman pleaded guilty in 10 out of the 20 cases identified. In these cases, there is no room for consideration (and possible acceptance) of the contention that the woman was acting in self-defence.

A further consequence of the number of guilty pleas is that the availability of self-defence for battered women has not often been tested on appeal. The lack of appeal cases has two related consequences. First, it means that there are only a limited number of reported decisions. Previously, Tolmie has commented on the limited number of reported decisions involving battered women syndrome, and observed there are resulting problems of consistency, access to justice and accountability. The cases form a judicial ‘underground’ - hidden and available only to those who have the ‘assistance and co-operation (if it is forthcoming) of someone involved in the particular trial process’. Similarly, the limited number of reported decisions (first instance and appeals) considering battered women and self-defence poses issues of access. While a policy of reporting cases involving battered women who kill their violent partners may not greatly assist the self-defence claims of battered women, given that acquittals are not reported, exposure may be secured in other ways. For example, case comments could be published in the significant criminal law publications, such as the Criminal Law Journal, and relevant portions of the transcript could be included on internet sites such as AUSTLII or Butterworths Online. This dissemination of

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18 See 4.4.2.
19 See Table 1.1 and Table 1.3.
20 For appeal cases, see Cornick, unreported, CCA Tas, 28 Jul 1987; Collingbur (1985) 18 A Crim R 94; Secretary (1996) 107 NTR 1; O'land (1998) 197 CLR 316.
22 Ibid at 228.
24 For example, in Kontinnen, unreported, SC SA, 30 Mar 1992, the judge’s summing up was available from Butterworths Online.
information is important, as the paradigm case of self-defence does not reflect the experiences of women who kill abusive partners.\textsuperscript{25} And defence counsel, without information about successful cases where battered women have relied on self-defence, may be reluctant to recommend that the accused rely on self-defence (particularly in a case where the Crown is prepared to accept a plea of guilty to manslaughter).\textsuperscript{26} A lack of information may mean that some counsel fail to even conceive of a battered women's actions in terms of self-defence.\textsuperscript{27}

A related consequence of the lack of appeal cases, and reported decisions is the impediment posed to the development of self-defence in the context of battered women who kill.\textsuperscript{28} There is a lack of clear judicial direction in relation to reliance by battered women on self-defence. Significantly (and unfortunately), the most important appeal decision considering the issue of battered women, and self-defence was not particularly helpful in terms of development of the Australian self-defence jurisprudence. In \textit{Osland},\textsuperscript{29} the High Court considered the relationship between 'battered women syndrome' (BWS), and the defences of provocation and self-defence. As Wells has observed, the Court revealed a ‘high degree of awareness of the contemporary literature on BWS’.\textsuperscript{30} Yet, in my view, it failed to ‘lift the fog’ that has enveloped the application of self-defence in cases where women kill their violent partners.\textsuperscript{31} In its discussion of BWS, the Court failed to recognise the underlying problem associated with reliance by battered women on self-defence – the gender-bias inherent in the law of self-

\textsuperscript{25} See 3.2.1.
\textsuperscript{26} It is acknowledged that other factors may also be relevant to a woman's decision to plead guilty to manslaughter, see 6.4.
\textsuperscript{27} As Kiff writes, in the context of the Queensland Criminal Code, 'unless very certain of their ground, defence counsel are loath to advise pursuing ... [a self-defence] line of defence, while many solicitors, judges and/or juries do not possess the requisite knowledge of the dynamics of domestic violence to be in any position to judge the availability of the defence generally and its applicability in the particular case', S Kiff, 'Defending the Indefensible: The Indefatigable Queensland Criminal Code Provisions on Self-Defence' (2001) 25 Criminal Law Journal 28 at 31.
\textsuperscript{28} J Stubbs & J Tolmie, 'Falling Short of the Challenge?', above n 1 at 721.
\textsuperscript{29} (1998) 197 CLR 316.
Consequently, Australia remains in need of a 'leading judgment which expounds in a clear and informed way the manner in which self-defence operates in the context [of battered women who kill their partners]'\textsuperscript{33}

6.3 THE LAW OF SELF DEFENCE

A killing in self-defence is lawful, unless the self-defence was excessive, and a person who kills in self-defence is entitled to an acquittal. The prosecution bears the onus of proof in respect of the defence of self-defence once there is evidence sufficient to raise the issue of self-defence.\textsuperscript{34} The circumstances in which a person can rely on self-defence are governed by legislation in Tasmania, Western Australia, Queensland, South Australia and the Northern Territory,\textsuperscript{35} and by the common law in Victoria and the Australian Capital Territory. In New South Wales, the common law currently applies. However, the law of self-defence will be governed by legislation following the commencement of the Crimes Amendment (Self-Defence) Act 2001 (NSW).\textsuperscript{36}

The approach to self-defence in Australia can be divided between those jurisdictions in which the defence is set out as a broad statement of principle and those jurisdictions in which the requirements of lawful self-defence are contained in a number of detailed provisions. The common law requirements of self-defence,\textsuperscript{37} the legislative provisions in the Northern Territory,\textsuperscript{38} Tasmania\textsuperscript{39} and South Australia,\textsuperscript{40} and the new legislative provision in New South Wales\textsuperscript{41}.

\textsuperscript{31} Wells makes this comment in relation to provocation and battered women, C Wells, 'Provocation: The Case for Abolition', \textit{ibid} at 97. My argument is that it is equally applicable to the court's treatment of self-defence.
\textsuperscript{32} See J Stubbs & J Tolmie, 'Falling Short of the Challenge?', above n 1.
\textsuperscript{33} \textit{Ibid} at 748.
\textsuperscript{34} \textit{Dziduch (1990) 47 A Crim R 378 at 379 per Hunt J.}
\textsuperscript{35} \textit{Criminal Code} (Tas) s 46; \textit{Criminal Code} (WA) ss 248, 249; \textit{Criminal Code} (Qld) ss 271, 272; \textit{Criminal Law Consolidation Act 1935 (SA) s15; Criminal Code (NT) s 29.}
\textsuperscript{36} This Act is due to commence on the 22 February 2002.
\textsuperscript{37} \\textit{Zecevic (1987) 162 CLR 645.}
\textsuperscript{38} \textit{Criminal Code} (NT) s 29. This was inserted by the Criminal Code Amendment Act 2001 (NT).
\textsuperscript{39} \textit{Criminal Code} (Tas) s 46, as amended by the Criminal Code Amendment (Self-Defence) Act 1987 (Tas).
\textsuperscript{40} Criminal Law Consolidation Act 1935 (SA) s 15, as amended by the Criminal Law (Self-Defence) Consolidation Act 1997 (SA).
\textsuperscript{41} \textit{Crimes Act 1900} (NSW) s 418 as inserted by \textit{Crimes Amendment (Self-Defence) Act 2001} (NSW). This Act is due to commence on the 22 February 2002.
have been reformulated into one simplified general statement. In contrast to this simplified statement of principle, in the remaining jurisdictions (Queensland\textsuperscript{42} and Western Australia\textsuperscript{43}) there are a number of detailed provisions setting out the requirements for lawful self-defence.

The specific rules relating to the defence of self-defence differ between jurisdictions. However, there are two primary requirements of self-defence that are common to all jurisdictions: the belief of the accused in the need to use defensive force\textsuperscript{44} and an assessment of the accused’s actions according to the objective standard of reasonableness.\textsuperscript{45} The assessment of the accused’s conduct involves a consideration of the threat perceived by the accused to exist and the accused’s response (the degree of force) used in response to that threat.\textsuperscript{46}

6.3.1 THE SUBJECTIVE TEST: THE ACCUSED’S STATE OF MIND

An essential requirement of the law of self-defence is the accused’s belief that he or she was acting in self-defence. While it is clear that self-defence is not available if the accused does not hold this belief, it is less clear what it means for an accused to believe that he or she was acting in self-defence. The primary emotion associated with self-defence is fear. It is usual to conceive self-defence in terms of fear for one’s safety or life, and to present feelings of anger as being inconsistent with a belief in self-defence.\textsuperscript{47} The focus on fear is seen to distinguish between those who have acted in self-defence from those who acted for some other motive, such as anger or revenge.\textsuperscript{48} However, in assessing the accused’s motivation, is self-defence only available if a person acts in fear?

As shown in Chapter Five, the law of provocation has developed to recognise that fear, as well as anger, are capable of causing a loss of self-control.\textsuperscript{49} In the context of battered women who kill, subsuming fear within the provocation

\textsuperscript{42} Criminal Code (Qld) ss 267, 271 – 278.
\textsuperscript{43} Criminal Code (WA) ss 244, 48, 248 – 255.
\textsuperscript{44} See 6.3.1.
\textsuperscript{45} See 6.3.3.
\textsuperscript{46} See 6.3.2.
\textsuperscript{47} See S Tarrant, ‘Something is Pushing them to the Side of their Own Lives’, above n 1 at 602.
\textsuperscript{48} See G Hubble, ‘Feminism and the Battered Woman’, above n 1 at 116.
\textsuperscript{49} See 5.3.2.2.
defence has the consequence that women’s actions may be classified as a provoked killing, rather than a killing in self-defence. This is problematic, as the co-existence of fear and anger are not necessarily incompatible with self-defence. It is to misconceive the law’s requirements concerning the accused’s motivation to focus on revenge and anger as antithetical to lawful self-defence. In assessing the accused’s reasons for action, self-defence is not excluded if the accused acts partly due to motives of anger or revenge.\(^{50}\) In Zecevic, the appellant in his unsworn statement stated that he was ‘very angry and very frightened’ at the time he obtained the rifle and shot the deceased.\(^{51}\) The mixed emotional state of the appellant was not an impediment to the issue of self-defence being left for the consideration of the jury.

Legal acceptance of the range of human emotions and motivation applicable to the defence of self-defence usefully applies to the situation of battered women who kill their abusive partners. A woman who kills her abusive partner has been involved in an intimate relationship with her abuser and human relationships are complex. A woman who has endured a history of domestic violence is likely to fear her abuser, but she may also love him, hate him, and also want to ‘get him back’ for the things that he has done to her and the way he treats her.\(^{52}\) Battered women are likely to experience a diverse emotional response to their violent partner and may kill for a variety of reasons. It is important to recognise, as Derrington J recognised in Stjernqvist, that ‘human beings are complex things — and a person can have both hatred and fear at the same time’.\(^{53}\)

The difficulty for battered women is that it is easy to construct the killing of a violent partner as revenge or an act of unreasonable anger because there are just so many wrongs to avenge.\(^{54}\) A moment’s reflection on the extent of the physical violence, as well as the psychological abuse, that has been inflicted readily raises


\(^{51}\) (1987) 162 CLR 645 at 655 per Wilson, Dawson and Toohey JJ. Similarly in *Howe* (1958) 100 CLR 448, the defendant explained that ‘I was afraid of him. I was angry with him’, at 459 per Dixon CJ.

\(^{52}\) See P Easteal & C Currie, above n 1 at 68 - 69.

\(^{53}\) Unreported, Cairns CC, 18 Jun 1996 at 166.

\(^{54}\) See J Tolmie, ‘Provocation or Self-Defence for Battered Women who Kill’, above n 1 at 70.
the spectre of revenge – we could understand wanting to kill anyone who did that to us. Although a battered woman does not have an automatic claim to self-defence by virtue of the history of violence she has endured, a valid claim to self-defence should not be denigrated solely by the existence of feelings of anger or the desire for revenge. It is to impose too high a standard on a battered woman. The important point to recall is that the essential factor for reliance on self-defence is that the woman genuinely believed that the action taken was necessary for her protection, regardless of the other emotions that she may have felt.

6.3.2 ASSESSING THE NATURE OF THE THREAT AND THE ACCUSED'S RESPONSE

6.3.2.1 Type of threat: proportionality

Traditionally, in order to rely on self-defence in circumstances where fatal force was used, the accused must have been confronted with a threat of death or serious bodily injury. This requirement related to the issue of proportionality. A traditional requirement of the law of self-defence was that the force used by the accused was proportionate to the threat faced by the accused. These restrictions posed problems for women who killed their abusive partner and then sought to rely on self-defence. The feminist critique of proportionality has focussed on the nature of the threat and the need to be perceived in order to respond with deadly force and the related issue of the resort to a weapon in response to an unarmed aggressor. These concerns are significant in the domestic context, where

55 For example, in Lavalley (1990) 55 CCC (3d) 97, Wilson J recognised that ‘obviously the fact that the appellant was a battered woman does not entitle her to an acquittal. Battered women may well kill their partners other than in self-defence. The focus is not on who the woman is, but on what she did’ at 126. This was cited by Kirby J in O'sland (1998) 197 CLR 316 at 376.
56 It is noted that the legal construction of love is also considered to be antithetical to lawful self-defence. A tactic employed by the prosecution in cross-examination is to ask whether the woman loved her violent partner, to suggest that the abuse did not occur or to challenge the woman's credibility, N Seuffert, 'Domestic Violence, Discourses of Romantic Love, and Complex Personhood in the Law' (1999) 23 Melbourne University Law Review 210 at 212.
57 See Viro (1978) 141 CLR 88.
58 See Viro (1978) 141 CLR 88 at 147 per Mason J.
59 See for eg, S Tarrant, 'Something is Pushing them to the Side of their own Lives', above n 1; J Tolmie, 'Provocation or Self-Defence for Battered Women who Kill', above n 1; N Seuffert.
domestic violence may consist of the repeated infliction of sexual assaults, or assaults that do not threaten lethal violence or violence likely to cause serious injury.

**Common Law, New South Wales, Tasmania and the Northern Territory**

At common law, under the new New South Wales provision, in Tasmania and in the Northern Territory, the difficulties posed by the requirement of proportionality to battered women who kill have been partially ameliorated. While the issue of proportionality remains relevant to the question of whether the response was reasonably necessary or whether the force was reasonable in the circumstances as the accused believed them to be, proportionality is no longer a separate requirement of the law in these jurisdictions. Neither is the narrow formulation of the need to face a threat of 'death or grievous bodily harm' a requirement at common law or under the self-defence provisions in New South Wales, Tasmania, or the Northern Territory. As Leader-Elliott observes, there are 'no determinate rules of proportionality, or anything in the nature of a rule requiring equivalence of threat and response'. Fatal force is potentially an appropriate response to a threat that caused the accused to fear for 'the safety of his person from injury, violation or insulting usage or 'the infliction of continuous acute pain which did not threaten any residual injury'. The threat of a sexual assault has also been accepted as providing the basis for lawful self-
defence.\textsuperscript{70} Judicial acceptance that a threat less than death or grievous bodily harm may provide a basis for self-defence in respect of fatal force clearly expands the scope of the defence for battered women who kill.

Unlike other jurisdictions (except South Australia), in New South Wales, the new self-defence provisions to be inserted into the \textit{Crimes Act 1900} (NSW) by the \textit{Crimes Amendment (Self-Defence) Act 2001} (NSW) provide for a partial defence of excessive force.\textsuperscript{71} In cases where there is force used that involves the intentional or reckless infliction of death and that force is not an objectively reasonable response in the circumstances, section 421 \textit{Crimes Act 1900} (NSW) provides that a person is to be found guilty of manslaughter provided that the accused believed that the conduct was necessary for self-defence.

\textbf{South Australia}

In South Australia, there is no specific requirement as to the exact threat that an accused must face in order to rely on self-defence (that is, a threat of death or grievous bodily injury), so the South Australian provision would appear to also offer more flexibility. However, the requirement of proportionality is preserved in section 15(2) \textit{Criminal Law Consolidation Act 1935} (SA) which requires that the accused's response be, in the circumstances the accused genuinely believed them to be, reasonably proportionate to the threat the accused believed to exist. In South Australia, if the accused's response was not reasonably proportionate, the accused is entitled to a partial defence to reduce murder to manslaughter.\textsuperscript{72}

\textbf{Western Australia and Queensland}

While there is no separate requirement of proportionality in Western Australia\textsuperscript{73} and Queensland,\textsuperscript{74} it is still a requirement for the use of fatal force that there is a reasonable apprehension of death or grievous bodily harm from the deceased's

\textsuperscript{70} \textit{Walden} (1986) 19 A Crim R 444 at 446 per Street CJ.

\textsuperscript{71} At common law, excessive self-defence was rejected by the High Court in \textit{Zecovic} (1987) 162 CLR 645. Similarly, excessive force does not provide the accused with a partial defence in Western Australia, Queensland, Northern Territory or Tasmania, see discussion in S Bronitt & B McSherry, \textit{Principles of Criminal Law}, Sydney: LBC Information Services, 2001 at 302 – 404.

\textsuperscript{72} \textit{Criminal Law Consolidation Act 1935} (SA) s 15(2).

\textsuperscript{73} \textit{Criminal Code} (WA) s 248.
assault. In these circumstances, it is less clear whether a sexual assault, for example rape or the threat of rape, would be sufficient for lawful self-defence in circumstances where the accused had used fatal force, for as Grant has observed, ‘at least some sexual assaults, and even some rapes, do not cause serious bodily harm’.\textsuperscript{75} This formulation of self-defence clearly limits the availability of self-defence in cases where it is difficult to identify a threat of sufficient seriousness (death or grievous bodily harm), and so these requirements are not included in the model of self-defence proposed in my thesis.\textsuperscript{76}

**Women and proportionality**

The requirement of proportionality poses difficulties for battered women, as women usually kill their violent partner with a weapon (other than their fists). In conformity with previous research, all the women identified in my study used a weapon to kill their violent partner.\textsuperscript{77} Women may kill their violent partner in ‘non-confrontational’ situations.\textsuperscript{78} Even if women kill when an attack is under way, it is often in response to a manual attack in which the man uses his fists, feet and hands to harm.\textsuperscript{79} And in resorting to weapons, the women are infringing the fundamental ‘rules of engagement’ for a fair fight.\textsuperscript{80} In the paradigmatic scenario of self-defence encapsulated in the bar-brawl, it was regarded as unreasonable for a person to use a weapon against an unarmed person.\textsuperscript{81} A fair

\textsuperscript{74} *Criminal Code* (Qld) s 271(2).

\textsuperscript{75} Grant et al discussed this issue in the context of the Canadian legislation which requires ‘reasonable apprehension of death or grievous bodily harm’ if the accused causes death or grievous bodily harm in repelling an assault (*Criminal Code* (Canada) s 34), see I Grant et al, *The Law of Homicide*, Ontario: Carswell Thomson Professional Publishing, 1994 at 6-41. However, note Tassone, unreported, SC NT, 26 Apr 1994, where the accused was charged with attempted murder and successfully relied on self-defence at trial. In this case, the accused attempted to kill her violent partner after he had raped her. Stubbs and Tolmie suggest that ‘the rape had “upped the ante” in the sense that it demonstrated a new level of violence towards her’, see discussion in J Stubbs & J Tolmie, ‘Falling Short of the Challenge’?, above n 1 at 734.

\textsuperscript{76} See 6.5.

\textsuperscript{77} Wallace noted that ‘women nearly always used a weapon. Only one woman allegedly poisoned her husband and no women bashed or strangled her husband to death’, A Wallace, *Homicide: The Social Reality*, Sydney: NSW Bureau of Crime Statistics and Research, 1986 at 94.

\textsuperscript{78} See 1.3.2.

\textsuperscript{79} Wallace reports that ‘the majority of women who had been subjected to physical abuse had sustained moderate to severe injuries. Punching and kicking was the most common mode of assault’, A Wallace, above n 77 at 97.

\textsuperscript{80} See I Leader-Elliott, above n 1 at 442, 444 - 445.

\textsuperscript{81} See N Seuffert, ‘Battered Woman Syndrome and Self-Defence’, above n 2; I Leader-Elliott, above n 1; D Martinson et al, above n 2; K O’Donovan, above n 2.
fight was a fist against fists. If a woman kills an unarmed man with a weapon, no matter how violent he is, it could be argued that the response is disproportionate.

The assumption that it is inappropriate to introduce a weapon into a violent altercation can be seen in the case of Cornick, where it was stated that 'on the best view of the evidence she did what she did to protect her son from the threats of an unarmed man'. This attitude ignores the fact that a woman is physically less powerful than a man and that in the domestic situation, a man's fists are a potentially lethal weapon. It ignores the nature of the threat that a violent man poses to his female partner, for as Sheehy, Stubbs and Tolmie assert:

Threats of unarmed attacks are not per se inherently less threatening than armed attacks on a woman with less strength, bodily size (and possibly physical training and socialisation into an aggressive gender role) than her male assailant.

There has now been judicial recognition of the relevance of the disparity in size between a female and her male aggressor to the assessment of reasonable necessity.

However, more crucial is the need for judicial acknowledgment of the threat that a violent male poses to his intimate partner. In cases where women have successfully relied on the defence of self-defence, questions of proportionality created by the fact that the deceased was unarmed and/or asleep obviously were not impediments. Rather, the crucial issue for the defence being left to the jury and ultimately accepted has been the construction of the threat that the deceased posed to the accused. The issue of proportion between threat and response is

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82 Unreported, SC Tas, 28 Jul 1987 at 12 per Cox J.
83 Wallace found that 'manual means were the second most common method [for male offenders to kill their partners]: nearly a quarter of men bashed, kicked or strangled their wife to death', A Wallace, above n 77 at 94. Easteal found that men killed their partners by assault in 20.7% of cases and by strangulation in 7.4% of cases, P Easteal, Killing the Beloved: Homicide Between Adult Sexual Intimates, above n 13 at 38.
85 See Walden (1986) 19 A Crim R 444 at 445 per Street CJ. The Court could conceive the threat created by an aggressive man to the accused as a 'lone woman' in the presence of the deceased's employee.
86 See 6.3.2.2.
87 See for example, Kontinnen, unreported, SC SA, 30 Mar 1992; Secretary (1996) 107 NTR 1; Stjernqvist, unreported, Cairns CC, 18 Jun 1996.
88 See 6.3.2.2.
essentially linked to the question of the nature of the threat that is accepted to exist in the domestic setting. If the seriousness of the threat is recognised, then proportionality ceases to be a live issue. So, in the cases where self-defence was successfully pleaded, the threat was constructed as a threat to kill or cause serious injury and consequently a fatal response was reasonably necessary.\(^9\)

6.3.2.2 Imminence

The law of self-defence used to require that there was an immediate (or at least imminent) threat, so that ‘the attack [must have been] started or be just about to commence when the defendant took defensive action’.\(^9\) In all Australian jurisdictions, the restrictive limits created by the requirement of imminence have been removed, as imminence is no longer a formal requirement of the law of self-defence.\(^1\) In addition, there has been recognition that a person can act in self-defence by way of a pre-emptive strike.\(^2\) The acknowledgment of the legitimacy of the pre-emptive strike has been a crucial development in the law of self-defence as far as it relates to those who kill in the context of abusive relationships. Nevertheless, the need to address the issue of imminence remains a practical obstacle for women who seek to rely on self-defence in respect of

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\(^9\) See 6.3.2.2.


\(^9\) Common law: Zecevic (1987) 162 CLR 645; NSW: Crimes Act 1900 (NSW) s418 (due to commence 22 February 2002); Tas: Criminal Code (Tas) s 46; SA: Criminal Law Consolidation Act 1935 (SA) s 15; Criminal Code (NT) s 29. In Western Australia (Criminal Code s 248), and Queensland (Criminal Code s 271), the accused must be defending him or herself against an assault. Under the former self-defence provision in the Northern Territory (contained in s 28(f)), the requirement for an ‘assault’ has been interpreted to require a temporal connection between the assault and the force used to defend the assault, Secretary (1996) 107 NTR 1 at 7 per Mildren J. However, it was accepted that the provision did not require the harm threatened be immediate or imminent. It was accepted that ‘an assault is a continuing one so long as the threat remains and the factors relevant to the apparent ability to carry out the threat ... have not changed’, Secretary (1996) 107 NTR 1 at 9 per Mildren J. In the context of a threatened assault, the person threatening the assault has to have ‘an actual or apparent present ability to effect his purpose’, Criminal Code (NT) s 187(b). The definition of assault in Western Australia (Criminal Code s 222) and Queensland (Criminal Code s 245) are in similar terms.


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killing their violent partners, as it is ‘still essential for an accused to demonstrate that their defensive action was necessary in the circumstances they faced’.

Confrontational situations

Most cases where women have successfully relied on self-defence have been in circumstances where they kill like men, that is during (or immediately) after an assault. In 5 of the 8 cases identified in my research where self-defence was successfully relied on at trial, the woman killed their violent partner in a ‘confrontational’ situation. For example in Hickey, the accused stabbed her estranged partner after he had thrown her on a bed, and proceeded to head-but and strangle her. In Lock, the accused stabbed her partner as he advanced towards her, and in Stephenson, the accused stabbed her husband during a struggle. In Zysce, the accused stabbed her de facto husband while he was strangling her. As Tarrant observes, in Zysce, ‘strong reliance was placed on evidence that bruising appeared on ... [her] neck after the killing to show the immediacy of the attack’.

Earlier in the evening, the accused had been struck with an iron bar, and a few days before her husband had strangled her until she was unconscious. In these cases, the women’s actions conformed to the paradigm of self-defence — an immediate response to an assault or threat.

However, even in circumstances where women killed in a ‘confrontational’ situation, the inherent masculinity of the appropriate model of behaviour in self-defence can operate to obscure a woman’s legitimate claim to self-defence. The need for an imminent threat has resulted in the court placing great importance on the events that take place immediately before the killing with the consequence

93 J Stubbs & J Tolmie, ‘Falling Short of the Challenge?’, above n 1 at 733 (emphasis in original).
that self-defence may not be considered appropriate if the attack is deemed to be over. In the case of Sheppard, the accused pleaded guilty to manslaughter in respect of killing her partner, and the inconsistency of the accused’s conduct with a claim of self-defence was the subject of comment by the judge. In recounting the circumstances of the killing, Bollen J stated that:

He had assaulted you vigorously just before the stabbing. Amongst other things he had held your head underwater ... I have no doubt that he did hold your head underwater then he seized you in a throttling manner around the throat. I have no doubt that all that caused you pain and fear.\(^{101}\)

Despite the existence of a violent assault prior to the stabbing, defence counsel expressly denied any ‘idea that a situation of self-defence existed’.\(^{102}\) Sheppard was applauded by the judge because she did not ‘make up a story to support an idea of self-defence’. The focus on the events immediately before the killing operated to exclude the possibility of raising self-defence as the ‘assault’ was over.\(^{103}\)

**Non-confrontational situations**

Self-defence has also been expanded into non-confrontational situations so that imminence can be demonstrated by establishing a continuing threat. In three of the successful self-defence cases identified in my research, the accused killed her violent partner while he was asleep or walking away, where there was a threat operative at the time of the killing.\(^{104}\) In *Kontinnen*,\(^{105}\) the accused lived in a menage-a-trois. The accused’s partner had threatened to kill the accused, his other de facto wife and their child when he woke in the morning. He went to sleep and was shot as he slept. Self-defence was left for the jury to consider. The requirement of imminence appears to have been satisfied as there was a threat on foot at the time of the killing, that is the threat that the he would kill the family

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101 Unreported, SC SA, 26 Aug 1992 at 1 per Bollen J.
102 Unreported, SC SA, 26 Aug 1992 at 2 per Bollen J.
103 See also Buzacon, unreported, SC SA, 21 Jul 1993; Franke, unreported, SC Tas, 22 Aug 1983; Rose, unreported, SC WA, Aug 1989.
104 See Kontinnen, unreported, SC SA, 30 Mar 1992; Secretary (1996) 107 NTR 1; Stjernqvist, unreported, Cairns CC, 18 Jun 1996.
when he woke up. The trial judge directed the jury that the threat to kill was a 'very important aspect of the case' and that considered in the context of the previous conduct of the deceased and the 'history of what had been happening that day', the jury may not be satisfied beyond reasonable doubt that the accused did not believe on reasonable grounds that it was necessary to shoot the deceased.  

A similar argument was successful in Secretary. The Court of Criminal Appeal of the Northern Territory allowed an appeal against conviction for manslaughter on the ground that there were sufficient grounds for self-defence. The appellant's relationship with the deceased was marked by his extreme and escalating violence towards her. Before the killing, the deceased had abused the appellant verbally and physically over an extended period. The deceased then said 'I want you to come back and tickle my back because I'm gonna have a little sleep and, when I wake up, I'm fucking (inaudible) haven't fuckin' started'.  

The appellant shot him while he was asleep and the issue on appeal was 'whether the [self-defence] provisions ... can apply to the deliberate shooting of a man whilst he is asleep'. In order to rely on self-defence, under the former provision in the Criminal Code (NT), it needed to be established that the appellant was defending herself from an assault. An assault is defined to include a threatened application of force provided the person had 'actual or present ability to effect his purpose'. In this case, the threat was not found in the 'general threat he represented in the relationship with her', and the Court did not address the possibility that the totality of accused's behaviour could be

106 Unreported, SC SA, 30 Mar 1992 at 147 per Legoe J.
108 (1996) 107 NTR 1 at 4 per Mildren J.
109 (1996) 107 NTR 1 at 3 per Angel J.
110 Criminal Code (NT) s 28(f). This has been omitted and replaced by s 29 Criminal Code (NT).
111 Criminal Code (NT) s 187(b).
112 J Stubbs & J Tolmie, 'Falling Short of the Challenge?', above n 1 at 735.
constructed as a threat to the accused. Instead, the Court accepted that this requirement was satisfied if there was a 'continuing' threat on foot at the time that the person responded with defensive force. And, evidence of the current threat was found in the words and actions of the deceased who, after a violent assault, said that he would continue the assault when he woke up.

A more flexible interpretation of the need to identify a continuing threat is found in the case of Stjernqvist. In this case, the accused shot her violent partner following an argument in which her husband assaulted her. The accused went inside and obtained a gun and returned and shot her husband. In relying on self-defence at trial, defence counsel asserted that there had been a specific threat to kill in the confrontation that preceded the killing. However, the trial judge did not consider that the jury needed to be satisfied in relation to whether that threat was uttered. The trial judge expressly stated that the assault could be found in the previous and repeated threats to kill the accused if the accused left him, viewed against the general nature of the abusive relationship. In this case, Derrington J directed the jury that:

If a person undertakes a course of threatening to kill another person and repeats it frequently enough, he must expect to be believed. And then you have that situation on any particular occasion that arises, and particularly if there is actual violence and emotion. One must say that a past history of repeated threats of killing a person in certain circumstances which discloses a deliberate frame of mind, a continuing frame of mind will, one must feel, be felt to be alive at that particular time, even though it may not be said at that particular moment. If I keep telling you from one moment to another, perhaps once a week, once every two weeks or

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113 Tolmie observes that one of the arguments advanced by the defence on appeal was that 'it was not necessary to find the assault against which the accused was defending herself in the words the deceased uttered before he fell asleep. Instead, the deceased's behaviour in the 12 hours leading up to his death amounted to one long threat', J Tolmie, 'Case and Comment Secretary', above n 21 at 227. Tolmie notes that 'unfortunately, beyond noting that the defence has made such a submission, none of the judges adopted it or even went so far as to assess its implications', at 227.

114 (1996) 107 NTR 1 at 8 - 9 per Mildren J. Contrast can be drawn with the New Zealand decision in Wang [1990] 2 NZLR 529. In that case, a narrow interpretation of imminence is found, where it was stated that 'what is reasonable under the second limb of s 48 and having regard to society's concern for the sanctity of human life requires, where there has not been an assault but a threatened assault, that there must be immediacy of life-threatening violence to justify killing in self-defence', at 539 per Bisson J. For an insightful discussion of the decision in Wang, see N Seuffert, 'Battered Woman Syndrome and Self-Defence', above n 2.

115 Unreported, Cairns CC, 18 Jun 1996.
something like that, that I am going to kill you, well, if I do it for long enough you do not need me to tell you on any particular occasion that that is in my mind because you can understand that it is continuing threat.\textsuperscript{116}

These repeated threats to kill provided the basis for the continuing threat provided the jury were satisfied that there was the capacity to carry out the threats if she left him. And Derrington J told the jury, ‘there seems to be nothing that I can see that would suggest at that time he lacked the capacity to kill her at a future time if she left him’.\textsuperscript{117}

Excepting this case, I have not identified any successful cases of self-defence in which women have killed their violent partner in a non-confrontational situation where her partner did not utter a specific threat to kill before walking away or falling asleep.\textsuperscript{118} The idea that a sleeping man with no threat on his lips could pose a threat does not fit easily with the traditional notions of self-defence. This reluctance to recognise a legitimate basis for self-defence absent a specific and current threat to kill is illustrated by the Victorian case of Bradley.\textsuperscript{119}

In Bradley, the accused killed her de facto husband while he was asleep. Despite the judge’s acceptance of the accused’s belief that her husband would kill her,\textsuperscript{120} the trial judge did not leave self-defence to the jury and directed it in relation to provocation only. The jury convicted her of manslaughter. The violence inflicted on the accused by her husband over their twenty-five year relationship can be categorised into a multitude of humiliating and repulsive acts, threats of violence

\textsuperscript{116} Unreported, Cairns CC, 18 Jun 1996 at 172 – 173.
\textsuperscript{117} Unreported, Cairns CC, 18 Jun 1996 at 174.
\textsuperscript{118} Although note the case of Tassone unreported, SC NT, 26 Apr 1994, where the accused successfully relied on self-defence in respect of attempted murder in a case where her partner made no verbal threats before he fell asleep. Tolmie suggests that ‘the jury clearly found a threat in the fact that he had raped her for the first time in their shared history before he fell asleep and in his past violent behaviour’, J Tolmie, ‘Case and Comment Secretary’, above n 21 at 224. Although Stubbs and Tolmie suggest that Tassone was not strong authority as the trial judge considered the case was ‘on any conceivable view ... on the outer limit of self-defence, [it] will be very likely to be beyond the outer limit’. However, the trial judge ‘left the question of self-defence to the jury on the basis that a trial judge needed to be extremely careful about withdrawing issues of fact from the jury’, J Stubbs & J Tolmie, ‘Falling Short of the Challenge?’, above n 1 at 734.
\textsuperscript{119} Unreported, SC Vic, 14 Dec 1994.
\textsuperscript{120} The trial judge stated ‘you were in a debilitated state and experiencing fear and panic at what you perceived to be your own imminent death,’ at 149a and that in ‘those final days you feared for your life’, at 155a per Coldrey J.
(including threats to kill) and actual violence. In the month preceding the killing, he would not let the accused out of his sight. In the week before the killing, he told the accused that he had hidden cartridges around the house but would not tell her where. On the morning of the shooting, he demanded breakfast in bed, and then refused to allow the accused back into bed. He called her ‘a dog’. He then fell asleep. The accused shot and killed him.

Despite the acceptance that the accused feared imminent death, her husband’s previous violence and his implied threats that he would kill her, there was no imminent danger that the court was prepared to recognise. The accused’s fear of death based on the accumulation of her husband’s behaviour did not provide a basis of the defence of self-defence, as the accused was not responding to a specific threat (but rather a generalised and well-founded fear) that her husband would kill her.

Imminence and battered women

Although imminence is no longer essential as a matter of law, in accessing self-defence the focus continues to be on the attack or threat in close temporal proximity to the killing. This poses continued difficulties for battered women, as the law’s understanding of self-defence does not easily accommodate on-going violence. Women who kill their abusive partners do not kill in the stereotypical scenario of self-defence: the once-off fight between two male strangers of equal size and strength, usually in a public place. The aggressor is not a stranger. He is her sexual partner, maybe the father of her children. The violence is not usually a ‘once-off’. It forms part of ongoing behaviour of domination: a complex relationship involving many strategies of control including violence.\(^{121}\)

In contrast to this reality, domestic violence has usually been constructed as a series of discrete assaults, each having an identifiable beginning and end in order to fit within the law’s story of the self-defensive killing (the isolated and once-off attack).\(^ {122}\) In the context of a violent domestic relationship, the problem (and

\(^ {121}\) See 2.5. See also J Stubbs & J Tolmie, 'Falling Short of the Challenge?', above n 1 at 79.

\(^ {122}\) This construction of self-defence is reinforced by the rules of evidence and the trial process, see 7.2.
the artificiality) arises from the need to isolate the parameters of any particular assault. For example, in Secretary, Mildren J considered that the issue was whether 'the assault had been completed by the time the deceased fell asleep', so that it could not be said that the accused was 'defending that assault, but a different one — an anticipated assault which she feared may occur in the future'. If the assault was completed, then self-defence was not available, as the accused could not be said to be defending herself against a continuing assault.

The most important assault from the perspective of the criminal justice system is that identified immediately before the killing. The panorama of previous violence is relegated to the 'background' with the effect that the prior violence in the relationship is minimised and the threat faced by the accused is distorted. The identification of a threat of further serious violence 'immediately before the fatal attack' — an imminent assault — is viewed as the barrier that stands between self-help and self-defence, enabling a distinction to be drawn between self-defence and 'revenge'. This view is echoed in the comments of Kirby J in Osland, that:

> It is still necessary to discriminate between a self-defensive response to a grave danger which can only be understood in the light of a history of abusive conduct and a response 'that

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123 (1996) 107 NTR 1 at 8.
124 See S Tarrant, 'Something is Pushing them to the Side of their Own Lives', above n 1 at 599. The diminution in value of prior assault is seen in Osland (1998) 197 CLR 316, where the prosecution accepted that while the deceased had been brutal and tyrannical in the past, at the time of the killing that behaviour had ceased, at 320 per Gaudron and Gummow JJ.
125 J Tolmie, 'Provocation or Self-Defence for Battered Women who Kill', above n 1 at 69. For example, in Bradley, unreported, SC Vic, 14 Dec 1994, the construction of the danger faced by the accused in terms of the events that occurred immediately before the killing did not accord with the reality of terror of her violent domestic relationship. The actual conduct to which Bradley responded by killing the deceased was that the deceased called her a 'dog'. If the killing is viewed in this way, it is easy to see why provocation was the appropriate defence. However, it is to ignore the reality of the situation to say that the threat Bradley faced was an insult.
126 Osland (1998) 197 CLR 316 at 381 per Kirby J.
127 See Hubble who cautions that the reconceptualisation of the concept of imminence to encompass the situation of a woman who kills her violent partner where there is time to call the police will condone premeditated killing. Hubble says that the prospect of exonerating significantly premeditated homicide is introduced ... the suggestion that battered women be permitted to engage in retaliatory conduct even where time allowed lawful assistance to be obtained effectively removes the law's basis for distinguishing between self-defence and self-help', G Hubble, 'Feminism and the Battered Woman', above n 1 at 120. See also W Chan, 'A
simply involves a deliberate desire to exact revenge for past and potential – but unthreatened – future conduct'.

'Revenge' is marked by the absence of an imminent threat and the label of 'revenge' serves to distinguish the undeserving case of homicide from lawful self-defence. However, this may not be a helpful indicator of culpability in cases where women kill their violent partners, for as Grant suggests, the use of the imminence doctrine to draw the line between self-defence and revenge is 'based on an empirical assumption that alternative ways of saving one's life are available to those who are not actually being assaulted but who fear some future attack'.

My argument is that it is important to bear in mind the purpose served by the concept of imminence. Imminence is a factor relevant to the consideration of the necessity of the accused's conduct. And although imminence can effectively demonstrate necessity, it is the reasonable necessity of using defensive force that founds the defence of self-defence rather than its imminence per se. In those cases where self-defence has been successfully relied on by battered women in the face of a threat of further serious harm, Kirby J acknowledged that:

The significance of the perception of danger is not its imminence. It is that it renders the defensive force used really necessary and justifies the defender's belief that 'he or she had no alternative but to take the attacker's life'.

Similarly in Secretary, Mildren J commented that the Supreme Court of Canada in Lavallee 'ultimately decided that the question of imminence was not

Feminist Critique of Self-Defence and Provocation', above n 2 at 44; W Chan, Women, Murder and Justice, above n 2 at 139 – 140 for a discussion of the self-help argument.

128 (1998) 197 CLR 316 at 381 citing Secretary (1996) 107 NTR 1 at 3 per Angel J.

129 J Grant et al, above n 75 at 6-38.

130 For example, if a gun is pointed or a knife raised the threat is imminent and the necessity of defensive force is obvious.

131 Osland (1998) 197 CLR 316 at 381 citing Lavallee (1990) 55 CCC (3d) 97 at 115. See also J Horder, 'Redrawing the Boundaries of Self-Defence' (1995) 58 Modern Law Review 431 at 442, who asserts that in some cases imminence has no purpose to serve provided it can be established that the force was necessary.

important; what was important was whether the accused reasonably believed that she had no alternative but to kill'. 133

In determining whether fatal defensive force is necessary in the domestic context, an understanding of the dynamics of domestic violence would reveal that the requirement of imminence does not always provide assistance. 134 In his consideration of imminence, Horder postulates that:

Suppose A (a notoriously violent criminal) is holding B hostage. A tells B that A may well kill B as a ransom demand has not been met. Knowing A's reputation, B kills A two days later, when A falls asleep on guard duty, and escapes. If we assume that it was necessary (as well as proportionate) for B to kill A in order to escape, is anything added by the requirement that the threat posed by A be imminent? I doubt it. The imminence of a threat is simply one of those factors taken into account in deciding whether the use of force was necessary. 135

The hostage analogy has been effectively used by feminists to seek to illuminate the dangers that women experience in the home, 136 and my argument is that an understanding of domestic violence may assist in determining whether fatal force was necessary (without asking also whether the threat was imminent). 137

In my argument, for some women, the threat posed by domestic violence consists in the very existence of the violent partner and his presence in her home, as there exists a perpetual state of fear, and this needs to be understood. The threat of violence is, for many women, constant in a battering relationship. 138 As West observes:

With the exception of Vietnam veterans, no white, heterosexual man I have ever known knows how it feels to be afraid all the time. Most women as well lack this knowledge. But

133 (1996) 107 NTR 1 at 10.
134 See 2.5.
135 J Horder, above n 131 at 442.
136 See 6.3.2.3.
137 See 6.3.2.3 for a consideration of a duty to retreat. See 2.6 for a discussion of women's responses to violence and barriers to leaving. In Chapter Seven, I consider the evidentiary framework that would allow this type of evidence before the jury.
138 See criticism by Hubble who asserts that this construction of domestic violence is 'an oversimplified portrayal of domestic violence which aims to subsume a diversity of experiences into one undifferentiated picture', G Hubble, 'Self-Defence and Domestic Violence', above n 1 at 52.
many women – and there are many battered women – know what it means to define oneself in such a way as to make it possible to live with the truth that tomorrow you may die.  

A woman in a battering relationship may love her abuser and the relationship may at times be harmonious, at times the violent relationship carries on like any ‘normal’ relationship. However, the threat of violence is the ever present shadow that hovers in the background of the relationship: it is ‘the third who lay in [their] embrace’. The fear of domestic violence is the juxtaposition of the known and predictable precursors to violence (a bad day at the office, a loss by the football team, alcohol) with the capacity for the violence to be arbitrary and unforeseen. She has become, of necessity, acutely aware of the signals of impending physical violence. However, the woman will not always know exactly when the violence will occur, the terror is that she knows that it will.

In the same way that there has been recognition of cumulative provocation, there needs to be recognition of cumulative self-defence. It is important that there is clear acknowledgment that the experience of domestic violence is a cumulative and complex experience, rather than a list of discrete and disconnected acts of violence. The Queensland case of *Stjernqvist* provides promising judicial recognition that the threat posed to women in a violent domestic relationship was the continued experience of living in a violent relationship, rather than any specific act of the deceased. In directing the jury on the issue of self-defence, Derrington J told the jury that:

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140 See M Mahoney, ‘Legal Images of Battered Women’, above n 2 at 16 and 2.6.3.2 for a discussion of the lack of clarity in the line between a violent and normal relationship. See also Leader-Elliott’s moving account of Bill and Vera that tells the story of a violent relationship. He records the episodes of violence but observes this: ‘I have not shown the ordinariness, the normality, of our lives between the nights of violence. … We did the things that most families do’, J Leader-Elliott, above n 1 at 429.

141 While writing this section, this phrase used by Judith Wright (in a very different context in *Woman to Man*) came to mind to explain the ever-present nature of the threat of violence, J Wright, *Collected Poems 1942 - 1970*, North Ryde: Angus & Robertson, 1987 at 29.

142 Leader-Elliott writes of his account of Bill and Vera that ‘[i]n this relationship, as in many others, the essence of terrorism was to be found in the unpredictability of violent attack. Unpredictability is heightened by theatrics and enhanced, rather than diminished by bathos. Domestic terrorism oscillates between reality and absurdity. A missed cue could prompt him to a sudden and unprecedented attack. Though his violence was ritualised, it was not completely
What emerges is necessarily a sad picture of serious violence – not violence that caused any great physical harm at any particular time, but violence of such a nature that, you might think, would be virtually intolerable, particularly if one had the view that it was going to be never ending. To live in an atmosphere where there was a constant threat of violence, you might think, is a very hard thing and must be very emotionally wearing. And, of course, after a while it becomes a case where not only is there physical violence, but the mere endurance of the threat of violence also becomes a form of psychological violence as well.144

It is significant that the trial judge recognised that the danger that the accused faced was found in ‘the threats the deceased had made to the accused over a period of years, rather than any specific action he had taken on the day in question’.145 The accused was acquitted by the jury following a deliberation of 15 minutes. It is notable that the trial judge did not unrealistically interpret the violence as ‘a series of battering incidents with lulls between confrontational incidents’.146

6.3.2.3 Duty to Retreat

Historically, the law of self-defence contained a legal duty to retreat.147 The contemporary understanding of retreat envisages that a person may avoid a confrontation by leaving the situation, calling the police, and/or seeking assistance from other sources. And while a general duty to retreat no longer forms part of the law of self-defence in most jurisdictions in Australia,148 a failure to retreat in the face of danger remains relevant to the assessment of whether reasonable grounds existed for the accused’s conduct.149 As shown at 6.3.2.2, the requirement for a person to retreat in the face of danger is closely linked to the concept of imminence. If an assault is not imminent, there is time to

within his control’, 1 Leader-Elliott above n 1 at 430. In relation to violent relationships generally, that ‘the constant element in the violent relationship is its reliance on terror’, at 430.
144 See 5.3.1.1.
145 Stjernqvist unreported, Cairns CC, 18 Jun 1996 at 153 per Derrington J.
146 J Stubbs & J Tolmie, ‘Falling Short of the Challenge?’, above n 1 at 735 referring to Stjernqvist unreported, Cairns CC, 18 Jun 1996 at 153, 165, 174 per Derrington J.
147 J Tolmie, ‘Provocation or Self-Defence for Battered Women who Kill’, above n 1 at 68 n 56.
149 However, note Criminal Code (Qld) s 272 and Criminal Code (WA) s 249 which require that the accused ‘declined further conflict and quit or retreated as far as practicable’ in the case of a provoked assault where the accused has attempted to kill or cause grievous bodily harm.
146 See Zecevic (1987) 162 CLR 643 at 663 per Wilson, Dawson and Toohey JJ.
rely on alternatives other than the application of force to avoid the threatened harm, and so if other alternatives are available it is not considered reasonably necessary to act in self-defence.\textsuperscript{150}

Retreat and battered women

The concept of retreat in the context of killings committed in response to ongoing domestic violence has been the subject of considerable feminist comment.\textsuperscript{151} This issue is significant, for as shown in Chapter Seven, retreat is highly relevant to community conceptions about the responses of women to domestic violence.\textsuperscript{152} In the context of threatened violence in a once-off encounter with a stranger or even an encounter between two people known to each other in the 'public' sphere, the relevance of retreat (and what retreat requires) is relatively straightforward. However, a clear understanding of what 'retreat' might mean in the context of an intimate relationship has proved more problematic.\textsuperscript{153} Does it mean that a battered woman should leave the house on that occasion or is it a broader obligation to leave the house permanently? How many times should a victim of domestic violence be required to retreat?\textsuperscript{154} While, it is inappropriate to impose an overriding obligation on a battered woman to leave a violent relationship instead of using defensive force,\textsuperscript{155} an assessment of the alternatives available to a woman is a separate issue relevant to the need to use defensive force.

\textsuperscript{150} Lavallee (1990) 55 CCC (3d) 97 at 115 per Wilson J.

\textsuperscript{151} For a sample, see M Mahoney, 'Legal Images of Battered Women, above n 2; M Mahoney, 'Exit: Power and the Idea of Leaving in Love, Work and the Confirmation Hearings' (1992) 65 Southern California Law Review 1283; A McCollan, 'In Defence of Battered Women who Kill', above n 2; D Martinson et al, above n 2 at 60 - 68; N Seuffert, 'Battered Woman Syndrome and Self-Defence', above n 2; J Stubbs & J Tolmie, 'Battered Woman Syndrome in Australia', above n 1; J Tolmie, 'Provocation or Self-Defence for Battered Women who Kill', above n 1; J Stubbs & J Tolmie, 'Feminisms, Self-Defence, and Battered Women', above n 1. Cf G Hubble, 'Feminism and the Battered Woman', above n 1; G Hubble, 'Self-Defence and Domestic Violence', above n 1.

\textsuperscript{153} See 7.4.1.2 and 7.4.2.2.

\textsuperscript{154} As Wells has asked '[s]hould ...[the battered woman] be required to go on retreating forever?', C Wells, 'Domestic Violence and Self-defence', above n 2 at 127.

Some commentators have been critical of the application of self-defence to the
cases where battered women have killed their abusive partners in a ‘non-
confrontational’ situation, as in these circumstances there is clearly time to seek
lawful assistance. For example, Hubble writes that ‘to allow self-defence to
exculpate conduct that was chosen in preference to lawful assistance eliminates
the traditional distinction between self-defence and self-help’.156 These
comments conform to the approach taken by the New Zealand Court of Criminal
Appeal in Wang, where the Court stated that:

There may well be a number of alternative courses open, other than the use of force, to a
person subjected to a threat which cannot be carried out immediately. If so, it would not be
reasonable to make a pre-emptive strike.157

In this case, approval was given to the comments of the trial judge that to accede
to the proposition that self-defence was available would ‘be close to a return to
the law of the jungle’.158

While I agree that the availability of alternative options is relevant to an
assessment of the reasonableness of the accused’s actions, in my view, the
availability of alternative options should not automatically exclude a woman’s
claim to reasonable self-defence. In assessing the application of self-defence in
cases where there is time to obtain assistance, the law’s concern should be to
consider whether it could be said that the woman was acting in lawful self-
defence. The fundamental issue is whether the use of deadly force was
reasonably necessary, and this may involve a consideration of the other options
that were reasonably open.159 The existence of possible alternatives to the use of
deadly force should not be the trump card for the prosecution case.

In considering the issue of retreat, feminist commentators have highlighted the
need to have regard to the ‘broader social and political context in which a

156 G Hubble, ‘Self-Defence and Domestic Violence’, above n 1 at 53. See also G Hubble,
‘Feminism and the Battered Woman’, above n 1 at 120.
157 [1990] 2 NZLR 529 at 536 per Bisson J. Sefuffert comments that according to Wang ‘it is
unreasonable as a matter of law not to retreat in the face of a threat where there are “alternative
courses of action open”’, N Seuffert, ‘Battered Woman Syndrome and Self-Defence’, above n 2 at
314.
158 [1990] 2 NZLR 529 at 535 per Bisson J.
woman who has killed an abusive man may have acted'. In my view, in assessing the alternatives available to battered women, it is necessary to look at the situation of the woman's life as well as to be cognisant of the body of knowledge concerning battering relationships. To suggest that a woman who kills in circumstances where there is time to call the police cannot be acting in reasonable self-defence, is to assume that 'the opportunity to leave the house or call the police will always be an effective way for a battered woman to deal with domestic violence'. Our understanding of domestic violence reveals that this simply is not the case. In assessing reasonable necessity, it is essential that regard be given to the attempts that a woman has made to pursue other alternatives in the past, and the likelihood of avoiding future violence if she was to leave the house or call the police on this occasion.

Another attempt to communicate the limitations of the alternatives to defensive force for a person 'trapped' in a violent relationship, has been to draw an analogy between the situation of a woman in a violent domestic relationship and the situation of a hostage. For example, McColgan writes:

[The battered woman] like the hostage, is caught within a potentially life-threatening situation. ... The possibility of seeking police protection or of simple flight may not constitute adequate alternatives to the use of force as she may know from experience that either measure is simply a temporary one.

The linkage of the hostage and the battered woman attempts to correct misconceptions that may be held about the realities of domestic violence. It draws on the powerful cultural association of the danger faced by a hostage to

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159 See I Leader-Elliott, above n 1 at 449.
160 J Stubbs & J Tolmie, 'Battered Woman Syndrome in Australia', above n 1 at 194. See also 2.6, 7.4.1 and 7.4.2.
161 See 2.5 and 2.6. For reception of evidence in connection with the dynamics of domestic violence and the reasons for women to remain in violent relationships, see Chapter Seven.
162 J Stubbs & J Tolmie, 'Feminisms, Self-Defence, and Battered Women', above n 1 at 78.
164 See 6.3.2.2. See J Horder, above n 131; M Mainey, 'Legal Images of Battered Women', above n 2; A McColgan, 'In Defence of Battered Women who Kill', above n 2; I Leader-Elliott, above n 1; J Stubbs & J Tolmie, 'Battered Woman Syndrome in Australia', ibid.
165 A McColgan, 'In Defence of Battered Women who Kill', ibid. at 519.
rewrite the narrative of self-defence for battered women who kill in response to ongoing domestic violence.\textsuperscript{166}

In \textit{Stjernqvist}, the trial judge was aware of the limitations of the alternatives open to the accused. There was evidence that the deceased made repeated threats to ‘track down and kill the accused should she leave him’.\textsuperscript{167} In assessing the reasonableness of the accused’s conduct, the trial judge directed the jury that:

> You would have to consider whether or not in those circumstances the situation was so intolerable that she could not stay, having regard to his refusal to let her have other women around and that type of thing, which means she had the impossible situation of remaining there in those circumstances, or leaving and then being subject to the threat of being killed by him.\textsuperscript{168}

His Honour clearly understood the dangers confronting women who leave violent partners: ‘there are irresponsible people with guns who go and blast their wives and children, their wife’s parents, when their wives are trying to hide from them’.\textsuperscript{169}

\subsection*{6.3.3 THE OBJECTIVE STANDARD: REASONABLENESS}

The requirements of proportionality,\textsuperscript{170} imminence\textsuperscript{171} and retreat\textsuperscript{172} are all related to the objective standard of self-defence that is embodied in the concept of ‘reasonableness’ – the need for reasonable grounds for the accused’s belief\textsuperscript{173} or that the accused’s actions are reasonable in the circumstances as the accused believed them to be.\textsuperscript{174} As I argued in Chapter Three, the requirement of ‘reasonableness’ plays a crucial role in the doctrine of self-defence:\textsuperscript{175} it operates as the means by which a balance is struck between the high value attached to

\textsuperscript{166} M Mahoney, ‘Legal Images of Battered Women’ above n 2 at 92 – 93. See also 6.3.2.2.
\textsuperscript{167} J Stubbs & J Tolmie, ‘Falling Short of the Challenge?’, above n 1 at 740.
\textsuperscript{168} Unreported, Cairns CC, 18 Jun 1996 at 165 per Derrington J. His Honour clearly recognised the significant danger that leaving a violent man raises. His Honour considered that ‘if she were living under the threat of his killing her if she left him, then that was a very substantial threat. It was not immediate, but certainly there, and very real if she did leave him’, at 174.
\textsuperscript{169} Unreported, Cairns CC, 18 Jun 1996 at 177 per Derrington J. See also 1.3.1.
\textsuperscript{170} See 6.3.2.1.
\textsuperscript{171} See 6.3.2.2.
\textsuperscript{172} See 6.3.2.3.
\textsuperscript{173} See 6.3.3.1.
\textsuperscript{174} See 6.3.3.1.
\textsuperscript{175} See 3.4.1.1. and 3.4.2.1.
human life and the circumstances in which human life is not the ultimate value. It allows for the assessment of the circumstances where a person is able to put their own well being and interests above another person’s life – circumstances in which it would be unreasonable to require self-sacrifice. It is the mechanism by which the accused’s motivations and actions are subjected to assessment according to community standards.

6.3.3.1 The standard of reasonableness

Common law

At common law, both components of the law of self-defence contain an objective element: the decision to use force and the decision concerning the amount of force used. This means that both the belief of the accused in the existence of the threat and the belief in the necessity of using the amount of force employed must be based on reasonable grounds.\(^{176}\) The accused must honestly belief on reasonable grounds that he or she is being threatened or attacked,\(^ {177}\) and in assessing the degree of force used, the issue is whether the defendant believed on reasonable grounds that the force applied was reasonably necessary.\(^ {178}\)

Tasmania

In Tasmania, it is only the quantum of force that is assessed objectively. Section 46 of the Criminal Code (Tas) provides that ‘a person is justified in using, in the defence of himself or another person, such force as, in the circumstances as he believes them to be, it is reasonable to use’.\(^ {179}\) This contains two requirements:

\(^{176}\) The common law applies in Victoria and the Australian Capital Territory. The common law also applies in NSW South Wales until the commencement of the Crimes Amendment (Self-Defence) Act 2001 (NSW).

\(^{177}\) Zecacvic (1987) 162 CLR 645 at 651 – 652 per Mason CJ, at 656 – 659 per Wilson, Dawson and Toohey JJ, at 672 – 674 per Deane J, at 683 per Gaudron J.

\(^{178}\) In Zecacvic (1987) 162 CLR 645 at 661 per Wilson, Dawson and Toohey JJ. See also Viro (1978) 141 CLR 88 at 146 – 147 per Mason J.

\(^{179}\) It is noted that the Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General have recommended an approach to self-defence consistent with the Tasmanian approach. See Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, General Principles of Criminal Responsibility Chapter 2, Final Report, 1992 at 69. The Tasmanian provision is in similar terms to section 48 Crimes Act 1961 (NZ) and similar to the common law position in England, see Williams (Gladstone) (1983) 78 Cr App R 276; Beckford [1987] 3 All ER 425; Martin [2001] EWCA Crim 2243.
first, the subjective belief of the accused in the need to use defensive force and second, ‘the determination by the jury as to whether given the belief of the person, it was reasonable to use the actual force used’. It is necessary to consider whether the accused genuinely believed that he or she was acting in self-defence (subjective test) and then, in view of the circumstances that the accused believed to exist, ‘whether a reasonable person would consider the force actually used was reasonable’. The degree of force used is assessed according to whether it was reasonable in the circumstances as the accused believed them to be. The objective test is assessed according to whether a reasonable person in the defendant’s position and with the defendant’s attributes would have believed that the force applied by the defendant was reasonably necessary.

New South Wales

Similarly, in New South Wales (after the commencement of the Crimes Amendment (Self-Defence) Act 2001 (NSW)) section 418 of the Crimes Act will provide that self-defence is available when ‘the person believes the conduct is necessary and the conduct is a reasonable response in the circumstances as he or she perceives them’. This contains the same mixture of objective/subjective tests as the Tasmanian position.

South Australia

The South Australian self-defence provision also contains the same mixture of objective/subjective tests. The need to act for a defensive purpose is assessed according to whether the accused genuinely believed that the force used was necessary and reasonable for the purpose of self-defence. The amount of force used by the accused is then subjected to objective scrutiny. It is necessary to assess whether the ‘conduct was, in the circumstances as the defendant genuinely

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180 Walsh (1991) 60 A Crim R 419 at 423 per Slicer J.
181 Walsh (1991) 60 A Crim R 419 at 423 per Slicer J.
182 See Walsh (1991) 60 A Crim R 419 at 424 per Slicer J.
183 This Act is likely to commence on the 22 February 2002.
184 Criminal Law Consolidation Act 1935 (SA) s 15 as amended by the Criminal Law Consolidation (Self-Defence) Amendment Act 1997.
185 A defensive purpose is defined in s 15(3) Criminal Law Consolidation Act 1935 (SA) to include a person who acts ‘in self defence or in defence of another’.
them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist. The assessment of the degree of force is approached from the perspective of the hypothetical ordinary person in the circumstances as the accused believes them to be.

Northern Territory

In the Northern Territory, a person is justified in acting in self-defence or defence of another if 'the person believes that the conduct is necessary' and 'the conduct is a reasonable response in the circumstances as the person reasonably perceives them to be'. This provision is similar to the common law as an accused's perception in relation to the need to use defensive force needs to be reasonable. In addition, the accused's response (the amount of force used) must be a reasonable response.

Western Australia and Queensland

In Western Australia and Queensland, a person using defensive force intended or likely to cause death or grievous bodily harm in response to an unprovoked assault can rely on self-defence provided: (1) there was a reasonable apprehension of death or grievous bodily harm from the deceased's assault; (2) the accused believed on reasonable grounds that death or grievous bodily harm cannot be otherwise avoided; and (3) that the force was necessary.

6.3.3.2 The standard of reasonableness and the battered woman

Although an objective standard is essential for the operation of self-defence, it is generally accepted that as a measure of community standards the concept of

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186 Criminal Law Consolidation Act 1935 (SA) s 15(1)(b). It is noted that there is a substantial difference between the South Australian law of self-defence and the law in all other jurisdictions except NSW – the retention of the 'excessive self-defence' provision, Criminal Law Consolidation Act 1935 (SA) s 15, as amended by the Criminal Law Consolidation (Self-Defence) Amendment Act 1997 (SA) s 15(2). This has the effect of reducing the crime from murder to manslaughter if the force used by accused was objectively excessive. This is also the position in NSW following the amendment to the Crimes Act 1900 (NSW) by the Crimes Amendment (Self-Defence) Act 2001 (NSW) See 6.3.2.1.

187 Criminal Code (NT) s 29.

188 The Laws of Australia, above n 50 at [73]. See Criminal Code (Qld) s 271(2), s 245 defines 'assault'; Criminal Code (WA) s 248, s 222 defines assault.
'reasonableness' has largely operated to exclude the experiences of women.\textsuperscript{189} The problems experienced by battered women in attempting to construct the killing of their abusive partner as 'reasonable' self-defence is impeded by a number of interrelated factors: the fundamental masculinity of the standard of reasonableness; cultural assumptions about masculinity and femininity, as well as the impact of stereotypes based on racial or cultural factors; and misconceptions about the seriousness and dynamics of domestic violence.

\textbf{Fundamental masculinity of reasonableness}

The current application of the concept of 'reasonableness' rests on a flawed and gendered view of human behaviour, as 'conceptions of what is reasonable are determined by social mores and these mores are informed by a construction of reality which is founded on male norms'.\textsuperscript{190} Reasonableness is based on the way men perceive events and the way in which men might respond in a threatening situation. The dominant model of reasonable self-defence rests upon the masculine model of defensive action, circumscribed by the male indicators of reasonable necessity: imminence, duty to retreat and proportionality. And as a


\textsuperscript{190} J Tolmie, 'Provocation or Self-Defence for Battered Women who Kill', above n 1 at 72.
consequence, there has been considerable difficulty applying notions of ‘reasonableness’ to the actions of battered women who kill their abusive partners.

If a woman kills her violent partner, the difficulty of appreciating the ‘reasonableness’ of her actions is not aided by the insensitivity sometimes found in trial judges’ directions to juries. The powerful suggestive effect of language was not recognised by the trial judge who directed that:

[In] dealing with self-defence; it is both good law and ... good common sense that a man who is attacked may defend himself. Where I use the word ‘man’, I do so because it is easier than saying man or woman or person or he or she and doubling up all the time. That a man who is attacked may defend himself; he may do but may only do what is reasonably necessary.\textsuperscript{191}

It is a questionable assumption that it is more convenient to use the word ‘man’ in setting out the doctrine of self-defence, and further, in a case where the accused is female it is a highly inappropriate use of language.

**Cultural stereotypes**

A lack of culturally understood models of female aggression and violence means that lawyers, judges and juries are not able to draw on these models to explain the reasonableness of the woman’s actions.\textsuperscript{192} As discussed in Chapter Four, the female offender is generally associated with the ‘popular perceptions of female traits such as passivity, irrationality and irresponsibility’.\textsuperscript{193} The female killer is typically presented in stereotypical terms – as ‘either weak – a victim of her circumstances, emotions or hormones – or as a wicked, a cunning monster’.\textsuperscript{194} If she is weak, she is deserving of our sympathy; otherwise, she is deserving of our condemnation. If the woman conforms to the ‘passive’ stereotype, then it is

\textsuperscript{191} Collingburn (1985) 18 A Crim R 294 per McGarvie J at 296 referring to the comments of the trial judge.


\textsuperscript{193} See 4.2. See also J Bridgeman & J Mills, Feminist Perspectives on Law, London: Sweet and Maxwell, 1998 at 621; T Henning, ‘Psychological Explanations in Sentencing Women in Tasmania’ (1995) 28 Australian and New Zealand Journal of Criminology 298 at 316. This construction is supported by the reception of ‘battered woman syndrome’ evidence, as its theoretical basis rests on the concept of ‘learned helplessness’, see 7.3.4.2.

\textsuperscript{194} B Naylor, ‘Media Images of Women who Kill’ (1990) 15 Legal Service Bulletin 4 at 7.
harder to make a claim to rationality and normalcy.\textsuperscript{195} As I argued in Chapter Four, the stereotypes of passivity and irrationality operate to subvert the rationality of the battered woman's actions, and so make it more difficult to argue that the accused's actions were carried out in reasonable self-defence.\textsuperscript{196}

The inconsistency inherent in the constructs of victim/offender/agent\textsuperscript{197} makes it difficult to reconcile the image of the helpless/passive woman with the reality of a woman who has committed an act of fatal violence.\textsuperscript{198} And, although the mismatch is a problem for all battered woman, it is a particular concern for those who do not conform to the stereotype of the 'appropriate' victim of domestic violence: women who fight back, ethnic women, women who use drugs and alcohol. If the woman does not conform to the stereotype of 'appropriate female', then she is not a 'battered woman' - a victim - and so has no proper claim to self-defence. These women run the risk of being doubly disadvantaged by the legal system as they do not fit either the male paradigm of self-defence or the stereotype of the battered woman.\textsuperscript{199}

Women who have fought back previously in response to their partner's violence are likely to experience difficulty relying on self-defence.\textsuperscript{200} As shown at 2.6, women who kill their abusive partners have often previously taken active steps to avoid violence: they may have left the relationship, called the police, taken out restraining orders, or fought back. Yet, the myth of helplessness is pervasive within community and legal consciousness. If a woman has previously used force to defend herself against her partner's violence then the boundaries of aggressor and victim are less clearly defined. The situation is more likely to be classified as a case of mutual violence in which neither party is subordinate, ignoring the other factors of domination such as psychological abuse, physical

\textsuperscript{195} Ibid.
\textsuperscript{196} See 4.4.3.
\textsuperscript{197} See 4.2.4 and 4.4.3.
\textsuperscript{199} See A McColgan, 'In Defence of Battered Women who Kill', above n 2; J Stubbs & J Tolmie, 'Feminisms, Self-Defence, and Battered Women', above n 1 at 81.
\textsuperscript{200} J Stubbs & J Tolmie, 'Falling Short of the Challenge?', above n 1 at 736 - 739.
superiority, and the context in which the defensive acts occurred. In these circumstances of mutual combat between ‘unarmed’ equals, it is difficult to argue that resort to a weapon and the infliction of fatal force was reasonably necessary.

The intersection of race/ethnicity and gender may also operate to distort an understanding of the reasonableness of the actions of women from culturally diverse backgrounds who kill violent male partners. As shown at 1.2.2 and 2.4, the risk of domestic violence, including domestic homicide is disproportionately high in Indigenous communities. Aside from the differential incidence of domestic violence, women from Indigenous or ethnic communities experience and respond to domestic violence within a different social framework. In their influential writing, Stubbs and Tolmie have stressed the importance of recognising:

> How the intersection of their gender and ethnic identity might impact on the range of social options available to them in coping with the violence, and might also affect the way in which they are constructed and their behaviour understood by the legal system.

In seeking to meet the standards for self-defence, these women face additional barriers, as they do not conform to the gendered standard (male) or to the racial/ethnic standard (white) inherent in the concept of ‘reasonableness’.

In contrast, men who kill and seek to rely on self-defence are able to benefit from a culturally endorsed view of male rationality provided their actions (and they) conform to ‘the dominant construction of masculinity’. The ready

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201 See *ibid* at 737. See 7.4.2.1.
202 See 2.6.4.
203 J Stubbs & J Tolmie, ‘Falling Short of the Challenge?’, above n 1 at 748.
204 See *ibid* at 747. See also 5.3.3.1.
205 G Barnes, above n 192 at 69. This is also evidenced in the acceptance of self-defence in cases where men claim to have acted in self-defence by killing in response to a homosexual advance. See Attorney General’s Department New South Wales, *Review of Homosexual Advance Defence Discussion Paper*, Sydney, 1996; P Johnston, ‘More than Ordinary Men Gone Wrong: Can the Law Know the Gay Subject?’ (1996) 20 Melbourne University Law Review 1152; F Manning, *Self Defence and Provocation: Implications for Battered Women who Kill and for Homosexual Victims*, Briefing Paper No 33/1996, NSW Parliamentary Library Research Centre, 1996. It is recognised that some males are not the beneficiary of favourable stereotypes. As Barnes notes that the ‘heroes or “icons of exemplary masculinity” are still mostly white, middle to upper class and overtly heterosexual males’, G Barnes, above n 192 at 69.
association of male violence with rational and reasonable responses was evidenced in the case of Morgan,\textsuperscript{206} where the accused was acquitted on the grounds of defence of another in respect of the killing of his brother in law. Morgan, a police officer, became aware of allegations that the deceased had been sexually molesting three young girls, two of whom were the deceased’s children’s (Morgan’s nieces). One of the girls alleged that the deceased had threatened to kill her if she told anyone of the deceased’s conduct. The accused gave evidence that in view of the threats made, ‘he believed that all three girls were in serious danger, given that the deceased had been charged as a result of their allegations and had been released on bail’.\textsuperscript{207} After discovering that it was not possible to change the deceased’s bail conditions until after the weekend, Morgan went to the deceased’s house and shot him six times.

Morgan was acquitted after a jury deliberation of just over 35 minutes.\textsuperscript{208} Despite the pre-meditation and the pre-emptive defensive action taken by Morgan, the defence of defence of another was left to the jury and accepted. Morgan was portrayed as the ‘dedicated family man [who] “very much felt a burden of responsibility for the care and protection” of his extended family’.\textsuperscript{209} He was a ‘police officer … and an Egyptian-born patriarch\textsuperscript{210} – the overtly masculine man.\textsuperscript{211} He was the hero, an example of ‘exemplary masculinity’\textsuperscript{212} who killed an alleged child molester – a paedophile.\textsuperscript{213} However, not all men benefit from the culturally endorsed model of male legitimate aggression. The requirement of ‘reasonable’ self-defence is informed by what is reasonable behaviour for a white, heterosexual male. This point is recognised by Barnes who observes

\textsuperscript{206} Unreported, SC NSW, 28 Jul 1997.
\textsuperscript{207} \textit{Morgan}, unreported, SC NSW, 28 Jul 1997 per Hidden J.
\textsuperscript{209} \textit{Ibid}.
\textsuperscript{210} O Barnes, above n 192 at 69.
\textsuperscript{211} \textit{Ibid}.
\textsuperscript{212} \textit{Ibid}. In this analysis, Barnes draws on the work of Connell, who asserts that ‘exemplary masculinities is integral to the politics of hegemonic masculinity’, R W Connell, \textit{Masculinities}, Sydney: Allen & Unwin, 1995 at 214.
\textsuperscript{213} Brown suggests that Morgan was able to draw upon the ‘morally sympathetic portrayal of fictional avengers’ seen in vigilante movies to enable the jury to empathise with his position and to construct the killing as lawful self-defence, D Brown, ‘On the Borderland of Defence and Revenge’, \textit{The Age}, Fri 8 Aug 1997, A15.
'what if Morgan had been a homosexual, a drug addict or even an Aboriginal man? Would the jury still have seen his action as reasonable?'\textsuperscript{214}

The ability to draw upon culturally accepted narratives of lawful self-defence means that it is easier for some defendants to construct the circumstances of the homicide into the shape of the defence. Sherwin writes:

Regardless of content, the form of one legal story may give it significantly more credibility than another story whose form fails to trigger any of the applicable tropes, narrative genres, and familiar storylines that are in our minds.\textsuperscript{215}

The story of the reasonable woman does not typify the familiar paradigm of lawful self-defence and consequently, to accept that these people were acting reasonably strains credulity. 'Reasonableness' is constructed on the model of male behaviour and this 'together with the incompatibility of aggressive force with stereotypical femininity'\textsuperscript{216} makes reasonableness a difficult standard for a woman to obtain.

\textbf{Misconceptions about domestic violence}

On a practical level, the lack of an adequate understanding of the seriousness of the situation of the battered woman impedes the classification of women's defensive behaviour as 'reasonable' self-defence. The problems experienced by battered women in attempting to construct the killing of their abusive partner as 'reasonable' self-defence arises from an inability by the legal system (lawyers, judges and juries) to appreciate the realities of the experience of living in a violent domestic relationship.\textsuperscript{217} It appears that although the threat created by an encounter with a violent stranger may be readily comprehended, there is less comprehension of the danger posed by a violent intimate partner.\textsuperscript{218} As shown at 7.4.1, although there is heightened community awareness about domestic

\textsuperscript{214} \textit{G Barnes}, above n 192 at 69.
\textsuperscript{216} \textit{A McColgan}, 'In Defence of Battered Women who Kill', above n 2 at 515.
\textsuperscript{217} \textit{J Tolmie}, 'Provocation or Self-Defence for Battered Women who Kill', above n 1 at 72.
\textsuperscript{218} \textit{E Sheehy et al}, above n 192 at 374. See also \textit{C Wells}, 'Battered Woman Syndrome and Defences to Homicide', above n 2 at 272; \textit{A McColgan}, 'In Defence of Battered Women who Kill', above n 2 at 514 – 515.
violence, my research suggests that community understanding remains flawed. As I have argued, there is a failure to appreciate the dynamics of domestic violence,\textsuperscript{219} as well as a failure to understand the constraints on choice that exist for women in violent domestic relationships.\textsuperscript{220} In addition, judicial misunderstanding of the seriousness and nature of domestic violence serves to diminish its significance.\textsuperscript{221}

6.4 OTHER CONSTRAINTS IMPACTING ON BATTERED WOMEN'S RELIANCE ON SELF-DEFENCE

In addition to the constraints posed by the model of behaviour that informs our understanding of self-defence, there are other constraints (both legal and extra legal) that may influence a woman's decision whether to proceed to trial and rely on self-defence or to plead guilty to manslaughter.

6.4.1 LEGAL REPRESENTATIVES' UNDERSTANDING OF DOMESTIC VIOLENCE

If a woman is to rely (successfully) on self-defence in respect of killing her violent partner, it is crucial that her legal representative has a thorough understanding of the dynamics of domestic violence and the experiences of battered women. As Schneider has stated:

*Without first listening to women's experiences, and without understanding the social framework and experience of battering, it [is] simply not possible for lawyers to fairly represent battered women in these circumstances.*\textsuperscript{222}

The minimisation of the seriousness and extent of domestic violence within the legal system is clearly not restricted to the judiciary.\textsuperscript{223} It appears that 'lawyers

\textsuperscript{219} See 2.5, 6.3.2.2, 7.4.1.1, 7.4.2.1 and 8.3.2.2.

\textsuperscript{220} See 2.6, 6.3.2.3, 7.4.1.2 and 7.4.2.2.

\textsuperscript{221} See 8.3.2.2.

\textsuperscript{222} E Schneider, *Battered Women and Feminist Lawmaking*, above n 2 at 147.

\textsuperscript{223} See Chapter Eight.
share with the police, judges, and society generally the tendency to minimise and trivialise domestic violence and to blame victims for the violence.\textsuperscript{224}

This is supported by the results of Bacon and Lansdowne's Australian study that found that while women mostly considered that they were acting in self-preservation, their lawyers did not consider that their actions fell within the parameters of lawful self-defence.\textsuperscript{225} Although the study is now dated, this finding remains significant in view of the large proportion of battered women who choose to enter a plea of guilty to the lesser charge of manslaughter rather than proceed to trial.\textsuperscript{226} It is clear that a lack of sensitivity by legal representatives, together with a failure to appreciate the dynamics of domestic violence, will have an adverse affect on the outcome of cases where women are charged following the killing of their violent partner. Conversely, an informed approach to domestic violence can assist in the presentation of the accused’s case of self-defence.\textsuperscript{227}

In addition, aside from misconceptions about battering relationships, as discussed at 6.2, problems created by the limited access to decisions concerning battered women who kill may limit the defence strategies. In particular, without access to information about cases where self-defence was successful and given the limited nature of the appeal cases, lawyers may not feel confident in recommending a trial with self-defence as a strategy.

6.4.2 COMMUNICATING DOMESTIC VIOLENCE

Women who have endured domestic violence may have difficulty communicating their experiences with their legal representatives. It is recognised that part of the reason for the reliance on provocation or lack of intent rather than self-defence and the number of pleas of guilty to manslaughter may be the fact that domestic violence is in its nature hidden. Women are reluctant to seek help


\textsuperscript{226} See Table 1.3 and 6.2.

\textsuperscript{227} See 7.4.4.
due to the shame and embarrassment associated with admitting that they are abused. They may also be reluctant to reveal the true nature of the violence to their legal representatives and this will have a direct impact on the defences that the legal representatives pursue. In addition, women may have limited memory of the events associated with the killing and so legal advisers may not be able to obtain adequate instructions to conduct a defence based on self-defence.

The clearest Australian example of the distorting effect of poor communication with legal representation is the case of *Kina*. In this case, the accused stabbed her de facto partner and was convicted of murder following a trial that lasted less than one day. On advice from her lawyer, she did not give evidence at her trial and her defence was that she had not intended to kill her partner. She was convicted of murder and unsuccessfully appealed. After considerable media attention about the injustice of her imprisonment, Kina's conviction was quashed in 1993 on the ground that there had been a miscarriage of justice based on the 'exceptional difficulties of communication between her legal representatives and the appellant'. The prosecution exercised its discretion not to proceed but by the time of her release, Kina had spent six years in goal.

The accused had been subjected to sadistic violence at the hands of her partner. He had repeatedly raped her anally and vaginally. He regularly beat her. He would leave her tied to the bed when he went to work or he would take her with him. On two occasions at work, he forced her to have sexual intercourse with himself and his workmates. On the day of the killing, the accused refused to have anal intercourse with her partner. He then punched her in the stomach and the face. He threatened that if she did not want to have sex that way, he would have

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230 See 4.4.2.3.
231 Unreported, CA Qld, 29 Nov 1993.
232 Unreported, CA Qld, 29 Nov 1993 at para 25 per the President and Davies JA.
anal sex with Kina’s niece. Kina’s niece was 14 years old and living with them at the time of the killing.

Although some information regarding the extreme brutality of Kina’s relationship with her partner was communicated to her lawyers, it was not presented to the court. However, the true extent of his violence was not revealed to her legal representatives due to Kina’s shame and embarrassment, and the way in which she was questioned by her lawyers. Kina was Aboriginal and the cultural differences between Kina and her representatives may also have contributed to the communication difficulties. It is possible that if the full story had been revealed to her lawyer, self-defence would have been raised at her trial.

6.4.3 THE TRIAL

6.4.3.1 Women’s credibility

In cases where a woman has killed her partner and claims that a history of domestic violence precipitated the killing, her credibility is likely to be crucial to her disposition at trial, as well as her treatment more generally within the criminal justice system. As Sheehy has commented, ‘in every prosecution of a woman who alleges that she killed her partner in self-defence, women’s

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232 P Robson, The Australian C. a Weekend, 26 Mar 1994, 26 at 41. See also P Easteal & C Currie, above n 1 at 62.
233 Unreported, CA Qld, 29 Nov 1993, that ‘there were ... a number of complex factors interacting which presented exceptional difficulties in communication between her legal representatives and the appellant because of: (i) her aboriginality; (ii) the battered woman syndrome; and (iii) the shameful (to her) nature of the events which characterised her relationship with the deceased’, at para 35 per the President and Davies JA.
234 This result is not certain as the preconceived notions held by the legal representatives operated at the trial to exclude evidence of the history of violence, as it was not considered relevant for the defence of provocation. The barrister who appeared at the trial told a reporter that ‘he was aware ... of Kina’s claims that [the deceased] had beaten and raped her over a prolonged period. The information wasn’t used as a basis for the defence at trial because it didn’t constitute “provocation” under law’, P Robson, above n 233 at 44. For further discussion of the relationship between Kina and her legal representatives, see P Easteal & C Currie, above n 1 at 60 – 62.
A woman’s credibility is usually pivotal to establishing reasonable necessity, as the believability of her claim that she is a victim of violence is crucial. The dynamics of domestic violence mean that she usually provides most of the information about the nature and extent of her partner’s violence.

Crediting domestic violence

The need to have faith in the woman’s account of the circumstances of the relationship and the killing creates difficulty for women in recounting their story (and having it accepted), as the law has not been good at crediting women’s experiences of domestic violence. Tolmie comments that, ‘[w]omen who kill to protect themselves from violence tend to have the history of violence, and sometimes the attack against which they were defending themselves, minimised or ignored’. These comments are amply supported in my research. As my discussion of the defence of self-defence and the reception of BWS shows, women’s claims to legitimate self-defence in response to violence from their male partners are generally not viewed as credible within the framework of the defence.

The believability of a woman’s claim to be a victim of domestic violence is linked to the existence of independent evidence of the violence. The significance of corroboration to confirm the woman’s account reflects the general failure to credit women’s experiences of violence. In the cases where self-defence was successful, corroborative evidence was led by experts and/or by other witnesses. Support for women’s accounts of violence is found in the reception of expert evidence of battered woman syndrome (BWS).

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239 Ibid.
240 See Chapter Seven.
A criticism levelled at BWS evidence by the feminist critique is its preference for the voice of the expert over the voice of the woman, thus undermining women’s credibility as witnesses. For example, in Secretary, the accused recounted, in her police statement and at trial, her partner’s history of violence, as well as the threat that she believed that she faced at the time that she shot him. The accused had told the police that at the time of the shooting she ‘feared for [her] life’. In court, she said that she feared for her life and that she believed that when her partner woke up ‘he was going to kill [her] like he always said he was going to do’. The accused’s account was supplemented by evidence of a psychiatrist who testified that at the time of the killing the accused ‘believed that she was going to die ... and ... that she was in a state of even heightened, more heightened terror’. However, instead of anchoring this finding in the history of violence and the events that led up to the killing, the psychiatrist described the accused’s learned helplessness and her post traumatic stress disorder. The accused’s account was presumably rendered more credible because of the support from the psychiatrist.

Independent evidence from non-experts is also important. For example in Stjernqvist, the trial judge, in directing the jury, commented that the witnesses called by the defence to provide evidence relevant to the questions of provocation and self-defence were ‘not challenged in any way by the learned Crown prosecutor in respect of what they say’. In Kontinnen, the trial judge reminded the jury that it had ‘heard a lot of evidence about the violence and the battering both from Crown witnesses and from defence witnesses’. In Secretary, the violence inflicted on the accused by her husband was so extreme, that ‘the women at Kulaluk had actually got together because of their worries

243 See R Hunter, above n 236 at 154; C Wells, ‘Provocation: The Case for Abolition’, above n 30 at 94; E Sheehy et al, above n 84 at 384; C Smart, Feminism and the Power of Law, London: Routledge, 1989 at 47.
244 (1996) 129 FLR 39 at 50 per Kearney J.
245 (1996) 129 FLR 39 at 57 per Kearney J.
246 (1996) 129 FLR 39 at 62 per Kearney J.
248 Kontinnen, unreported, SC SA, 26, 30 Mar 1992 at 41 per Legoe J.

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and fears. ... 'They went ... to the police station'. In Lock, there was evidence 'of police, hospital and ambulance records of attendances over many years' that supported the accused's account of her violent relationship. There was also evidence given by various friends and her son. The importance of independent evidence to establish events that occurred in private (as domestic violence often does) may cause problems, as these events may be largely unwitnessed and difficult to establish.

**Storytelling**

Women’s claims of violence may also be rendered incredible by the conflict between the way they tell their story and the manner in which facts are constructed. The assessment of veracity of a person's account (both in law and society generally) reflects a 'view that there is one truth about an event which is most likely to be elicited at or close to the time of the event'. Such an assumption is problematic for women who have endured a history of physical and psychological abuse and have eventually killed their batterer. It means that in gaining recognition of the legitimacy of her story of abuse, the initial account provided to the police of the circumstances of the killing and her relationship

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249 Secretary (1996) 129 FLR 39 at 42 per Kearney J.
250 (1997) 91 A Crim R 356 at 357 per Hunt CJ at CL.
with the deceased is likely to be crucial. However, the version of events provided to the police at this time may not be the ‘whole story’. As Hunter and Mack observe:

A woman who has killed her batterer is likely to be in shock, unclear about what happened, unable to give a complete story, and simply reacting to questions posed by the interrogator, who may not even ask if she was battered.

Women may not identify themselves with the label of a ‘battered woman’. They may accept blame for their partner’s violence towards them, and so want to be punished for their act of violence. Further, in order to survive the abuse, women may minimise or deny the violence to themselves, and ‘their accounts therefore rarely emerge fully and in meticulous detail immediately’. If the details of the violence emerge over time, then the accused’s failure to reveal those details to the police is used to undermine the credibility of her account of her experience of violence.

**Stereotypes**

An assessment of the accused’s credibility is based on an assessment of her believability as a victim of violence, and more generally, her credibility as a woman. As I have argued at 6.3.3.2, the gendered and racial assumptions that

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253 See for example, *Vandersee* [2000] NSWSC 916, where James J notes that ‘these acts of physical abuse were humiliating and distressing. I consider that they were regarded by the prisoner primarily as psychological abuse, rather than physical violence. When the prisoner was interviewed by police, she said that the deceased had not been a physically violent man and that what she was complaining of was mental abuse’. Thus, the evidence of the physical abuse is labelled according to the account initially provided to police. James J considered that ‘some of the history as recorded by Dr Clark, including that the deceased had “enslaved” the prisoner and that the prisoner was living in a “cocoon of terror” overstates the true history’, at [124]. See Bacon and Lansdowne’s study of police interviews, W Bacon & R Lansdowne, ‘Women Homicide Offenders and Police Interrogation’, in M Findlay, S Egger & J Sutton (eds), *Issues in Criminal Justice Administration*, North Sydney: Allen & Unwin, 1983.

254 R Hunter & K Mack, above n 252 at 180.

255 See 2.6.3.2.


257 See Scheppel who comments that, ‘women who delay in telling their stories of abuse at the hands of men or who appear to change their stories over time about such abuse are particularly likely to be discredited as liars. The very fact of delay or change is used as evidence that the delayed or changed stories cannot possibly be true. But abused women frequently have exactly this response: they repress what happened; they cannot speak; they hesitate, waver, and procrastinate; they hope the abuse will go away; they cover up for their abusers; they try harder to be “good girls”; and they take the blame for the abuse upon themselves’, K Scheppel, ‘Just the Facts, Ma’am’, above n 251 at 126 – 127.
underpin the categories of ‘victim’ and ‘woman’ may exclude a realistic assessment of the circumstances in which some women have acted, and so undermine their claim for reasonable self-defence. The plausibility of a woman’s claim to be a ‘victim’ of domestic violence is dependent upon stereotyped assumptions about the appropriate victim. If the accused is not viewed as ‘passive and helpless’, then her claim that she is a ‘victim’ is likely to be closely scrutinised. In Stjernqvist, Derrington J appeared mindful of stereotypes when directing the jury about the fact that the accused swore at her husband before he slapped her face. His Honour told the jury that

You might think that that is not exactly consistent with the description that she WAS an intimidated cowardly woman or something like that as some of the pictures that have been presented to you seem to suggest but that does not really matter.

In his direction to the jury, Derrington J stressed that if she honestly and reasonably believed that she was acting in self-defence, then ‘it does not really matter whether she was ... swearing or not and whether the picture that has been painted to you has been somewhat exaggerated or not’. Rather:

The real question is whether or not she was undergoing this treatment and, more particularly, [whether] the threats [were] of such a nature as to make it necessary virtually for her to take some such action as that [which she did] in order to preserve her life.

The accused’s conformity to stereotypes did not matter. It was her honest and reasonable belief in the need to use fatal force that was crucial, as that was when ‘self-defence can arise’. 

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258 See also 4.2 for a discussion of the theoretical engagement with women who kill and the intersection of race and gender.
259 See R Hunter, above n 236; H Kennedy, Eve was Framed: Women and British Justice, London: Vintage, 1992 at 66. The assessment of the credibility of woman as victims has been explored in the context of rape. There is literature that has considered the need for a rape victim to behave as an ‘appropriate’ rape victim based on stereotyped models of behaviour. See: R Hunter, above n 236; R Hunter & K Mack, above n 251; K Mack, ‘Continuing Barriers to Women’s Credibility’ (1993) 4 Criminal Law Forum 327; S Bronitt, above n 252.
260 See 6.3.3.2.
261 Cairns CC, 19 Jun 1996 at 190 (emphasis in original).
262 Cairns CC, 19 Jun 1996 at 191.
263 Cairns CC, 19 Jun 1996 at 191.
264 Cairns CC, 19 Jun 1996 at 191.
6.4.3.2 The price of the trial

It is recognised that some women may not want to endure the ordeal of the criminal trial and may choose to enter a plea of guilty to manslaughter. Women experience ‘shame and fear about revealing their own abuse in court, and an overwhelming sense of responsibility and contrition for killing someone they loved’.[265] In her analysis of a Canadian case of Kondejewski,[266] Sheehy writes of:

All the ... humiliating and soul-destroying testimony that she had to relate or listen to as a price for her acquittal, for example, her son’s statement that he had not told his mother about all of his father’s violence against him in order to protect her and her daughter’s admission, upon cross-examination, that her father’s dog was treated better by her father than was her mother.[267]

Sheehy recounts the devastating personal cost of the trial to the accused, including having to witness both her children testify and be cross-examined; having to recount the physical violence, the rapes, the psychological abuse before the court and her children; and to hear the evidence of violence recounted by her neighbours and co-workers.[268] The factors identified in this case are not unique. Factors such as shame, embarrassment and a desire not to relive the violence or involve her children in the trial process may contribute to a decision to enter a plea of guilty to manslaughter.

6.4.4 SENTENCING CONSIDERATIONS

Sentencing considerations may also contribute to the reluctance of battered women to proceed to trial and place reliance on the defence of self-defence. A person who un成功fully relies on self-defence faces the prospect of a mandatory life sentence in several jurisdictions if their defence is not successful.[269] Even if discretionary sentencing for murder exists, a person who is convicted of manslaughter faces the prospect of a considerably lighter sentence

266 Transcript of proceedings at trial before The Honourable Mr Justice Mykle in the City of Brandon, Province of Manitoba, 12 May 1998.
268 Ibid.
269 See 8.2.3.
than faced by a person convicted of murder.\textsuperscript{270} This may influence the decision of women, on advice from their counsel, to plead guilty to manslaughter or to rely on both provocation and self-defence at trial.\textsuperscript{271} A further relevant consideration in the decision to plead guilty to manslaughter is the sentencing discount received for a plea of guilty. Defence counsel would need to advise the accused that if she was convicted of manslaughter at trial (rather than after a plea) she would be likely to receive a heavier penalty.\textsuperscript{272} Clearly, if women are to be encouraged to rely on self-defence at trial, there needs to be reform to the sentencing framework.\textsuperscript{273}

6.5 THE FUTURE OF SELF-DEFENCE

Domestic violence presents a significant challenge to contemporary Australian society,\textsuperscript{274} as well as to fundamental legal concepts such as reasonableness that have traditionally been considered to reflect community views. Although domestic violence is prevalent in Australia, it is ‘rarely accompanied by the sense of outrage or moral panic’ as seen with other forms of violence.\textsuperscript{275} The minimisation of domestic violence within the community and by the legal system operates to preclude the fair assessment of women’s self-defence claims. In addition, the language of reasonable self-defence is encoded with meaning from its masculinist history that operates to exclude the experiences of women.\textsuperscript{276} The overarching concept of reasonableness, with its pillars of imminence, proportionality and retreat, has served to exclude women’s experience from self-

\textsuperscript{270} See 8.2.4.
\textsuperscript{271} For example, in regard to the case of \textit{Osland} (1998) 197 CLR 316, the question has been asked, ‘\textit{why did Heather not plead guilty to manslaughter? If she had, she surely would have received a much reduced sentence. The reason is that Heather says she killed in self-defence. She took an enormously courageous stance even though the entire system had tried to coerce her into admitting guilt’}. C Momot, ‘A Battered Wife Resorts to Violence, and Justice is Murdered’, \textit{The Age}, Fri 13 Feb 1998, A15. At trial, Osland relied on the defences of provocation and self-defence. Both defences were rejected by the jury and she was convicted of murder and sentenced to 14 1/2 years imprisonment.
\textsuperscript{272} See 8.2.2.
\textsuperscript{273} See Chapter Eight.
\textsuperscript{274} See J Tolmie, ‘Provocation or Self-Defence for Battered Women who Kill’, above n 1 at 66.
\textsuperscript{275} A Wallace, above n 77 at 83. Wallace observes that domestic violence is marked by its ‘ordinariness’, at 83.
\textsuperscript{276} See 6.3.2 and 6.3.3.2. See A McColgan, ‘In Defence of Battered Women who Kill’, above n 2 at 514.
defence. Although these rules are no longer formal requirements of the law, their spectre continues to overshadow attempts by women to re-define self-defence to accord with the experience of living in a situation of ongoing domestic violence.

In advancing a new framework for self-defence to challenge the law’s traditional perceptions, the law must be receptive to an alternative model of defensive action founded on the conduct of those in repressive and violent domestic relationships. Yet, instead of completely reformulating the law of self-defence, what is required is a rethink of ‘the requirement that the defendant’s use of force be reasonable … [in] cases other than those involving the traditional model of a one-off adversarial meeting of strangers’.277 In facilitating this ‘rethink’, my proposal is to incorporate the most favourable aspects of the law of self-defence in a legislative provision in an attempt to overcome the obstacles posed by the current approach to self-defence. This is aimed to encourage lawyers to perceive self-defence as a viable defence strategy, and to encourage judges to place self-defence before the jury. If self-defence is raised by the evidence, the trial judge must give a direction regardless of whether it is raised by the defence.278

My recommendation for self-defence is based on the broad statement of general principle with the subjective/objective test as recommended by the Model Criminal Code Officers Committee.279 Under this formulation, the existence of the threat is determined from the accused’s perspective – it is a wholly subjective test. The issue is whether the accused honestly and genuinely believed that he or she was acting in self-defence. There does not need to be reasonable grounds for the accused’s belief in the necessity to use force in self-defence.280 However, the accused’s response is determined on an objective basis. The issue is whether a reasonable person would consider that the force used by the accused was

277 Ibid at 527. My thesis does not advocate a new defence that applies to battered women who kill, such as psychological self-defence or a defence of self-preservation. For a consideration and a rejection of these options, see Chan, above n 2.
278 Viro (1978) 141 CLR 88 at 117 – 118 per Gibbs J; Howe (1958) 100 CLR 448 at 459 per Dixon CJ.
279 See Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, above n 179 at 66 - 68.
280 Although as a matter of practice, if the accused’s belief is manifestly unreasonable, it may be difficult for the jury to accept that the belief was honestly held, see Beckford [1987] 3 WLR 611 at 619 per Lord Griffiths.
reasonable, in view of the circumstances that the accused believed to exist.\textsuperscript{281} In assessing the degree of force used, it is essential that the circumstances of the accused include the attributes and history of the accused, as it is not possible to accurately access the threat perceived by the accused without this information.\textsuperscript{282}

Although the reformulation of the law of self-defence into a general statement of principle is essential to remove the complexity and restrictions that continue to operate in some Australian jurisdictions,\textsuperscript{283} this alone is not sufficient. In the jurisdictions where the law of self-defence is contained in a broad statement of principle, the difficulties faced by battered woman raising self-defence are not founded on the actual formulation of the defence, rather on its interpretation and application. At common law,\textsuperscript{284} in Tasmania,\textsuperscript{285} the Northern Territory\textsuperscript{286} and South Australia,\textsuperscript{287} despite the seemingly flexible nature of the concept of reasonable necessity,\textsuperscript{288} the law’s understanding of self-defence has struggled to move beyond the traditional male-dominated paradigm. The problem is summed up by McCollgan, who writes that:

\textsuperscript{281} The need to assess the accused’s conduct according to the circumstances that the accused believed to exist reflects the concept of ‘agent-relative permission’ that should underpin self-defence. ‘Agent-relative permission’ focuses on the self-interest of the individual in their own survival and cannot be ascertained from the viewpoint of an impartial observer, see 3.4.2.1. In the context of the MCCOC recommendations, Howe is concerned that the provision may in fact be too subjective so as to allow an expanded operation for self-defence in cases of homosexual advance defence cases. Howe asks ‘will male defendants be heard to say that they killed a man who made a sexual advance because they perceived this to be a reasonable response?’, A Howe, ‘Reforming Provocation (More or Less)’ (1999) 12 The Australian Feminist Law Journal 127 at 135. However, this concern is based on a misconception of the operation of the objective test – it is not what the accused thought reasonable but what a reasonable person in the circumstances of the accused would consider to be a reasonable response.


\textsuperscript{283} See 6.3.2. See also S Kift, above n 27 for a discussion of the Queensland self-defence provisions.

\textsuperscript{284} The common law applies in Victoria and the Australian Capital Territory. In New South Wales, the common law applies until the commencement of the Crimes Amendment (Self-Defence) Act 2001 (NSW).

\textsuperscript{285} Criminal Code (Tas) s 46.

\textsuperscript{286} Criminal Code (NT) s 29.

\textsuperscript{287} Criminal Law Consolidation Act 1935 (SA) s 15.

\textsuperscript{288} See I Leader-Elliott, above n 1; R Bradfield, above n 1.
It seems that the difficulty rests not with the formal legal rules, but with informal, almost extra-legal, models of self-defence. These models are constructed in the imagination, owe their contours to ‘common sense’ or traditional paradigms of human behaviour and operate to block real consideration of situations which, although arguably within the legal defences’ contours, do not fit the model. The relative scarcity of female killers has resulted in a paradigmatically male ‘ideal model’, which requires a spontaneous reaction against an unknown assailant, the defender using only comparable methods of defence (weapon matched to weapon, bare hand to bare hand).²⁸⁹

The ‘idealised’ model of self-defence that has captured the legal imagination is an essentially masculine model, and there has been a reluctance to acknowledge claims of self-defence that do not conform to the masculine paradigm.

The answer to the deficiencies of self-defence cannot be found in a further broadening of principle without abandoning an objective standard, as a broader model than a general test of reasonable necessity would be difficult to conceive.²⁹⁰ In my view, the challenge is to reclaim the concept of reasonableness as a standard that can work for women. The approach adopted in New South Wales to deal with the masculinist operation of the defence of provocation may provide a model by which to address the difficulties experienced by battered women satisfying the requirement of reasonable self-defence. In 1982, the defence of provocation in New South Wales was amended to take account of the circumstances of women in abusive relationships and specifically dealt with the aspects of the existing law of provocation that operated to disadvantage women.²⁹¹ The new legislative provision was specifically aimed to make the defence of provocation more appropriate for ‘women who kill in response to a culmination of long-term abuse rather than

²⁸⁹ A McColgan, ‘General Defences’, above n 2 at 154. McColgan was writing about the English self-defence position, where access by battered women to self-defence is more restrictive than in Australia. However, the point still has relevance in this jurisdiction.
²⁹⁰ A broader option would be the adoption of a purely subjective test for self-defence. However, this is not a realistic option given the need to have the accused’s conduct judged according to community standards. A wholly subjective test could lead to anomalous results, for example an accused could be acquitted if they killed a person who brushed past them in the street, if that person thought that killing was an appropriate response to such conduct.
²⁹¹ Crimes Act 1900 (NSW) s 23. See 5.3.1.2.
immediately following a single act of provocation. This reform appears to have been successful in its aim of facilitating reliance by battered women on the provocation defence.

Similarly, the aim for self-defence should be to allow the defence in situations where a person is responding to the cumulative effect of violence. Legislative prescription that the behavioural pattern of battered women acting in self-defence is not excluded from lawful self-defence would be a positive step. My recommendation aims to make self-defence more accessible for women who kill their violent partners by specifically addressing the requirements of imminence, duty to retreat and proportionality that anchor the paradigm case of self-defence to the male model of behaviour in self-defence. My aim is to challenge the law’s imagination, so as to allow room to envisage reasonable self-defence from the perspective of a battered woman. The defence of self-defence needs to be supplemented with sentencing reforms, specifically the abolition of the mandatory life penalty for murder, and the revision of the way in which evidence of domestic violence is presented and constructed in the criminal trial.

6.5.1. DRAFT PROVISION

- A person is not criminally responsible for an offence if the conduct constituting the offence is carried out by him or her in self-defence or in defence of another.

283 See Chapter Five.
284 S Yeo, ‘Resolving Gender Bias’, above n 90 at 115–116.
285 For example, McColgan has observed the need for long-term solutions and that the law alone is not capable of remedying the situation of battered women. However ‘in the meantime society’s failure to protect women from violence within their homes must be brought to the fore by defence lawyers and taken into account by those whose task it is to allocate blame’, A McColgan, ‘In Defence of Battered Women who Kill’, above n 2 at 529.
286 See 8.4.1.
287 See Chapter Seven.
288 This draft provision is based on my submission to the Taskforce on Women and the Criminal Code. It is noted that the formulation of self-defence set out by Taskforce on Women and the Criminal Code relies extensively on my recommendations, Taskforce on Women and the Criminal Code, Taskforce on Women and the Criminal Code Report of the Task Force on
• Conduct is carried out by a person in self-defence or in defence of another if the person believed that the conduct was necessary to defend himself or herself or another person and his or her conduct was a reasonable response in the circumstances as perceived by him or her.\textsuperscript{300}

• In considering whether a response was reasonable in the circumstances as perceived by a person, that person’s personal history, attributes and characteristics are relevant.

• For the purpose of determining whether a person was acting in self-defence or defence of another, there is no rule of law that self-defence is negatived if –

(a) the person was responding to a history of personal violence against himself or herself or another rather than a single isolated attack;

(b) the person has not pursued other options other than the use of force; or

(c) the person used a weapon against an unarmed person.

• If a person is responding to a history of violence against himself or herself or another person, consideration should be given to the cumulative effect of such violence in assessing whether the force used was reasonable.\textsuperscript{301}

6.5.2 CRITIQUE

The feminist reconsideration of self-defence has been challenged for failing adequately to consider the ‘ramifications of expanding the availability of self-defence’.\textsuperscript{302} In proposing a revised version of self-defence, it is necessary to consider whether the net has been ‘cast … too wide’,\textsuperscript{303} to include within its


\textsuperscript{300} This provision is taken from the MCCOC recommendation, see Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, above n 179 at 66 – 68.

\textsuperscript{301} This provision is taken from the MCCOC recommendation, see \textit{ibid}.

\textsuperscript{302} This provision is taken from the Taskforce on Women and the Criminal Code, however this formulation was based largely on my submission, see Taskforce on Women and the Criminal Code, above n 298 at 163 – 164.

\textsuperscript{303} G Hubble, ‘Feminism and the Battered Woman’, above n 1 at 113.


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ambit killing that ought not be lawful. It is recognised that lawful self-defence must have limits. The sanctity of human life needs to be protected and the circumstances in which society is willing to recognise a killing as lawful should be exceptional. Accordingly, the question needs to be asked – does my proposed defence expand the boundaries of lawful self-defence to an undesirable extent? Does it unduly compromise the value of human life as opposed to a person’s self-interest in his or her own well being?  

6.5.2.1 Premeditated killings and imminence

The expansion of self-defence to the situation of women who kill in a ‘non-confrontational’ situation has been challenged as allowing the exculpation of a premeditated killing. Premeditation is perceived to be the opposite of lawful self-defence. However, this approach fails to recognise that the acceptance by the courts of the legitimacy of the ‘pre-emptive strike’ has already extended the defence of self-defence to premeditated killings. I acknowledge that the application of reasonable necessity in self-defence is more problematic in cases where there is time for reflection, as it raises the possibility that alternatives to the use of force were open to the accused. But my contention is that premeditation should not operate as an additional barrier in cases where women kill their abusive partners, and claim self-defence. It is to ignore the nature of the danger faced by women in the home to suggest that a planned killing is never a necessary response.

It is for the trier of fact to determine when fatal violence is reasonably necessary. The jury will need to determine if, in the circumstances believed by the accused to exist, the degree of force used was reasonable. This task may be more difficult in ‘non-confrontational’ situations, as the necessity of using force is less

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See discussion at 3.4.

G Hubble, ‘Feminism and the Battered Woman’, above n 1 at 120.

For example, in describing the accused’s conduct in Oland (1998) 197 CLR 316, Kirby J considered that it was open to the jury to find that ‘the appellant’s conduct was premeditated and effected with “calm deliberation” and “detached reflection” rather than reasonably necessary to remove further violence threatening her with death or serious injury’, at 381.

See 6.3.2.2 and 6.3.2.3.

See discussion in Chapter Two.
apparent than in the situation of the lifted knife or the raised fist. Yet, it is an assessment that the jury can make with appropriate evidence of the situation confronting the battered woman. In some cases, the jury may decide that the prosecution has proved beyond reasonable doubt that the accused was not acting in self-defence. However, the recent case of Stjernqvist suggests that a sensitively and appropriately directed jury can be receptive to the self-defence claims of battered women in non-confrontational situations.

6.5.2.2 Third parties

A related concern is that the expansion of self-defence may unduly allow reliance on self-defence by third parties. Hubble has argued that:

> Once necessity’s temporal dimension is abandoned, a third party might be exonerated from a significantly premeditated homicide on the strength of a reasonable and honest judgment that lawful assistance would be ineffective.

The exoneration of premeditated homicide in defence of another may be a consequence of an expanded defence of self-defence and defence of another. Although this theoretically may a possibility, defence of another would be very difficult to raise as a matter of practice. In view of the private nature of domestic violence, as a matter of practice, it is likely that only those with intimate knowledge of the violence perpetrated in the relationship would have a realistic claim to defence of another. If defence of another where to be available to a third party with detailed knowledge of the relationship (for example, a child), I can see no problem with allowing such a person to raise defence of another. The

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309 Hubble makes the point that 'the question of reasonable necessity will rarely be straightforward when pre-meditation is present', G Hubble, 'Self-Defence and Domestic Violence', above n 1 at 54.

310 See Chapter Seven.

311 Unreported, Cairns CC, 18 Jun 1996.

312 See discussion at 6.2.2.3

313 G Hubble, 'Feminism and the Battered Woman', above n 1 at 120.

314 However, the exonerating of premeditated homicide in defence of another has already occurred, see Morgan, unreported, SC NSW, 1 Aug 1997. See discussion at 6.3.3.2.

315 See Chapter Two.

316 Historically, defence of another has predominately been considered in the context of immediate family. However, it is not excluded in the case of strangers, see D O’Connor & P Fairall, Criminal Defences, 3rd ed, Australia: Butterworths, 1996 at 179 – 180.
judicial system remains reliant on the jury to 'reflect community values'\(^{317}\) in its consideration of the defence of another. A person seeking to rely on defence of another must satisfy the jury that their actions were 'reasonably necessary'.

### 6.5.2.3 Male offenders

Concerns have been raised that the expansion of self-defence to accommodate the experiences of battered women may have the related consequence of enabling male offenders to inappropriately rely on the expanded self-defence provision. For example, Hubble argues that if the broader social context in which a woman acts is presented to the jury, then the 'same may be done for male offenders'.\(^ {318}\) Hubble states that 'the violence perpetrated by many male criminals, for example, may well be comprehensible when regard is had to their personal experiences of violence and the teaching of a patriarchal culture'.\(^ {319}\) In response, Stubbs and Tolmie have asserted that:

> Violent behaviour will not result in an acquittal for the purposes of self-defence unless it is a consequence of the accused’s honest belief on reasonable grounds that what they did was necessary in self-defence. Being informed by patriarchy is not a defence. Being in terror for one’s life and defending oneself against attack is.\(^ {320}\)

It is essential to recall that the broader social context of women’s experience of violence is not admissible as a defence in itself. The fact of being a battered woman is not a defence to murder. The evidence of the woman’s personal experience of violence (and the experiences of women in violent relationships generally) is relevant to explain the ‘reasonableness’ of the woman’s actions and to counter misconceived stereotypes.\(^ {321}\)

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\(^{317}\) G Barnes, above n 192 at 69.

\(^{318}\) G Hubble, 'Feminism and the Battered Woman', above n 1 at 122.

\(^{319}\) Ibid.

\(^{320}\) J Stubbs & J Tolmie, 'Feminisms, Self-Defence, and Battered Women', above n 1 at 81.

\(^{321}\) See Chapter Seven.
6.6 CONCLUSION

This chapter has shown that women only infrequently rely on self-defence. My research shows that self-defence was left for the consideration of the jury in only 21 of the 65 cases where women killed their violent partners. In the 21 cases where self-defence was left for consideration of the jury, the defence was successful in 9 cases. My study has questioned the infrequency with which women rely on self-defence in view of the circumstances of violence that surround the killings. Further, I argued that it is significant that many women who kill their violent partner plead guilty to manslaughter, rather than relying on self-defence at trial.

In my discussion of reliance by battered women on self-defence, I highlighted the limited jurisprudence that has critically considered the relationship between battered women and self-defence. In particular, my concern was that the lack of a leading judgment recognising the inherent gendered nature of the law of self-defence has impeded the application of the defence to battered women. This conclusion finds resonance with findings in other jurisdictions. For example, the problem that Chan has identified in the English context, is that as the legal system is:

Unwilling to recognise how the interpretation of the criteria for self-defence is deeply gendered, it is piecemeal and inconsistent compassion for the battered women defendant rather than any real understanding about women’s self-defensive reactions which occasionally results in a successful case.322

Similarly in Australia, compassion has been demonstrated in the use of the partial defences323 and at the sentencing stage.324 This has not extended to a willingness to recognise that self-defence may be the most appropriate defence.

322 W Chan, Women, Murder and Justice, above n 2 at 149.
323 See Chapters Four and Five.
324 See Chapter Eight.
My discussion of the law of self-defence has shown that there have been expansions in the defence in recent years. At common law and in Tasmania, there is no longer any legal requirement that the accused's act be proportionate to the threat faced, there is no legal duty to retreat, and the concept of imminence has been expanded to recognise a pre-emptive strike. In jurisdictions where the law of self-defence is more prescriptive, there have also been expansions in the law of self-defence. In particular, there has been recognition of the legitimacy of a pre-emptive strike, as well as a more liberal interpretation of the need for a current threat. However, this chapter demonstrates that this expansion in self-defence has not yet been translated into more widespread reliance on self-defence by battered women who kill.

In my analysis of the operation of self-defence, I concluded that despite the expansions in the law, the importance placed on the existence of an imminent assault has restricted the availability of self-defence to women who are the victims of ongoing violence. I have shown that there is a fundamental mismatch between the nature of domestic violence and the type of assault that is considered to be 'imminent' for the purposes of self-defence. The need to point to a current assault, an assault that is 'on foot' at the time of killing, fails to recognise the cumulative impact of violence, and the cumulative impact of living with a partner who uses violence. There has been only limited recognition of the experience of living in a violent relationship and the threat posed by domestic violence. The failure to acknowledge the threat posed by a violent domestic relationship is exacerbated by the fact that the concept of reasonable necessity is informed by the experiences of men and has not readily accommodated the different experiences of women.

In seeking to ameliorate some of difficulties faced by battered women in relying on self-defence, my proposed defence clarifies the law of self-defence as it applies to battered women. As I have argued, my concern is that the existing male-orientated construction of self-defence has the effect that lawyers and

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325 This is the case in Western Australia and Queensland, see 6.3.
judges do not often allow self-defence to be placed before the jury. The clarification of the law is to facilitate appropriate cases proceeding to trial with the issue of self-defence being left for the jury to determine. However, this alone is not enough. There needs to be education of lawyers and judges in relation to the dynamics of domestic violence. Further, as this chapter has shown, the application of the law of self-defence is not the only impediment to reliance by battered women on the defence of self-defence. The issues associated with the trial process may make a plea of guilty an attractive alternative, particularly as an assessment of the accused's credibility may be difficult to make in advance.\textsuperscript{327} It is for this reason that the proposed statutory amendment to self-defence must be accompanied by changes to the nature of the evidence that is adduced at trial and reforms to the sentencing regime. In Chapter Seven, I address the reception of evidence of domestic violence in cases concerning battered women who kill.

\textsuperscript{326} As with the defence of provocation introduced in New South Wales, my proposed amendments to the defence of self-defence would be of general application.

\textsuperscript{327} See L. Ratusnay, above n 236 at 75.