Chapter Seven

UNDERSTANDING THE WOMAN - THE ADMISSIBILITY OF EVIDENCE OF DOMESTIC VIOLENCE

7.1 INTRODUCTION

While previous chapters have addressed the substantive law of homicide and the defences to murder, this chapter focuses on the procedural rules of evidence, particularly the interrelationship between the rules of evidence and reliance on self-defence by battered women who kill. This chapter builds upon my examination of the operation of the defence of self-defence in the context of battered women who kill. In challenging the paradigm construction of self-defence and the myths and stereotypes that have shrouded battered women’s actions, my contention is that successful reliance on self-defence depends on conveying to the jury the reality of a woman’s experience of violence. The significance of the dynamics of domestic violence (the power and control) and the broader social context in which a woman’s decision to use fatal force is situated must be made visible to the fact-finder in order for her claim to self-defence to be assessed on an informed basis. The rules of evidence regulate an accused’s ability to present this contextual evidence – to communicate this reality - to the fact-finder in a trial.

In this chapter, my aim is to challenge the traditional way in which evidence of the accused’s personal history is presented and constructed in cases where battered women kill and rely on self-defence. Although an accused (and other witnesses) may provide an account of the history of violence and her lack of alternatives other than the use of force, the potential message of reasonable necessity that this evidence might convey is usually not realised. My contention is that the current evidentiary framework of ‘battered woman syndrome’ (BWS)

1 See Chapters Three to Six.
relied on for the presentation of 'expert evidence' to educate judges and juries in cases where women kill their violent partners works against the efforts of defence counsel to make apparent the reality of the accused's situation. In this chapter, I propose a fundamental shift from PWS evidence (with or without accompanying social framework evidence) to the reception of social framework evidence in its own right. This conceptual change aims to open the way for the legal system to think more creatively about the relevance of specific evidence relating to the personal experiences of the accused that is presented in cases where women kill their violent partners.

In developing this argument, it is important to recognise that I am not calling for any alteration to the formal evidentiary rules in Australia. My contention is that the rules of evidence do not operate to exclude evidence of women's experience that would enable the jury to fully grasp the accused's situation. Instead, the restraint is found in the prevailing legal mind-set towards the rules of evidence and the relevance of evidence about domestic violence (influenced by the North American experience) that has not conceived the possibility of admitting such social context evidence in its own right. As such, this chapter aims to show defence counsel and judges a new way of thinking about evidentiary issues in cases involving battered women who kill.

This chapter is divided into four main sections. First, I examine the relationship between the reception of evidence of domestic violence and self-defence. This discussion provides a detailed examination of the battered woman's ability to communicate her entire experience of violence to the jury within the substantive framework of self-defence and the procedural framework that operates in the criminal trial. In this analysis, the argument I develop is that the rules of self-defence and the criminal trial operate to reduce experience to discrete incidents and this makes it difficult to convey the continuous texture of a violent relationship.

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2 See Chapter Six.

3 This proposed shift has application outside of the context where battered women kill their male partners. However, my thesis is restricted to considering the application of the rules of evidence in cases where women kill their violent partners.
Secondly, I discuss the current evidentiary approach to battered women who kill – the utilisation of evidence of BWS. I provide a brief overview of the main elements of BWS, examine the reasons for reliance on BWS, and consider the extent of reliance on BWS in Australia. Although I provide an overview of the existing critique of BWS, my thesis does not extensively traverse the same arguments that have been advanced by other scholars. Rather, I rely upon the conclusion that can be discerned from this body of literature – that despite the laudable aims of BWS evidence ‘to make domestic violence visible as serious violence … and to provide a context in which the reasonableness of the woman’s actions may be fairly assessed’⁴ – the use of BWS evidence has failed in its aim of making self-defence more accessible to women who kill their violent partners. My consideration of BWS evidence shows that it is counterproductive to the objective of facilitating battered women’s reliance on self-defence as it actually operates to construct case specific evidence in ways that are not conducive to women’s self-defence claims.

Third, I discuss my proposal for ‘social framework evidence’. In advancing my argument, I draw on the work of Stubbs and Tolmie who have advocated the recognition by Australian courts of the gendered nature of self-defence and the need for broad ‘social framework’ evidence about battering and its effects.⁵ However, this consideration advances the existing literature as it considers in detail the need for social framework evidence, the nature of the evidence that might be provided and the rules of evidence that would regulate its admissibility.⁶

In the final section of this chapter, I consider the nature of evidence that would be appropriate if evidence of a woman’s psychological state was considered necessary.

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⁶ See ibid at 748.
7.2 AN OVERVIEW - EVIDENCE OF DOMESTIC VIOLENCE AND SELF-DEFENCE

The relationship between the criminal law and the rules of evidence is central to the legal system’s ability to appropriately comprehend the self-defence claims of battered women who kill. Self-defence is governed by the principle of reasonable necessity. As shown in Chapter Six, the generalisations that have informed the law’s understanding of reasonable self-defence have generally not reflected women’s experiences. In assessing a woman’s claim to self-defence in a domestic situation, the underlying assumptions of self-defence premised on the masculine paradigm (informed by the principles of imminence, retreat and proportionality) may be brought to bear on an accused unless there is the provision of contrary evidence.7 The nature of the threat faced, as well as the necessity of using fatal force may not be readily apparent. As Rathus has argued:

Juries need to be informed about the dynamics of domestic violence if they are to understand why battered women act to preserve their lives in ways that do not fit the usual paradigm of self-defence.8

The association of the defensive actions of battered women with reasonable self-defence does not sit comfortably within the legal imagination, and so the connection needs to be made clear. As well as assumptions about legitimate self-defence, assumptions (myths and stereotypes) about the female offender9 and the nature and seriousness of domestic violence10 operate to influence the legal construction of the accused and her violent act.

In cases of self-defence, absent the raised knife/pointed gun scenario – the immediate confrontation – where the threat conforms to the paradigm case of self-defence and the seriousness of the threat is obvious, battered women need to be able to convey to the jury the necessity of the resort to fatal force in their

9 See 4.2.
10 See 6.3.2.2, 7.4.1, 8.3.2 and 8.3.4.1.
circumstances.\textsuperscript{11} Although retreat and imminence are no longer legal requirements for self-defence, they remain practical obstacles for women who seek to rely on self-defence.\textsuperscript{12} The battered woman needs to convey to the jury the seriousness of the situation that she faced and the reasonableness of her belief about the need to take defensive action, instead of using other options that the jury might perceive as alternatives to the use of fatal force. Her ability to convey her reality is dependent on the way in which the threat and her options in response to the threat are constructed at trial.

As I argued in Chapter Six, the threat posed to women in a violent relationship and the options that are available in relation to that threat cannot be adequately understood by focusing on discrete acts of violence. Domestic violence cannot be understood as a series of isolated incidents detached from the overall pattern of power and control within which the violence is situated.\textsuperscript{13}

Domestic violence and abuse should not be understood simply as a list of episodes that have occurred over time, nor as a list of aggressive behaviours that can be added up to see who has won the fight. Rather, it is a pattern of interaction that inevitably changes the dynamics of the intimate relationship within which it occurs. Thereafter, both parties understand the meaning of specific actions and words within the continually changing context.\textsuperscript{14}

It follows that it is essential for the fact-finder to have an understanding of the dynamics of violence in that particular relationship, so that they can also understand the more subtle nuances of ‘communication’ and implied violence that underpin the actual acts of physical violence. A woman’s perception of the threat faced and the assessment of the reasonableness of her response are intimately dependent upon detailed knowledge of that particular woman’s experience of violence. In assessing the legitimacy of a woman’s claim to use fatal self-defence, an appreciation of the interconnected and ongoing nature of the violence is essential. The jury must be able to empathise with her perspective of the violence – they must be able to feel how life felt for the accused.

\textsuperscript{11} See 6.3.2.2.
\textsuperscript{12} See 6.3.2.2 and 6.3.2.3.
\textsuperscript{13} See 6.3.2.2 and 6.3.3.2.
In relation to self-defence, evidence of the history of the accused's relationship with her violent partner is relevant and admissible.\textsuperscript{15} This case specific information about the accused's personal experience of violence can be used to inform the jury about her reality. This evidence can be provided from a number of potential witnesses including the accused, family members, friends or neighbours who saw or heard the violence or saw the consequences of the violence, professionals such as doctors, nurses, social workers, crisis workers, dentists who had contact with the accused and became aware of the violence, and documentary evidence of hospital/medical records, court proceedings or protection orders.\textsuperscript{16} Such evidence, however, can be problematic. Instead of conveying the totality of the experience of living in a violent relationship (which is the aim), the provision of evidence from individual witnesses can tend to build a list of violent acts seen as discrete incidents.

This fragmentation occurs because of the complementary operation of the substantive law of self-defence, the rules of evidence and the way in which relevance is constructed within the trial context. As Hunter observes, 'the rules of evidence are designed to complement substantive legal doctrine by eliciting information about discrete incidents or transactions'.\textsuperscript{17} In the law of self-defence (with the practical relevance of imminence), the legal focus is placed on discrete incidents of violence, with the most recent incident being considered the most

\textsuperscript{15} Babsek, unreported, CA Qld, 2 June 1998 referring to Wilson (1970) 123 CLR 334 at 337 per Barwick CJ. In Queensland, s132B Evidence Act 1977 (Qld) makes admissible 'relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed'. See discussion in Taskforce on Women and the Criminal Code, Taskforce on Women and the Criminal Code Report of the Task Force on Domestic Violence to the Queensland Government, Report, Brisbane: Department of Justice and Attorney-General, 2000 at 140 - 144.

\textsuperscript{16} Taskforce on Women and the Criminal Code, \textit{ibid} at 120.

significant.\textsuperscript{18} This becomes ‘the threat’ and evidence of the history of the relationship merely contextualises this incident.\textsuperscript{19} As a consequence, there is a failure to elicit at trial ‘the experiences and effects of living a life of being abused’.\textsuperscript{20} This tendency to fragment and compartmentalise women’s experiences of violence is reinforced by the adjudicative context of the trial that reinforces and corresponds to the incident-focused approach of self-defence.

In the adversarial trial, witnesses do not recount their story by means of a narrative account from start to the finish. Instead, their story is distorted by the question and answer format of examination-in-chief and cross-examination that elicits information in fragments which the jury must then reconstruct to arrive at the ‘true’ story.\textsuperscript{21} This fragmentation compartmentalisation is reinforced by the prosecution’s presentation of the case which encourages the jury to focus on events in close proximity to the killing and to discount the relevance of other evidence for the purposes of self-defence. In contrast to defence attempts to portray the killing in as wide a context as possible,\textsuperscript{22} the prosecution is able to utilise the intrinsic relevance of events immediately before the killing (endorsed by the paradigm of self-defence) to curtail the time frame within which the ‘threat’ is viewed.

This approach is seen in the case of \textit{Cornick}, where the accused killed her partner after he assaulted her son (R) and then assaulted the accused and her son.

\textsuperscript{18} See 6.3.2.2. See also S Tarrant, ‘Something is Pushing them to the Side of their Own Lives: A Feminist Critique of Law and Laws’ (1990) 20 University of Western Australia Law Review 573 at 599.

\textsuperscript{19} Support for the compartmentalised approach to domestic violence and self-defence in the cases identified in my research is discussed at 6.3.2.2.

\textsuperscript{20} See S Tarrant, ‘Something is Pushing them to the Side of their Own Lives’, above n 18. See 6.3.2.2.


\textsuperscript{22} See for example the summary of the defence case in \textit{Secretary} (1995) 129 FLR 39 Kearney J comments that the defence counsel ‘stressed the need to examine “the whole picture”’, at 40. Defence counsel stated that the defence case ‘will be a life story’. Further, ‘the defence case ... is that it’s about one thing; it’s about fear. It’s about fearfulness ... the essence of this woman’s plea of not guilty by self-defence, by necessity requires her to tell the court ... about the things that were done at the hands of the deceased over a period of years to various people, [to herself] and the children’, at 42.
(A) when they intervened.\textsuperscript{23} There was a further altercation and as he walked away he threatened to kill her son (R). The accused then fatally stabbed her partner. The trial judge directed the jury in relation to defence of another but refused to leave self-defence. The accused was convicted of manslaughter and appealed on the ground that self-defence should have been left to the jury.

At trial, evidence was provided by the accused (in examination in chief) about her relationship detailing the history of violence and her fear of her partner. Her partner would become argumentative and sometimes violent when he had been drinking. She provided the jury with information about the danger signals that she had come to recognise within the context of their relationship: ‘there would usually be a tone of voice or a phrase that he may use that would sort of act as a warning that he was getting more angry’.\textsuperscript{24} The accused’s account of the relationship was supported by her children, who gave evidence of the deceased’s violence, including assaults with an open hand, with an 18-inch garden hose and an assault with a knife that included a threat to kill. By placing the accused’s fatal act within the broader perspective of her partner’s violence and domination, the legitimacy of the accused’s fear for herself and her son is comprehensible.

However, following cross-examination, crown counsel effectively reconstructed the focus of inquiry to the events (and the threat that existed) at the time of the killing so that the fatal violence was no longer seen in the broader context of the relationship. I have extracted the following exchange from the cross-examination of the accused to demonstrate this technique:

Q. Was that [the threat to kill R] the dominant reason for your killing C?

A. I struck out at C to make him go away to leave my sons and me alone.

Q. What was your principal feeling towards him at that stage. Fear or anger?

A. Anger but mostly fear.

Q. Anger but mostly fear – what did you think he could do?

\textsuperscript{23} See also Kontinnen, unreported, SC SA, 30 March 1992, where the Crown submission was that expert evidence about BWS was ‘not sufficiently connected ... with the vital time element in those early hours of that Monday morning’, at 42 per Legoe J.

\textsuperscript{24} Cornick, unreported. CCA Tas. 28 Jul 1987 at 2 per Cox J.
A. Almost anything.

Q. Almost anything— he is up round the corner of the house near the bathroom, R is nowhere near him what did you think at that stage, at that moment, he could do to R?

A. At that moment he could not have done anything to R.

Q. No and if he tried to do anything to R R could either have defended himself or run away could he not have?

A. He could have done.25

There is another exchange during which Crown counsel sought to highlight the absence of the threat at the exact time the accused stabbed her partner:

Q. Well the time you went up to C in the passageway did you think he was going to harm you or did you think he was going to harm your son R?

A. Either or both of us.

Q. Either or both of us, had he meant [sic] a threat against you.

A. Not that I recall.

Q. Not that you recall and you have already agreed that he had no weapons in his hand?

A. Ye.

Q. And you had a knife in your hand?

A. Yes.

...

Q. Did it occur to you that night that you should perhaps get R and say ‘Come on let’s leave the house until the police or taxi arrive’?

A. No. I didn’t think about it.

Q. You didn’t think about that—the truth is was it not ... you were fed up and you were extremely angry and you had had enough?

In undermining the accused’s account of her fear for herself and her son, the prior history of violence and the fear is reduced to a simple scenario where there is no threat. At the exact moment of the killing, his violent assault was over and
he could not have ‘done anything’. The accused had a knife and her partner was
unarmed. There were other options available to the accused. She could have left
the house. Instead, she followed him down the hall with a knife and stabbed him
in anger and revenge. The prosecution’s reconstruction of the killing (with its
close temporal focus) makes the accused’s actions appear unreasonable. This
construction was apparently accepted by the jury which convicted the accused of
manslaughter (on the basis of provocation). It was also the view of the
Tasmanian Court of Criminal Appeal which rejected her appeal in relation to
self-defence. As Cox J stated:

It is my opinion looking at the whole of the evidence that there is no material available to the
jury entitling them to find the existence of a reasonable doubt based upon the possibility that
she was defending herself.26

The legal process breaks down a woman’s experience of violence into discrete
episodes of violence to which she can respond anew. In the atomisation of events
and their reconstruction within the trial framework, the reasonableness of the
accused’s action can be rendered unrecognisable.

In an attempt to make ‘whole’ the accused’s experience of violence and to
challenge the stereotypes and generalisations that have informed the application
of the law of self-defence, feminists have advocated the introduction of evidence
that contextualises the actions of the woman who kills her abusive partner.27
Following the approach adopted in the United States, the usual strategy to
counter the problems encountered by battered women within the criminal justice
system has been the use of expert witnesses to supplement the specific evidence
provided by lay witnesses.28 Again, following the North American experience,
the prevailing conceptual approach to ‘expert’ evidence in Australia has been
reliance on BWS evidence. The perceived value of BWS being that it can draw

25 Cornick, unreported, CCA Tas, 28 Jul 1987 at 8 - 9 per Cox J.
26 Cornick, unreported, CCA Tas, 28 Jul 1987 at 10 percox J.
27 See J Stubbs & J Tolinic, ‘Battered Woman Syndrome in Australia: A Challenge to Gender
Bias in the Law’, in J Stubbs ed, Women, Male Violence, Sydney: The Institute of
Criminology, 1994 at 192; N Seuffert, ‘Locating Lawyering Power, Dialogue and Narrative’
(1996) 18 Sydney Law Review 523 at 550. See also Malott [1998] 1 SCR 123 at 144 per
L’Heureux-Dube J.
together the series of violent events that have been atomised by the laws of evidence\textsuperscript{29} and the trial process, and secure the accused’s claim to reasonable self-defence. In this chapter, my contention is that while expert evidence can usefully serve a cohesive purpose, this purpose will not be realised by the use of evidence of BWS.

7.3 \textbf{THE EXPERT WITNESS – EVIDENCE OF ‘BATTERED WOMAN SYNDROME’}

In Australia, as well as in the United States, Canada, New Zealand and England, expert evidence of BWS provided by psychologists and psychiatrists has been the predominant means by which evidence of domestic violence and its impact upon domestic violence survivors has been ‘packaged’ for the courts.\textsuperscript{30} In Australia, evidence of BWS was first accepted in 1991 in the South Australian case of \textit{Runjanjc and Kontinnen}\textsuperscript{31} a case concerned with the defence of duress, and its admissibility in the context of women who kill their violent partners was examined by the High Court in the 1998 decision of \textit{Osland}.\textsuperscript{32}

7.3.1 \textbf{WHAT IS BWS?}

BWS originated in the United States in the 1970s in the work of Lenore Walker.\textsuperscript{33} As a result of studies of battered women, Walker advanced a theory

\textsuperscript{30} R Hunter, above n 17 at 141.
\textsuperscript{32} (1991) 56 SASR 114.
\textsuperscript{33} (1998) 197 CLR 316.
that described 'both a pattern of violence against a woman by her male partner and its psychological impact upon her'. The concept of BWS describes the psychological sequelae that result from living in a violent relationship. These include depression, decreased self-esteem, learned helplessness: 'it is a distortion of thought and perception, impaired ability to perceive and realistically appraise alternatives and delusions regarding batterer and relationships'. BWS is not a diagnosable mental disorder recognised in the *Diagnostic and Statistical Manual of Mental Disorders – IV TR (DSM IV TR).* However, Walker has argued that BWS is a sub-category of the diagnostic category for Post-Traumatic Stress Disorder. Although a precise definition of BWS remains obscure, two essential features inform the concept: (1) the 'cycle of violence'; and (2) 'learned helplessness'.

### 7.3.1.1 The 'cycle of violence'

In her research, Walker found that 'battering did not take place all the time in abusive relationships but neither was it as random as those involved perceived it to be.' Walker identified a three-phase cycle of violence that explains the pattern of violence in battering relationships: (i) tension building stage; (ii) acute battering stage; (iii) kindness and contrite, loving behaviour stage. In the first phase, there is a build-up of tension during which the woman attempts to placate

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26 Ibid.


her partner. In the battering phase, the acute physical violence occurs which ‘may last for anywhere from 2 to 24 hours, with the intensely violent period estimated to average 15 to 30 minutes’.\textsuperscript{42} The anticipation of the battering phase causes ‘severe psychological stress for the battered woman: she becomes anxious, depressed, and complains of other psychophysiological symptoms’.\textsuperscript{43} In the third phase, the batterer is ‘extremely loving, kind, and contrite’.\textsuperscript{44} Although this third phase has been identified, Walker has observed that in some relationships the third phase may simply be the absence of tension and violence rather than any loving contrition.\textsuperscript{45} A battered woman is defined as a ‘woman who has gone through the battering cycle at least twice’.\textsuperscript{46}

\textbf{7.3.1.2 Learned helplessness}

The concept of ‘learned helplessness’ is central to BWS. In their experimental work with dogs, Seligman and his colleagues developed the concept of ‘learned helplessness’ to explain their discovery that where the animals ‘were repeatedly and non-contingently shocked, they became unable to escape from a painful situation, even when escape was quite possible’.\textsuperscript{47} Walker adapted the theoretical concept of ‘learned helplessness’ to explain why women remain in violent relationships. In the context of battered women, the theory of learned helplessness ‘is responsible for the apparent emotional, cognitive, and behavioural deficits observed in the battered woman, which negatively influence her from leaving a relationship after battering occurs’.\textsuperscript{48} Although Walker’s own theorising on learned helplessness has evolved since 1979 from an emphasis on helplessness and passivity\textsuperscript{49} to viewing ‘learned helplessness’ as a coping

\textsuperscript{42} M McMahon, above n 34 at 27.
\textsuperscript{43} L Walker, \textit{The Battered Woman}, above 33 at 61.
\textsuperscript{44} \textit{Ibid} at 65.
\textsuperscript{45} \textit{Ibid} at 96.
\textsuperscript{46} I Freckelton, ‘Contemporary Comment: When Plight Makes Right - the Forensic Abuse Syndrome’ (1994) 18 \textit{Criminal Law Journal} 29 at 32.
\textsuperscript{47} L Walker, \textit{The Battered Woman Syndrome}, above 33 at 86.
\textsuperscript{48} \textit{Ibid} at 2.
\textsuperscript{49} For example, Walker wrote that ‘once the women are operating from a belief of helplessness, the perception becomes reality and they become passive, submissive, ‘helpless’. They allow things that appear to them to be out of control to actually get out of control’, \textit{ibid} at 47.
strategy, it is the helpless and passive aspects of BWS that have found resonance in the legal context.\textsuperscript{51}

7.3.2 BWS AND SELF-DEFENCE

Although feminists have become increasingly concerned with reliance on BWS evidence,\textsuperscript{52} BWS originally developed as a feminist defence strategy to assist in cases where battered women killed their abuser and relied on self-defence.\textsuperscript{53} At its inception, BWS evidence was a device directed towards counteracting the limitations of the substantive law of self-defence as it applied to battered women. BWS evidence relates to the jury’s evaluation of the accused’s belief in the existence of the threat requiring the use of defensive force (the imminence and seriousness of the threat) and the reasonableness of her fatal response.\textsuperscript{54} The cycle theory is significant as it elucidates the woman’s perception of a threat, in circumstances where the existence of a threat or its seriousness may not be apparent to an ‘outsider’. A battered woman is said to be hyper vigilant. She is sensitive to ‘cues of impending danger and [can] accurately perceive the seriousness of the situation before a person who has not been repeatedly abused might recognize the danger’.\textsuperscript{55}

Evidence of BWS is seen to assist in establishing the imminence of the threat in a ‘non-confrontational’ situation (for example, a sleeping partner) by providing a “psychological” link for the battered woman between the two temporally distinct events.\textsuperscript{56} The ‘cycle theory’ supports the view that ‘[a] “cumulative terror” consumes the woman and holds her in constant fear of harm. This fear


\textsuperscript{51} See 7.3.2 and 7.3.4.2. See also M McMahon, ibid at 29.

\textsuperscript{52} See 7.3.4.2.

\textsuperscript{53} E Schneider, Battered Women and Feminist Lawmaking, New Haven: Yale University Press at 125.

\textsuperscript{54} See Lavallee (1990) 55 CCC (3d) 97 at 125; Malott [1998] 1 SCR 123 at 133 - 134. See Osland (1998) 197 CLR 316 at 377 per Kirby J. However, Stubbs and Tolmie suggest that one reading of Gaudron and Gummow JJ’s judgment in Osland is to limit the relevance of BWS evidence to the subjective test in self-defence only, J Stubbs & J Tolmie, ‘Falling Short of the Challenge?’ above n 5 at 724 – 723.

\textsuperscript{55} L Walker, ‘Legal Self-Defence for Battered Women’, above 33 at 209.
continues even during the peaceful interlude between episodes of abuse'. The cycle has also been used to help explain a woman’s failure to leave her violent partner – the loving contrition positively reinforces a woman’s decision to remain in the relationship. This explanation of the woman’s failure to leave a violent relationship is reinforced by the theory of ‘learned helplessness’.

Aside from direct relevance to the requirements of self-defence, the value of BWS evidence was seen in its broader educative role as ‘myth-dispelling’ or ‘counter-intuitive’ evidence. In Lavallee, Wilson J stated that:

The average member of the public (or the jury) could be forgiven for asking: Why would she continue to live with such a man? How could she love a partner who beat her to the point of hospitalisation? We would expect the woman to pack her bags and go. Where is her self-respect? ... Such is the reaction of the average person when confronted with the so-called “battered woman syndrome” ... [she] faced the prospect of being condemned by popular mythology about domestic violence. Either she was not as badly beaten as she claims or she would have left the man long ago. Or, if she was battered that severely, she must have stayed out of some masochistic enjoyment of it.

As Freckelton has observed, the utility of BWS evidence is its role in ‘disabusing tribunals of fact of misapprehensions about the ways people behave when they suffer trauma that are not within the ordinary experience of most of the population’.

7.3.3 BWS AND THE RULES OF EVIDENCE

As well as confronting limitations in the substantive law, evidence of BWS was also designed to circumvent the operation of the adjectival rules that place restrictions on the material to which the fact-finder can have regard in a criminal trial. This is conveyed in the comments of Schneider who wrote (in 1980) that:

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56 M McMahon, above n 34 at 27.
58 I Freckelton, ‘Contemporary Comment’, above 46 at 31. See also Lavallee (1990) 55 CCC (3d) 97 at 112 –113, 125; Osland (1998) 197 CLR 316 at 376 per Kirby J.
60 I Freckelton, ‘Contemporary Comment’, above 46 at 31.
Sex-stereotyped attitudes and the sex bias inherent in the legal rules of self-defence often cause the judge to exclude evidence of an individual woman’s circumstances and perceptions. The woman is thus unable to present her case fully and is denied a fair trial.\textsuperscript{61}

In her article, Schneider refers to American cases involving battered women who kill where information about their partner’s prior acts of violence (actual and threatened) had been excluded as irrelevant.\textsuperscript{62} In seeking a fair trial for battered women, Schneider argued for the admission of evidence from lay witnesses who can provide the jury with information about the history of the relationship and evidence from expert witnesses who can contextualise the accused’s act.\textsuperscript{63} In the United States, this interest in evidentiary constraints has continued until the present. In 2000, Schneider wrote that ‘the primary legal issue concerning battered women who kill is the admissibility of expert testimony on battering or battered woman syndrome’.\textsuperscript{64}

In seeking to place the actions of battered women within a broader social framework, feminist commentators have called attention to the gendered nature of the rules of evidence that have made it difficult for women to convey their experiences to the court.\textsuperscript{65} For example, Scheppele has observed, that ‘what “everyone knows” when they live life as … a woman turns out to be surprisingly difficult to prove under conventional rules of evidence’.\textsuperscript{66} The primary rules of admissibility that have impacted on the acceptance of expert evidence providing contextual information about women’s experiences of domestic violence have been relevance and the rules of expert opinion evidence, particularly the common knowledge rule.

\textsuperscript{61} E Schneider, ‘Equal Rights to Trial for Women’, above n 17 at 636.
\textsuperscript{62} Ibid at 636 – 637.
\textsuperscript{63} Ibid at 644 – 645.
\textsuperscript{64} E Schneider, \textit{Battered Women and Feminist Lawmaking}, above n 53 at 125.
\textsuperscript{66} K Scheppele, ‘Manners of Imagining the Real’ (1995) 19 \textit{Law and Social Inquiry} 995 at 997.
7.3.3.1 Relevance

The concept of relevance has been problematic for feminist scholars. In the context of the relationship between the operation of the rules of evidence and self-defence, Hunter has written that:

The notion of relevance is gendered to the extent that legal doctrine is gendered. If ... legal constructs such as self-defence ... and the ubiquitous reasonable person reflect typical masculine behaviour ... then courts may rule aspects of women's experience that do not conform to such paradigmatic behaviour to be irrelevant and therefore inadmissible. Self-defence doctrine ... requires a showing of 'imminent' or 'immediate' danger to the defendant. Battered women who have killed their batterers face the possibility that evidence of past abuse and threats will be excluded as irrelevant to the claim that they were in 'imminent' danger, precisely in cases in which such evidence is most needed — that is, in cases involving battered women who struck back at a time when their batterers were not attacking them.

In the United States, there is now general acceptance that expert evidence of BWS is relevant to self-defence. However, there is currency to Hunter's observation about the admissibility of BWS evidence in 'non-confrontational' scenarios. In the United States, there is variation between states as well as within jurisdictions (from case to case) about the admissibility of BWS evidence in 'sleeping man' or 'hire to kill' self-defence cases.

In contrast to the continuing jurisprudential interest in the United States concerning the relevance of BWS evidence to self-defence, the Australian experience has been that BWS evidence has been accepted as relevant to self-

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68 See R Hunter, 'Gender in Evidence', above n 17 at 133.
70 Ibid at 19 - 20.
71 Similarly in Canada, the Supreme Court has articulated the utility of BWS for the purposes of self-defence, see Lavallee [1990] 1 SCR 852; Malott [1998] 1 SCR 123. See discussion of the Canadian experience in J Stubbs & J Tolmic, 'Falling Short of the Challenge?', above n 5 at 717 - 720.
defence with little or no debate. In a number of prominent Australian cases where BWS evidence was adduced, its relevance to non-traditional self-defence situations was accepted: for example, in cases of the retreating or sleeping husband or killing with the involvement of others.

7.3.3.2 Expert opinion evidence

In adducing expert evidence in relation to the social context that informs battered women’s offending behaviour, the rules relating to opinion evidence have shaped the evidentiary model relied upon. The common knowledge rule has operated to limit the reception of expert opinion evidence in relation to community standards and human behaviour. In the United States, the traditional focus was whether the evidence was ‘beyond the ken’ of the average juror. The modern formulation of the common knowledge rule is whether the evidence will ‘assist the trier of fact to understand the evidence or determine a fact in issue’. Similarly in Australia, there have been expansions in the common knowledge rule with the adoption of a more flexible approach focusing on whether the evidence would be helpful.

The common knowledge rule assumes that there exists a common understanding between people: ‘a set of universally accepted generalisations about “human” behaviour based on common experience’. The concept of shared ‘common sense’ or ‘common experience’ - reflecting a supposed unproblematic singular vision of the world - is dubious as ‘widely accepted generalisations may actually

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72 See discussion ibid at 720 – 722.
73 For example, Secretary (1996) 107 NTR 1; Kontinnen, unreported, SC SA, 30 Mar 1992.
74 Osland (1998) 197 CLR 316.
75 See I Freckelton & H Selby, The Law of Expert Evidence, Sydney: Law Book Company, 1999, Chapter 6. In addition to the common knowledge rule, Freckelton observes that the prejudicial/probative rule, the general acceptance of the evidence within the scientific field and the qualification of the witness were initially used to exclude BWS evidence, see I Freckelton & H Selby at 329 – 340.
77 Federal Rules of Evidence 1975 r 702.
78 See 7.4.3.2.
be untrue and there is much scope for value judgments, bias and prejudice. 80 This is particularly problematic for those whose perspective does not conform to the accepted ‘common sense’ viewpoint. Although the principle of ‘commonality’ appears neutral and objective, feminist commentators have pointed out that the assumption of common experience is fundamentally gendered. As with the objective standards found within the substantive criminal law (reasonableness or the ordinary person), 81 the concepts of ‘common sense’ or ‘common knowledge’ or ‘common experience’ within the rules of evidence privilege what is ‘common’ to a particular category of person – the white, middle-class, heterosexual male. 82

In the United States, as with Australia, the admission of evidence explaining the experiences of battered women in the form of ‘syndrome’ evidence – a medical, pathological model to explain the perceptions of battered women 83 was a strategy to satisfy the common knowledge rule. In Australia, the ‘common knowledge rule’ was a significant evidentiary hurdle that BWS evidence was required to overcome for admissibility. In Runjanjic & Kontinnen, evidence of BWS was initially rejected. On appeal, King CJ canvassed the importance of the common knowledge rule as the protector of jury function:

The law jealously guards the role of the jury, or the court where it is the trier of fact, as the judge of human nature, of the behaviour of normal people and of situations which are within the experience of ordinary persons or are capable of being understood by them. 84

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80 J Freckelton & H Selby, above n 75 at 329 – 330.
81 See 5.3.3.1 and 6.3.3.1.
84 (1991) 56 SASR 114 at 120.
His Honour stated that he had 'considered anxiously whether the situation of the habitually battered woman is so special and so outside ordinary experience that the knowledge of experts should be made available'. In quoting from the summary of the evidence that the psychologist proposed to give, King CJ observed that:

There are certain behaviour patterns displayed by women who are battered in the way these women have been battered and it leads to certain inability to handle situations in the way ordinary people would ...

It is associated with a loss of self-esteem and confidence which robs them of the ability to cope with infliction of violence in the way that an ordinary person would. ... He says their emotional responses are blocked and the expectation of violence which is abnormal to an ordinary person becomes normal to them. Their anxiety level robs them of the ability to make decisions.

In admitting evidence of BWS, it appears that the classification of the battered woman's reactions as 'abnormal' - placing her outside the experiences of the 'ordinary person' - was influential in the decision.

Reliance on the medical model of BWS appears to have been an expedient evidentiary strategy able to be used to persuade courts that information about battered women's situations may assist in the jury decision-making process. The acceptance of BWS evidence has been used tactically in the United States and Canada to present contextual evidence of the social and political factors that inform the actions of battered women in conjunction with the medical model of BWS. This has allowed defence counsel to place social context information before the jury while avoiding potential admissibility issues that may arise if social framework evidence was presented in its own right. In contrast, the strategic importance of BWS has been largely overlooked in Australia where the primary focus of the expert evidence has been the diagnostic capabilities of BWS.

85 (1991) 56 SASR 114 at 121.
87 See J Stubbs & J Tolmie, 'Falling Short of the Challenge?', above n 5 at 712 – 720.
(whether or not the accused was a sufferer of BWS). Usually, evidence of social context (if provided) has only been a secondary consideration.\textsuperscript{88}

7.3.4 BWS IN AUSTRALIA

7.3.4.1 Reliance on BWS

Since its reception in Australia, BWS has been used in 20 of the cases identified in my research where women have killed their violent partner.\textsuperscript{89} Evidence of BWS has also been accepted in a range of cases outside this context, from social security fraud to armed robbery.\textsuperscript{90}

Self-defence with BWS

In the cases identified in my research where women killed their male partner, evidence of BWS was adduced in 10 of the 14 cases where the accused relied on self-defence at trial.\textsuperscript{91} The accused were acquitted in 5 of these 10 cases.\textsuperscript{92} These


\textsuperscript{91} Chhay (1994) 72 A Crim R 1; Denney [2000] VSC 323; Gilbert, unreported, SC WA, 4 Nov 1993; Buzzacott, unreported, SC SA, 21 Jul 1993; Osland (1998) 197 CLR 316; Secretary (1996) 107 NTR 1; Gadd, unreported, SC Qld, 27 Mar 1995; Kontinnen, unreported, SC SA, 30 Mar 1992; Hickey, unreported, SC NSW, 14 Apr 1992; Terare, unreported, SC NSW, 20 Apr 1995. In Babsek, unreported CA Qld, 2 Jun 1998, the accused relied at trial on the defences of provocation and self-defence, and adduced evidence of BWS. The accused was convicted of murder and successfully appealed on the basis that inadmissible evidence was admitted. At the re-trial, the accused did not rely on self-defence, and instead argued that she was guilty of manslaughter only as she did not intend to kill or do grievous bodily harm to the deceased. The accused was convicted of manslaughter.
acquittals could be used to claim that BWS evidence has assisted in securing acquittals for battered women who kill, particularly if pre-BWS evidence and post-BWS evidence acquittals are compared. Before 1991, I identified one case where a woman relied on self-defence and was acquitted. This was the case of Zysec, where the accused stabbed her partner during a physical confrontation in which he was strangling her (the paradigm self-defence scenario) and ‘strong reliance was placed on evidence that bruising appeared on the woman’s neck after the killing to show the imminence of the attack’. In their research, Stubbs and Tolmie found no reported case where a woman who killed her male partner was acquitted before the introduction of BWS. Despite this apparent success, a more detailed evaluation of reliance on BWS indicates that this conclusion cannot necessarily be sustained.

In numerical terms, the impact of BWS evidence appears to be neutral in relation to facilitating successful reliance on self-defence. The accused were only acquitted in half of the cases in which BWS evidence was adduced (5 out of 10). In the remaining five cases, in three cases the accused relied on provocation and self-defence at trial and was convicted of manslaughter, in one case the accused unsuccessfully relied on both provocation and self-defence and was convicted of murder and in one case the accused’s conviction for murder was overturned on appeal and the Crown accepted a plea of guilty to manslaughter.

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93 Unreported, SC WA, 21 May 1987, 76/87.
94 S Tarrant, ‘Provision and Self-defence: A Feminist Perspective’ (1990) 15 Legal Service Bulletin 147 at 48. I have not been able to obtain a copy of this case from the Western Australia Supreme Court. I rely on the details of the case found in S Tarrant, ‘Provision and Self-defence’, at 148. This case is also discussed at 6.3.2.2.
96 In addition to the arguments advanced in my thesis, Stubbs and Tolmie have commented on other possible reasons for this success: community education campaigns, the process of law reform in Australia in relation to domestic violence, the public debate about gender bias and the law, and a growing interest in the application of the defences to battered women who killed: ibid at 203 – 204.
A broader perspective of the cases in which BWS evidence has been relied upon in Australia reveals that BWS has been more useful in securing manslaughter convictions for battered women than acquittals. While there were only acquittals in 5 of the 20 cases where BWS was relied upon,\textsuperscript{100} BWS evidence was used in connection with manslaughter convictions in 11 cases. As well as the four manslaughter convictions already discussed, there were six other cases where BWS evidence was relied upon following a plea of guilty in connection with mitigation of sentence.\textsuperscript{101} In one further case, the accused was convicted of manslaughter following a trial where self-defence was not relied upon.\textsuperscript{102} In Chapter Six, I highlighted the reluctance of defence counsel to argue self-defence at trial.\textsuperscript{103} The clear trend is for battered women to be convicted of manslaughter (usually following a plea).\textsuperscript{104} A consequence of stereotypes associated with BWS evidence may be that it encourages defence counsel to compromise in cases where reliance on self-defence would be more appropriate.\textsuperscript{105}

**Self-defence without BWS**

In my view, the three recent cases where self-defence was successful in the absence of BWS are more notable than the self-defence cases where BWS was relied upon.\textsuperscript{106} In all of the cases, the accused’s account of her relationship was supported by independent evidence of the violence.\textsuperscript{107} The significance of these cases, as Stubbs and Tolmie comment, is ‘that it is now possible to succeed with a claim to self-defence arising in the context of domestic violence without

\textsuperscript{100} Claiming this level of ‘success’ requires an assumption to be made that BWS evidence contributed to the acquittal, see J Stubbs & J Tolmie, ‘Battered Woman Syndrome in Australia’, above n 27 at 203 – 204.


\textsuperscript{102} Raby, unreported, SC Vic, 22 Nov 1994.

\textsuperscript{103} See 6.2.

\textsuperscript{104} See 6.2.


offering evidence of BWS'. These cases demonstrate that it is possible to convey to the jury the threat that battered women face in their home (even in 'non-traditional' self-defence situations) without expert evidence.

The case of Stjernqvist is particularly noteworthy as the killing occurred in a 'non-traditional' self-defence situation (arguably in the absence of a specific threat). In these circumstances, it was a case where it might be expected that the defence would rely on BWS evidence in an attempt to convey the accused's experience of violence to the jury. Although defence counsel consulted with a social worker in the preparation of the defence, there was no expert evidence about domestic violence adduced at trial. At trial, self-defence was supported by evidence about the history of violence and the circumstances of the killing provided by the accused and other witnesses called by the defence. As I observed at 6.4.3.1, these witnesses were not challenged in any way by the learned Crown Prosecutor in respect of what they said.

The other two cases involved self-defence pleas where the accused killed during a confrontation situation. Interestingly in Stephenson, in the preparation for the accused's case, defence counsel consulted with the Women's Legal Service and reports were obtained from two psychiatrists and information was provided by a social worker from the Domestic Violence Resource Centre. There was consideration given to presenting a 'BWS self-defence' defence. However, it was decided to rely upon a 'straight self-defence' approach in view of the circumstances of the killing: 'there was a concern that the expert testimony might confuse the relatively straightforward fact situation'.

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102 See ibid at 740 in relation to Lock and Stjernqvist.
103 Ibid at 739.
104 Unreported, Cairns CC, 30 Mar 1992. This case is discussed in detail at 6.3.2.2.
105 See discussion in J Stubbs & J Tolmie, 'Falling Short of the Challenge?', above n 5 at 739.
106 See 6.3.2.2.
107 See 7.4.4.
108 Unreported, Cairns CC, 30 Mar 1992 at 152 per Derrington J.
111 Z Rathus, above n 8 at 119.
7.3.4.2 Critique of BWS

As well as my analysis of the quantitative data that casts doubt on the utility of BWS evidence in securing acquittals for battered women who kill, the use of BWS evidence is also objectionable on a theoretical level (a theoretical critique with significant practical implications). There is extensive literature debating the use of evidence of BWS in the context of women who kill their violent partners, both in Australia\textsuperscript{117} and internationally.\textsuperscript{118} Feminist scholars have acknowledged


the potential utility of BWS in the individual case, however its use has increasingly been criticised as being shortsighted and ultimately counter-productive to the self-defence aspirations of battered women who kill. Although the feminist literature is diverse, three main criticisms of BWS can be identified: the ‘syndromisation’ of women’s experiences; its failure to challenge the existing stereotypes of women; and the creation of a new stereotype. Aside from the compelling feminist critique, the scientific basis and methodology of BWS have also been effectively challenged.

The ‘syndromisation’ of women’s experiences

The use of the term ‘syndrome’ has been criticised as it ‘pathologises’ women’s experiences of violence. In Australia, the reception of BWS evidence has been largely based on the ‘notion that battered women have developed different perceptions from other people’. the effect of the on-going violence is to create a condition that ‘has a fundamental effect on the normal reasoning processes of the sufferer’. The focus of the evidence (and the judicial inquiry) is the individual psychological state of the woman, rather than the broader social context within which the accused’s conduct occurred and the extreme situation to which she was responding.

In my research, I found support for the pathologisation of women’s experiences of domestic violence. As I argue in Chapter Eight, domestic violence and BWS have virtually become amalgamated in the construction of women who kill their partners, so that the judicial response is to the accused’s (dysfunctional) psychology rather than the history of violence. This is the deficiency of BWS evidence. It obscures the violence and with it the possibility that the killing was a


19 For an excellent account of the scientific critique of BWS, see M McMahon, above n 34. See also I Freckelton, 'Contemporary Comment', above n 46; I Freckelton, 'Syndrome Evidence', above n 30 at [13.40].

21 Taylor, unreported, SC SA, Feb 1994 at 13 per Olsson J.
22 J Stubbs & J Tolmie, 'Battered Woman Syndrome in Australia', above n 27 at 199, 204.
23 See 8.3.3.1 and 8.3.4.2.
rational and reasonable response to a prolonged and extreme situation. Instead, the reality of the threat and the circumstances in which the woman acted are subsumed by the account of her psychology, including her 'learned helplessness'.

This is illustrated in the case of Bradley, 124 where the accused was convicted of manslaughter on the basis of provocation. The accused had attempted on at least eight occasions to leave her violent partner and she obtained a divorce. She had used women's refuges on five occasions. Her partner always found her and by a combination of threats to the accused and the harassment of those who sheltered the accused compelled her to return to him. 125 In one instance, he pursued her from Queensland to Perth on the basis of a reference she had made in a letter to her son about the weather. On finding the accused, he gave her a bullet as a gift. He then took her and their sons camping in a remote location and forced them to live there for three months while he subjected her to beatings with 'such items as sticks and fan belts'. 126

After detailing a history of horrific violence, the accused's attempts to leave the relationship and the lengths that her partner went to find her, Coldrey J observes that these features of her relationship led two experienced clinical psychologists and a highly credentialled forensic psychiatrist to 'conclude that [the accused] represent[ed] a classic case of battered woman syndrome'. 127 In the context of another case, Stubbs and Tolmie have observed that the tension between 'the broader circumstances in which the accused found herself, and the psychological evidence introduced in the case shows in the unintentional irony of the judge's sentencing comments'. 128 So too in the comments of Coldrey J who says that 'among the characteristics of [BWS] is a feeling of helplessness where battered

124 Unreported, SC Vic, 14 Dec 1994. This case is discussed in detail at 6.3.2.2.
125 Unreported, SC Vic, 14 Dec 1994 at 145 per Coldrey J.
126 Unreported, SC Vic, 14 Dec 1994 at 145 per Coldrey J.
127 Unreported, SC Vic, 14 Dec 1994 at 147 per Coldrey J.
women believe that there is nowhere they can go and no-one to turn to for help’.  

The focus on the psychological constraints (learned helplessness) that prevent women from leaving obscures the ‘external’ constraints that may explain a woman’s decision to remain in a relationship. Evidence may be provided by witnesses about the accused’s relationship with the deceased and her previous efforts to leave the relationship or deal with his violence (for example, calling the police, leaving the house/the relationship, obtaining restraint orders, getting help from friends, family or professionals). However, the real potentiality of this evidence to demonstrate the existence of a serious threat and the necessity of using fatal violence is lost within the BWS framework. Instead, the woman is said to ‘perceive’ a threat or ‘perceive’ that she cannot otherwise escape the violence – the implication is that her perception is not real.

For example, in Kontinnen, there was considerable evidence provided about the accused’s prior attempts to leave her violent partner and the steps that she had taken to seek assistance in respect of his violence. She had ‘no safe place to go’, ‘no other support’ and ‘overriding it all is the absolute fear that if she leaves the person will find her and that the violence and brutality will be worse than before she left’. Her prior knowledge of the ineffectiveness of other avenues of protection and her legitimate fear of escalating violence could have been used by defence counsel (without BWS) to show the reasonableness of her decision to shoot her partner while he was asleep, after he had threatened to kill the accused, his other defacto wife and their child when he woke. Instead, the accused’s
'psychological dysfunction' explains her failure to leave and her fear of escalating violence (if she left).\textsuperscript{135}

**Failure to challenge existing stereotypes**

The introduction of BWS evidence creates an exception for the 'abnormal' woman, while leaving the fundamental 'maleness' of self-defence unchallenged and unaltered. In Australia, there has been a judicial failure to acknowledge the fundamental masculinity of self-defence,\textsuperscript{136} as well as limited judicial consideration of the purpose served by the introduction of BWS evidence.\textsuperscript{137} A consequence is that BWS has been narrowly conceived in terms of its ability to categorise women according to the symptomatology of a medical/pathological condition. Forensic understanding of BWS has focused on its diagnostic capabilities – that is, whether or not the accused fits within the diagnostic criteria of BWS.\textsuperscript{138} As Grant has asserted, a fundamental problem with reliance on BWS is that 'we risk transforming the reality of this form of gender oppression [the male model of self-defence] into a psychiatric disorder'.\textsuperscript{139}

In explaining the woman's actions in terms of her psychological deficiencies, evidence of BWS operates to undermine the reason for its introduction – to assist in establishing the reasonableness of her actions in self-defence.\textsuperscript{140} Instead of challenging the existing account of women who use fatal violence against their male partners, evidence of BWS endorses her status as a helpless and weak victim. As Kirby J observed in *O'sland*:

> The pressure to 'medicalise' the response of a victim in a prolonged violent relationship, and to attribute that response to the manifestation of an established psychological or psychiatric disorder, distracts attention from conduct which may constitute a perfectly reasonable

\textsuperscript{135} Unreported, SC SA, 30 Mar 1992 at 52 per Legoe J referring to the evidence given by the expert witness. See J Stubbs & J Tolmie, 'Battered Woman Syndrome in Australia', above n 27 at 205.

\textsuperscript{136} See Chapter Six.

\textsuperscript{137} See J Stubbs & J Tolmie, 'Falling Short of the Challenge?', above n 5.

\textsuperscript{138} Ibid at 728. See 7.3.3.2.

\textsuperscript{139} I Grant, above n 118 at 51. In contrast, Stubbs and Tolmie have identified that the approach to BWS evidence in North America reflects an acceptance of the fundamental masculinity of self-defence, and the purpose that BWS evidence serves is viewed in this light, see J Stubbs & J Tolmie, 'Falling Short of the Challenge?', *ibid*.

\textsuperscript{140} M Shaffer, above n 118 at 12.
response to extreme circumstances. BWS denies the rationality of the victim's response to prolonged abuse and instead presents the victim's conduct as irrational and emotional.141

The judicially endorsed model of BWS highlights the passivity and impaired psychological state of the woman who kills her abusive partner: she 'meekly compl[i]es with the batterer's wishes without any logical thought to her own rights';142 she has 'certain inabilitys to handle situations in the way ordinary people would';143 her 'anxiety level robs [her] of the ability to make decisions'.144 The psychologisation of experience means that BWS reinforces and perpetuates negative stereotypes of women as helpless and irrational, thus establishing her unreasonableness rather than her reasonableness.145

Creation of the stereotypes of the 'battered woman'

There is concern expressed that the construct of BWS has given rise to a new stereotype of the 'battered woman', and thus serves to exclude from the framework of self-defence the experiences of those who do not fall within this stereotype.146 BWS produces a 'stereotype of how the abused woman not only does behave, but how she should behave'.147 An 'impression [is created] that all

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142 Osland [1998] 2 VR 636 at 642.
143 Runjanjic & Kontinen (1991) 56 SASR 114 at 117 per King CJ.
144 Runjanjic & Kontinen (1991) 56 SASR 114 at 118 per King CJ.
145 See J Stubbs & J Tolmie, 'Falling Short of the Challenge?', above n 5; J Stubbs & J Tolmie, 'Battered Woman Syndrome in Australia', above n 27; E Sheehy, 'Battered Woman Syndrome', above n 118; S Noonan, 'Battered Woman Syndrome: Shifting the Parameters of Criminal Law Defences (or (Re) Inscribing the Familiar?)', in A Bottomley (ed), Feminist Perspectives on the Foundational Subjects of Law, London: Cavendish Publishing Limited, 1996; C Gillespie, above n 118; W Chan, 'Legal Equalities and Domestic Homicides', above n 118; M Shaffer, above n 118; C Wells, above n 118; E Schneider, 'Describing and Changing', above n 118; M Mahoney, 'Legal Images of Battered Women' above n 118; R Hunter, above n 17 at 153.
146 This was recognised by Kirby J in Osland (1998) 197 CLR 316, who wrote that 'as a construct, BWS may misrepresent many women's experiences of violence', at 371. See further J Stubbs & J Tolmie, 'Falling Short of the Challenge?', ibid; J Stubbs & J Tolmie, 'Battered Woman Syndrome in Australia', ibid; E Sheehy, 'Battered Woman Syndrome', ibid; E Sheehy, 'Battered Women and Mandatory Minimum Sentences' (2001) 39 Osgoode Hall Law Journal, forthcoming; W Chan, Women, Murder and Justice, above n 118; W Chan, 'Legal Equalities and Domestic Homicides', ibid; W Chan, 'A Feminist Critique of Self-Defence and Provocation', above n 118; P Crocker, above n 118; M Shaffer, ibid; E Schneider, 'Particularity and Generality', above n 118; M Dutton, 'Understanding Women's Responses to Domestic Violence', above n 118; M Mahoney, 'Victimization or Oppression?', above 17; R Hunter, ibid at 151--154.
battered women act and react in a similar manner'. In claiming self-defence, the issue becomes the need to 'prove that she is a genuine battered woman rather than whether or not she acted in reasonable and necessary self-defence'. The defence seeks to 'fit' the accused within the stereotype of the battered woman, while the prosecution seeks to show that the accused does not fit within the syndrome. For example, in Rogers, Hampel J commented that the psychiatrist at the police Crisis Support Unit had expressed:

> Reservations about the correctness of [the accused's] classification as a 'battered woman' mainly because of ... [her] ability to seek assistance, to defuse the situation [herself] and because of [her] intelligence. She thought that [the accused] did not present as one in a powerless, isolated family violent situation.

In contrast, the defence expert considered that 'all the classical features of the "battered woman" syndrome were present in [the] case'.

The limitations imposed by the category of the 'battered woman' is objectionable as it seeks to reduce the diversity of experience of women into a single category of the essential battered woman - thus ignoring the complexity of race and ethnicity - as well as the diversity of women’s experience of violence.

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149 *Ibid* referring to P Crocker, above n 28 at 145.
150 As Freckelton has observed, '[i]t has already been argued in North American and Australian courts that particular victims of domestic violence could not properly avail themselves of expert evidence on battered woman syndrome because they had not been sufficiently beaten or beaten for long enough to develop the syndrome. The inference sought then to be drawn (usually on behalf of the prosecution) is that the woman’s actions are in fact premeditated, malicious and calculated – not the result of the injurious effects of long-term violence', I Freckelton, 'Syndrome Evidence', above n 30 at [13.45]. As Freckelton notes, this strategy was ultimately successful in *Oland* (1998) 197 CLR 316 at [13.45].
152 Unreported, SC Vic, 14 Mar 1997 at 13 per Hampel J.
155 The dangers of labelling and setting limits to the responses of women who are abused by their partners in terms of a medical/psychiatric model, means that the 'syndrome comes to define
potentially excludes the self-defence claims of those who do not behave as an "appropriate victim",\textsuperscript{155} such as those who have actively sought to stop the abuse, especially those who have actively fought back in the past.\textsuperscript{156}

This is seen in the case of \textit{Young}, where the trial judge endorsed the defence counsel’s approach of not putting the accused ‘forward as the victim of the battered woman syndrome’. His Honour observed that:

\begin{quote}
The prisoner did not assert, nor do I understand it to be asserted on her behalf, that she was a helpless passive victim of the violence ... Certainly, verbally she appears to me, I am satisfied, as having given as good as she got, and indeed pouring hot water over [the deceased] is indicative of someone with a more robust attitude to the volatility and violence of the relationship.\textsuperscript{157}
\end{quote}

While in \textit{McIntyre}, the image of the battered women trapped in a relationship because of children appears to have held sway with the sentencing judge. The accused killed her violent defacto husband and the Crown accepted a plea of manslaughter on the basis of provocation. In sentencing, the judge rejected the classification of BWS:

\begin{quote}
This is not a case of a woman with young children who was utterly dependent on the support of her husband. She was free to leave at any time, and action could have been taken against the deceased to stop him harassing her or her family.\textsuperscript{158}
\end{quote}

In the absence of the assumed indicia of BWS, the judge found it difficult to understand ‘why the prisoner remained in this relationship if it was as bad as it appears to have been’.\textsuperscript{159}

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\textsuperscript{155} See 4.2.

\textsuperscript{156} J Stubbs & J Tolmie, ‘Falling Short of the Challenge?’, above n 5 at 736.


\textsuperscript{158} Unreported, SC NSW, 15 Mar 1996 at 22 per McInerney J.

\textsuperscript{159} Unreported, SC NSW, 15 Mar 1996 at 16 per McInerney J.
7.4 BEYOND BATTERED WOMAN SYNDROME - 'SOCIAL FRAMEWORK' EVIDENCE

As my discussion of the relationship between self-defence and the rules of evidence has shown, the criminal process operates to reduce human experience into discrete events or incidents. This creates problems for battered women who kill and rely on self-defence (particularly in 'non-confrontational' situations). If the jury is to make an informed decision about the necessity of resorting to fatal force, the jury must appreciate the continuity and entirety of the accused's experience of violence. The danger is that the jury may fail to fully grasp the reality of her position even though her particular experience of violence is presented to the court by lay witnesses. The dynamics of the trial process, the 'stock stories' of self-defence and the misconceptions held within the community (including the judicial system) about domestic violence may obscure the accused's account of fear and necessity.

In this section, I develop my argument that there must be a fundamental shift in approach to the use of expert evidence in cases where women kill their violent partners in order to make the accused's experience 'whole' and comprehensible to the jury. The approach to the issue of expert evidence I advocate incorporates the work of Stubbs and Toomie who have asserted, that we require:

Not so much expert testimony about whether or not a woman might have BWS but rather broad 'social framework evidence' to provide the context within which to understand the issues in a given case.

It is my argument that the jurisprudence in Australia needs to move beyond BWS, which has proved itself a narrow and distorting construct, toward the use of broader social framework evidence. My analysis of BWS evidence has highlighted the inability of the BWS model to make the evidence of the accused's relationship and her social context relevant to self-defence in practical

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160 See 7.2.
terms. Instead of elucidating the circumstances in which battered women kill, my analysis has shown that BWS evidence obscures the objective realities of domestic violence by focusing on the accused’s damaged psychology.  

Although there is a well-developed critique of BWS in academic writing, BWS has been generally accepted by Australian courts with little or no discussion. The worrying aspect of the lack of scrutiny is that the North American evidentiary model has been duplicated and transplanted in Australia without any careful consideration by most defence counsel and courts about whether BWS evidence is actually helpful and necessary within the Australian context. Expert evidence was needed to counter the gendered nature the law of self-defence and myths and stereotypes concerned with domestic violence and women who remained in violent relationships. However, BWS was also a device designed to counter evidentiary rules and practice that operated in other jurisdictions. My contention is that evidence of social context is already admissible within the current evidentiary framework in Australia and that there is no need to saddle this contextual evidence with the distorting features of BWS.

7.4.1 WHY DO WE NEED SOCIAL FRAMEWORK EVIDENCE?

In order to argue that social framework evidence is necessary to counter stereotypes and misconceptions about the experiences of women who have endured domestic violence, and the difficulties encountered in communicating these experiences within a self-defence framework, the issue arises as to the existence of such stereotypes and misconceptions. In evaluating the need for evidence of BWS, courts and commentators have referred to the existence of

597 at 599; M MacCrimmon, 'The Social Construction of Reality', above n 7; E Schneider, 'Describing and Changing', above n 118 at 198.

162 See 7.3.4.2.

163 J Stubbs & J Tolmie, 'Falling Short of the Challenge?'; above n 5 at 720 – 722. See 7.3.3.1.

164 See Lavallee (1990) 55 CCC (3d) 97; Chhay (1994) 72 A Crim R 1. See also Chapter Six.


166 See 7.3.4.2 for a discussion of the feminist critique of BWS.


168 See for example, J Parish, above n 69; E Sheehy et al, above n 117; J Tolmie, ‘Provocation or Self-Defence for Battered Women who Kill’, in S Yeo (ed), Partial Excuses to Murder, Sydney: The Federation Press, 1991 at 73; S Tarrant, 'Something is Pushing them to the Side of their Own
community myths and stereotypes that impact upon decision making in the context of battered women who kill.\textsuperscript{169} Women who kill their violent partners may profess their love for the deceased, and the co-existence of violence and love are seemingly irreconcilable within society's (and the judicial system's) understanding of love.\textsuperscript{170} The contention is that the credibility of a battered woman's account of fear and self-defence is undermined by a failure to understand the dynamics of domestic violence, and the response patterns of women who live in violent relationships.

Although much writing in this area is premised upon the existence of myths and stereotypes concerning the reactions of battered women, some commentators have pointed to the lack of empirical study that clearly demonstrates that such myths and stereotypes are prevalent in the Australian community.\textsuperscript{171} Recent writing in the area of BWS has queried whether the jury needs educating in relation to the experiences and responses of battered women.\textsuperscript{172} After a review of recent research investigating community attitudes to domestic violence in Australia, McMahon suggests this research raises 'some doubt as to whether expert evidence on battered woman syndrome is really necessary to disabuse members of a jury of myths and stereotypes concerning domestic violence'.\textsuperscript{173} This issue is significant as the ability to prove the existence of such myths may be increasingly important in the forensic context due to signs of a more rigorous

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\textsuperscript{169} For example, as Tolmie has observed, these myths and stereotypes include 'explanations of domestic violence in terms of the fault of the victim: her failure to leave the relationship...; her incitement of the violence by stereotypical female behaviour such as "nagging"; her enjoyment of the violence because of masochistic personality traits; her hopeless passivity in failing to exercise a minimum of human self-respect', E Sheehy et al, above n 117 at 375 - 376.

\textsuperscript{170} Seuffert has argued that 'the (seemingly common sense) logic is that it is contradictory for the woman to love someone who abuses her. If she says she loves him, then he must not have abused her, or she must be abnormal or crazy, or, at a minimum, her testimony must not be credible', N Seuffert, 'Domestic Violence, Discourses of Romantic Love, and Complex Personhood in the Law' (1999) 23 Melbourne University Law Review 210 at 211.

\textsuperscript{171} M McMahon, above n 34 at 43; P Reddy et al, 'Attributions about Domestic Violence: A Study of Community Attitudes' (1997) 4 Psychiatry, Psychology and Law 125 at 128. See also J (1994) 75 A Crim R 522 at 536 per Brooking J.

\textsuperscript{172} M McMahon, \textit{ibid}. See also I Freckleton & H Selby, above n 75; P Reddy et al, \textit{ibid}.

judicial approach to counter-intuitive evidence. As Freckelton has observed, it may become necessary to show 'what the myths are, ... that such myths are prevalent within the community and that they are myths'.

There is certainly increased community awareness in relation to domestic violence. Public education campaigns that have sought to highlight the extent and seriousness of domestic violence appear to have increased public awareness in relation to certain aspects of it. A comparison of the results of the surveys of community attitudes in Australia to domestic violence that were conducted on behalf of the Office of the Status of Women in 1987 (the '1987 OSW study') and in 1995 (the '1995 OSW survey') shows that there was 'far greater understanding of domestic violence in 1995. In particular, there has been a discernible shift in domestic violence's positioning as a 'public' and criminal matter rather than a 'private matter' to be handled within the family. The 1995 OSW survey also showed improved community knowledge in relation to the types of behaviours that constituted domestic violence – including psychological as well as physical abuse. In 2000, the Office of the Status of Women commissioned further research to investigate attitudes to domestic and family violence in the diverse Australian community, (the '2000 PADV Report'). This qualitative research found that 'participants across the research appeared to have a sound level of understanding of domestic violence'.

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175 I Freckelton, 'Judicial Pedagogy and Expert Evidence', ibid at 85.
178 Ibid at 8.
179 It was found in the 1987 OSW survey 'a third of people believe that domestic violence [is] a private matter to be handled within the family', Office of the Status of Women, Community Attitudes Towards Domestic Violence in Australia, above n 176 at 3. In contrast, in 1995 only 18% of the community held this belief, Office of the Status of Women, Community Attitudes to Violence Against Women: Executive Summary, ibid at 30. In the 1987 OSW survey, 79% of people agreed that domestic violence was a criminal offence, while in the 1995 OSW survey this figure had risen to 93%, at 32.
180 Office of the Status of Women, Community Attitudes to Violence Against Women: Executive Summary, ibid at 7.
182 Ibid at 2.
General community research provides a valuable insight into attitudes to domestic violence, however, the transferability of that knowledge into the criminal trial of a woman charged with murder in respect of killing her violent partner is less clear. Despite the increased public awareness of the extent and seriousness of domestic violence, this knowledge does not appear to have been translated into a wholesale acceptance of self-defence as the appropriate defence for women who kill their violent male partners. In North America, there have been a number of studies examining the state of knowledge of laypersons in relation to the responses of battered women who kill and the utility of expert evidence in that context. It has been noted in the United States that numerous studies ‘have supported the contention that to varying degrees, the general population endorses erroneous beliefs about battered women’. In regard to the impact of expert evidence pertaining to battered women in criminal trials, there has been some research that has suggested that the evidence has only a limited effect on the decision process. However, Schuller and her colleagues have found consistently ‘that the presence of … expert testimony leads mock jurors to

183 See Chapter Six.
185 See D Follingstad et al, above n 184; N Finkel et al, above n 184. See also C Terrance et al who concluded that the issue of 'whether the addition of expert testimony contributes to the ability of jurors to consider the defendant's perspective remains equivocal', ibid at 222.
render more-lenient verdicts, as well as interpretations that are more consistent with the woman’s account of what occurred'.

There has been limited Australian research that has investigated the ‘state of knowledge’ in the community in relation to domestic violence in the context of a woman who kills her abusive partner. An exception is the study conducted by Reddy, Knowles, Mulvaney, McMahon and Freckelton in 1997 investigating the ‘beliefs and attributions held by members of an urban Australian community regarding men who are violent and women who are battered’ and ‘whether laypersons’ attributions are different if the domestic violence situation leads to the battered woman killing her abuser’. The study concluded that its findings indicated that respondents did not believe women were responsible for the violence or that ‘the victim of domestic violence could extricate herself from the situation if she were a real victim’. The study also found that respondents believed domestic violence was not legitimate and that men were responsible for their violent behaviour. The authors suggest that their findings undermine the rationale for admitting expert evidence of BWS to ‘disabuse jurors of misperceptions and wrong assumptions’.

However, I would suggest that this conclusion is overstating the research findings, for as was acknowledged by the authors the vignettes provided to respondents in the study were ‘stereotyped representation of the actions’. The violent husband was unambiguously bad, while the wife who killed her violent husband was unambiguously the ‘good wife’: ‘a caring mother and a long-suffering wife, perhaps a Cinderella-type character’. She actively tried to avoid upsetting her husband. ‘She cleaned the house, made sure his dinner was ready

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188 P Reddy et al, above n 171 at 144. See also R Ho & M Venus who concluded that ‘presentation of BWS information appears to have been successful in pointing out the array of determinants for the fatal action that lessened the negative reactions normally associated with such action, above n 173 at 158.
189 P Reddy et al, ibid at 144.
190 Ibid.
191 Ibid at 143.
192 Ibid.
and put the baby to sleep’.\textsuperscript{193} He was still violent. There was independent evidence of severe injury requiring hospitalisation on the night of the killing, suggesting the woman killed during an actual confrontation. As the authors commented, even with the ‘extreme good-bad images of the actors, there was still a reluctance to wholly attribute blame for the violent assault (and the history of violence) to the male’.\textsuperscript{194}

Although Reddy et al’s study provides useful insights, it is less clear how the responses would have changed if the woman did not fit the stereotypical image of the passive and ‘good’ women. Their study does not address the complexity of race and ethnicity. It did not address attitudes towards the ‘bad’ woman, for example a woman who uses drugs or alcohol, or who has fought back previously. As the authors comment, “[h]ow would the responses change if violence was shown to occur without alcohol being involved? ... if the violent behaviour occurred during a heated argument between the actors?”\textsuperscript{195} How would responses have altered if the woman had killed her husband in a non-confrontation situation (either before his violent assault commenced or while he was asleep)?

While Australian research reveals increased community knowledge in Australia about domestic violence, I would suggest that the findings of this research indicate that there is still ambivalence towards domestic violence in our community. This is not surprising given historical attitudes to domestic violence (its invisibility and its trivialisation) that have served to dilute the potency of the history of male violence when women killed their violent partners. As I will demonstrate in this section, in relation to women who kill their violent partners, on the basis of Australian research, the most significant ‘gaps’ in community understanding appear to be in relation to the failure to appreciate the ‘power’ dynamics of domestic violence, and the ambivalence concerning women who

\textsuperscript{193} \textit{Ibid} at 129.

\textsuperscript{194} As Reddy et al observed, “[o]ne might expect that such a dramatic depiction of a history of violence would lead respondents to assert that the abuser was a chronically violent and abusive character with few redeeming qualities. ... Although nearly everyone believed that [he] was responsible for [her] injuries and that he had done considerable harm, there was still a disinclination to blame him entirely for what occurred”. \textit{Ibid} at 141 – 142.
remain in violent relationships. While respondents may state that the domestic violence is unacceptable, that the victim is not to blame and may indicate that they do not accept that women could easily leave, there are disturbing uncertainties and contradictions in the responses. These may have a significant impact in relation to a claim of self-defence for women who kill their abusive partners.

7.4.1.1 Power dynamics

My argument is that while the community may understand something of the nature of domestic violence, there is an apparent failure by the community to recognise the positioning of the violence within the overall context of a relationship of power imbalance, that is, the power dynamics of domestic violence. Current research indicates that 'external' factors are the most commonly assumed causes of domestic violence, rather than the power imbalance in the relationship or the man's desire to exert control. In the 1995 OSW study, the most common cited causes of domestic violence were financial pressure (57%), alcohol (42%) and relationship problems (36%). The woman's infidelity (11%) rated higher in the perceived causes of domestic violence than men's desire to exert power over women (8%) as a cause of domestic violence. Although the 2000 PADV study noted that 'most participants had a broad definition of domestic violence, centred on power imbalance and control', when asked about the causes of domestic violence, 'most participants were more likely to perceive external factors, such as financial pressures, alcohol and drug abuse and gambling, as the cause of domestic violence'. There is also a tendency to characterise the violence of the deceased as a problem of the

195 Ibid at 143.
196 Office of the Status of Women, Community Attitudes to Violence Against Women: Executive Summary, above n 177 at 29.
197 Ibid.
198 Partnerships Against Domestic Violence, above n 181 at 18.
marriage rather than a problem of the violent partner. In Reddy et al’s study, it was found that laypersons tended to explain domestic violence by focussing on the relationship and the woman rather than the man. Domestic violence was explained ‘by placing emphasis on the characteristics of the couple and the behaviour of the battered woman rather than the abusive male’.

The construction of domestic violence as a product of a ‘relationship’ caused by situational factors (such as alcohol) obscures the masculinity of the violence, and its placement within the dynamics of power and control. The texture of the man’s violence towards his partner - the positioning of an individual act of violence within a ‘systematic attempt to maintain power and control’ - is concealed by the focus on the isolated incidents of abuse. As I have argued, a proper appreciation of women’s self-defence claims requires an awareness of the interconnected nature of the accused’s experience of violence. The ability to convey this reality is undermined by community perceptions of domestic violence as individual episodes of violence with external triggers, which is reinforced by the legal framework of self-defence and the operation of trial processes that focus on discrete incidents of violence.

7.4.1.2 The issue of exit

The preoccupation with a woman’s responsibility to leave a violent relationship also obscures the power dynamics of a violent relationship. The dichotomy of leaving/staying overlooks the fact that ‘battering reflects a quest for control that goes beyond separate incidents of physical violence and that does not stop when the woman attempts to leave’. It is apparent that society’s expectation is that women will leave violent relationships and there is a corresponding failure to understand why women do not leave. The 1995 OSW study found that most of the respondents (77%) agreed that is was hard to understand why women stay in

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201 P Reddy et al, above n 171 at 141.
202 Domestic Violence Resource Centre Queensland, Extract from Educational Materials.
203 See 7.2
violent relationships. It appears that this myth about domestic violence is prevalent in the community. Similar sentiments are found in Reddy et al’s study, which observed:

While few people directly stated that [she] was responsible for her own injuries, there seems to be a struggle for most people to understand why the battered woman would stay in such a relationship.

Reddy et al’s study concluded that there was an ‘underlying belief that the battered woman is somehow responsible because she continues to stay in a situation where she knows she will be beaten and hurt’.

In Australia, community attitudes towards women who fail to leave violent relationships is cause for concern, for as Mahoney has argued:

The issue of exit colors almost every legal and social inquiry about battering ... Emphasising exit defines the discussion of violence in ways that ignore the woman’s lived experience and the personal and societal context of power, focusing instead on whether her responsive actions conform with social expectations.

As discussed at 6.3.2.3, in the context of self-defence, retreat - constructed as leaving - has proved problematic for women who kill their violent partners. In order to counter this misconception, it is necessary that the jury understand the realistic options that are available to women, other than the use of fatal violence. The jury must understand why women do not leave violent relationships.

7.4.1.3 Culturally diverse communities

In seeking to illuminate the social context in which a woman kills her violent husband, it is important to recognise that there is not an ‘essential’ victim of domestic violence, and an individual’s response to domestic violence is influenced by factors such as race, ethnicity, and class. The intersection of race, ethnicity and gender may affect the choices ‘available to [women] in coping with

204 M Mahoney, ‘Victimization or Oppression?’, above n 17 at 75. See also E Schneider, Battered Women and Feminist Lawmaking, above n 53 at 77 – 79.
206 P Reddy et al, above n 171 at 141.
207 Ibid.
violence, and might also affect the way in which they are constructed and their
behaviour is understood by the legal system". As Stubbs and Tolmie have
argued:

It may be impossible to accurately interpret the accused's behaviour for the purposes of
applying the various criminal defences ... without attempting to understand the context in
which the accused was operating.210

And, such a context clearly includes a woman's position within a particular
cultural or racial group. Unaided jurors may fail to recognise the woman's
particular context which 'may be powerfully informed by the accused's position
as a woman with a particular ethnic or racial identity'.211 Without an appreciation
of the particular woman's racial and ethnic context, the reality of a woman's
conduct (understood in its social context) is concealed beneath the layers of
inappropriate and stereotyped understandings of that woman's race/ethnicity, as
well as stereotypes of the battered woman.212

7.4.2 WHAT IS THE CONTENT OF SOCIAL FRAMEWORK
TESTIMONY?

In appropriate cases, as the preceding discussion has foreshadowed, my
argument is that the social framework evidence be provided to fact-finders in
cases where women kill their violent partners.213 The purpose of this specialised
evidence is to enable the fact-finder to make sense of the evidence provided by
lay witnesses about the accused's experience of violence and to position her
experience within the context of women's experiences generally. In general

209 M Mahoney, 'Victimization or Oppression?', above n 17 at 74.
210 J Stubbs & J Tolmie, 'Falling Short of the Challenge?', above n 5 at 748. See also J Tolmie,
'Pacific-Asian Immigrant and Refugee Women Who Kill their Batterers', above n 117.
211 J Stubbs & J Tolmie, 'Falling Short of the Challenge?', ibid at 745.
212 ibid.
213 See ibid (generally); J Tolmie, 'Pacific-Asian Immigrant and Refugee Women Who Kill their
Batterers' above n 117; J Stubbs & J Tolmie, 'Race, Gender and the Battered Woman Syndrome',
above n 117.
214 A similar argument has been advanced by the New Zealand Law Commission that has
recommended that the 'term “battered woman syndrome” or any use of the term “syndrome” in
this context be dropped and that reference be made instead to the nature and dynamics of
battering relationships and the effects of battering': New Zealand Law Commission, Some
Criminal Defences with Particular Reference to Battered Defendants, above n 38 at 6. The
Commission outlined the range of expert evidence that it envisaged may be admissible in relation
to self-defence, see 15 – 19.
terms the evidence would be directed to the removal of the potential sources of error in the fact-finding process. Such errors may arise due to the existence of misconceptions about the nature of domestic violence, the response patterns of women in violent relationships, and the cultural or racial context of the accused.

The content of the social context evidence provided would vary according to the circumstances of the case taking into account the particular accused and the context in which she killed her violent partner. This is important. Defence counsel must give careful consideration to whether social framework testimony would be useful in the particular case. As my discussion at 7.3.4.1 has shown, self-defence can succeed without it. If social framework evidence is used (and my contention is that it continues to be valuable as a means to provide jurors with an alternative perspective to assess the conduct of women charged in connection with killing her violent partner) then the social framework evidence must be tailored to the particular case. It should not become a rigid construct that is unquestioningly introduced in each case.

7.4.2.1 General dynamics of domestic violence

It is my argument that the ‘Power and Control Wheel’ developed by Ellen Pence and the Duluth Abuse Intervention Project should be the primary theoretical framework used to explain the general dynamics of domestic violence and women’s responses to domestic violence instead of the psychological model of BWS. In addition to oral testimony explaining the dynamics of domestic violence, an enlarged copy of the ‘Power and Control Wheel’ could be shown to the jury. This would be a powerful means by which to remove misconceptions about domestic violence that impact on a woman’s ability to convey the need for

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215 Freckelton has argued, the forensic utility of ‘counter-intuitive’ evidence in the form of BWS is ‘to provide jurors with an alternative perspective or ‘social framework’ for determining whether a woman’s beliefs and actions were contextually reasonable’: I Freckelton, ‘Contemporary Comment’, ibid at 47. My argument is that if such social framework evidence is provided it should be in a framework other than the construct of BWS.

216 See 2.5.
self-defence. An understanding of the systemic nature of domestic violence is crucial for self-defence as the jury must be able to understand the seriousness and ongoing nature of the threat that a woman faces in the domestic context. If domestic violence is viewed episodically, then in non-confrontational situations, there is no imminent threat.217

Although a woman must be able to convey the continuum of abuse, as I have shown, operating against this construction is the fact that domestic violence is generally viewed in the community and at trial episodically as the product of ‘situational’ factors.218 This construction of the violence is reinforced by the focus of self-defence on the ‘imminent’ assault and a legal process that conveys information to the jury as discrete events or incidents.219 In countering this construction of domestic violence, the ‘Power and Control’ model can help highlight the systemic nature of the violence. It also assists by drawing together the disparate accounts provided by various witnesses about isolated incidents of violence into a cohesive account of constant and persistent danger.

This approach to expert testimony may be novel in the Australian context. However, in the United States the ‘Power and Control’ model of domestic violence forms the basis of evidence provided in some cases where women kill or harm their abusers. A psychologist, Mary Ann Dutton, uses an enlarged copy of the ‘Power and Control Wheel’ to illustrate the nature of a battering relationship.220 Dutton explains that the ‘state of siege’ in battering relationships ‘creates the context of power and control within which isolated, more identifiable incidents take place’.221 This technique has the advantage of

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217 See 7.2.
218 See 7.4.1.1.
219 See 7.2.
220 M Mahoney, ‘Victimization or Oppression?’, above n 17 at 83.
221 Ibid. Dutton says that ‘abusive behaviour does not occur as a series of discrete events. Although a set of discrete abusive incidents can typically be identified within an abusive relationship, an understanding of the dynamics of power and control within an intimate relationship goes beyond these discrete incidents. To negate the impact of the time period between discrete episodes of serious violence – a time period during which the woman may never know when the next incident will occur, and may continue to live with ongoing psychological abuse – is to fail to recognise what some battered women experience as a continuing “state of siege”’, M Dutton, ‘Understanding Women’s Responses to Domestic Violence’ above n 118 at 1208.
contextualising the woman’s experience of violence by explaining the general
dynamics of domestic violence, without medicalising the woman’s response to
the violence. As Mahoney says:

Because physical violence, threats, and other controlling and abusive behaviours punctuate
the whole state of siege, incidents that seem minor separately are brought together as part of
the complete pattern of power and control. Meaning does not lie in separate incidents but in:
their context in the woman’s life and this particular relationship.222

The advantage of such evidence in cases where women kill their violent partners
is that ‘the concept of battering as power and control helps make sense of the
woman’s act of resistance as well as her experience of harm’.223 In the United
States, this evidence is provided as ‘BWS evidence’. In Australia, there is no
need to complicate the issue with BWS as my contention is that such evidence is
admissible in its own right.224

7.4.2.2 Responses of women in violent relationships

In the context of women who kill their violent partners, there are apparent
misconceptions about the responses of women in violent relationships that can
be remedied by the provision of information about the broader context of her
offending behaviour.

There is a failure within the community to understand a woman’s decision to
remain in a violent relationship.225 The ‘common sense’ understanding is that a
woman in a violent relationship would (and could) leave the relationship if the
violence was as bad as the accused claimed. This is reinforced by the dominant
societal and legal conception of domestic violence that focuses on isolated and
discrete episodes of violence which ‘facilitates the position that leaving the
relationship is the sole appropriate form of self-assertion’.226 In the context of
self-defence, these assumptions can be relied upon by the prosecution to
challenge the accused’s account of her relationship and her need to use fatal

222 M Mahoney, ‘Victimization or Oppression?’, ibid.
223 Ibid.
224 See 7.4.3.
225 See 7.4.1.2.
226 M Mahoney, ‘Victimization or Oppression?’, above n 17 at 75.
force. In order to undermine the reasonableness of the accused’s response, the tactic will be to suggest that alternatives were available to the use of fatal force. The Crown may query why the accused did not leave; why she did not call the police, or seek assistance from neighbours or friends.

Defence counsel needs to reconstruct the issue of exit to demonstrate the compatibility of ‘staying’ and using fatal force with reasonable self-defence. In doing this, the defence case needs to meet the assumptions that underpin the prosecution’s construction of the situation. The prosecution case rests on a number of assumptions: that the accused could leave, that the accused had not left, that if the violence was as serious as the accused asserted she would have left and that leaving would protect the accused from her partner’s violence. It is important for defence counsel to convey to the jury the many reasons why a woman may remain in a violent relationship (that was as bad as she said), the things that she had done previously to cope with the violence and importantly that ‘leaving’ is not a panacea.

In challenging the prosecution case, defence counsel can ask the accused about her prior attempts to deal with or prevent her partner’s violence. For example, whether she had left the relationship, sought assistance from friends and neighbours, called the police, taken out restraining orders, or fought back. Rather than the Crown focus on what she did not do, these questions focus on what the accused did in response to her partner’s violence. If an accused has not pursued some (or all) of these options, she could be asked about her reason for not pursuing a particular option. For example, she could explain her view of the consequences that would flow from calling the police, or leaving the

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See *ibid*, where Mahoney writes that ‘failure to exit is often treated ... as evidence against the woman’s account of the facts, her competence, even her honesty’, at 78.

For example in *Cornick*, unreported, CCA Tas, 28 Jul 1987, the accused was asked in cross-examination – ‘Did it occur to you that night that you should perhaps get Raymond and say ‘Come on let’s leave the house until the police or taxi arrive’, at 9 per Cox J.

See discussion of these reasons at 2.6.3.

See M Mahoney, ‘Victimization or Oppression?’, above n 17; M Dutton, ‘Validity of “Battered Woman Syndrome”’, above n 118 at 15 – 16; M Dutton, ‘Understanding Women’s Responses to Domestic Violence’, above n 118; E Sheehy et al, above n 117 at 385; J Stubbs & J Tolmie, ‘Falling Short of the Challenge?’, above n 5 at 736 – 737; M Mahoney, ‘Legal Images of Battered Women’, above n 118; M Shaffer, above n 118.
relationship. There is a great scope for defence counsel to use case specific information to convey to the jury the reasonableness of her actions.

However, the expectation that leaving is possible and is the reasonable response to violence may mean that an accused’s inability to counter her partner’s violence by other means may be viewed as her individual failing by the jury. Even though the accused may tell the jury about her reasons for not leaving, the ‘common sense’ of the jury might lead them to think that if she had left on this occasion, she would be safe. This is the potential value of social framework evidence. The provision of independent evidence that outlines the ‘external’ realities for women who leave violent relationships and the reasons why women do not leave assists in conveying the lack of realistic alternatives to the use of fatal force, and the reasonableness of the particular woman’s action in using fatal force.

Social framework evidence can be used to challenge the fundamental question that the prosecution rely upon: ‘why didn’t she leave?’ An appreciation of the broader framework – the social context in which the woman was acting – illuminates the problems and dangers associated with leaving a violent relationship. If the battering is conceived in terms of a systemic attempt to maintain control and power (and there is a recognition of the positioning of violence in a continuum of controlling behaviours), then ‘the danger that violence will continue as part of the attempt to reassert power over the woman is revealed’.231 ‘Leaving’ is no longer the ultimate solution that the Crown suggests as the jury can recognise that the violence may not stop even if the woman leaves.

The work of Mahoney has been instrumental in challenging the dichotomy of ‘staying’ or ‘leaving’ as the framework within which a woman’s options (and actions) in a violent relationship are assessed. As a strategic attempt to oppose the ‘equation of agency with exit from violent relationships’,232 Mahoney has named the violence that men inflict on their partners at or after separation -

231 M Mahoney, ‘Victimization or Oppression?’, ibid at 75.
232 Ibid at 79.
'separation assault'. 'Separation assault' is 'the violent attack on a woman's body and volition by which a batterer seeks to keep her from leaving, force her to return, or retaliate against her departure'. Mahoney argues that the concept of 'separation assault' enables us to 'challenge the coercion of women's choices, reveal the complexity of women's experience and struggle, and recast the entire discussion of separation in terms of the batterer's violent attempts at control'. Separation assault redefines the issue of exit, so our understanding of the dynamics of domestic violence includes the continuation of violence after separation. The aim is to make the continuum of violence clear (pre and post separation), so that a woman's claim to self-defence is not equated with the question - 'why didn't she leave?'.

The reality of 'separation assault' is statistically supported as the dangers for women attendant on separation are well established. The danger faced by women on separation is reinforced by research that shows the failure of the police and the judicial system to protect women from domestic violence. Evidence of the number of women who are killed by their male partners, women who are killed or assaulted following separation, and evidence of the inadequacy of the protection currently offered to these women contextualises a woman's account of her relationship, the threat that she perceived and her fear, by placing it within the experiences of battered women generally. The provision of information about dangers faced on separation reinforces the woman's claim that her failure to 'leave' is compatible with reasonable self-defence - as leaving provides no guarantee of safety. In providing evidence in terms of separation

233 Ibid.
234 M Mahoney, 'Legal Images of Battered Women', above n 118 at 64.
235 Ibid at 63.
236 See 1.3.1 and 2.6.3.3.
assault, it 'brings the ghosts of dead women – women slain by their abusers – into court to stand beside the woman accused of killing an abusive spouse'.

The broader framework also allows for a recognition of the complexity of women’s lives: that women may be abused but also fight back; that women may simultaneously love and fear their partner; that woman are not only victims but agents; that women may previously have left and then returned; that women are not passive; that women engage in many acts in an attempt to regain ‘control’ in the relationship and stop the violence. In arguing that a woman killed her violent partner in self-defence, this diversity needs to be communicated so the jury can reconcile the woman’s acts of agency with her claim that she was seriously abused and that her response was reasonable. The recognition of the ‘enormous human strengths and capacities of battered women, who struggle to survive, and keep their family functioning’ enables both a woman’s agency and her victimisation to be acknowledged.

The construct of the helpless and passive battered woman (encouraged by BWS) has contributed to an apparent inability to reconcile a woman’s previously assertive behaviour with a claim of self-defence. However, the myth of the passive woman, inert in her violent relationship is contrary to the reality of the active steps taken by women to avoid or prevent their partner’s violence – including fighting back. A woman who has previously responded to her husband’s violence by physically resisting, may need to have that response placed within the context of power and control in the relationship if she is to avoid having the relationship constructed as one of mutual violence. The ‘Power and Control’ model of domestic violence assists in distinguishing mutual violence (‘giving as good as she got’) from prior acts of self-defence.

This may also assist defence counsel to utilise more creatively evidence of a woman’s previous acts/ attempts of self-defence. In countering the construction

238 M Mahoney, ‘Legal Images of Battered Women’, above n 118 at 83.
239 E Schneider, ‘Particularity and Generality’, above n 118 at 550.
240 See J Stubbs & J Tolmie, ‘Falling Short of the Challenge?’, above n 5 at 736 - 739.
of the accused's prior resistance as evidence of a relationship of mutual violence, defence counsel might equally present these prior acts/Attempts of self-defence as unsuccessful attempts to deal with the violence and therefore demonstrating the need for more drastic permanent action.

7.4.2.3 Culturally relevant information

An understanding of the impact of racial/cultural factors is critical, as there is empirical evidence that suggests that racial factors appear to be associated with the incidence of intimate homicide. Information pertaining to the community attitudes to domestic violence, its prevalence and the availability of avenues to deal with violence in ethnic and indigenous communities is relevant to understanding a woman's response to her partner's violence. The problematic nature of the issue of exit may be increased for women from culturally diverse backgrounds and indigenous women. The intersectionality of race and gender means that the positioning of an accused within 'separate systems of subordination (race and gender) interact to compound the effects of each, and to shape the experiences both of violence, and of attempts to address the violence.' These different perceptions of domestic violence and the barriers to disclosing domestic violence and leaving a violent relationship may impact upon a woman's response to the violence, and also a jury's understanding of her response.

7.4.3 IS SOCIAL FRAMEWORK EVIDENCE ADMISSIBLE?

The evidential framework that I have proposed rests on a shift from specific evidence of the accused's psychology to general social context evidence as a means to convey to the jury the circumstances in which the accused was acting. Rather than providing psychologically based evidence that the particular accused was a battered woman with its attendant 'symptoms' and linking social context

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242 See 1.2.2.
243 See 2.6.4.
244 J Stubbs & J Tolmie, 'Race, Gender and the Battered Woman Syndrome', above n 117 at 131.
evidence with this evidence, I am advocating the reception of evidence of the experiences of battered women generally that provides a contextual framework in which to assess the woman's actions and her explanation of those actions. As I have observed, the BWS model was a device used to present contextual information within the adjectival rules. In advocating a change from the medical/diagnostic model to socially based evidence, I am mindful of the potential evidentiary difficulties that arise, particularly in relation to the concept of relevance and the rules of expert evidence. However, my contention is that social framework evidence is admissible.

7.4.3.1 Relevance

Relevance to self-defence

Social framework evidence (separate from evidence pertaining to the particular accused) must be relevant to the facts in issue at trial. Although the medical model of women's responses to domestic violence (the BWS framework) has been extensively criticised, any concerns about the relevance of social framework evidence were averted by saddling evidence of the social factors that informed the battered woman's offending behaviour (if any were provided) with evidence relevant to the accused's psychology as a battered woman. If the medical model is discarded, one of the potential problems will be the issue of relevance - making the general germane to the particular facts of the case.

The issue of relevance is not an insurmountable problem. My contention is that social framework evidence is directly relevant to the facts in issue where self-

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245 See 2.6.4.
246 In this regard, my argument draws on the writings of Freckelton who has argued that 'evidence that such a phenomenon constitutes a "syndrome" should not be given. Nor should evidence be permitted that a particular woman fits in with the profile of women who are the subjects of domestic violence', I Freckelton, 'Contemporary Comment', above n 46 at 49. However, unlike my argument, I understand Freckelton's form of non-diagnostic evidence to still to rest on the impact of the trauma on the psychology of the accused.
247 See 7.3.3.1. As Kirby J commented in Oland (1998) 197 CLR 316, 'any evidence of BWS or an analogous condition must be related to the facts of the particular case', at 376 - 377.
248 See 7.3.4.2.
249 See J Stubbs & J Tolmie, 'Falling Short of the Challenge?', above n 5 at 728.

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defence is raised as a defence at trial, if a broad view of relevance is taken. As discussed in Chapter Six, the principle of reasonable necessity is central to self-defence and the personal circumstances of the accused, as well as the social context of the accused’s actions in self-defence should be the focus of the legal inquiry into reasonableness. This has been recognised in the Canadian case of Malott, where L’Heureux-Dube J acknowledged ‘a woman’s perception of what is reasonable is influenced by her gender, as well as her individual experience, and both are relevant to the legal inquiry’. Her Honour acknowledged the significance of this legal development was that ‘it demonstrates a willingness to look at the whole context of a woman’s experience in order to inform the analysis of the particular events’. 

In my consideration of the content of social framework evidence at 7.4.2, I provided an overview of a range of matters (the general dynamics of domestic violence, the responses of women in violent relationships and culturally relevant information) that might be the subject of social framework evidence. However, the precise form that the social framework evidence would take in an individual case would be dependent on the woman’s particular situation. For example, if the woman was not an Indigenous woman, then evidence outlining the impact of racial/cultural factors is not relevant. Similarly, ‘expert evidence on the economic factors that typically affect battered women would not be relevant if the defendant was financially independent’. Evidence provided by the accused and/or other witnesses would need to establish a factual foundation for the social framework evidence adduced. For example, evidence of the accused’s fear of the dangers of leaving would be necessary in order to make information about the dangers of separation assault relevant.

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250 See 7.2. See also the comments of Judge Ratushny who, in her review of Canadian self-defence cases involving battered women, commented that ‘the [real] significance of Lavallee ... for the law of self-defence lies in the fact that the Court took a broad view of the evidence that is relevant to the legal elements of that defence’. L Ratushny, Self-Defence Review, Canada: Minister for Justice, 1997 at 23.

251 [1998] 1 SCR 123 at 141.

252 [1998] 1 SCR 123 at 141.


254 Ibid.
While the content of the social framework evidence would be dependent on the circumstances of the particular accused, I contend that social framework evidence is potentially relevant to the imminence of the threat, the nature of the threat faced (its seriousness) and the magnitude of force used (proportionality) in the determination of reasonableness. In Osland, in his consideration of BWS, Kirby J considered:

That expert evidence of BWS, or an analogous condition ... might be offered as relevant to questions such as (1) why a person subjected to prolonged and repeated abuse would remain in such a relationship; (2) the nature and extent to the violence that may exist in such a relationship before producing a response; (3) the accused's ability, in such a relationship, to perceive danger from the abuser; and (4) whether, on the evidence, the particular accused believed on reasonable grounds that there was no other way to preserve herself or himself from death or grievous bodily harm than by resorting to the conduct giving rise to the charge.

In my view, social framework evidence is also relevant to these issues. Social framework evidence is also a more useful means by which to convey to the jury the seriousness of a woman's situation and the existence of realistic options to protect herself.

An understanding of the dynamics of domestic violence is relevant to the jury's assessment of the threat that the accused faced. My consideration of the relationship between evidence of domestic violence and self-defence showed the need to challenge the perception that domestic violence is a series of isolated incidents to which the accused can respond anew. Defence counsel needs to demonstrate to the jury that the threat that the accused faced was not merely the threat proximate to the killing but the accused's entire experience of violence with the accused. The impact of external circumstances upon a woman's decision to remain in the violent relationship 'necessarily informs the

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255 Ibid.
257 See 2.6.3.
reasonableness of the woman's beliefs or perceptions of, for instance, her lack of an alternative to the use of deadly force.  

As previously argued, the requirements of self-defence are informed by male standards of behaviour and the tacit (and gendered) assumptions that underpin the defence of self-defence are likely to underpin the Crown's conduct of the case. In order to undermine the accused's claim to self-defence, the tactic will be to challenge the reasonableness of the accused's response by suggesting that alternatives were available to the use of fatal force. The Crown may also challenge the imminence of the threat or its seriousness. The Crown may highlight evidence that shows that at the time of the killing, the deceased was asleep, unconscious, or drunk. Or, it may be implied that the accused's response was disproportionate to the threat she faced. The Crown may seek to demonstrate that it was a relationship of 'mutual violence'. In advancing her defence, the accused must be allowed to introduce contrary evidence to refute the Crown's construction of the killing along stereotyped and gendered lines.

Credibility

As discussed at 6.4.3.1, a battered woman's credibility is likely to be a significant issue in a trial where self-defence is raised. The primacy of the jury's role in relation to the assessment of the credibility of a witness has meant that courts have generally rejected evidence that merely bolsters the credibility of a witness ('oath-helping' evidence). However, in supporting the credibility of

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258 Malott [1998] 1 SCR 123 at 144 per L'Heureux-Dube J.
259 See Chapter Six and 7.2.
260 See 7.2.
261 For example, in Secretary (1996) 129 FLR 39, Kearney J stated that, '[y]ou might think, just on first blush, that the fact that the man was then asleep makes it difficult [to argue self-defence]; and that's the view the Crown will urge you to take in due course', at 40.
262 For example in Cornick, unreported, CCA Tas, 28 Jul 1987, the accused was asked in cross-examination (in relation to defence of another) —... Raymond is nowhere near him what did you think at that stage, at that moment, he could do to Raymond? A. At that moment he could not have done anything to Raymond' at 8 per Cox J.
263 See J Stubbs & J Tolmie, 'Falling Short of the Challenge?', above n 5 at 736 – 738.
working with battered women ... or experience in domestic violence research’.\textsuperscript{317} This would include social workers, those involved in women’s shelters, or domestic violence education programs, criminologists or sociologists.\textsuperscript{318}

For example, in \textit{Gadd},\textsuperscript{319} evidence of BWS was provided by a social worker. In my view, the social worker would also have been appropriately qualified to provide the social framework evidence that I have proposed. The witness had extensive experience in relation to domestic violence, including her role as programme coordinator at a domestic violence resource centre, and as refuge coordinator at a women’s shelter. She also had extensive experience in counselling work with women who had reported experiences of domestic violence, she was the co-author of a programme in relation to the prevention of domestic violence, had coordinated a project connected with leaving domestic violence, as well as having provided public presentations of seminars, and had conducted workshops with respect to domestic violence.

Under the evidentiary framework that I propose, in some cases (depending on the content of the evidence), the evidence may be classified as evidence of ‘experience’ rather than as ‘opinion’ evidence.\textsuperscript{320} This would aid the extension of the range of ‘experts’ to those with extensive practical experience in relation to domestic violence. This was the approach taken by the High Court in \textit{Weal v Bottom}, where evidence was given by witnesses who had long experience in driving and observing articulated vehicles, of the tendency of such vehicles to ‘drift’ or swing out around corners. It was held by Barwick CJ that:

\begin{quote}
Such evidence could be given by an expert, properly so called, that is to say by a person who by study and instruction in some relevant scientific or specialised field was able to express an opinion, founded on scientific or specialised knowledge thus acquired, as to the likely behaviour of such a vehicle so placed. But it could also be established by the evidence of a person who had had actual experience of or had observed such behaviour. Such a person
\end{quote}


\textsuperscript{318} See also New Zealand Law Commission, \textit{Some Criminal Defences with Particular Reference to Battered Defendants}, above n 38 at 14.

\textsuperscript{319} Unreported, SC Qld, 27 Mar 1995.

\textsuperscript{320} See M Arconson & J Hunter, above n 21 at 1108 – 1111.
exaggeration or that the violence did not occur. In these circumstances, evidence outlining the reasons why some women do not report violence and the barriers to disclosure would be useful to rebuild the believability of the accused’s account of violence.\textsuperscript{267}

\textbf{Jury directions on evidence}

In addition to evidence of the social context of her action, a woman who kills her violent partner needs to have ‘the relevance of that context to her claim of entitlement to act in self-defence’ explained to the jury.\textsuperscript{268} It is not enough for the jury to be informed of the dynamics of domestic violence, the barriers to leaving and/or cultural and ethnic factors. The jury also needs to understand how this evidence is relevant to the accused’s claim of self-defence, if the accused’s actions are to be realistically assessed. The preferable approach is for responsibility for articulating the links between the evidence of domestic violence and the woman’s criminal responsibility to lie with the trial judge. It should be the judge’s responsibility, during summing up, to ensure that the relevance of the evidence to the woman’s claim of self-defence is clearly explained to the jury.\textsuperscript{269}

In Australia, the current position is that responsibility for making the links between the evidence of domestic violence and the woman’s criminal responsibility rests upon defence counsel.\textsuperscript{270} This needs to be altered. This recommendation has been accepted in New Zealand. As a result of a submission by Tolmie highlighting the ‘great practical importance’ of the judge’s role in directing ‘the jury on the relationship between expert evidence and the specific requirements of the legal defences’,\textsuperscript{271} the New Zealand Law Commission recommended that instructions be prepared to provide guidance for judges. These instructions should cover how to provide clear directions to juries ‘linking

\textsuperscript{267} See 2.6.3.
\textsuperscript{268} H Maguigan, ‘Battered Woman Syndrome and Self-Defence: Myths and Misconceptions in Current Reform Proposals’ (1991) 140 \textit{University of Pennsylvania Law Review} 379 at 383. See also E Schneider, ‘Equal Rights to Trial for Women’ above n 17 at 639.
\textsuperscript{269} J Stubbs & J Tolmie, ‘Falling Short of the Challenge?’, above n 5 at 732.
\textsuperscript{270} \textit{Osland} (1998) 197 CLR 316 at 337 per Gaudron and Gummow JJ, at 379 per Kirby J.
the different aspects of the expert evidence on battering relationships to the various elements of the defences to which that evidence relates. Similarly, in Australia, if there is to be any significant practical benefit, my argument is that the provision of contextual evidence needs to be coupled with judicial instructions that relate the evidence to the battered woman’s claim of self-defence.

7.4.3.2 Rules of expert evidence

Evidence (such as social framework evidence) that is general in character, rather than specifically related to the particular accused, and social rather than psychological, will need to comply with the rules for the admissibility of expert evidence. The rules of opinion evidence assume that there is a difference between fact and opinion. In the context of the social framework evidence proposed, I contend that there is an argument that it is not expert opinion evidence at all but evidence of observed fact. However, in view of the lack of clarity of the fact/opinion distinction, I will address the admissibility constraints imposed by the expert opinion rules. In New South Wales and the Australian Capital Territory, the rules of expert evidence are provided in the legislation. In the remaining Australian jurisdictions, expert evidence is governed by the common law. The law of opinion evidence assumes that there is a distinction between fact and opinion.

Common knowledge rule

As discussed at 7.3.3.2, the common knowledge rule has operated as a restriction on the reception of expert opinion evidence about community standards and human behaviour. In opposing the admission of social framework evidence, an

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271 New Zealand Law Commission, Some Criminal Defences with Particular Reference to Battered Defendants, above n 38 at 7.
272 Ibid at 8.
273 See discussion of Stjernqvist, unreported, Cairns CC, 18 Jun 1996 at 6.3.2.2 for a consideration of the importance of judicial directions.
274 M Aronson & J Hunter, above n 21 at 1108 – 1109; A Ligertwood, Australian Evidence, Australia: Butterworths, 1998 at 446 - 449.
276 See I Freckelton & H Selby, above n 75, Chapter 6.

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argument could be advanced that 'judges and juries are thoroughly knowledgeable about “human nature” and that no more is needed. They are, so to speak, their own experts on human behaviour'. However, in Australia, there have been expansions to the common knowledge rule. In New South Wales and the Australian Capital Territory, the common knowledge rule has been formally abolished. The effect is that opinion evidence provided by an expert witness is admissible 'whenever it is relevant to the determination of a fact in issue', even if it is a matter about which the jury has some knowledge. Despite its formal abolition, the operation of the common knowledge rule may not be wholly removed, as it is likely to remain a matter relevant to the court’s exercise of its discretion to exclude evidence.

There have also been expansions in the common law rules applicable to opinion evidence. The High Court in Murphy endorsed a more flexible approach to the common knowledge rule that focuses on whether the evidence would be helpful. The High Court accepted that the test was whether the proposed evidence would provide assistance to the jury. The more liberal approach 'means that expert evidence is given in order to enhance the understanding of the tribunal of fact or to remedy misconceptions that may be harboured by individual jurors'. The focus on the 'usefulness' or helpfulness of the evidence means that courts can be more receptive to purely social framework evidence directed

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278 *Evidence Act 1995* (NSW) s 80. Section 80 provides that '[e]vidence of an opinion is not inadmissible only because it is about a matter of common knowledge'.
279 *Evidence Act 1995* (Cth) s 80.
280 I Freckelton & H Selby, above n 75 at 241.
282 (1989) 167 CLR 94.
283 See I Freckelton & H Selby, above n 75 at 153.
284 (1989) 167 CLR 94 at 110 per Mason CJ and Toohey J, at 126 per Deane J, at 130 per Dawson J. Mason CJ and Toohey J stated that 'it does not follow that, because a lay witness can describe events and behaviour, expert evidence is unavailable to explain those events and that behaviour. Expert evidence will often build on lay observations', at 112. See also *Runjanic & Kontinnen* (1991) 56 SASR 114 at 121 per King CJ; *Ostland* (1998) 197 CLR 316 at 334 - 335 per Gaudron and Gummow JJ, at 372 - 377 per Kirby J.
285 I Freckelton & H Selby, above n 75 at 153.
towards assisting the jury in its determination of the facts in issue at trial by removing potential sources of error.\textsuperscript{286}

It is my argument that social framework evidence does not infringe the ‘common knowledge rule’ and should be admissible to ‘cause the judge or jury to review impressions or instinctive judgments based on ordinary experience’.\textsuperscript{287} As shown at 7.4.1, although there has been an increase in community awareness of domestic violence, considerable misapprehension and contradictions remain in community attitudes to domestic violence. The current state of knowledge in the community in relation to domestic violence,\textsuperscript{288} and the gendered assumptions that underpin the paradigm model of self-defence\textsuperscript{289} mean that an expert is able to assist the jury’s decision making, and may help the fact-finder avoid error in assessing the circumstances of the battered woman.

**Area of expertise**

In Australia, there has been debate concerning the existence and nature of any threshold test that must be satisfied in order to establish the existence of an ‘area of expertise,’ in particular whether the test (if one exists) is founded on general acceptance or reliability.\textsuperscript{290} In Australia, the common law position is that expert evidence is only admissible if there is an area of expertise in which a person can become ‘expert’.\textsuperscript{291} In *Bonython*, King CJ applied the test ‘of a body of knowledge or experiences which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience’.\textsuperscript{292} In New South Wales and the Australian Capital Territory, while there is no specific requirement that an area of expertise exist, section 79 of the *Evidence Act* requires ‘specialised

\textsuperscript{286} See Gaudron and Gummow JJ in *Oslund* (1998) 197 CLR 316 at 335.
\textsuperscript{287} *Decha-Jansakul* (1992) 8 CRNZ 470 at 475 – 476 per Cooke P.
\textsuperscript{288} See 7.4.1.
\textsuperscript{289} See Chapter 6.
\textsuperscript{291} See I Freckleton & H Selby, *ibid*, Chapter 4.
\textsuperscript{292} (1984) 38 SASR 45 at 47. This test was endorsed by Gaudron and Gummow JJ in *Oslund* (1998) 197 CLR 336 at 335.
knowledge based on the person’s training, study or experience’, and it is likely that this will be interpreted ‘in such a way as to require expert testimony to meet a standard of evidentiary reliability’. 293

Despite the uncertain status of the threshold test in the ‘area of expertise’ rule, Freckelton has suggested that courts are increasingly ‘likely to focus upon the reliability and validity of techniques and theories placing “syndrome evidence” in an “at risk” category’. 294 This may present a danger for the future viability of BWS evidence. Although there has been general judicial acceptance of BWS evidence in Australia, 295 commentators have been increasingly critical of the theoretical foundations of BWS and have suggested that it is ‘not sufficiently scientifically validated to be appropriately employed in the forensic context in Australia’. 296 In part, the problem with the use of BWS in the forensic context stems from the inappropriate use of medical concepts and language. 297

These concerns associated with the theoretical basis of BWS are avoided if the contextual evidence is provided separately from BWS evidence. In relation to social framework evidence, it will need to be demonstrated that the evidence forms part of a specialised field of knowledge. However, my contention is that there is ample evidence of research, publications, courses of study, and the like, to demonstrate that ‘domestic violence’ is an area of specialised knowledge. 298 Australian governments have commissioned numerous studies investigating issues associated with domestic violence, including women’s responses to violence and the impact of cultural and racial factors. 299 In addition, there are

294 I Freckelton & H Selby, above n 75 at 339.
295 See 7.3.3 and 7.3.4.
296 M McMahon, above n 34 at 43. See also I Freckelton, ‘Syndrome Evidence’, above n 30; I Freckelton & H Selby, above n 75.
297 As Freckelton has observed ‘the problem occurs when the medical term “syndrome” is adopted and when therapeutic tools are employed for purposes for which they are not suited’, I Freckelton, ‘Contemporary Comment’, above n 46 at 48. See also M McMahon, ibid at 37 – 38.
298 See Chapter Two.
299 See Chapter Two.
independent studies that form part of an established body of research in relation to domestic violence.  

**Expert rule**

It is ‘a fundamental tenet of evidence law that [experts] are not permitted the privilege to give evidence in the form of opinions if they are not properly to be designated experts’. In New South Wales and the Australian Capital Territory, the common law rule that an expert must be an expert is preserved in section 79:

If a person has specialised knowledge based on the person’s training, study or experience, the opinion evidence rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

At common law, there has been some uncertainty as to whether expertise can be derived from experience, rather than a course of study. However, the trend of recent authority suggests that expertise can be gained by experience. It is clear in New South Wales and the Australian Capital Territory that expertise can be gained by obtaining it through training or study or derived by experience. A further restraint is that an expert witness must only give opinion evidence on a subject of which that person is an expert.

The potentially limited range of ‘experts’ (psychologists and psychiatrists) qualified to provide evidence of BWS has been a significant criticism of the approach to BWS in Australia. Although a range of professionals, including a

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300 See Chapter Two.
301 J Freckelton & H Selby, above n 75 at 22.
303 Evidence Act 1995 (Cth).
304 S Odgers, above n 293 at 180.
305 See HG (1999) 197 CLR 414 at 430 - 431 per Gaudron J.
306 Evidence Act 1995 (NSW) s 79; Evidence Act 1995 (Cth) s 79.
308 J Stubbs & J Tolmie, ‘Falling Short of the Challenge?’ , above n 5. As Stubbs and Tolmie write, ‘[l]aw and psychology … collude in the disciplining of women. Successful reliance on BWS … may involve the reconstruction of woman as a psychologised, pathologised object’, J Stubbs & J Tolmie, ‘Race, Gender and the Battered Woman Syndrome’, above n 117 at 34.
social worker, a criminologist, and a refuge administrator have provided evidence of BWS in Australian courts, there are indications that courts are applying the expertise rule with increasing rigour. Freckelton suggest that this more restrictive approach will preclude ‘professionals other than psychiatrists and psychologists being able to give evidence about the phenomena attendant upon the syndromes’. For example in F, evidence of the behavioural responses of children who have been sexually abused was led by a ‘specialised paediatrician, who had a substantial amount of experience in dealing with children who had been subjected to sexual abuse’. Despite the considerable practical experience of the witness, she was held not to be qualified to provide the evidence, as she was not an expert. Although this case did not concern BWS evidence, the court’s ruling has implications for the possibility of adducing BWS evidence from a witness other than a psychologist or psychiatrist.

In contrast, the model of social framework evidence advanced in my thesis - evidence of the dynamics of domestic violence and women’s responses to that violence constructed in a non-medical ‘social framework’ model – would enlarge the category of experts ‘qualified’ to provide the evidence. The expansion of the range of potential witnesses (beyond psychiatry and psychology) aims to allow ‘women’s expertise ... [to] shape the legal concepts’, rather than having women’s experiences reinterpreted through medical discourse. Although the qualification of the expert will vary according to the evidence provided, ‘social framework’ evidence could be provided by people ‘with an extensive history of

310 Winnett v Stephenson, unreported, Magistrates’ Court ACT, 19 May 1993.
312 See I Freckelton & H Selby, above n 75 at 22 – 27.
313 I Freckelton, ‘Judicial Pedagogy and Expert Evidence’, above n 39 at 82.
314 (1995) 83 A Crim R 502 at 507 per the Court.
315 (1995) 83 A Crim R 502 per the Court that ‘Dr Packer was not shown to be properly qualified to give evidence about matters within the expertise of a psychiatrist or a psychologist’ at 509.
316 E Sheehy et al, above n 117 at 393.
working with battered women ... or experience in domestic violence research'.\(^{317}\)

This would include social workers, those involved in women’s shelters, or domestic violence education programs, criminologists or sociologists.\(^{318}\)

For example, in *Gadd*,\(^{319}\) evidence of BWS was provided by a social worker. In my view, the social worker would also have been appropriately qualified to provide the social framework evidence that I have proposed. The witness had extensive experience in relation to domestic violence, including her role as programme coordinator at a domestic violence resource centre, and as refuge coordinator at a women’s shelter. She also had extensive experience in counselling work with women who had reported experiences of domestic violence, she was the co-author of a programme in relation to the prevention of domestic violence, had coordinated a project connected with leaving domestic violence, as well as having provided public presentations of seminars, and had conducted workshops with respect to domestic violence.

Under the evidentiary framework that I propose, in some cases (depending on the content of the evidence), the evidence may be classified as evidence of ‘experience’ rather than as ‘opinion’ evidence.\(^{320}\) This would aid the extension of the range of ‘experts’ to those with extensive practical experience in relation to domestic violence. This was the approach taken by the High Court in *Weal v Bottom*, where evidence was given by witnesses who had long experience in driving and observing articulated vehicles, of the tendency of such vehicles to ‘drift’ or swing out around corners. It was held by Barwick CJ that:

> Such evidence could be given by an expert, properly so called, that is to say by a person who by study and instruction in some relevant scientific or specialised field was able to express an opinion, founded on scientific or specialised knowledge thus acquired, as to the likely behaviour of such a vehicle so placed. But it could also be established by the evidence of a person who had had actual experience of or had observed such behaviour. Such a person


\(^{318}\) See also New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 38 at 14.

\(^{319}\) Unreported, SC Qld, 27 Mar 1995.

\(^{320}\) See M Aronson & J Hunter, above n 21 at 1108 – 1111.
could speak of the capability of the vehicle in the described circumstances as a fact within his experience or observations. In truth, the evidence of such a person is not the expression of an opinion nor is he strictly within the category of an expert, though there is a tendency to refer to such evidence compendiously as expert evidence.\footnote{321}

The Court accepted that by virtue of their practical experience, a witness could provide evidence of ‘fact’ derived from observation and experience. In making the distinction between ‘fact’ and ‘opinion’, it was significant that the witness was not testifying as to how a particular event occurred, but how such events typically occur.\footnote{322}

So, how do we get from trucks and ‘drift’ to battered women and social framework evidence? In my view, the application of the principle from \textit{Weal v Bottom} to social framework evidence can be made - social framework evidence can be classified as evidence of fact rather than opinion. In providing evidence of the general dynamics of domestic violence, or the impediments that may prevent battered women leaving a violent relationship, or the impact of cultural and/or racial factors,\footnote{323} the witness is not asked to ‘diagnose’ the accused as a sufferer of BWS (or any other medical/psychological condition), nor is the witness necessarily proffering an opinion on the particular circumstances of the case. Rather, the witness is providing general evidence in relation to observable trends in violent relationships: the structural impediments to leaving; the dangers attendant on separation; and the general dynamics of domestic violence.

In relation to women from culturally and linguistically diverse backgrounds and indigenous women, evidence of the social context of domestic violence could be provided by members of the relevant community. Evidence from a community member has already been provided in a trial where a woman was charged with killing her violent partner to explain ‘the breakdown in Aboriginal law’ and the

\footnote{321} (1966) 40 ALJR 436 at 438. See also Taylor J at 441, Kitto J at 439, and McTiernan J at 439; Menzies J dissenting at 445.\footnote{322} (1966) 40 ALJR 436 at 438 per Barwick CJ.\footnote{323} See 7.4.2. I have focused on these aspects in my thesis, as I consider that they are particularly important as they correspond to the deficiencies in community knowledge. However, I recognise that (depending on the case) the content of social framework evidence may not be limited to (or extend to) these areas.
impact of that breakdown on the options available to the accused. Community attitudes to domestic violence and the barriers that exist within that community in relation to the disclosure of domestic violence, or leaving a violent relationship could be explained by a member of the community on the basis of their knowledge of such matters. This evidence would be evidence of ‘fact’. There is appeal court precedent for the reception of such evidence in Yildiz, where the Crown was able to lead evidence from a heterosexual Turkish interpreter as to the attitudes and customs of the Turkish community towards homosexuality. There was no need for the evidence to be provided by an anthropologist who had made a study and undergone a course of specialised learning in relation to the attitudes and customs of the Turkish community to homosexuals. The Victorian Court of Criminal Appeal accepted that the evidence was of ‘fact’, rather than as ‘opinion evidence in the sense that he related his evidence to the facts of the case’.

7.4.4 EDUCATING LAWYERS

The utility of specialist knowledge pertaining to domestic violence, the responses of women in violent relationships, the options available to them and the impact of cultural, ethnic or racial factors extends beyond the criminal trial itself. There is a need to inform lawyers about the dynamics of domestic violence, so that women can be adequately represented. My research has highlighted the number of women who plead guilty to manslaughter, rather than relying on self-defence at trial. As outlined at 6.2, a difficulty with the development of self-defence is the infrequency with which it is utilised in the context of battered women who kill. The expert has a valuable role to play in educating defence counsel before trial. Adequate knowledge about the

326 (1983) 11 A Crim R 114 at 125 per Murray J. See also at 124.
328 Stubbs and Tolmie observe that '[i]t is worthy to note that in at least two of the three Australian cases that the authors are aware of which resulted in acquittals in the absence of BWS evidence, counsel engaged experts in the pre-trial preparation. The same social worker
dynamics of domestic violence, women's responses to domestic violence, and the relevance of the evidence to the defence of self-defence means that lawyers can conceptualise the woman's actions as raising self-defence and can ensure that the appropriate evidence is called at trial. 329

7.5 PSYCHOLOGICAL SEQUELAE OF ABUSE

In view of the current Australian approach to expert evidence relating to battered women, my discussion has centred on the provision of broader social framework evidence, evidence that is not connected with the psychological sequelae of abuse. It is acknowledged, however, that in some cases, a woman's experience of violence may have impacted significantly on her psychological state and may be relevant to the issues at trial. 330 If such evidence is to be provided, my contention is that the evidence should not be structured according to the interpretative framework of BWS. Although BWS has become the shorthand description for a diverse range of evidence pertaining to the social positioning and responses of battered women (psychological and otherwise), 331 it fails to adequately describe the existing state of knowledge relating to the psychological sequelae of abuse. 332 Instead, the evidence should reflect the current state of knowledge concerning the psychological reactions of battered women to violence. As Dutton has argued, if evidence of a woman's psychological state is provided, such evidence needs to encompass 'the diverse range of traumatic reactions described in the scientific literature, and should not be limited to an examination of learned helplessness, PTSD, or any other single reaction or "profile"'. 333

contributed in both cases', J Stubbs & J Tolmie, 'Falling Short of the Challenge?', above n 5 at 741.
331 E Schneider, Battered Women and Feminist Lawmaking, above n 17 at 23, 123 – 124.
332 As McMahon has commented '[i]here is now a voluminous literature on domestic violence and the psychological and behavioural consequences of abuse by a male on his partner', M McMahon, above n 34 at 29. See also M Dutton, 'Validity of "Battered Woman Syndrome"', above n 118 at 10, 22; M Dutton, 'Understanding Women's Responses to Domestic Violence', above n 118 at 1197.
333 M Dutton, 'Understanding Women's Responses to Domestic Violence', ibid.
7.6 CONCLUSION

Although I have shown that defence counsel can more effectively make use of evidence of the accused’s particular relationship to challenge the generalisations that have informed the application of the law of self-defence, this chapter highlights how the dynamics of the trial process, the paradigm of self-defence and misconceptions about domestic violence operate to obscure a battered woman’s account of reasonable necessity. In attempting to convey the broader perspective of a woman’s experience of violence, defence counsel confronts head-on the ‘common-sense’ assumptions about the nature of domestic violence and appropriate responses to domestic violence that can be utilised by prosecution counsel. The practical relevance of imminence to self-defence and the legal method’s reconstruction of experience into discrete and isolated incidents mean that attempts to convey the complexity and interconnectedness of domestic violence by the use of case specific information can be destabilized. This is the potential value of expert evidence – to make ‘whole’ the accused’s experience of violence and to position the actions of the accused within their broader social context.

If defence counsel use expert evidence to assist the jury to understand the reality of the battered woman’s situation, this evidence is currently provided as evidence of BWS. My assessment of BWS evidence has highlighted in empirical and theoretical terms its inability to realise this purpose. In numerical terms, self-defence was only successful in 5 of the 10 cases in which BWS evidence was adduced. However, more prominent than the acquittals were the cases in which BWS was used in relation to a manslaughter conviction (11 cases). My analysis has shown that, as an evidentiary device, BWS is a ‘double-edged sword’ that has ‘syndromised’ women’s experiences of violence, failed to confront the gendered nature of the law, perpetuated existing stereotypes of women as irrational and emotional, and created a new stereotype of the ‘battered woman’. BWS has diverted attention from the practical realities faced by women in violent domestic relationships. In short, BWS has failed in its goal of making the reality of male violence visible and self-defence more receptive to women’s claims of self-defence.
In developing an alternate evidentiary framework to explain the dynamics of domestic violence, and to dislodge the misconceptions and biases that inform ‘common sense’ assumptions about self-defence and battered women, my argument has been that there needs to be a fundamental shift to the provision of social context evidence and that such evidence is admissible without reliance on the BWS construct. My analysis has addressed the need for social context evidence by demonstrating the community myths and stereotypes that exist in relation to domestic violence and how these misconceptions are utilised within the trial context. I have highlighted the misconceptions that exist in relation to the power dynamics of domestic violence and women’s decisions to remain in violent relationships – both essential to an evaluation of women’s actions in self-defence. The options available to battered women in response to violence, and the barriers to leaving a violent relationship are not constant within the diverse Australian communities. These cultural and ethnic factors may mean that the jury is not able to accurately assess the context in which a woman is acting.

This chapter also addressed the content of the social framework evidence. Although the nature of the evidence adduced would depend on the circumstances of the particular case, my proposal was that evidence could be provided about the general dynamics of domestic violence, women’s responses to violence, and/or the woman’s ethnic/cultural context. In explaining the dynamics of domestic violence, my argument was that the theoretical framework of domestic violence represented in the ‘Power and Control Wheel’ should be used. This model focuses on the violence (instead of the accused’s deteriorating psychology) and makes visible the continuum of abuse. An awareness of the accused’s entire experience of violence is vital if the jury are to understand the threat faced by the accused. The ‘Power and Control Wheel’ model is also useful in understanding a woman’s decision to use fatal force instead of leaving her violent partner. Evidence of the external factors that constrain a woman’s choices challenges the assumption that leaving a violent relationship is the only reasonable response.

\[324\text{ See 7.2 and 7.4.1.}
\[335\text{ See 2.6.4 and 7.4.1.3.} \]
My examination of reliance on BWS evidence in the context of self-defence showed that self-defence could succeed in the absence of expert evidence. Significantly, in one case, the accused’s defence was successful in a non-traditional self-defence situation. However, while these cases show promise and while I share the hope that in the future, expert evidence will no longer be ‘necessary for the finder of fact to realistically understand the context in which women’s defensive force might take place’, 336 my analysis suggests that social framework evidence is still potentially helpful in many cases. The value of expert evidence is to tie together the varying accounts of witnesses by providing an overarching conceptual framework of domestic violence within which the individual incidents of violence can be positioned and understood. The expert can draw together the series of isolated violent acts into a collective whole so that the jury can understand the threat that the accused faced and her need to use fatal force. By placing a woman’s actions in the broader social context (supported by research), this evidence can challenge the narrow construction of woman as either victim or agent. It enables recognition of the complexity of women’s lives and responses.

336 J Stubbs & J Tolmie, 'Falling Short of the Challenge?', above n 5 at 739.