Centre for Women's Justice

Proposed and actual reforms to self-defence laws in Australia and their impact on women experiencing family violence

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About the Centre for Women's Justice
Centre for Women's Justice (CWJ) is a lawyer-led charity focused on challenging failings and discrimination against women in the criminal justice system. We carry out strategic litigation and work with frontline women's sector organisations to challenge police and prosecution failings around violence against women and girls (VAWG). Our evidence base is built on the experience of frontline women's sector support workers discussed during our training sessions with them, the requests for legal advice they send to us, and our research. In 2021 we responded to a total of 1,081 legal enquiries, including 559 in which we gave legal advice.

About this paper
This paper was commissioned as part of CWJ's work to address the unjust criminalisation of victims of VAWG who are accused of offending. It is specifically intended to help inform debate about potential reforms in law and practice in England and Wales to make self-defence more accessible for victims of domestic abuse who use force against their abuser.

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1. Introduction

Self-defence is a full defence which, when successful, results in a not guilty verdict. Self-defence is the classic defence of agency and autonomy as it is thought to involve taking the law into one's own hands.[1] Self-defence is available to effect arrest, defend oneself, others or to defend property (although, over recent decades, reforms have prohibited the use of lethal force to protect property). Where the defence is raised, the prosecution must prove beyond a reasonable doubt that the accused did not act in self-defence. Self-defence is a general defence in that it is available across the board of criminal offences. But in practice, self-defence is generally raised in relation to violence offences including assault and homicide. Despite its general remit, self-defence has long been criticized for being inaccessible or less accessible to women than men.[2] In particular, historically, women had difficulties satisfying the requirements of the defence that force was used in response to an imminent threat, and that the force was proportionate to that threat. As we discuss in this report, despite reforms over several decades, there remain issues with the defence of self-defence for women experiencing family violence.[3]

In some jurisdictions in Australia, self-defence has an allied partial defence, excessive self-defence. This defence, which is available to murder only, reduces the offence from murder to manslaughter when successful. In general terms, the statutory version of excessive self-defence is available to an accused person who would have relied on self-defence but could not satisfy the requirement of reasonable grounds for belief in the need for defensive force. In Australia, excessive self-defence had existed at common law, but was abolished by the High Court in the 1987 decision of *Zecevic v DPP (Vic) (Zecevic)*.[4] In the decades since its removal from the law, excessive self-defence has been reintroduced in several Australian jurisdictions.[5] The existence of this partial defence is part of what makes Australia an interesting point of comparison with other similarly positioned countries. Excessive self-defence is important in itself, as it provides a half-way house between a full defence and no defence. In addition, it has served as a model for the introduction of other allied partial defences, as we discuss in this report.

Australia inherited the English common law of crime (and other laws) at the time of colonisation. Australia is a federation consisting of the Commonwealth or Federal jurisdiction, six states and two territories, each of which have separate criminal laws. The laws relating to self-defence differ across these nine (9) jurisdictions (see appendix for relevant provisions from each jurisdiction). But there are broad commonalities between the common law states – New South Wales, Victoria, and South Australia – on the one hand, and the states which have criminal codes, Queensland, Western Australia and Tasmania, on the other hand.[6] The Australian Capital Territory and the Northern Territory have adopted

[1] See eg Joshua Dressler, 'New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and *Rethinking*' (1984–85) 32 *University of California Los Angeles Law Review* 61.
[2] See eg Kate Fitz-Gibbon and Julie Stubbs, 'Divergent directions in reforming legal responses to lethal violence' (2012) 45(3) *Australian and New Zealand Journal of Criminology* 318, 325.
[3] We acknowledge that men and trans people are subject to family violence. In recognition of the reality that most victim/survivors are women, we refer to women throughout this report. The Australian Institute of Health and Welfare (AIHW) defines 'family, domestic and sexual violence' as acts of physical violence, sexual violence, emotional abuse, and coercive control between family members, including current and former intimate partners. AIHW, *Mental health services in Australia: Family, domestic and sexual violence* (09 Nov 2022). In this report we primarily consider instances of intimate partner violence in which men are the primary aggressors against their current or former partners, but we use 'family violence' as a more inclusive term.
[4] *Zecevic v DPP (Vic)* (1987) 162 CLR 645. The elements of excessive self-defence were formulated in *R v Howe* (1958) 100 CLR 448.
[5] See NSW (*Crimes Act 1900* s 421), South Australia (*Criminal Law Consolidation Act 1935* s15, introduced in 1991 and amended in 1997), and Western Australia, (*Criminal Code Act Compilation Act 1913* sch. 1 s248).
[6] See for discussion Arlie Loughnan, '"The very foundations of any system of criminal justice": Criminal responsibility in the Australian model criminal code' (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 8.

versions of the Model Criminal Code that was developed by the Commonwealth in the 1990s.[7] Each of the Australian states and territories has its own law reform commission, which, together with parliament and the courts, have directed reform in the different jurisdictions. Each jurisdiction has a different story relating to self-defence, but it is possible to identify some themes across which reform has taken place. As this report indicates, there is a general trend to broaden the accessibility of the defence to women which is evident in each jurisdiction.[8]

As in other countries, reforms to self-defence laws in Australia have taken place against a background of increasing public and political concern about family violence. While reform in Australia have varied from jurisdiction to jurisdiction – reflecting the role of localized histories and political campaigns, as well as the specifics of the triggering cases, in reform processes[9] – the need to respond to violence against women has driven change in this area of the criminal law across jurisdictions. Enhanced understanding of the impact of family violence, and relatedly, changing ideas of criminal blameworthiness, have contributed to reforms that expand the remit of self-defence, and led to the reintroduction, in some jurisdictions, of excessive self-defence, as well as experimentation in allied special defences, as we discuss below.

This report analyses the law of, and reforms to, self-defence as it relates to women experiencing family violence. To expose the trends evident in reform across Australian jurisdictions, it is organised thematically. It consists of six (6) main sections. In Sections 2, 3 and 4, we consider the definition of self-defence in Australia, the allied partial defence of excessive self-defence, and reforms related to the admissibility of evidence of family violence, respectively. The report then turns in Section 5 to the creation of new provisions as an alternative response to expanding the scope of self-defence. To assess the impact of the reforms discussed in this report, in Section 6, we examine the empirical profile of the operation of self-defence in Australia. We conclude with a brief discussion of what we believe is a likely future reform issue, prosecutorial decision-making as it relates to charging women who commit offences in the course of responding to family violence.

2. The Definition of Self-Defence

The common law of self-defence, which applies in the most populous states in Australia, was subject to a comprehensive restatement in 1978 and 1987. In 1978, the majority of the High Court of Australia offered what was intended as a definitive statement about the defence (and excessive self-defence, discussed below). In *Viro v The Queen (Viro)*, Mason J presented a six-point statement of the law framed around the task of the jury, which took into account the burden of proof in relation to the defence.[10] This comprehensive definition proved difficult in practice. Just ten years later, in 1987, in *Zecevic*,[11] the High Court undertook a major reconsideration of self-defence (and excessive self-defence). This reconsideration recognised that 'it was a mistake to attempt to state the law of self-defence in a form which sought to take account of the onus of proof' on the basis that 'this attempt

[7] The jurisdictions that have traditionally applied the common law (Victoria, New South Wales and South Australia) have all now introduced legislation, in some cases attempting to codify the law of self-defence (e.g., *Crimes Act 1958* (Vic), s322N; *Crimes Act 1900* (NSW), s418), and in others adopting formulations that replicate the model Criminal Code (Criminal Code (ACT), s42).

[8] This trend has been identified by others. See discussion and citations in Stella Tarrant, 'Self Defence in the Western Australian Criminal Code: Two Proposals for Reform' (2015–16) *University of Western Australia-Faculty of Law Research Paper* 3 fn 9.

[9] See Fitz-Gibbon and Stubbs (n. 3), 320–322. As Fitz-Gibbon and Stubbs note, legislative change coincided with changes in judicial attitudes in which courts became more receptive to women's victimization by partners and others (ibid.)

[10] *Viro v The Queen* (1978) 141 CLR 88 at 146–7.

[11] *Zecevic* (n. 5).

led to complexity which might otherwise have been avoided'.[12] In *Zecevic*, Wilson, Dawson and Toohey JJ formulated a new test for self-defence (and abolished excessive self-defence):

> The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. Stated in that form, the question is one of general application and is not limited to cases of homicide.[13]

This decision means that, in common law states, the imminence of the threat required for self-defence had an evidentiary rather than legal or substantive significance.[14] As a result, in general terms, self-defence provides a full defence to a charge where the defendant believes on reasonable grounds that his or her conduct was a necessary response to a threat to him or herself or others or to property.[15] While this change made it easier for defendant women utilising the defence when defending themselves against abusers, self-defence has remained less accessible to women than men, as we discuss below.

Following *Zecevic*, **New South Wales** legislated to enshrine the new definition of self-defence. The legislative definition of self-defence in New South Wales is set out in section 418 of the *Crimes Act 1900* (NSW) (see appendix). Broadly, to rely on the defence of self-defence a person must have (1) believed it was necessary to use force in defence of themselves (or another); and the person's (2) response must have been reasonable in the circumstances as the person believed them to be. The jury may consider the age, gender, state of health and physical circumstances of the accused in the second stage of the test.[16] A defendant does not need to show that they were defending themselves against unlawful conduct, although they still need to show that their actions in self-defence were reasonable in the circumstances.[17] It is not possible to rely on self-defence if the defendant has used lethal force in defence of property (see appendix). As per reforms, immediacy of the threat is no longer a legal requirement but a matter of evidence relating to the perceived need for force.

The requirements for self-defence in **Victoria** are set out in section 322K of the *Crimes Act 1958* (Vic). These largely mirror section 418 of the *Crimes Act 1900* (NSW), with the first limb providing that the accused "believes that the conduct is necessary in self-defence", and the second limb requiring that the accused's conduct be reasonable in the subjective circumstances as perceived by the accused.[18] As per the usual scope of self-defence under the common law, a person may claim to have acted in self-defence, *inter alia*, in order to defend themselves or another person or for the "prevention or termination of the unlawful deprivation of liberty of a person or another person".[19] However, section 322K expressly provides that self-defence only applies in the case of murder if the accused believed that their conduct was necessary to defend themselves or another from the infliction of death or "really serious injury". Section 322H defines "really serious injury" to include "serious sexual assault".[20] If self-defence is raised in the context of family violence, S322M specifically

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[12] Ibid, per Mason J at 653.
[13] *Zecevic* (n. 5) per Wilson, Dawson and Toohey JJ.
[14] See ibid.
[15] See eg *Crimes Act 1900* (NSW) s 418(2); for critical discussion, see Eric Colvin, 'Abusive Relationships and Violent Responses: The Reorientation of Self-Defense in Australia' (2009) 42 *Texas Tech Law Review* 339.
[16] *R v Katarzynski* [2002] NSWSC 613.
[17] See also *Silva* [2016] NSWCCA 284 whereby the defendant was acquitted on appeal on the grounds that the absence of immediacy did not, in this context, render the defensive response unreasonable.
[18] *Crimes Act 1958* (Vic), s 322K.
[19] Ibid.
[20] Ibid, s 322H.

provides there and that that person may use force in excess of the use of force in harm or threatened harm to which they are responding (eg using a knife in response to unarmed abuser).[21]

The law of self-defence in **South Australia** in contained in the *Criminal Law Consolidation Act 1935* (SA). The full defence requires a belief that conduct was "necessary and reasonable" for defence of oneself or another (or to prevent imprisonment of oneself or another). This requires an added assessment of reasonability, but otherwise follows NSW and Victoria. Under the second limb, the conduct must have been "reasonably proportionate to the threat that the defendant genuinely believed to exist".[22] Like the law in NSW, if the conduct is not held to be reasonably proportionate to the perceived threat, then a charge of murder may be reduced to manslaughter.[23] It is possible to rely on the defence if lethal force is used to protect property or to prevent criminal trespass as long as the defendant did not mean to cause death or act recklessly.[24] The South Australian legislation specifies that where an offence is committed in circumstances of family violence, the requirement that conduct be reasonably proportionate to the believed threat "does not imply that the force used by the defendant cannot exceed the force used against him or her".[25] When a defendant asserts the offence occurred in these circumstances, the questions relevant to self-defence are to be determined having regard to evidence of family violence admitted during the trial. In addition, South Australia makes an exception to the requirement of "reasonable proportionality" in cases of an innocent defence against home invasion.[26]

The law of self-defence is different in the Code jurisdictions in Australia. In these jurisdictions, the criminal law is governed by a comprehensive code, which is contained in a schedule to a Code Act. The Code jurisdictions are organised around objective rather than subjective fault requirements.[27] This means that an accused is held responsible not because their state of mind is blameworthy in itself, but because of a 'blameworthy failure to live up to an objective standard of thought and behaviour'.[28] This reflects the approach to criminal responsibility that was dominant at the end of the nineteenth century and beginning of the twentieth century, the time the Codes were drafted.[29] Under the Codes, self-defence may only be used in response to an attack.

Queensland retains an objective requirement that the person was defending themselves against an 'assault'. Section 271 of the Queensland Criminal Code provides self-defence against an unprovoked assault. Subsection (1) provides a defence for the use of force that is objectively necessary for a person to defend themselves from an unprovoked attack. Subsection (2) provides a defence for more extreme force (extending to the infliction of death or grievous bodily harm) if the person subjectively believes on reasonable (objective) grounds they could not otherwise save themselves from death or grievous bodily harm.[30] Case law has made clear that an assault need not present as an immediate threat to justify

[21] See S322M.
[22] *Criminal Law Consolidation Act 1935* (SA), s 15(1), (3).
[23] Ibid, s 15(2).
[24] Ibid, s 15A.
[25] Ibid, s 15B; The meaning of 'circumstances of family violence' is found in section 34V of the *Evidence Act 1929* (SA).
[26] Ibid, s 15C.
[27] See, eg *Criminal Code Act 1899* (Qld) ss 22–25.
[28] See Eric Colvin, 'Criminal Responsibility Under the South Pacific Codes' (2002) 26 *Criminal Law Journal* 98–113, 104.
[29] See further Arlie Loughnan, *Self, Others and the State: Relations of Criminal Responsibility* (Cambridge University Press, 2020).
[30] *R v Young* [2004] QCA 84, 60 per McPherson J.

a response of self-defence.[31] But the requirement of an initial assault, or a threat to commit an assault, makes the defence less suitable for victims of family violence.[32]

Western Australia is another Code jurisdiction. In 2007, the Law Reform Commission of Western Australia (LRCWA) reviewed the law of self-defence in the context of family violence as part of a broader review of the law of homicide. As the report noted, the laws on self-defence in Western Australia had been criticised for their complexity, particularly in relation to the application of different rules for provoked and unprovoked assaults by women against their abusers.[33] The complexity of the relevant legislative provisions led to complicated directions being given to jurors at trial as to the tests to be met for a defendant to be entitled to rely on self-defence. The LRCWA reformulated the test for self-defence, removing two elements that had proven problematic for survivors of domestic abuse, namely the requirement for an assault and the requirement that the person feared death or grievous bodily harm.[34] As the LRCWA found, survivors of domestic violence "may be responding to a continuous threat or series of events and … domestic violence can take many forms, some of which may not satisfy the test for grievous bodily harm".[35] The LRCWA also considered that proportionality and imminence should not be referred to in the reformulated test.[36] In particular, the LRCWA observed that imminence "is hard to reconcile with the constant nature of domestic violence … to require someone who has suffered abuse and controlling behaviour for some time to nominate a single point of confrontation as the reason for his or her retaliation, misunderstands the nature of violent relationships".[37]

This report led to the amendment of the Western Australian Criminal Code in 2008.[38] Importantly, these amendments made the scope of self-defence explicit: the defence operates where a person has defended themselves against an imminent or a "not imminent" harmful act.[39] However, in their report *Transforming Legal Understandings of Intimate Partner Violence*, Tarrant, Tolmie and Giudice demonstrate (via a detailed analysis of a case decided under the relevant provision) that the way the law is being applied, by reference to old and inaccurate models of violence and relationships, directly undercuts even this express statutory statement about the scope of the defence.[40] Further, as part of a 2013 parliamentary review of the operation and effectiveness of these amendments, while it was found that the amendments were generally operating as intended, it was noted that the reformulated self-defence provisions were more frequently invoked in the context of illegal drug transactions, and not domestic violence.[41]

In **Tasmania**, provision for self-defence is found in section 46 of the *Criminal Code* (Tas), which requires the belief by the defendant in the need to use defensive force (a subjective test), and the finding that the force used was reasonable in the circumstances as the

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[31] *R v McKenzie* [2000] QCA 324.
[32] Anthony Hopkins, Anna Carline and Patricia Easteal, 'Equal Consideration and Informed Imagining: Recognising and Responding to the Lived Experience of Abused Women Who Kill' (2018) 41 *Melbourne University Law Review* 1201, 1225; Queensland Women's Safety and Justice Taskforce [QWSJT], *Options for Legislating Against Coercive Control and the Creation of a Standalone Domestic Violence Offence* (Discussion Paper 1, 2021), 24.
[33] LRCWA *Review of the Law of Homicide* Final Report, 2007, *Chapter 4 – Self Defence*.
[34] Ibid, 172, 290.
[35] Ibid, 290.
[36] Ibid.
[37] Ibid, 274.
[38] See *Criminal Law Amendment (Homicide) Act 2008* (WA).
[39] *Criminal Code* (WA), s 248(4).
[40] Stella Tarrant, Julia Tolmie and George Giudice, *Transforming Legal Understandings of Intimate Partner Violence*, Australian National Research Organisation for Women's Safety [ANROWS] Research Report, 2019.
[41] Parliament of Western Australia 'Statutory Review: Operation and Effectiveness of the 2008 Amendments to the *Criminal Code* and the *Sentencing Act 1995*'
<https://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3912480c1d445a5f956eb6d348257df1000801bd/$file/tp-2480.pdf>

defendant believed them to be (a subjective/ objective test).[42] The defence has no requirement regarding the immediacy or type of threat that warrant the use of force and is theoretically capable of accommodating circumstances of family violence in which women kill perpetrators of abuse.[43] However, its operation in these circumstances is largely untested.[44] Responding to concerns that immediacy remains an element of community perceptions of self-defence, in 2015, the Tasmania Law Reform Institute (TLRI) proposed specifying that "a person may have an honest belief that they are acting in self-defence and that their conduct may be regarded as a reasonable response in the circumstances as the person perceives them to be even if the person is responding to a harm that is not immediate or that appears to be trivial".[45] In 2016, the Tasmanian government invited comments on the reform of self-defence, among other initiatives to improve the justice system's response to family violence.[46] But reforms to self-defence were not included in the *Family Violence Reforms Bill* 2022 (Tas).

There are three other Code jurisdictions. At **Commonwealth** level, self-defence applies if a person carries out conduct he or she believes is necessary and the conduct is a reasonable response in the circumstances as he or she perceives them. As in other jurisdictions, self-defence is not available if a person uses force that involves the intentional infliction of death or really serious injury in the protection of property. The self-defence provisions in the **Northern Territory** are contained in the *Criminal Code 1983* (NT). Section 43BD is modelled on the self-defence provisions from the Model Criminal Code, following a recommendation of the Northern Territory Law Reform Committee.[47] Under section 42 of the **Australian Capital Territory** *Criminal Code Act 2002* (ACT) self-defence requires that a defendant believes his or her conduct was necessary to protect him or herself or someone else and the conduct was a reasonable response in the circumstances that he or she perceived. Neither the Commonwealth, NT, or ACT has had no recent reforms to the law of self-defence.

R v Secretary [1996] NTCCA 18

This case was decided under now superseded legislation,[48] however it contains relevant statements of principle. Helen Secretary shot her de facto partner, Darren Nelson, while he slept and was charged with his murder. For eight years leading up to this incident, the deceased verbally, mentally, and physically abused Secretary and their children. She had obtained a restraining order against him which was not enforced, and he had also assaulted other members of her family. In the months before the incident the deceased, who was a chronic drug abuser, threated to kill her, beat her, and sexually assaulted her. On the day of the incident, the deceased had threated Secretary with a knife before cutting the telephone cord so that she could not call the police. During a subsequent drive, during which he was under the influence of amphetamines and threatened to kill her, she noticed a gun in his car. When they arrived home, he threated to beat her with a belt, choked her, and further threatened her before falling asleep, at which point Ms Secretary retrieved the gun and shot

[42] *R v Walsh* (1991) 60 A Crim R 419.
[43] Tasmania Law Reform Institute, *Review of the Law Relating to Self-defence* (Final report No 20, October 2015, 2.
[44] Ibid.
[45] Bradfield, RJ and Henning, T and Prichard, J and Cockburn, H, Review of the Law Relating to Self-defence: Tasmania Law Reform Institute Final Report No 20, Tasmanian Attorney-General's Department, Tasmania, October (2015), vii.
[46] See Department of Justice (Tas), *Family Violence: Strengthening Our Legal Responses* (Consultation paper, October 2016).
[47] Northern Territory Law Reform Committee, *Self Defence and Provocation* (2000), 3–4; see also Australian Law Reform Commission, *Recognising family violence in homicide defences* (ALRC Report 114, 2010).
[48] *Criminal Code Act 1986* (NT), s 28(f).

him. The trial judge ruled that the issue of self-defence should not be left to the jury, but this decision of law was overturned by the Court of Criminal Appeal and a retrial was ordered.

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Self-defence continues to generate challenges for women experiencing family violence. There are several elements of self-defence that make it difficult for victims/survivors of family violence to rely on it, either as a defence to homicide or a defence to offences like assault and sexual assault. Historically, self-defence was unlikely to succeed without a physical attack such that the defensive response was a response to imminent harm.[49] Reforms have restructured self-defence so that it does not require an immediate threat to be successful. For instance, and as discussed above, following a series of reforms in 2014 to the *Crimes Act 1958* (Vic), Victorian juries are directed that self-defence can be reasonable or justified, even if the harm is not immediate. Nonetheless, empirical evidence shows that Australian jurisdictions seldom acquit women accused of murder unless they were being physically attacked at the time of the killing or the assault.[50]

Other elements of the defence of self-defence have also been criticised. The requirement that force used in self-defence was reasonable might not take into account ostensibly irrational responses that can often arise suddenly against a backdrop of prolonged abuse.[51] Most survivors find it difficult "to argue persuasively that her fear of death or her belief that she could otherwise save herself was reasonable".[52] Similarly, it can be difficult to prove proportionality outside confrontational cases, such as where a woman uses a weapon against her unarmed partner.[53] It is also difficult to show immediacy, proportionality, necessity and/or the seriousness of the threat in non-confrontational cases, such as where a woman kills her abusive partner while he is sleeping or has his back turned, or where it can be argued that the woman should have left the relationship or called the police. Some of these difficulties have prompted changes in legislation in Victoria, Western Australia and South Australia, as we discuss below.

Another issue with the definition of self-defence relates to the uncertainty about what personal characteristics of the accused can be considered under the second limb of the common law version of the test for self-defence. This makes it difficult for a survivor of domestic abuse to successfully rely on self-defence because the experience of trauma (caused by the abuse) is often labelled as an 'irrational overreaction by a woman who has developed a unique psychological condition', rather than a rational and an objective response to years of abuse.[54] The response to this problem has been to address issues of evidence that supports the use of self-defence by women in family violence contexts. We discuss this in Section 4 below.

The problems with the elements of self-defence are compounded for First Nations women by systemic issues including racism. We discuss these issues in the Part 5 below.

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[49] Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in R v Falls' (2014) 38 *Melbourne University Law Review* 707.
[50] Stella Tarrant, 'Self Defence against Intimate Partner Violence: Let's Do the Work to See It' (2018) 43 *University of Western Australia Law Review* 196, 206.
[51] Sheehy, Stubbs and Tolmie (n. 49), 678.
[52] Stella 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* 598.
[53] Victorian Law Reform Commission [VLRC], *Defences to Homicide* (Options Paper, 2003) 115–123; see also *DPP v Arslanian* [2022] VSC 736 (a homicide case with domestic violence involving male victim and male defendant, who were brothers).
[54] Sheehy, Stubbs and Tolmie (n. 49), 678.

3. The Allied Partial Defence of Excessive Self-Defence

In some Australian jurisdictions, self-defence has a close relative defence, a partial defence of excessive self-defence. As mentioned above, excessive self-defence operates to reduce murder to manslaughter. This defence has an interesting history, having been recognised in the law, removed, and then reintroduced, and, in its current formation, aimed at women victims/survivors of family violence rather than men.

In Australian common law states, in the post-war era, a series of cases recognised the existence of a qualified or partial defence of excessive self-defence, available in the prevention of a felony, and in the defence of property and persons.[55] In a way that would later prove significant for the development of the law, each of these cases involved male defendants. For example, in *R v McKay*, the defendant was convicted of the murder of an intruder on his chicken farm: at trial, Justice Barry directed the jury that if he used 'more force than reasonably necessary' McKay should be convicted of manslaughter, a direction that was accepted by the Victorian Court of Criminal Appeal.[56] In *R v Howe*, the defendant responded to a non-violent sexual advance by a male friend with lethal force.[57] The South Australian trial judge directed the jury that the only basis on which it could find manslaughter was provocation, but the South Australian Court of Appeal held that manslaughter could be based on excessive force.[58] The prosecution in *Howe* appealed to the High Court. The High Court granted special leave to appeal and confirmed that the use of excessive force in self-defence could be the basis of a manslaughter conviction.[59] In 1987, in *Viro*, however, and as mentioned above, a different High Court bench rejected the defence.[60] In *Zecevic*, discussed above, a majority of the High Court stated that proportionality could only be taken into account as a circumstance of the case, rather than a rule of law or a separate requirement.

The demise of the partial defence of excessive self-defence was not the end of the story of this part of Australian criminal law. In the decades after the abrogation of excessive self-defence, it has been revived, and **New South Wales, South Australia,** and **Western Australia** have re-introduced a defence of excessive self-defence, operating to reduce murder to manslaughter.[61] The Victorian government opted to reject the Law Commission's recommendation regarding excessive self-defence to instead create a new homicide offence (see Section 4 below). By contrast with the first tranche of cases concerning excessive self-defence, all of which involved men, the revival of excessive self-defence in recent decades was a response to women's violence. In particular, the re-introduction of excessive self-defence was one of a set of legislative responses to a specific construction of women accused of murder in the context of domestic violence.[62] As the Victorian Law Reform Commission stated in recommending a partial defence of excessive self-defence, "excessive self-defence would seem to better fit the circumstances of women who kill in this [family

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[55] See *R v McKay* [1957] VR 560, *R v Howe* [1958] SASR 95, *R v Buffalo* [1958] VR 363; *R v Haley* [1959] WN (NSW) 550, *Tikos (No. 1)* [1963] VR 285; *Tikos (No. 2)* [1963] VR 306; see also *McClelland v Symons* [1951] VLR 157 (concerning a civil case in which the plaintiff argued excessive self defence). For contemporaneous discussion of *McKay*, see N Morris 'The Slain Chicken Thief' (1958) 2(3) *Sydney Law Review* 414.

[56] See *McKay* (n. 55) (application for special leave to appeal the conviction to the High Court was sought but refused).

[57] *Howe* (n. 55) (per Dixon CJ, with whom McTiernan and Fullagar JJ agreed). Howe was the first of a series of cases of what became known as the 'gay panic defence', in which male defendants successfully pleaded provocation in relation to lethal violence after a same-sex sexual advance. These cases include *Green v R* (1997) 191 CLR 334.

[58] Referred to in *Howe* (n. 55), 470.

[59] Ibid.

[60] *Zecevic* (n. 5).

[61] These states are South Australia (*Criminal Law Consolidation Act 1935*, s 15), NSW (*Crimes Act 1900*, s 421), and WA (*Criminal Code*, s 248(3)). Each of these provisions contains both objective and subjective elements.

[62] See for discussion Loughnan (n. 29), ch 6.

violence] context than … provocation or … diminished responsibility. … unlike diminished responsibility, women's actions are not treated as if they arise from a mental condition".[63] As this suggests, women who use excessive force in defending themselves against abusive partners are seen as a particular class of "deserving accused",[64] and it is appropriate to accommodate them within a special defence to murder.

Across the jurisdictions in which it is in place, excessive self-defence takes a standard form. South Australia provides an illustration. The *Criminal Law Consolidation Act 1935* (SA) provides that murder will be reduced to manslaughter if the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; but the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.[65]

R v Silva [2015] NSWSC 148

Jessica Silva was charged with manslaughter by excessive self-defence after stabbing and killing her former partner, James Polkinghorne. He had been increasingly abusive towards her leading up to his death. On the day of the incident, he continuously threatened and abused her, before arriving at her parent's house in a highly aggressive state, under the influence of methylamphetamine, and, according to some evidence, threatened to kill her. Her brother and father intervened when the deceased assaulted the offender, while the brother and deceased were fighting, she stabbed him with a knife. Expert evidence concluded that Silva developed Post Traumatic Stress Disorder (PTSD) because of the relationship with the deceased. Hoeben CJ imposed a sentence of 18 months' imprisonment, wholly suspended. His Honour found that she intended to inflict grievous bodily harm because she believed the act was necessary to defend herself and her brother and father. The jury's verdict held that the "conduct was not a reasonable response in the circumstances as she perceived them".[66] However, Hoeben CJ did not accept that the offender developed PTSD during the relationship, because the history that informed that diagnosis differed from other evidence.[67] Silva appealed on the issue of whether it was open for the jury to conclude beyond reasonable doubt that the stab wound was not a reasonable response to the circumstances as she saw them.

The appeal was upheld in *Silva v The Queen* [2016] NSWCCA 284 where the majority held there was no rational reason for the jury to reject the substance of the evidence. The critical issue was the reasonableness of Silva's act judged "by reference to an assessment of the circumstances in that instant" as perceived by Silva.[68] McCallum J's assessment was that Silva perceived the attack as "urgent, life-threatening and inescapable" in part because of the "irrational, menacing rage exhibited by the deceased in his calls to Silva in the period leading up to the time when he confronted her physically".[69] Her Honour concluded that: "the circumstances described in the evidence in this case are the kind in which, more commonly, it is the woman who is killed. In my assessment of the record of the trial, the evidence was not capable of proving beyond reasonable doubt...that Ms Silva's conduct in fatally stabbing the deceased was not reasonable in the circumstances as she perceived them at the time of the stabbing".[70]

[63] VLRC, *Defences to Homicide* (Final Report, October 2004), [3.117], Recommendation 9, and ch 3 more generally.
[64] Ibid, [3.83].
[65] See *Criminal Law Consolidation Act 1935* (SA), s15(2).
[66] *R v Silva* [2015] NSWSC 148 [38].
[67] Ibid, [40].
[68] *Silva* [2016] (n. 18) [94].
[69] Ibid, [95]-[109].
[70] Ibid, [110].

Excessive self-defence is not available in the other Australian jurisdictions, **ACT, Commonwealth, Northern Territory, Victoria and Tasmania**. When the Model Criminal Code was drafted in the 1990s, the drafters decided against excessive self-defence on the basis that it was 'inherently vague'.[71] In these jurisdictions, the use of more force than justified by the circumstances renders the action unlawful.[72] A form of excessive self-defence exists in **Queensland**: as part of the new defence of killing for preservation in an abusive domestic relationship, s304B(4) provides that the defence may be available even if the response was done or made in response to a particular act of domestic violence committed by the deceased that would not, if the history of acts of serious domestic violence were disregarded, warrant the response (see discussion below regarding allied special defences, in Section 5).

Excessive self-defence is a double-edged sword for women who kill their abusers. Excessive self-defence has been criticised as potentially diverting women away from a full defence of self-defence.[73] But, on the other hand, there is evidence that women are more likely to risk going to trial where this defence is on offer rather than pleading guilty to manslaughter.[74] While it is an additional defence which may be useful in particular cases, it is no substitute for a full defence of self-defence, as even a partial defence may result in a significant period of imprisonment.

4. Incorporating Battered Women Syndrome and Evidence of Family Violence

In recent decades, the relevance and admissibility of evidence of family violence to support the defence of self-defence and other defences has become a key law reform issue in Australia. Before recent developments, the courts interpreted the law of self-defence as sufficiently capable of accommodating evidence of *battered women's syndrome*. As elsewhere, in Australia, in the 1980s and 1990s, the scope of self-defence was expanded with the acceptance in the courts of battered woman syndrome.[75] This provided a medicalised basis for admitting evidence relating to histories of abuse and so contextualised women's actions. In Australia, the admissibility of evidence related to battered woman syndrome was first authorised in *Runjanjic and Kontinnen* (1991) 53 A Crim R 362 (SASC), where it was used to establish duress. In *Osland v The Queen* (1998) 197 CLR 316, the High Court confirmed that this evidence was also relevant to whether the battered woman "believed she was at risk of death or serious bodily harm and that her actions were necessary to avoid that risk and the reasonableness of that belief'".[76]

[71] See Model Criminal Code Officers Committee, *Discussion Paper Chapter 5 – Fatal Offences Against the Person (*June 1998), 113.
[72] See *Criminal Code Act 1899* (Qld) s 283 and *Criminal Code Act Compilation Act 1913* (WA) s 260. In WA, the rule has been amended: see now *Criminal Code Act Compilation Act 1913* (WA) s 248(3).
[73] Fitz-Gibbon and Stubbs (n. 3); Kellie Toole, 'Self-defence and the reasonable woman: Equality before the new Victorian law' (2012) 36(1) *Melbourne University Law Review* 250.
[74] See Caitlin Nash and Rachel Dioso-Villa, 'Australia's Divergent Legal Responses to Women Who Kill Their Abusive Partners' (2023) *Violence Against Women* (advance).
[75] Australian courts were influenced by the US case of *New Jersey v Kelly* 478 A 2d 364 (1984) and Canadian case of *Lavallee* (1990) 55 CCC (3d) 97.
[76] *Osland v The Queen* (1998) 197 CLR 316, 56.

Osland v The Queen (1998) 197 CLR 316

In *Osland*, Heather Osland, and her son David Albion were jointly tried for the murder of her husband, Frank Osland. Osland drugged her husband with sedatives and while he was sleeping the son struck him on the head with an iron pipe in her presence. They then buried his body in a hole they had dug earlier. In the Supreme Court of Victoria, they both relied on self-defence and provocation, defences raised against "an evidentiary background of tyrannical and violent behaviour by Mr Osland over many years" which had allegedly been "escalating in the days prior to his death".[77] This included verbal, mental, sexual and physical abuse, including threats to kill her and her children if she left. He spoke to the children about killing and chopping up animals and pointed firearms at them. In the week prior to his death, the deceased literally kicked her out of bed and punched her in the chest numerous times. In the trial, expert evidence on battered woman syndrome was admitted, but Osland was convicted. She appealed to the High Court on the issue of whether the trial judge had erred in "failing to make clear the connection between the evidence of battered women syndrome … and the law of self-defence".[78] The appeal was dismissed by the majority, but the Court unanimously held that the judge's directions with respect to battered woman syndrome were appropriate. Gaudron and Gummow JJ held that the expert evidence was relevant to the defence of self-defence but found an obligation on counsel to make clear the precise manner in which the evidence was relied on in relation to the other facts in the case.[79] Kirby J was supportive of the evidence being admitted, but stated that battered woman syndrome "appears to be an 'advocacy driven construct' designed to 'medicalise' the evidence in a particular case in order to avoid the difficulties which might arise in the context of a criminal trial from a conclusion that the accused's motivations are complex and individual: arising from personal pathology and social conditions rather than a universal or typical pattern of conduct sustained by scientific data".[80]

While acceptance of evidence of battered woman syndrome seems to have made a difference to the outcome of some trials of women accused of killing their abusers, in the majority of these cases, "the evidence appears to have been narrowly construed and directed primarily towards explaining the psychology of the particular accused or of battered women in general" as opposed to the broader evidence concerning abuse and its effects.[81] The practical application of the "syndrome" is limited by the way it scopes "women's experiences and conduct through a psychological template of disorder, divorces women from their social, racial and cultural contexts, and obscures the structural nature of violence against women".[82] It is arguable that in Australia self-defence, and other related defences, are flexible enough to do justice without relying on a technical "syndrome" and expert evidence.

[77] Ibid, [5] per Gaudron and Gummow JJ.
[78] Ibid, [155] per Kirby J.
[79] Ibid, [60].
[80] Ibid, [161].
[81] Julie Stubbs and Julia Tolmie, Battered women charged with homicide: Advancing the interests of Indigenous women (2008) 41(1) *Australian & New Zealand Journal of Criminology* 138; see *R v Bradley* (unreported, 14 December 1994), *R v Tassone* (Unreported, NTSC 16 April 1994), *R v Hickey* (Unreported, NSWSC, 14 April 1992) and *R v Runjanjic* and *R v Kontinnen* (1991) 56 SASR 114.
[82] David Brown et al, *Criminal Laws Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 7th edition, 2020), 961. On feminist debate of this topic: Julie Stubbs, 'Battered woman syndrome": An advance for women or further evidence of the legal system's inability to comprehend women's experience?' (1991) 3(2) *Current Issues in Criminal Justice* 267; Patricia Easteal, 'Battered woman syndrome: misunderstood? (1992) 3(3) *Current Issues in Criminal Justice* 356; Julie Stubbs, 'Response' (1992) 3(3) *Current Issues in Criminal Justice* 359; Gail Hubble, 'Feminism and the battered woman: The limits of self-defence in the context of domestic violence' (1997) 9 *Current Issues in Criminal Justice* 113. For recent discussion, see Danielle Tyson et al., 'Family Violence in Domestic Homicides: A Case Study of Women Who Killed Intimate Partners Post-Legislative Reform in Victoria, Australia' (2017) 23(5) *Violence Against Women* 559-583. doi: 10.1177/1077801216647796.

Against this background, the issue of the appropriate means by which to provide juries with evidence about domestic violence, and combat stereotypes about victim/survivors, became acute. In recent years, there has been a movement in Australian case law to legislate to provide for social context framework evidence. Social framework evidence is a holistic analysis focusing on the social context of the survivor's actions, including the nature and dynamics of the survivor's history of family violence, rather than narrow medicalised constructions of battered woman syndrome.[83] In 2010, the Australian Law Reform Commission and the New South Wales Law Reform Commission jointly published a report entitled "Family Violence – A National Legal Response", which recommended, *inter alia*, that state and territory criminal legislation should ensure that defences to homicide accommodate the experiences of survivors of family violence and recognise the dynamics and features of family violence.[84] The ALRC/NSWLRC's recommendations are reflected in a number of important statutory reforms subsequently introduced in various states and territories. Notably, the ALRC/NSWLRC recommended that state and territory criminal legislation should provide guidance as to the relevance of family violence related evidence.[85] In several jurisdictions, parliaments have amended statutory provisions on self-defence to make evidence of the nature and effects of family violence more readily admissible.

In **Victoria**, legislation has been introduced that has been regarded as a model across the country. Notably, section 322M of the *Crimes Act 1958* (Vic) (introduced as s9AH in 2005 and renumbered in 2014) provides that, for the purposes of section 322K, where self-defence has been raised in the context of family violence:

> … the conduct may be a reasonable response in the circumstances as the person perceives them, even if—
> (a) the person is responding to a harm that is not immediate; or
> (b) the response involves the use of force in excess of the force involved in the harm or threatened harm.[86]

This provision was introduced in order to make self-defence more accessible to domestic abuse survivors and to counter the view that self-defence cannot be used in non-confrontational cases and when the threat is not imminent.[87] In addition, section 322J allows for a wide range of evidence of family violence to be adduced.[88] While this provision is available to men and women, as the Victorian Law Reform Commission stated, in those cases in which women kill their intimate partners, "the homicide often follows a history of physical abuse at the hands of their male partners".[89] To facilitate the effectiveness of these provisions at trial, amendments to the *Jury Directions Act 2015* (Vic) provide for jury directions on how family violence evidence, its scope and its significance, may be relevant to self-defence and also the defence of duress.[90] Part 6 *(Family Violence) of the Jury*

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[83] See Thomas Crofts and Danielle Tyson, 'Homicide Law Reform in Australia: Improving Access to Defences for Women Who Kill Their Abusers' (2013) 39(3) *Monash University Law Review* 864, 882.
[84] ALRC and NSWLRC, *Family Violence – A National Legal Response: Final Report* (ALRC Report 114/ NSWLRC Report 128, October 2010) 653.
[85] Ibid, 654.
[86] *Crimes Act 1958* (Vic) s 322K (emphasis added). See for discussion Heather Douglas, 'Social Framework Evidence: Its Interpretation and Application in Victoria and Beyond ' in Kate Fitz-Gibbon and Arie Freiberg (eds.) *Homicide law reform in Victoria: retrospect and prospects* (Federation Press, 2015). We note that the 2014 amendments extended existing self-defence and duress provisions to all offences, meaning that the social framework/family violence considerations now apply to all offences.
[87] VLRC (n. 60), 76–81. See also *DPP Reference No 1 of 2017* [2018] VSCA 69 which provides some evidence that this approach is making a difference.
[88] This includes: the history of the relationship; the cumulative effect (including psychological effect) on the accused of that violence; social, cultural or economic factors; and the general nature and dynamics of abusive relationships: *Crimes Act 1958* (Vic), s 322J(1)(a)–(f).
[89] VLRC (n. 60), [1.3].
[90] See *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic).

Directions Act 2015 (Vic) applies to criminal proceedings where self-defence or duress in the context of family violence is in issue and allows for unique jury directions in the context of family violence.[91]

Following the Victorian model, family violence evidence provisions have been introduced recently in **Western Australia**. In June 2020, the *Family Violence Legislation Reform Act 2020* (WA) was passed, following public advocacy surrounding the convictions of Chamari Liyanage and Jody Gore.[92] Among other changes, amendments to the *Evidence Act 1906* (WA) were introduced to clarify the relevance and admissibility of evidence of family violence, including, in particular, where self-defence is at issue.[93] The amendment allows evidence of family violence to be adduced in determining whether the "act was necessary to defend the person or another person from a harmful act, including a harmful act that was not imminent".[94] Similar to Victoria, the *Evidence Act 1906* (WA) allows for special jury directions to be given in the context of family violence where self-defence is relied upon.[95] For instance, section 39C-F of the *Evidence Act* facilitates judges providing jury directions in family violence cases,[96] whilst section 39F(2)(a)-(g) and (3) makes it clear that family violence can be understood as a form of entrapment by broadening the kinds of considerations that are relevant in these cases to include the nature of the family violence safety response and structural inequities in the victim's life.[97]

As noted above, the WA provisions are based on the Victorian legislation but go further. They adopt formulations of coercive control from the *Domestic Abuse (Scotland) Act 2018* and also include principles in a "social entrapment" model of domestic violence.[98] For example, evidence of family violence incorporates the impact of social, cultural, and economic factors, including how both violence and a lack of safety options may be "exacerbated by inequities experienced by the person, including inequities associated with (but not limited to) race, poverty, gender, disability or age".[99] In addition, a trial judge may give directions to a jury indicating factors that influence responses to family violence. These include "the provision of, or failure in the provision of, safety options that might realistically have provided ongoing safety to the person, and the person's perceptions of how effective those safety options might have been to prevent further harm".[100]

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[91] For example: "that family violence is not limited to physical abuse and may include sexual abuse and psychological abuse; may involve intimidation, harassment and threats of abuse; may consist of a single act; may consist of separate acts that form part of a pattern of behaviour that can amount to abuse, even when some or all of those acts may, when viewed in isolation, appear to be minor or trivial; and that experience shows that people may react differently to family violence and there is no typical, proper or normal response to domestic and family violence; it is not uncommon for a person who has been subjected to domestic and family violence to stay with an abusive partner after the onset of violence or to leave and then return to the partner; and not to report family violence to police or seek assistance": *Jury Directions Act 2015* (Vic), s 60.

[92] *Western Australia v Liyanage* [2016] WASC 12; *Western Australia v Gore* (WASC, 327 of 2015); *Western Australia v Gore* [2016] WASCSR 229. We record our thanks to Stella Tarrant for her guidance regarding these developments.

[93] *Evidence Act 1906* (WA) ss 38–39B. See also ss 39C–39G in relation to requests for directions on family violence, including where self-defence is at issue.

[94] *Evidence Act 1906* (WA), s 39B.

[95] Ibid, s 39F.

[96] Ibid, s 39C-F.

[97] Ibid, s 39F(2)(a)–(g).

[98] *Crimes Act 1958* (Vic), s322M(2), ss322G – 322P; *Jury Directions Act 2015* (Vic), ss 58-60; *Domestic Abuse (Scotland) Act (2018)*, ss 2(2), 2(3).

[99] *Evidence Act 1906* (WA), s 38(1)(f).

[100] Ibid, s 39F(3)(c) and (d).

Western Australia v Liyanage [2016] WASC 12

This case related to the admissibility of expert evidence in cases concerning the law on self-defence. Chamari Liyanage claimed to have acted in self-defence after killing her husband, Dinendra Athukorala, by twice striking him on the head with a heavy metal mallet as he lay in bed. She called emergency services in the morning. Liyanage had no memory of the incident, or anything that occurred between going to bed and waking up to find him dead, but she was charged with his murder in 2014 and convicted of manslaughter in 2016 after a jury trial. The relationship was characterised by cycles of abuse and violence of the deceased toward Liyanage. She presented evidence that he regularly assaulted her and forced her to participate in sexual acts with other women, including a 17-year-old girl who he was actively grooming. He threatened her family in Sri Lanka, forced Liyanage to perform sexual acts in front of an active web-camera and to watch pornography and child exploitation material. In the case, the court refused to allow expert evidence be provided from a family violence expert on the results of applying the Campbell risk assessment tool[101] for intimate partner violence homicide, however, evidence was permitted to be provided from two psychiatrists relating to Battered Women Syndrome. Liyanage unsuccessfully appealed, including on the issue of whether the judge erred in ruling certain evidence inadmissible on the assessment of domestic violence and its social context. The discrepancies in terms of the admissibility of expert evidence at trial led some to question this judicial practice in Western Australia with respect to the law on self-defence.[102]

South Australia has also recently legislated to incorporate evidence of family violence. The defence of self-defence was amended on 29 March 2021 to allow the court to consider evidence of family violence when assessing questions of reasonability, necessity, and proportionality, if the defendant asserts the offence occurs in circumstances of family violence.[103] The test for self-defence is set out in section 15 of the *Criminal Law Consolidation Act 1935* (SA), which provides that:

> (1) It is a defence to a charge of an offence if—
> (a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; and
> (b) the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.[104]

If the accused asserts that the offence occurred in circumstances of family violence, the questions of whether the defendant genuinely believed that particular conduct was necessary and reasonable, or whether the defensive act was reasonably proportionate to the threat, are to be determined having regard to any evidence of family violence admitted during the course of trial.[105] This evidence can include "social framework evidence" (introduced through expert evidence). "Social framework evidence" refers to:

[101] Jacquelyn C Campbell et al, 'Risk factors for femicide in abusive relationships: Results from a multisite control study' (2003) 93(7) *American Journal of Public Health* 1089.
[102] Tarrant, Tolmie and Giudice (n. 39), 1–118.
[103] See the South Australian Law Reform Institute [SALRI], *The Provoking Operation of Provocation: Stage 1* (April 2017); the SALRI's recommendations were implemented pursuant to the *Statutes Amendment (Abolition of Defence of Provocation and Related Matters) Act* 2020, including in relation to admissibility of evidence of family violence.
[104] *Criminal Law Consolidation Act 1935 (SA)*, s 15(1).
[105] *Criminal Law Consolidation Act 1935 (SA)*, s 15B(2).

(a) evidence relating to the general nature and dynamics of relationships affected by family violence and the cumulative effect on the person or a family member of family violence; and
(b) evidence of the experiences of victims of family violence generally, to the extent that the evidence assists in understanding family violence generally; and
(c) such other evidence as may be necessary or appropriate to ensure a jury has an adequate understanding of family violence.[106]

These amendments allow the court and the jury to consider circumstances of family violence when assessing the questions of reasonableness, necessity and proportionality of the survivor's conduct.[107] The court and jury must also take into account, where there is evidence of family violence, the "history, nature and dynamics of the relationship between the accused person and the deceased, and the effect of family violence on the accused person or their family members – including psychologically, socially, culturally and economically".[108]

Other jurisdictions are yet to introduce family violence evidence provisions. In **Tasmania**, the 2015 Tasmanian Law Reform Institute report on self-defence recommended the introduction of a requirement for trial judges to give directions to the jury on family violence, unless there are good reasons not to, which would draw on Part 6 of the *Jury Directions Act 2015* (Vic). Other amendments suggested by the Institute were procedural. For instance, amending the *Evidence Act 2001* (Tas) to "include provisions based on the *Crimes Act 1958* (Vic) ss 322J and 322M that provide for a broad range of family violence evidence to be admitted and to make it clear that that evidence is relevant to both the subjective and objective components of s 46".[109] This amendment should "provide an inclusive definition of violence and should make it clear that violence may include a number of acts that form part of a pattern of behaviour (whether or not the acts are of the same kind or directed towards the same person), even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial".[110]

In 2013, in **New South Wales**, the Upper House Select Committee on Provocation published a report considering, *inter alia*, the adequacy of the defence of self-defence for survivors of domestic violence in the context of whether abolish or reform the defence of provocation. Many participants in the inquiry commented on the need to strengthen self-defence so that it could be more readily relied upon by survivors of domestic abuse, which the Select Committee described as "an attractive proposition".[111] However, the Select Committee was unable to make a firm recommendation on this issue as it was not provided with "strong arguments from participants on what methods could effectively be used to do so".[112] The Select Committee did, however, recommend the introduction of legislative provisions regarding the admissibility of evidence of family violence similar to those provided for under Victorian law.[113] This proposal has not been addressed to date.

[106] *Evidence Act 1929* (SA), s 34X.
[107] For the legislative definitions of circumstances of family violence, and evidence of family violence, see *Evidence Act 1929 (SA)*, ss 34V and 34W.
[108] Ibid, s 34W(a)–(e).
[109] Bradfield, RJ and Henning, T and Prichard, J and Cockburn, H, Review of the Law Relating to Self-defence: Tasmania Law Reform Institute Final Report No 20, Tasmanian Attorney-General's Department, Tasmania, October (2015).
[110] Ibid.
[111] Provocation Select Committee, *The Partial Defence of Provocation* (Report, April 2013) 82.
[112] Ibid.
[113] Ibid, 186.

5. Allied special defences

While various Australian states/territories have opted to amend and adapt existing full defences, some jurisdictions have also introduced abuse-specific provisions in their criminal laws. These special defences vary from jurisdiction to jurisdiction but share some distinctive features, in particular, they combine offence and defence, justification and excuse elements together. As one of us has argued elsewhere, like excessive self-defence, which serves as a precursor defence, these atypical legal forms reflect the construction of women's responsibility for crime as an amalgam of agency and victimhood/survivorhood.[114]

In significant part in order to accommodate abused women who used lethal violence against abusers, in **Victoria**, the government created a new homicide offence of **defensive homicide**.[115] "Defensive homicide" applied to an individual who killed a victim under a genuine but unreasonable belief that he or she was using lethal force in self-defence. It was introduced to sit alongside manslaughter and provide a halfway house between an acquittal (via self-defence) and a conviction of murder for women who killed an abusive partner, and for individuals with mental illness who could not fit within the mental illness defence.[116] "Defensive homicide" was also an atypical legal form, in that it combined elements of offence ("homicide") and defence ("defensive") together. Although it was intended for use by women responding to domestic violence, "defensive homicide" was not restricted to homicides that occurred in particular circumstances, and, before it was abolished in 2014, the majority of individuals convicted of the offence were men who had killed other men.[117]

Following a high-profile case in which a 28-year-old man killed his 16-year-old girlfriend, and successfully raised provocation, provocation was reviewed by the **Queensland** Law Reform Commission in 2008.[118] The reforms recommended by the Commission were designed to limit the use of provocation based on words alone to situations of a "most extreme and exceptional character", with the Commission recommending that the particular circumstances of abuse survivors (such as "slow burn provocation") should be dealt with via a different defence.[119] At around the same time, the Queensland government investigated the option of a specialised defence for victim/survivors of domestic violence. This was enacted as a partial defence of **killing for preservation in an abusive domestic relationship** in 2010.[120] The "preservation defence" was intended for individuals responding to domestic violence (against a factual backdrop of awareness that the vast majority of victims of domestic violence are women) and designed to avoid the restrictions of existing defences of self-defence and provocation, which required the defendant to respond to a specific assault, or threat, or to respond to an instance of provocation within a particular timeframe.[121] The "preservation defence" is an atypical legal form in that it brings separate elements together – here, offence and defence as well as justification and excuse ("killing for preservation" – a hallmark of self-defence – but "in an abusive domestic relationship" – a situation of victimisation) – and is marked by particularity (it is restricted by the context in

[114] Loughnan (n. 29), ch 6.
[115] See *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic).
[116] Madeline Ulbrick, Asher Flynn, and Danielle Tyson, 'The abolition of defensive homicide: A step towards populist punitivism at the expense of mentally impaired offenders' (2016) 40 *Melbourne University Law Review* 324.
[117] See for discussion Kellie Toole, 'Defensive Homicide on Trial in Victoria' (2012) 39(2) *Monash University Law Review* 473; see also Rosemary Hunter and Danielle Tyson 'The implementation of feminist law reforms: The case of post-provocation sentencing' (2017) 26(2) *Social & Legal Studies* 129.
[118] See *R v Sebo*, Unreported, Supreme Court of Queensland, 2007; *Sebo ex parte Attorney-General (QLD)* [2007] QCA 426, and Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation* (Brisbane: Department of Justice, 2008).
[119] For critical discussion, see Heather Douglas, 'A consideration of the merits of specialized homicide offences for battered women' (2012) 45(3) *Australian and New Zealand Journal of Criminology* 367, 372.
[120] *Criminal Code* (QLD), s 304B ('the preservation defence'). Queensland also amended the law on provocation at this time.
[121] See Douglas (n. 110), 375-77.

which it can be raised).[122] The Queensland provision was intended to provide sentencing discretion for those who would otherwise fact mandatory life imprisonment. This provision has been used on only a couple of occasions.[123] It has been criticised because it provides only a partial defence but is very similar to the complete defence of self-defence contained in section 271(2).[124] Community perception that the circumstances that give rise to the charge of killing for preservation may entirely justify the use of lethal force is suggested by the case of *R v Falls*.[125]

R v Falls, Coupe, Cummings-Creed & Hoare [2010] QSC (3 June 2010)

Susan Falls was charged with murder after she drugged, shot, and killed her husband, Rodney Falls. Falls was subjected to severe physical and emotional abuse throughout the relationship with the deceased, including physical and sexual violence, threats against the children and threats that she would be killed. The deceased also beat the family dog to death. Expert evidence on the history of the violence and its effect on Falls was admitted. At the trial, self-defence, ss 271(2), 273 *Criminal Code 1899* (Qld) and the defence of killing for preservation in an abusive domestic relationship, s 304B *Criminal Code 1899* (Qld), were both raised. Falls was acquitted of the charge.

Western Australia and **Tasmania** have each considered whether it is preferable to retain and reform existing defences or to introduce a new defence specifically for survivors of domestic violence. On balance—and influenced by the Victorian trial discussed above—both the Law Reform Commission of Western Australian and the Tasmania Law Reform Institute concluded that the former is preferable.[126] In rejecting the options of a partial defence of excessive self-defence and killing for self-preservation in a domestic relationship, the Tasmanian Law Reform Institute concluded that these amendments would focus "the jury deliberations on the cumulative threat faced by the victim rather than on the abuser's conduct immediately before the use of violence".[127] Western Australia has recently reformed its Code to make self-defence more accessible in other ways, as discussed above.

In a related move, and also to accommodate domestic violence better within the criminal law, some states have introduced new offences that will criminalise domestic violence in new ways. The states of Queensland and NSW recently committed to the introduction of offences of *coercive control* following prolonged parliamentary inquiries.[128] As is well-known, "coercive control" is a type of domestic abusive, which includes repeated patterns of behaviour of physical, psychological, sexual, emotional or financial abuse.[129] While beyond

[122] See further Loughnan, n 29.
[123] See Michelle Edgely and Elena Marchetti 'Women Who Kill Their Abusers: How Queensland's New Abusive Domestic Relationships Defence Continues to Ignore Reality' (2011) 13 *Flinders Law Journal* 125.
[124] Hopkins, Carline and Easteal (n. 32), 1225; QWSJT (n. 32), 25.
[125] See also *R v Irsliger* (Unreported, QSC, 28 February 2012) (in which the defendant was acquitted of murder but convicted of interfering with a corpse). This decision is summarised in material related to the Australian Feminist Judgments Project directed by Heather Douglas and colleagues: https://law.uq.edu.au/files/5948/battered-woman-syndrome.pdf. See also Heather Douglas et al., *Australian Feminist Judgments: Righting and Rewriting the Law* (Hart, 2014).
[126] See LRCWA, *Review of the Law of Homicide: Final Report* (Project 97, September 2007) 287–289 and Bradfield, RJ and Henning, T and Prichard, J and Cockburn, H, Review of the Law Relating to Self-defence: Tasmania Law Reform Institute Final Report No 20, Tasmanian Attorney-General's Department, Tasmania, October (2015).
[127] Ibid. 66.
[128] QWSJ Taskforce, *Options for Legislating Against Coercive Control and the Creation of a Standalone Domestic Violence Offence* (Discussion Paper 1, 2021) 56; Joint Select Committee on Coercive Control, NSW Parliament, *Coercive control in domestic relationships* (Report 1/57, June 2021).
[129] For critical discussion of coercive control, see Julia Quilter, 'Evaluating criminalisation as a strategy in relation to non-physical family violence' in Marilyn McMahon and Paul McGorrery (ed) *Criminalising Coercive Control:*

the scope of this report, the introduction of coercive control offences in Australia changes the legal landscape relating to domestic violence. Although this will not directly help domestic abuse victim who kill, it may well influence how intimate partner violence is conceptualised by judges and lawyers and in the community.

6. Impact of these reforms

As noted above, in part due to unreported cases and lack of Australia-wide, multi-jurisdictional empirical research, there is limited evidence as to the impact of reforms on the effective implementation of self-defence.

The most up-to-date empirical research has been undertaken by Caitlin Nash and Rachel Dioso-Villa.[130] Between 2010 and 2020, across all Australian jurisdictions, 69 women prosecuted for killing their abusive male partners. They were charged with murder in 90 per cent of the 67 cases in which the original charges were apparent, while 10 per cent were charged with manslaughter. The most common legal outcome was defendants pleading guilty to manslaughter, which resolved 48 per cent of the cases. In the vast majority of these cases (85 per cent), guilty pleas were given in exchange for the prosecution withdrawing murder charges. Of the 49 per cent of cases that proceeded to trial, 44 percent were found guilty of manslaughter, 21 per cent were found guilty of murder, and 11 per cent were acquitted. In all but one instance, acquittals were on the basis of self-defence. In total, 13 women were not convicted.[131]

Evidence suggests that women are more likely to proceed to trial in jurisdictions that retain partial defences, such as NSW, WA, and Queensland (which retains a mandatory life sentence for murder), while in jurisdictions with no partial defence, such as Victoria, they are more likely to plead guilty to manslaughter than risk a murder conviction.[132] Although the law in Queensland has been criticised for maintaining the requirement of an initial assault, this jurisdiction had the highest number of acquittals for women charged with murder (36 per cent), followed by NSW (33 per cent). WA had the highest proportion of murder convictions (29 per cent) and the second highest proportion of Indigenous defendants (43% of WA cases involved Indigenous defendants.[133] In material provided to the authors of this report, Stella Tarrant notes early evidence of the impact of the recent reforms to the *Evidence Act* in WA. In *Kritskikh v Director of Public Prosecutions,*[134] an appeal against conviction for aggravated assault occasioning bodily harm was allowed by the Supreme Court on grounds that the magistrate had assessed the defendant's claim that she was defending herself inconsistently with the family violence provisions. And in *Western Australia v Bridgewater*[135] the amendments were referenced by the trial judge when questioning the prosecutor about whether, on the evidence, the defendant was defending her home when she stabbed her partner.[136] In response, the state withdrew its prosecution, and the manslaughter trial was discontinued.

These recent data show strong continuities with the preceding period. From 2000 to 2010, there were 67 reported cases involving what the authors identified as battered women

Family Violence and the Criminal Law (Springer, 2020), 111, and Jane Wangmann 'Law Reform Processes and Criminalising Coercive Control' (2022) 48(1) *Australian Feminist Law Journal* 57-86.

[130] Nash and Dioso-Villa (n. 75), advance.

[131] Ibid.

[132] Ibid.

[133] Ibid.

[134] *Kritskikh v Director of Public Prosecutions* [2022] WASC 130

[135] *The State of Western Australia v Bridgewater* (Supreme Court of Western Australia, No 10 of 2019), transcript, 1062–1063.

[136] This is a defence under s 244 of the WA Code.

defendants in Australia and only 11 of those cases resulted in acquittals on the basis of self-defence.[137] Significantly, out of the 11 acquittals, three involved non-traditional self-defence scenarios (i.e., using force when not being attacked by the abuser).[138] Evidence from this period suggests that women who kill their male partners were more likely to be convicted of manslaughter.[139] Notably, most charges were resolved by pleas of guilty to manslaughter.[140] It has been suggested that a number of these cases "demonstrate strong defensive components on the facts, suggesting that an acquittal on the basis of self-defence may have been justified in at least some of these cases. This raises questions about the prosecutorial practice of indicting the defendant for murder when a guilty plea to manslaughter is subsequently accepted".[141] We return to this point in our conclusion.

Despite changes in the law, concerns remain about the influence that outdated, gendered ideas exert on the operation of the defence of self-defence. The complexity of the law on self-defence in certain Australian states and territories has resulted in complicated directions being given to jurors at trial relating to the legal tests to be met to rely on self-defence. Judges and jurors have been criticized for the practice of placing too much emphasis on the association of the law on self-defence with a one-off confrontation leading to a random act of violence. Whilst the common law elements for self-defence no longer require that the person was "responding to an ongoing or imminent attack and that the degree of force used in defence was necessary",[142] imminence and proportionality influence the way juries and judges view the reasonableness of a victim's/survivor's actions.[143]

Notwithstanding the ongoing problems in the operation of self-defence, there have been a number of circumstances where survivors have successfully argued self-defence resulting in acquittals. In certain circumstances, the courts have held that a relationship of violence is a highly relevant context for the assessment of an accused's claim to have acted in self-defence.[144] This was apparent in *R v Lock*[145] where the survivor was acquitted on the grounds of self-defence even though the perpetrator had not physically assaulted her on the night in question – the relevant evidence was in relation to the perpetrator's *past* violence and that the evidence showed the threat being the nature of the relationship, rather than a specific impending threat.

R v Lock (1997) 91 A Crim R 356

The accused was charged with murder after she stabbed and killed her previous de facto partner with whom she continued to reside. On the night she fatally stabbed him they were intoxicated after attending a club. During an argument in the early hours of the morning, the accused feared he would assault her and armed herself with a knife. He was stabbed once in the stomach, which severed a major artery and caused his death within minutes. She was unclear about whether she had lunged at him, or he had walked into the knife during the

[137] Sheehy, Stubbs and Tolmie (n. 49), 667–668, 670.
[138] Elizabeth Sheehy, Julia Stubbs and Julia Tolmie, 'Battered Women Charged with Homicide in Australia, Canada and New Zealand: How do They Fare?' (2012) 45 *Australian and New Zealand Journal of Criminology* 383.
[139] Rebecca Bradfield, *The Treatment of Women Who Kill Violent Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002), 23.
[140] Ibid, 22; Sheehy, Stubbs and Tolmie (n. 49); Debbie Kirkwood et al, *Out of Character: Legal Responses to Intimate Partner Homicide by Men in Victoria 2005–2014* (Domestic Violence Resource Centre Victoria, 2016) 32.
[141] Sheehy, Stubbs and Tolmie (n. 139).
[142] Crofts and Tyson (n. 83), 878.
[143] Susie Kim, 'Looking at the Invisible: When Battered Women are Acquitted by Successfully Raising Self-Defence' (2013) 13(4) *UNSW Law Journal Student Series* 5.
[144] Stubbs and Tolmie (n. 81), 709.
[145] *R v Lock* (1997) 91 A Crim R 356.

argument. Her claim of self-defence relied on a history of violent attacks upon her by the deceased and the general nature of the relationship. She adduced evidence of the multiple injuries caused by these previous attacks. The Crown sought to adduce evidence of the injuries by stabbing she had previously caused the deceased, which were put forward as being relevant to the nature of the relationship between them and the tendency of the accused to stab the deceased during arguments. Some of the Crown's evidence was admitted as relationship evidence, but it was held not relevant or otherwise inadmissible as tendency evidence. The accused was found not guilty of murder or manslaughter.

The problems with the defence of self-defence (and other criminal defences), are particularly acute for First Nations women. As is well-known, First Nations women have staggering rates of over-incarceration in Australia.[146] The criminal justice response to family violence has been identified as one dimension of this devasting picture.[147] As researchers have revealed, First Nations women are doubly-impacted – by racism and sexism – in the operation of the criminal law.[148] First Nations women have been particularly marginalised by misconceptions of victimhood that are perpetuated by battered women syndrome.[149] Indigenous women are over-represented in the number of women prosecuted for homicide of an abusive partner. Indigenous persons make up 3.3 per cent of the Australian population, but Indigenous women accounted for 20 out of 69 cases of women killing abusive partners between 2010 and 2020, or 29 per cent.[150] These women were more likely to plead guilty, and in the relevant cases from 2010 to 2020, no Indigenous women were acquitted.[151]

7. Conclusion

This report has provided a review of the law of self-defence in Australia, covering reforms, and impact and also canvassing related developments such as new special defences. As we have shown, self-defence law in Australia is a dynamic area of criminal law. In broad terms, self-defence now covers non-immediate threats, ensures the admissibility of a range of evidence related to family violence and jury directions on this issue, assesses the reasonability of force according to the offender's subjective perception of the threat, and provides alternative options for assessing the criminal culpability of the offender (for instance, total acquittal or a charge of manslaughter by way of excessive self-defence). The creation of new offences with reduced culpability for women who commit homicide (such as defensive homicide) has not offered impactful reform. While it is possible to point to some successes in this area, such as, arguably, the re-introduction of excessive self-defence in several jurisdictions, there remains significant work to be done to ensure that self-defence is

[146] See eg Chris Cunneen and Amanda Porter, 'Indigenous Peoples and Criminal Justice in Australia' in Antje Deckert and Rick Sarre (ed) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (Palgrave Macmillan, 2017) 667; Thalia Anthony and Henry Blagg 'Hyperincarceration and Indigeneity' in *Oxford Research Encyclopedia Criminology and Criminal Justice* (Oxford University Press, 2021).

[147] See Tanya Mitchell, 'A Dilemma at the Heart of the Criminal Law: The Summary Jurisdiction, Family Violence, and the Over-Incarceration of Aboriginal and Torres Strait Islander Peoples' (2019) 45(2) *University of Western Australia Law Review* 136.

[148] See Heather Douglas and Robin Fitzgerald, 'The domestic violence protection order system as entry to the criminal justice system for Aboriginal and Torres Strait Islander people' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 41.

[149] Lisa Young Larance et al, 'Understanding and addressing women's use of force in intimate relationships: A retrospective' (2019) 25(1) *Violence Against Women* 56; Nash and Dioso-Villa (n. 75), advance.

[150] Nash and Dioso-Villa (n. 75), advance.

[151] Ibid; This evidence is consistent with earlier findings: Sheehy, Stubbs and Tolmie (n. 139), 383; Stubbs and Tolmie (n 81).

genuinely accessible to women experiencing family violence. We believe that a likely future reform issue is the pre-trial issue of prosecutorial decision-making around charging women who are responding to family violence.

The recent reforms across several jurisdictions to allow both expert evidence and specific jury directions on the nature of family violence in an attempt to ensure juries have appropriate understanding puts the spotlight on criminal trial process. But concerns remain about the adequacy of these reforms. Doubt that these measures sufficiently allow a jury to determine whether a response was reasonable, along with the principles of the onus of proof, suggests no-case submissions may be a viable legal response in particular cases.[152] For instance, the prosecution dropped a murder charge on the basis of insufficient evidence that a woman who stabbed her partner following a prolonged assault during which he threatened to kill her was not acting in self-defence.[153] In addition, at least on case was dismissed by a magistrate at committal stage.[154] Defendants who draw on expert evidence remain in the minority, and the majority of experts in these cases are forensic psychologists and psychiatrists rather than family violence experts.[155] Out of the 34 cases that went to trial between 2010 and 2020, only nine defendants adduced expert evidence. Five of these women were found guilty of manslaughter, while four were acquitted after successfully establishing self-defence; during this period, no women who went on to be convicted of murder relied on expert evidence at trial.[156]

As advocates, and victim/survivors know, the criminal trial is just one plank in the governmental response to violence against women. In recent high-profile inquiries into government responses to family violence, the emphasis has been on a wholistic approach. For example, the Victorian *Royal Commission into Family Violence* was tasked with making "practical recommendations" for improvements in matters including early intervention, victim support, the coordination of community and government responses, and the measurement of successful policies and programs, as well as making "perpetrators accountable".[157] The recommendations of this Commission were similarly wide-ranging, and included moving family violence matters to specialist courts, which deal with criminal, civil and family law matters together, greater reliance on restorative justice and improving risk assessment and screening procedures in the health system.[158] As this suggests, responding to family violence is multi-dimensional, involving a number of discrete legal sub-disciplines and areas of governance, both recognising and constructing family violence as a problem that exceeds the bounds of criminal law (and even law in general), to become a problem of "public risk".[159]

This wholistic approach to family violence brings the role and responsibility of actors (and institutions) *other* than the individual perpetrator or defendant to the fore. In particular, and against a backdrop formed by the historical failure of the police to take family violence seriously, the policies and practices of state organisations have come to attract significant

[152] Stella Tarrant 'Making no-case submissions in self-defence claims for primary victims of intimate partner violence charged with criminal offending' (2022) *Current Issues in Criminal Justice*, 3-4.
[153] Nash and Dioso-Villa (n. 75), advance.

[154] See cases reviewed in Danielle Tyson, *Justice or Judgment? The impact of Victorian homicide law reforms on responses to women who kill intimate partners*, Discussion Paper, Domestic Violence Resource Centre Victoria 2013

[155] See Bronwyn Naylor and Danielle Tyson "Reforming Defences to Homicide in Victoria: Another Attempt to Address the Gender Question" (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 72-87. doi: 10.5204/ijcjsd.v6i3.414.
[156] Ibid, 13.
[157] See Victorian Royal Commission into Family Violence [VRCFV], *Report and Recommendations,* Vol.1 (Melbourne, 2016), 1. The Commission's report, published in March 2016, covered a wide range of topics including violence against Aboriginal women, information sharing, court practices and experiences of victims.
[158] Ibid.
[159] See Adam Burgess 'The changing character of public inquiries in the (risk) regulatory state' (2011) 6 *British Politics* 3, 14.

attention. For instance, the police are seen as the front line in addressing the problem of family violence.[160] As the Victorian Royal Commission stated in explaining the reasons it had not recommended new criminal offences, "whatever laws we have will be only as effective as those who enforce, prosecute and apply them ... [i]mproving these practices ... is likely to be more effective than simply creating new offences".[161] Similarly, the social services agencies dealing with families in which violence is occurring have come in for scrutiny. Here, the emphasis has been on sharing relevant information and adopting a whole-of-government approach.[162] As this suggests, in recognising and constructing family violence as structural and systemic, demanding a coordinated and multilayered response, family violence has become more than a crime, and criminal law responses to it have been seen as increasing inadequate.

This discursive change places pressure on the criminal law and trial process, which is organised around individual responsibility for crime. In particular, it places pressure on defences like self-defence, to be adequate solutions to the situation women find themselves in when they respond to their abusers. This discursive change raises the prospect that it is the "failure" of state actors and agencies to provide protection that led to the woman's reliance on defences like self-defence in response to family violence.[163] For instance, the woman who resorts to lethal violence following abuse – that is, a 'victim who kills' – becomes a woman who has been failed by the state that is now prosecuting her, raising questions about the legitimacy of the state in proceeding against the individual woman. And this is what is behind recent high-profile public questioning of decisions to prosecute women responding to abuse.[164] The concern about the criminalisation of women in family violence contexts is particularly strong in relation to First Nations women, who are criminalised via domestic violence order protection systems which are set up to protect them.[165] Such calls suggest that the new frontier for reform of the legal response to violence against women may well not be the criminal law, but rather than criminal justice practices like prosecutorial decision-making that might ensure the criminal law does not come into play at all.

A number of scholars have identified a need for increased attention to prosecutorial practice in the context of family violence.[166] As Tarrant argues, the circumstances of family violence should impact on decision-making at multiple points in time, including pre-trial, during the trial and post-trial, in relation to sentencing.[167] In our view, there is room for enhancing the space prosecutors and police have to take family violence into account in electing not to prosecute, particularly in relation to less serious offences which arise when women respond to their abuser. While this approach may be controversial, it would alleviate some of the pressure on defences such as self-defence to do justice in the profoundly unjust circumstances victims/survivors of family violence find themselves, where they have been failed by the state that will charge them with an offence. At the outset of the ten-year policy framework that responds to family violence through prevention, early intervention, response,

[160] While there have been some lawsuits for negligence in the investigation of domestic violence or the inadequacy of protection provided to victims who have sought police assistance these matters concern the civil law, these are limited. Empirical studies indicate it is difficult to succeed in suing the police for failings in relation to domestic violence: for discussion in the context of Queensland, see Mandy Shircore, Heather Douglas, and Victoria Morwood 'Domestic and family violence and police negligence' (2017) 39 *Sydney Law Review* 539.
[161] VRCFV (n. 147), 27.
[162] See eg ALRC, *Family Violence - A National Legal Response* (ALRC Report 114, 2010), ch 20.
[163] See further Loughnan (n. 29), ch 8.
[164] See eg ANROWS, *Women who kill abusive partners: Understandings of intimate partner violence in the context of self-defence. Key findings and future directions* (Research to policy and practice, March 2019).
[165] See Douglas and Fitzgerald (n. 143).
[166] See eg Sheehy, Stubbs and Tolmie, (n. 130); Nash and Dioso-Villa (n. 75) (advance).
[167] Tarrant (n 151).

and recovery, to which all Australian governments have committed,[168] perhaps nothing less is needed.

[168] Commonwealth of Australia, *The National Plan to End Violence against Women and Children 2022-2032* (Department of Social Services, 2022), 20.

Appendix

Statutory Provisions

Australian Capital Territory: Criminal Code Act 2002 (ACT)

42 Self-defence

(1) A person is not criminally responsible for an offence if the person carries out the conduct required for the offence in self-defence.

(2) A person carries out conduct in self-defence only if—(a) the person believes the conduct is necessary – (i) to defend himself or herself or someone else; or (ii) to prevent or end the unlawful imprisonment of himself or herself or someone else; or (iii) to protect property from unlawful appropriation, destruction, damage or interference; or (iv) to prevent criminal trespass to land or premises; or (v) to remove from land or premises a person committing criminal trespass; and
(b) the conduct is a reasonable response in the circumstances as the person perceives them.

(3) However, the person does not carry out conduct in self-defence if— (a) the person uses force that involves the intentional infliction of death or serious harm— (i) to protect property; or (ii) to prevent criminal trespass; or (iii) to remove a person committing criminal trespass; or
(b) the person is responding to lawful conduct that the person knows is lawful.

(4) Conduct is not lawful for subsection (3) (b) only because the person carrying it out is not criminally responsible for it.

Commonwealth: Criminal Code Act 1995 (Schedule)

10.4 Self-defence

(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self- defence.

(2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:(a) to defend himself or herself or another person; or (b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or (c) to protect property from unlawful appropriation, destruction, damage or interference; or (d) to prevent criminal trespass to any land or premises; or (e) to remove from any land or premises a person who is committing criminal trespass;
and the conduct is a reasonable response in the circumstances as he or she perceives them.

(3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury: (a) to protect property; or (b) to prevent criminal trespass; or (c) to remove a person who is committing criminal trespass.

(4) This section does not apply if (a) the person is responding to lawful conduct; and (b) he or she knew that the conduct was lawful.

However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

New South Wales: Crimes Act 1900 (NSW)

418 Self-defence--when available

(1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.
(2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary-- (a) to defend himself or herself or another person, or (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or (c) to protect property from unlawful taking, destruction, damage or interference, or (d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass, and the conduct is a reasonable response in the circumstances as he or she perceives them.

419 Self-defence--onus of proof

In any criminal proceedings in which the application of this Division is raised, the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.

420 Self-defence--not available if death inflicted to protect property or trespass to property

This Division does not apply if the person uses force that involves the intentional or reckless infliction of death only-- (a) to protect property, or (b) to prevent criminal trespass or to remove a person committing criminal trespass.

421 Self-defence--excessive force that inflicts death

(1) This section applies if-- (a) the person uses force that involves the infliction of death, and (b) the conduct is not a reasonable response in the circumstances as he or she perceives them,
but the person believes the conduct is necessary-- (c) to defend himself or herself or another person, or (d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.
(2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

422 Self-defence--response to lawful conduct

This Division is not excluded merely because-- (a) the conduct to which the person responds is lawful, or (b) the other person carrying out the conduct to which the person responds is not criminally responsible for it.

423 Offences to which Division applies

(1) This Division applies to offences committed before or after the commencement of this Division, except as provided by this section.

(2) This Division does not apply to an offence if proceedings for the offence (other than committal proceedings) were instituted before the commencement of this Division.

Northern Territory: Criminal Code Act 1983 (NT)

43BD Self-defence

(1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence only if: (a) the person believes the conduct is necessary: (i) to defend himself or herself or another person; or (ii) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or (iii) to protect property from unlawful appropriation, destruction, damage or interference; or (iv) to prevent criminal trespass to any land or premises; or (v) to remove from any land or premises a person who is committing criminal trespass; and (b) the conduct is a reasonable response in the circumstances as he or she perceives them.

(3) However, the person does not carry out conduct in self-defence if: (a) the person uses force that involves the intentional infliction of death or serious harm: (i) to protect property; or (ii) to prevent criminal trespass; or (iii) to remove a person who is committing criminal trespass; or (b) the person is responding to lawful conduct that the person knew was lawful.

(4) Conduct is not lawful for subsection (3)(b) merely because the person carrying it out is not criminally responsible for it.

Victoria: Crimes Act 1958 (Vic)

322K Self-defence

(1) A person is not guilty of an offence if the person carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if— (a) the person believes that the conduct is necessary in self-defence; and (b) the conduct is a reasonable response in the circumstances as the person perceives them.

(3) This section only applies in the case of murder if the person believes that the conduct is necessary to defend the person or another person from the infliction of death or really serious injury.

322L Self-defence does not apply to a response to lawful conduct

Section 322K does not apply if— (a) the person is responding to lawful conduct; and (b) at the time of the person's response, the person knows that the conduct is lawful.

322M Family violence and self-defence

(1) Without limiting section 322K, for the purposes of an offence in circumstances where self-defence in the context of family violence is in issue, a person may believe that the person's conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if— (a) the person is responding to a harm that is not immediate; or (b) the response involves the use of force in excess of the force involved in the harm or threatened harm.

(2) Without limiting the evidence that may be adduced, in circumstances where self-defence in the context of family violence is in issue, evidence of family violence may be relevant in determining whether— (a) a person has carried out conduct while believing it to be necessary in self-defence; or (b) the conduct is a reasonable response in the circumstances as a person perceives them.

322N Abolition of self-defence at common law

Self-defence at common law is abolished.

Queensland: Criminal Code Act 1899

S 271 Self-defence against unprovoked assault

(1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.

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

272 Self-defence against provoked assault

(1) When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.

(2) This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.

304B Killing for preservation in an <u>abusive domestic relationship</u>

(1) A person who unlawfully kills another (the **"deceased"**) under circumstances that, but for the provisions of this section, would constitute murder, is guilty of manslaughter only, if— (a) the <u>deceased</u> has committed acts of serious <u>domestic violence</u> against the person in the course of an <u>abusive domestic relationship</u>; and (b) the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and (c) the person has reasonable grounds for the belief having regard to the <u>abusive domestic relationship</u> and all the circumstances of the case.

(2) An **"abusive domestic relationship"** is a domestic relationship existing between 2 persons in which there is a history of acts of serious domestic violence committed by either person against the other.

(3) A history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation.

(4) *Subsection (1)* may apply even if the act or omission causing the death (the **"response"**) was done or made in response to a particular act of domestic violence committed by the deceased that would not, if the history of acts of serious domestic violence were disregarded, warrant the response.

(5) *Subsection (1) (a)* may apply even if the person has sometimes committed acts of domestic violence in the relationship.
(6) For *subsection (1) (c)* , without limiting the circumstances to which regard may be had for the purposes of the subsection, those circumstances include acts of the deceased that were not acts of domestic violence.

(7) In this section—**"domestic violence"** see the *Domestic and Family Violence Protection Act 2012* , *section 8* .

South Australia: Criminal Law Consolidation Act 1935

15—Self defence

(1) It is a defence to a charge of an offence if— (a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; and (b) the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

(2) It is a partial defence to a charge of murder (reducing the offence to manslaughter) if— (a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; but (b) the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

(3) For the purposes of this section, a person acts for a defensive purpose if the person acts— (a) in self defence or in defence of another; or (b) to prevent or terminate the unlawful imprisonment of himself, herself or another.

(4) However, if a person— (a) resists another who is purporting to exercise a power of arrest or some other power of law enforcement; or (b) resists another who is acting in response to an unlawful act against person or property committed by the person or to which the person is a party, the person will not be taken to be acting for a defensive purpose unless the person genuinely believes, on reasonable grounds, that the other person is acting unlawfully.

(5) If a defendant raises a defence under this section, the defence is taken to have been established unless the prosecution disproves the defence beyond reasonable doubt.

15A—Defence of property etc

(1) It is a defence to a charge of an offence if—(a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable (i) to protect property

from unlawful appropriation, destruction, damage or interference; or (ii) to prevent criminal trespass to land or premises, or to remove from land or premises a person who is committing a criminal trespass; or (iii) to make or assist in the lawful arrest of an offender or alleged offender or a person who is unlawfully at large; and (b) if the conduct resulted in death—the defendant did not intend to cause death nor did the defendant act recklessly realising that the conduct could result in death; and (c) the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

(2) It is a partial defence to a charge of murder (reducing the offence to manslaughter) – (a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable— (i) to protect property from unlawful appropriation, destruction, damage or interference; or (ii) to prevent criminal trespass to land or premises, or to remove from land or premises a person who is committing a criminal trespass; or (iii) to make or assist in the lawful arrest of an offender or alleged offender or a person who is unlawfully at large; and (b) the defendant did not intend to cause death; but (c) the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

(3) For the purposes of this section, a person commits a criminal trespass if the person trespasses on land or premises – (a) with the intention of committing an offence against a person or property (or both); or (b) in circumstances where the trespass itself constitutes an offence or is an element of the offence.

(4) If a defendant raises a defence under this section, the defence is taken to have been established unless the prosecution disproves the defence beyond reasonable doubt.

15B—Reasonableness etc where offence committed in circumstances of family violence—

(1) A requirement under this Division that the defendant's conduct be (objectively) reasonably proportionate to the threat that the defendant genuinely believed to exist does not imply that the force used by the defendant cannot exceed the force used against him or her.

(2) In a trial for an offence in which the defendant raises a defence under this Division, the question of whether—(a) the defendant genuinely believed that particular conduct was necessary and reasonable (either for a defensive purpose or for the purposes referred to in section 15A(1)(a)); or (b) particular conduct was reasonably proportionate to a particular threat; or (c) the defendant reasonably believed that a particular threat would be carried out; or (d) the defendant reasonably believed that particular conduct was the only reasonable way a particular threat could be avoided; or (e) particular conduct was a reasonable response to a particular threat, is, if the defendant asserts that the offence occurred in circumstances of family violence, to be determined having regard to any evidence of family violence admitted in the course of the trial.

(3) In this section—
"circumstances of family violence" has the same meaning as in section 34V of the Evidence Act 1929; "evidence of family violence" has the same meaning as in section 34W of the Evidence Act 1929.

15C—Requirement of reasonable proportionality not to apply in case of an innocent defence against home invasion

(1) This section applies where – (a) a relevant defence would have been available to the defendant if the defendant's conduct had been (objectively) reasonably proportionate to the threat that the defendant genuinely believed to exist (the "perceived threat); and (b) the victim was not a police officer acting in the course of his or her duties.

(2) In a case to which this section applies, the defendant is entitled to the benefit of the relevant defence even though the defendant's conduct was not (objectively) reasonably proportionate to the perceived threat if the defendant establishes, on the balance of probabilities, that – (a) the defendant genuinely believed the victim to be committing, or to have just committed, home invasion; and (b) the defendant was not (at or before the time of the alleged offence) engaged in any criminal misconduct that might have given rise to the threat or perceived threat; and (c) the defendant's mental faculties were not, at the time of the alleged offence, substantially affected by the voluntary and non-therapeutic consumption of a drug.

(3) In this section—
"criminal misconduct" means conduct constituting an offence for which a penalty of imprisonment is prescribed;
"drug" means alcohol or any other substance that is capable (either alone or in combination with other substances) of influencing mental functioning;
"home invasion" means a serious criminal trespass committed in a place of residence;
"non-therapeutic"—consumption of a drug is to be considered non-therapeutic unless—(a) the drug is prescribed by, and consumed in accordance with the directions of, a medical practitioner; or (b) the drug is of a kind available, without prescription, from registered pharmacists, and is consumed for a purpose recommended by the manufacturer and in accordance with the manufacturer's instructions;
"relevant defence" means a defence under section 15(1) or section 15A(1).

Western Australia: Criminal Code Act Compilation Act 2013

248. Self-defence

(1) In this section — harmful act means an act that is an element of an offence under this Part other than Chapter XXXV.
(2) A harmful act done by a person is lawful if the act is done in self-defence under subsection (4).
(3) If — (a) a person unlawfully kills another person in circumstances which, but for this section, would constitute murder; and (b) the person's act that causes the other person's death would be an act done in self-defence under subsection (4) but for the fact that the act is not a reasonable response by the person in the circumstances as the person believes them to be, the person is guilty of manslaughter and not murder.
(4) A person's harmful act is done in self-defence if — (a) the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and (b) the person's harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and (c) there are reasonable grounds for those beliefs.
(5) A person's harmful act is not done in self-defence if it is done to defend the person or another person from a harmful act that is lawful.
(6) For the purposes of subsection (5), a harmful act is not lawful merely because the person doing it is not criminally responsible for it.

Tasmania: Criminal Code Act 1924

46. Self-defence and defence of another person

A person is justified in using, in the defence of himself or another person, such force as, in the circumstances as he believes them to be, it is reasonable to use.

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