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A consideration of the merits of specialised homicide offences and defences for battered women

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Abstract

In response to calls for reform, some jurisdictions have introduced specialised offences and defences for battered women who kill their abuser. In 2005, Victoria introduced the offence of 'defensive homicide'. More recently, in 2010, Queensland introduced a defence titled 'killing for preservation in an abusive domestic relationship'. If successful these approaches result in a conviction of defensive homicide and manslaughter respectively. While defensive homicide has been explored in a number of cases in Victoria; the Queensland defence has only been considered on a few occasions to date. This article reviews the underlying debates relating to these developments and then examines recent case law to consider the application of these two approaches and their effectiveness in light of what they were designed to achieve. The article concludes that the reforms may have resulted in some unintended consequences.

Keywords

abusive relationships, defensive homicide, preservation defence, self-defence, law reform, provocation

Introduction

Women kill far less frequently than men, but when women do kill, the deceased is often a male intimate partner who has abused them for years (Morgan, 2002). In many such cases the requirements of self-defence and the partial defence of provocation have been difficult for women to meet (Tyson, 2007: 305; Coss, 2002: 134). Since the 1980s attempts to modify these criminal defences so they better reflect the context of women's lives have continued to drive law reform initiatives in jurisdictions around the world.[1] In 2005 Victoria introduced a package of reforms to the Crimes Act 1958 (Vic). Key reforms included the abolition of provocation as a partial defence to murder, the inclusion of a definition of self-defence in legislation, reforms to evidence law and a new offence of

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defensive homicide (Department of Justice, 2010: 21). Faced with similar concerns, Queensland also undertook reform of the Criminal Code Act 1899 (Qld) (QCC). In 2010 Queensland introduced a new partial defence to murder titled 'killing for preservation in an abusive domestic relationship' (referred to as the 'preservation defence') which, if successful results in a conviction for manslaughter (section 304B, QCC) and in 2011, changes to the partial defence of provocation (section 304, QCC). This article examines the application of the offence of defensive homicide and the preservation defence. After briefly discussing the concerns that these two relatively new provisions seek to address, the article explores their operation in recent cases and considers their effect.

Underlying concerns

The problem the Victorian and Queensland reforms sought to address is well rehearsed (Howe, 1999, 2002; Coss, 2002). It is argued that both provocation and self-defence are not equally available to men and women (Morgan, 2002). While both men and women have relied on provocation in intimate partner homicides (Bradfield, 1998), men have often successfully argued that they were provoked to kill by their partner's alleged infidelity and/or their partner leaving or threatening to leave the relationship (Coss, 2006: 59–60). In contrast, women have often claimed provocation in the context of a long history of abuse (VLRC, 2004: 29). Often when men kill their intimates they are primarily motivated by jealously and a need for control (Dobash and Dobash, 2010: 130), while women's actions are more commonly motivated by fear, suggesting self-defence rather than provocation (Howe, 1999; Taskforce, 2000: 172–174). In most Common Law jurisdictions, self-defence is available where the accused believes on reasonable grounds that the responsive force used was necessary in self-defence. While self-defence has regularly succeeded for men who kill in response to attacks in public places, the application of self-defence to women who kill in the context of extended intimate violence has encountered strong resistance (VLRC, 2004: 61, 63). The requirement of 'reasonable grounds' has been interpreted in a way that sometimes excludes womens' experiences. For example some women have waited until their abuser is asleep or their back is turned, suggesting a pre-emptive strike and that they are responding to non-imminent danger (Ramsay, 2010: 61–62; *Osland v R* (1998)). Due to discrepancies in size and the experience of abuse, women are often armed when they kill, while their victim is unarmed, suggesting an excessive response (VLRC, 2004: 62, 67). In Queensland the requirement of an unlawful assault, as a threshold for the application of self-defence, has proved a barrier to some women who killed in response to a particular look or action from their abuser that they know will precipitate dangerous levels of violence (Rathus, 2002).

Victoria and defensive homicide

In 2004, the Victorian Law Reform Commission (VLRC) recommended abolition of the provocation defence.[2] The VLRC found that this defence, despite the fact that it had been incrementally changed over time in an attempt to ensure that it was applied fairly, had continued to reinforce gender inequality (VLRC, 2004: xxviii). Provocation was abolished as a defence to murder in Victoria in 2005 (Crimes (Homicide) Act 2005

(Vic) section 1), although it remains relevant in sentencing (Stewart and Freiburg, 2008). The Victorian legal reforms also reformulated self-defence and established a new offence of 'defensive homicide' with a maximum penalty of 20 years imprisonment (Crimes Act 1958 (Vic), sections 9AC & 9AD). In an attempt to ensure that womens' experiences of violence inform the analysis of the person's belief in the necessity of the defensive response, and drawing on the critique of Stubbs and Tolmie (1999), the Victorian reforms to evidence law specifically recognise the potentially cumulative effect of family violence on an individual and the particular context and dynamics of abusive relationships (Crimes Act 1958 (Vic), section 9AH).

In introducing the offence of 'defensive homicide' the then Attorney General stated that it provided a kind of 'halfway house' between complete acquittal and conviction for murder and that it may encourage more women to plead not guilty to murder on the basis of self-defence because it was no longer 'all or nothing' (Hulls, 2005; VLRC, 2004: xxix). Defensive homicide applies when a person kills believing it is necessary to kill to protect themselves but where the belief is ultimately not found to be reasonable. The offence has been described by some as a reintroduction of excessive self-defence (*R v Gould* (2007); Priest, 2007; Hopkins and Easteal, 2010: 134). However according to Weinberg, defensive homicide is not in truth about using excessive force, rather the focus is on the actions of the accused and whether they unreasonably believed those actions were necessary, not on whether the force used was necessary (2011: 11).

Defensive homicide in practice

So far, in almost all of the reported matters, where a person has been convicted of the crime of defensive homicide, both the defendant and the victim have been men. However three cases, discussed in more detail below, have involved intimate partner homicides. Thirteen cases of defensive homicide were dealt with in Victoria between 2005 and 2010 (Department of Justice, 2010: 34). One case, *R v Middendorp* (2010a), is of particular interest. This case caused substantial community concern (Fitz-Gibbon and Pickering, 2012: 169) and prompted a review of the offence.

In its report on *Defences to Homicid*e the VLRC (2004) had recommended that any subsequent reforms should be reviewed every five years. This recommendation along with the *R v Middendorp* (2010) case spurred the Victorian Government to review the application of defensive homicide (Department of Justice, 2010: 3) and a discussion paper (the Discussion Paper) was released in August 2010. The Discussion Paper examined defensive homicide cases from 2005 to 2010. In this period there were 13 cases that resulted in a conviction for defensive homicide, 10 resulted from a guilty plea and three resulted from a trial for murder with a jury verdict of guilty to defensive homicide. All of the offenders in these cases were male and in only one case, *R v Middendorp* (2010), was there a female victim. Most of the offenders had prior convictions and a history of drug abuse and the average age of offenders was 28 years. In relation to the guilty plea cases the discussion paper observed that generally they involved 'young men in one-off violent confrontations' (Department of Justice, 2010: 36). Existing or past family violence was relevant only in *R v Middendorp* (2010). The Discussion Paper suggested that most of the defensive homicide cases more closely resembled the 'traditional formulation of self-defence' (Department of Justice, 2010: 36, 44). However, in considering the cases,

many others claimed that defensive homicide was provocation 'in a new guise' (Department of Justice, 2010: 44) or 'different form' (Fitz-Gibbon and Pickering, 2012: 170). The profile of the cases was similar to those that, in the past, had been dealt with as provocation manslaughter cases (Morgan, 2002: 38-41; QLRC, 2004: 217). Since *R v Middendorp* (2010) and the release of the Discussion Paper nine more cases have resulted in a conviction for defensive homicide. What is interesting about this latter group of defensive homicide cases is that the facts of only one of them (*R v Jewell,* 2011 – a jury verdict in a murder trial) reflects the context of young men in a one off violent confrontation. While the defendant's mental illness was considered the 'most cogent explanation for the violence' in one matter (*R v Ghazlan* (2011) para. 4), in the remaining six cases, killings took place in the context of a history of family or sexual violence (*R v Black* (2011); *R v Creamer* (2011); *R v Edwards* (2012) *R v Monks* (2011); *R v Svetina* (2011); *R v Martin* (2011)).[3] The case of *R v Middendorp* (2010) is reviewed below along with two cases, *R v Black* (2011) and *R v Creamer* (2011), where women killed their abuser.[4]

Luke Middendorp killed Jade Bownds in September 2008. He was charged with murder. They had been in a relationship since 2007. While they had decided to separate, in August 2008 they still shared a house. At the time of the killing there was a domestic violence order in force to protect Bownds from Middendorp's violence. On the day she was killed Bownds had returned home with a male friend who Middendorp had chased away with a knife. Middendorp then returned to the house. He claimed that when he entered Bownds advanced towards him with a knife and that he responded to this advance stabbing her four times in the back. Bownds subsequently moved into the street where she bled to death. Witnesses heard Middendorp say 'words to the effect that she got what she deserved and that she was a filthy slut' (*R v Middendorp* (2010a), para 9). There was evidence presented during the trial that Bownds had told her mother she was scared of Middendorp and that in February 2008 he had threatened to kill her (*R v Middendorp* (2010b), para 7). Despite the aggressive behaviour towards Bownds' male friend, the fact that the knife wounds were in Bownd's back, the discrepancy in the pair's sizes (he was over six feet tall and some 90 kg and she was about 50 kg) and Middendorp's threats and subsequent comments, the jury found him guilty of defensive homicide. Tyson et al. described the case as of 'particular concern' (2010: 11; Tyson, 2011: 205–207) and Howe argued the reforms had gone 'spectacularly wrong' (2010). It is likely that prior to the reforms this case may have been argued to be a provocation killing – the provocation being Bownds' decision to separate and possibly her commencement of a new relationship. However in the absence of this defence, it seemed that Middendorp's story was re-oriented as a claim of defensive homicide.

Eileen Creamer, was involved in a 'largely, if not entirely, dysfunctional' relationship with her husband, David Creamer (*R v Creamer* (2011) para. 6). While both had sexual affairs with others, David Creamer often attempted to engage his wife in group sex and made various sexual demands which she strongly resented. Upon returning home on the day of the killing, Eileen believed that her husband was attempting to arrange for her to have sex with other men in his presence. She hit her husband, possibly with a club, and then stabbed him in the abdomen with a kitchen knife. Eileen pleaded not guilty to murder; however, the trial was run on the basis that she was guilty of either manslaughter, because she lacked intent to kill or do grievous bodily harm, or defensive homicide

(*R v Creamer* (2011) para. 1). Coghlan J noted that 'the blows can only be described as a very severe beating, demonstrating that you were out of control' (*R v Creamer* (2011) para. 29). While the 'loss of control' suggests a provocation-type killing (Coss, 2006: 52), the judge also observed that Eileen had injuries to her back which probably occurred in the struggle which led to David's death (*R v Creamer* (2011) para. 17). The latter comment is more in line with a self-defence response. Ultimately the judge found that 'the verdict of guilty to defensive homicide means that the jury entertained a reasonable doubt about the issue of self-defence' (*R v Creamer* (2011) para. 2)

In 2009 Karen Black killed her de facto husband Wayne Clark; stabbing him twice with a kitchen knife. Just prior to the killing the couple had an argument and Clark had pinned Black to the corner of the kitchen and was 'jabbing' at her body with his finger (*R v Black*, (2011) para.2). In a statement made to police Black's son stated: 'most of the times, from what I saw, Wayne treated mum like shit, especially if he'd been drinking. If he had been drinking he was like a tormentor'(*R v Black* (2011) para.7). In her evidence a psychologist said that she formed the opinion that Black had been:

> subjected to ongoing intimidation, ridicule and harassment by Clarke and that [Black] had been repeatedly pointed at and jabbed, occasionally in the upper chest but typically on the forehead, in a manner which [the psychiatrist] regarded as being physically and emotionally abusive (*R v Black* (2011) para. 13)

The Crown accepted a plea to defensive homicide on the basis that Black was subjected to on-going harassment and intimidation which would come within the section 9AH of the Victorian Crimes Act 1958 definition of 'family violence' (*R v Black* (2011) para. 7).

The effects of the Victorian reforms

Defensive homicide is not explicitly limited to a specific class of cases (compared to the Queensland preservation defence) so, given that many more men kill than do women (Naylor, 2011), it was perhaps inevitable that defensive homicide would be used by men who kill other men and by men who kill women (Tyson et. al., 2010: 11; Howe, 2010). However, it is possible that the controversy and debate surrounding *R v Middendorp* (2011) and the process of review has influenced a shift in the way the offence is applied. While cases subsequent to *R v Middendorp* (2010) continue to disproportionately represent male–male killings, most of the recent defensive homicides have occurred in the context of family or sexual violence. Further, Tyson notes several cases in Victoria, post-reform, where abused women who have killed a violent partner have not been brought to trial (Tyson, 2011: 211)[5] and there have also been a number of wife killings, committed in the context of family violence and found to be unpremeditated, that have resulted in murder convictions that might previously have qualified for the provocation defence.[6] These outcomes provide tentative signs that the reforms are working (Tyson, 2011: 211). It is arguable that *R v Creamer* (2011) demonstrates the importance of the 'halfway house' provided by defensive homicide; Creamer ran a trial on the basis of self-defence knowing that she had the safety net of defensive homicide. Alternatively, perhaps the *R v Creamer* (2011) result occurred because the jury decided that a conviction of defensive

homicide was simpler than considering a complete acquittal based on self-defence (Fitz-Gibbon and Pickering, 2011: 168). Some, like Weinberg, a Judge on Victoria's Court of Appeal, question whether defensive homicide has given any effect to the underlying policy considerations it sought to respond to (2011: 14). It may be too early to tell as the jurisprudence underlying the application of defensive homicide may take more time to become established.

Queensland and the preservation defence

In Queensland the introduction of a specific defence for battered persons who killed their abuser was prompted by a controversial provocation case: *R v Sebo* (2007). In 2007, 28-year old Damien Sebo bashed his 16 year old girlfriend, Taryn Hunt, to death with a steering wheel lock. Charged with murder, a jury found Sebo guilty of manslaughter on the basis that he was provoked by Hunt's taunts about her other relationships (*R v Sebo* (2007)). The controversial finding led to a Queensland Government audit of recent cases that had employed the provocation defence (Shine, 2007). The audit focused attention on cases involving intimate partner killings (Department of Justice and Attorney General, 2007: 17–18) and a reference to the Queensland Law Reform Commission (QLRC) to review the provocation defence followed.[7] The QLRC handed down its report in 2008 and, at least partly, as a result of the continued mandatory penalty of life imprisonment for murder, which was not open for review, it found that the provocation defence must remain available for 'deserving cases' (QLRC, 2008: 3, 474, 497, 500). The QLRC sought to 'recast' the provocation defence (QLRC, 2008: 474) so that it should, among other things, 'operate without gender bias' and should 'require the jury to assess the circumstances of the killing by reference to principles of equality and individual responsibility . . .' (QLRC, 2008: 474). Reforms to the provocation defence were enacted in 2011. The new provision states that, save for situations of a 'most extreme and exceptional character', the provocation trigger should not be based on words alone or upon the deceased's 'choice about a relationship' (section 304 QCC; QLRC, 2008: 10). This latter change was included to deal with situations where the accused (usually male) alleged that their partner's decision to leave the relationship provoked them to kill (QLRC, 2008: 377; Coss, 2006: 65; Mahoney, 1991). The risks inherent in this approach are that 'extreme and exceptional' cases are undefined. This may result in retention of the status quo, where judges, as gatekeepers, must make the call on a case by case basis about whether to allow the jury to consider provocation; a position that has not always led to results that are acceptable to the community (e.g. *R v Sebo* (2007)) and has often resulted in appeal (McSherry, 2005: 909, 915). The QLRC recommended that the issues that specifically confront 'battered persons' who kill an abusive partner (including the need for an assault by the abuser to trigger a self-defence response, the lapse of time between provocation and response and/or pre-emptive strikes) should be dealt with using a different defence (QLRC, 2008: 501, 461–464, 497). However the QLRC did not provide a detailed consideration of the specific reform required.

Subsequently the Queensland Government commissioned research to consider the content of a specialised defence for victims of abusive relationships who kill their abuser (Mackenzie and Colvin, 2009a: 3). Again, the mandatory penalty of life imprisonment for murder was not open for debate (Mackenzie and Colvin, 2009b: 7). Issues

canvassed in an initial discussion paper included whether the proposed battered person's defence should be a complete or partial defence to murder, whether ancillary evidentiary provisions were required to facilitate the operation of a new defence and whether self-defence should be amended (Mackenzie and Colvin, 2009a: 38, 40, 44).

In Queensland, commentators have identified several limitations on the use of self-defence in cases where battered women kill their abuser (Task force, 2000: 149). A central concern is that in order to argue self-defence in Queensland the accused must be 'unlawfully assaulted' (section 271 QCC). This has been perceived to be a problem in many cases where battered women kill their abuser, as often there has been a long break between an earlier assault and the application of deadly force (QLRC, 2008: 298; *R v R* (1981)). Self-defence also requires that the abused person has a reasonable apprehension of death or grievous bodily harm and that the apprehension is based on reasonable grounds. While this has been determined to be a subjective test (*R v Messant* (2011)), there has been concern that juries may not understand a battered woman's subjective reality (Stubbs and Tolmie, 1998: 78). 'Imminence', or the time between the threat of harm and the response, has also been an important consideration; the longer the time the more a jury may question why the person did not retreat (Guz and McMahon, 2012: 80). While there is no requirement to retreat instead of acting in self-defence, the failure to retreat has been relevant in considering the belief of the person. In the context of the battered woman who kills her abuser the question from a jury member (or a judge) may be 'why didn't she just leave?' (Stubbs and Tolmie, 2008: 146). While a number of submissions to the initial discussion paper identified the need for reform of self-defence in Queensland (2009b: 9), ultimately the report endorsed the introduction of a separate, partial defence to murder based on the principles of self-defence rather than any amendment to the law of self-defence (Mackenzie and Colvin, 2009b: 10–11). It concluded that there was strong support for a partial defence to murder in circumstances where victims intentionally kill their abuser but, despite acting in fear and desperation cannot meet the conditions for a complete defence of self-defence (Mackenzie and Colvin, 2009b: 8) and that the proposed partial defence should result in a manslaughter conviction providing discretion on sentencing (Mackenzie and Colvin, 2009b: 11). Mackenzie and Colvin also endorsed the inclusion of a specific evidentiary provision similar to the Victorian approach (2009b: 58–59).

The new defence of 'killing for preservation in an abusive domestic relationship' (the preservation defence) was introduced into Queensland law in 2010 (section 304B QCC). The requirements of the defence are that:

> an accused person killed the deceased under circumstances that would ordinarily constitute murder; the deceased has committed acts of serious domestic violence against the accused in the course of their abusive domestic relationship and, at the time of the killing the accused 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. There must also be reasonable grounds for the accused's belief having regard to the abusive domestic relationship and all the circumstances of the case (Exp. notes, 2009: 2)

If a jury is not satisfied, beyond reasonable doubt, that the preservation defence has been disproved by the Crown, the accused would be found not guilty of murder, but

guilty of manslaughter. In theory at least, what distinguishes this defence from existing defences of self-defence and provocation in Queensland is that the preservation defence does not rely on the accused person responding to a specific assault or imminent threat from the deceased person and there is no emphasis on the timeframe between the actions of the deceased and the killing by the accused person (Exp, notes, 2009: 9). In practice, however, judicial developments in Queensland self-defence law, accentuated subsequent to the reforms, suggest that the role of the preservation defence may be extremely limited. The reforms did not include a specific evidentiary provision.

Killing for preservation in an abusive domestic relationship in practise

So far three cases have directly raised the preservation defence. Since it was introduced, Susan Falls, Michele Irsigler and Emma Ney killed their partners in the context of a history of violent abuse. These cases are discussed in turn.

In May 2006[8] Susan Falls killed her husband, Rodney Falls. Susan and Rodney had known each other since they were teenagers and had married in 1987. They had four children together. In her testimony she graphically recounted numerous injuries (*R v Falls*, 2011: day 8 pp. 57–67; day 9 p3; Edgely and Marchetti, 2012); including being burned with an oxywelder and on another occasions being trapped in the roof of the house (*R v Falls*, 2011: day 9 pp. 22, 29–30). On occasion Rodney became so angry that he had beaten nine of the family's pet dogs to death (*R v Falls*, 2011: day 8 pp. 77–78), he was relentlessly controlling, placing her on time limits to run errands, calling her at early hours of the morning for a lift home and often raping her (*R v Falls*, 2011: day 9 pp. 41, 6, 9). Rodney told her that if she ever left he would kill her or harm the ones she loved (*R v Falls*, 2011: day 9 p. 23). Susan had made a number of statements to police about Rodney's violence during the relationship and had tried to leave. On one occasion police assisted her to leave Queensland but Rodney found her so she returned, fearful of what he would do to her family (*R v Falls*, 2011: day 9 pp. 11, 17–21). In the weeks preceding the killing the violence escalated and Rodney threatened to kill one of the children (*R v Falls*, 2011: day 9, pp. 39–44). He created a lottery and demanded she choose a piece of paper. Susan selected a paper on which was written the name of her youngest son; she assumed Rodney would kill him. In the days before she killed him, Rodney had punched Susan in the chest with such force that it was painful to cough or sneeze (*R v Falls*, 2011: day 9, p. 43). Susan was very small compared to Rodney; his thigh was bigger than her waist (*R v Falls*, 2011: day 9 p. 43) and this discrepancy in size was emphasised in the trial as a reason why she used a gun. Ultimately Susan laced her husband's evening meal with crushed Temazepam tablets and shot him twice as he dozed in a chair. She was assisted by others in disposing of the body. Justice Applegarth directed the jury on both the preservation defence and self-defence and she was acquitted of murder on the basis of self-defence.

In 2007 Emma Louise Ney killed her partner, Graham Haynes. She struck Haynes' head and face with an axe. Haynes was hospitalised and died two days later. Initially charged with murder when she began her trial in 2010, she pleaded not guilty on the basis of self-defence or that she was guilty of manslaughter pursuant to the preservation defence. The defence lawyer, on opening the case, told the jury that Ney had experienced demeaning and humiliating violence and abuse at the hands of the

deceased (Bentley, 2010). Counsel said that Haynes had assaulted Ney on the night she killed him. Defence counsel told the jury that Ney just wanted the abuse to stop but she believed that if she didn't get the axe, Haynes would kill her (Bentley, 2010). On day six, of a proposed two-week trial, the jury were discharged. According to newspaper reports, jury deliberations had been disclosed to someone not on the jury panel (Keim, 2010). The matter was returned to court in March 2011 and a plea of guilty to manslaughter, based on diminished responsibility (s304AQCC), was accepted (*R v Ney*, 2011: 6). Two expert reports identified Ney's alcohol and substance abuse and multiple traumas she suffered in a series of violent relationships. While Dick AJ was not confident that all the violence Ney described was a reality, she was prepared to act on the basis that Ney's perception was that Haynes was violent to her (*R v Ney*, 2011, p.2). Ney was sentenced to serve nine years imprisonment with a non-parole period of three years. However as a result of serving 965 days on remand she was able to apply for immediate release on parole (*R v Ney*, 2011: 11).

Michele Irsigler killed her husband, Jonathan Watkins, in 2001. In 2012, she pleaded not guilty to both murder and interfering with a corpse. Assisted by others, she burnt the body spreading the ashes on a farm. In her evidence at trial, Irsigler described a long history of abuse at the hands of the deceased including broken bones, rape and threats (*R v Irsliger*, 2012: day 5, pp. 5–29). On many occasions she had called the police or tried to leave (*R v Irsliger*, 2012: day 5, pp. 10, 20, 32). Watkins had moved out of the family home prior to the killing because Irsliger had threatened to expose his sexual abuse of their daughter. Several days before the killing he returned to the family home and held Irsliger and their daughter hostage for three days. On the fourth day Irsliger managed to escape; she obtained a gun for protection so that she could collect her belongings. She returned to the house with a friend, Pilkington. On their arrival Watkins set upon Pilkington and Irsliger shot Watkins, killing him (*R v Irsliger*, 2012: day 5, pp.36). While self-defence was the focus of the defence case, the preservation defence was raised as a 'fall-back' option and Justice Mullins directed on both self-defence and the preservation defence (Meredith, 2012). Irsliger was acquitted of homicide but she and two co-offenders were found guilty of interfering with a corpse. She was sentenced to 18-months imprisonment, fully suspended.

The effects of the Queensland reforms

Two matters are notable in the review of Queensland preservation defence cases: the prominence of the role of expert evidence about the effects of living in an abusive relationship and the apparently limited role of the preservation defence in Queensland law.

Case law interpreting section 271(2) QCC makes it clear that 'the defender's belief' in the need for the fatal response 'is the definitive circumstance' in self-defence (*R v Messant* (2011), para. 33) and expert evidence about the experience of living in an abusive relationship has been relevant to self-defence in Queensland for some time (*R v MacKenzie* (2000), para. 45–47). Despite this, in *R v Falls* (2011), and 'bizarrely' (Hunter, 2012) the prosecution sought to exclude the evidence of two experts. Applegarth J refused the application and, given the lack of a specific evidentiary provision, resorted to the explanatory notes to the new defence. They stated that sub-section 304B(1)(c)QCC would 'facilitate the admission of evidence including information from the accused

person, experts, treating practitioners and witnesses regarding the reasonableness of the belief' in the necessity of the action (or inaction) that causes death and 'may also allow consideration of behaviours within an aspect of the relationship which may . . . impact on the accused's belief as to the necessity of his/her actions' (Exp. Notes, 2009: 10). Section 304B(1)(c) simply states: 'the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case'. It is disappointing that the approach found in the explanatory notes was not reflected in the new legislation. Nevertheless, Applegarth J found that section 304B(1)(c) 'reflects a recognition of the role of expert evidence on issues that arise in the context of abusive relationships', the evidence therefore spoke outside the experience and knowledge of a judge and jury (*R v Falls*, ruling, 2010: 10). The judge observed that experts could report back what Falls had told them about her belief and this reporting back did not usurp the role of the jury (*R v Falls*, 2010, ruling: 10). Subsequently two experts gave evidence about the long-term effects of abuse, the cycle of violence, why an abused person might find it impossible to leave their abuser and the sense of hyperarousal and heightened ability to assess the seriousness of threats, risk and imminence of harm (*R v Falls*, 2010: day 10 and 11). This is the type of information that many commentators have worried often fails to reach the jury (Rathus, 2002: 4).

Similar evidence was presented by experts in *R v Irsigler* (2012). Defence counsel asked one expert psychiatrist to explain the concept of battered wife syndrome, the expert witness responded: 'it's not actually a psychiatric diagnosis, and the reason why it's not a psychiatric diagnosis in itself is because anybody in the situation of protracted violence will develop certain behaviours' (*R v Irsigler,* 2012: day 6, p.4; Sheehy et al., 1992: 384–385). Clearly such evidence is pivotal in providing a social context that helps to explain the accused person's behaviours to the jury (and the judge) (Stubbs and Tolmie, 1999). In this case expert evidence could support an alternative explanation for going to the house armed with a gun. Hunter suggests that such evidence can discount the possibility of psychiatric defences (Hunter, 2012; cf Stubbs and Tolmie, 2008: 145). Although Ney ultimately negotiated a plea to manslaughter on the basis of diminished responsibility, in sentencing Justice Dick quoted from the expert psychiatrist's report to understand why Ney was unable to leave the abusive relationship (*R v Ney*, 2011: 4). This evidence mitigated penalty (*R v Ney*, 2011: 10). These cases suggest that judges increasingly accept that expert evidence is relevant in understanding the circumstances in which battered women kill their abuser.

Self-defence was successfully argued in both *R v Falls* (2010) and *R v Irsliger* (2012). As the first case to deal with self-defence in the shadow of the new preservation defence, Applegarth J's summing up in *R v Falls* (2010) was particularly significant. This first part of his summing up confronted two of the key problems associated with battered women in Queensland attempting to apply self-defence to their circumstances: identification of a specific assault and the imminence of further assault or danger (Bradfield, 2002: 178). Applegarth J read the definition of assault (s245 QCC) to the jury and, referring to the cases of *R v Secretary* (1996) and *R v Mackenzie* (2000) he emphasised that a continuing threat, where there is a present ability to carry out the threat, is an assault for the purposes of triggering a defensive response. While in an earlier Queensland case, *R v Stjernquist* (1996), Justice Derrington observed that the mere endurance of a threat can become a form of violence and that this might give rise to legitimate use of force

in self-defence, in *R v Falls* (2010) Applegarth J stressed that the threat could continue regardless of the fact that the deceased was temporarily unable to carry out the threat (i.e. asleep) (Hunter, 2010). This suggests that a history of past abuse, along with an expectation that the abuse would continue, could be sufficient to trigger self-defence. In summing up the judge stressed the subjective nature of the test, underlining that the critical question was whether Susan believed on reasonable grounds that the force used was necessary for defence (Hunter, 2010). His direction clearly tied the assessment of reasonable grounds to Susan's personal experience; he unequivocally told the jury that they could consider previous threats and assaults and, most importantly, he said explicitly that self-defence is available for wives who kill their husbands in self-defence. His summing up on self-defence explained to the jury that Susan's actions must be considered in light of her experience of living in an abusive relationship. In understanding this, the jury could draw on the expert evidence as well as other evidence. These directions underscore the potential for the application of self-defence in the context of killings within an abusive relationship in Queensland and suggest that the preservation defence may have a very narrow application. It may be useful to amend the self-defence notes in the Supreme and District Courts Benchbook (2012) which provides guidance to judges to reflect Applegarth J's approach.

Benchmark battered women and the limits of law reform

Falls and Irsliger were perhaps 'benchmark'[9] battered women. Both were smaller than their partners, white, drug-free, monogamous and without a criminal record. They suffered fierce physical abuse over many years, actively protected their children from the abuser and the killing was, apparently, the first time they had physically fought back. Both had attempted to leave the relationship and both had sought assistance from the police in the past. In both cases the abuser had harmed animals and threatened their own children with violence. In both cases they were acquitted by the jury. In comparison, the other women whose cases I have reviewed in this article, fell short of the benchmark in some way. Ney, an Indigenous woman, was larger than the deceased; she had drug and alcohol issues, a criminal record and had been in a series of violent relationships. There was evidence she had fought back before. Eileen Creamer had an open sexual relationship with her abuser (*R v Creamer* (2011)) and Karen Black was intimidated and harassed by her abuser but there was limited physical assault in the relationship. 'Merciful outcomes' (Stubbs and Tolmie, 2008: 139), were arguably delivered to the latter three women via defensive homicide and manslaughter convictions and through reduced sentences. While the cases reviewed in this article demonstrate that an individual woman's experience of abuse is now a significant and relevant consideration at trial and in sentencing, the cases involving Eileen Creamer, Karen Black and Emma-Louise Ney show that it remains very difficult for battered women to meet the threshold required to succeed in a claim of self-defence. While not all homicide cases where battered women kill should result in an acquittal on the basis of self-defence (Stubbs and Tolmie, 1999: 74), it may be that certain stereotypes about battered women continue to inform the choices made by prosecution authorities and juries and sometimes these stereotypes may continue to obscure structural and racial disadvantage (Stubbs and Tolmie, 2008: 142–143).

There is ample criticism about the limitations inherent in the two key reforms discussed in this article. Ramsay argues that Victorian reformers did not go far enough in 'curbing the influences of excuses' in criminal law because defensive homicide continues to provide a partial excuse for irrationality (2010: 40; see also Fitz-Gibbon and Pickering, 2012: 177). Hopkins and Easteal have criticised the preservation defence arguing that the reforms have emphasised the need to judge reasonableness from the battered woman's perspective only in so far as this may enable murder to be reduced to manslaughter (2010: 132). Another concern is that the preservation defence does not extend to the situation where the battered woman kills her abuser to protect a family member (Edgely and Marchetti, 2012: 152). The approach to expert evidence set out in the Explanatory notes to section 304B(1)(c)QCC (Exp. Notes, 2009: 10) should be encapsulated in Queensland legislation. Nevertheless, perhaps the evidentiary 'reforms' – despite being mere explanatory notes in Queensland – introduced alongside the new offence and defence may be the most valuable aspects of reform (Crimes Act 1958 (Vic), section 9AH; QCC section 304B(1)(c)) as they help to ensure that the contexts of the lives of abused women who kill are better understood and heard throughout the criminal justice process (Morgan, 2002: 45). Experts corroborate the narratives of the accused and explain why an abused woman's response is rational. The value of the substantive reforms is more difficult to gauge, but their importance extends beyond their direct application to the indirect changes they may help to produce. Perhaps these changes have influenced prosecution practice and also the way that judges consider sentence and direct on self-defence (the latter in Queensland at least). Graycar and Morgan, and many others, have recognised the limits of formal legal change in achieving equality for women (2005: 401, 419; Smart, 1989; Schneider, 2000). More than statute reform is required to change battered womens' experience of justice as the impact of legal change is dependent on wider social and cultural contexts (Romkens, 2001: 267). These deeper cultural and social changes take time and will, optimistically, ultimately be reflected in changes in the approach of prosecution services, the judiciary, counsel, juries, and eventually in intimate relationships.

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QCC: Criminal Code Act 1899 (Qld)

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Notes

1. For a review of previous reports see QLRC (2008: 280–295)
2. Unlike the situation in Queensland, there has been no mandatory life imprisonment penalty for murder in Victoria for some time (VLRC, 2004: xx).
3. In *R v Martin* (2011) the victim made a 'homosexual advance' however the accused had been sexually abused in the past and had a very low IQ.
4. A third case, *R v Edwards* (2012), was recently decided. Edwards pleaded guilty to one count of defensive homicide; she killed her husband, stabbing him with a corkscrew and knife. There was evidence of a history of domestic violence and at the time of the killing a protection order was in place to protect Edwards from the deceased. Edwards also had a history of psychiatric illness. Initially she claimed self-defence on the basis she was being attacked by the deceased. She was sentenced to serve seven years imprionsment with a non-parole period set at four years and nine months.
5. Although see *R v Kells* (2012). Kells pleaded guilty to manslaughter (on the basis of lack of intent to kill) after killing her male partner. The relationship was described as 'fractious' and characterised by 'mutual abuse'; there was evidence that she had previously threatened to kill the deceased and damaged his property.
6. See *R v Azizi* (2010) found guilty of murder – he had strangled his wife during an argument; *R v Felicite* (2010) pleaded guilty to murder – he was worried his wife would leave*; R v Mamour*

(2011) pleaded guilty to murder – believed his wife had slept with others; cf *Sherna v R* (2011) who was found guilty of manslaughter after he strangled his wife during an argument (see Tyson, 2011: 216–218).

7. Both the audit and the QLRC report investigated accident as well as provocation.
8. Pursuant to section 723 QCC, the preservation defence applies to proceedings started but not finished before, or started after the commencement of the provision (s304BQCC).
9. See Margaret Thornton (1996: 2), who used the phrase 'benchmark man' to refer to 'authoritative legal knowers'. In her research she further identified benchmark men to be 'invariably white, heterosexual, able-bodied, politically conservative, and middle class' (1996: 2).

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