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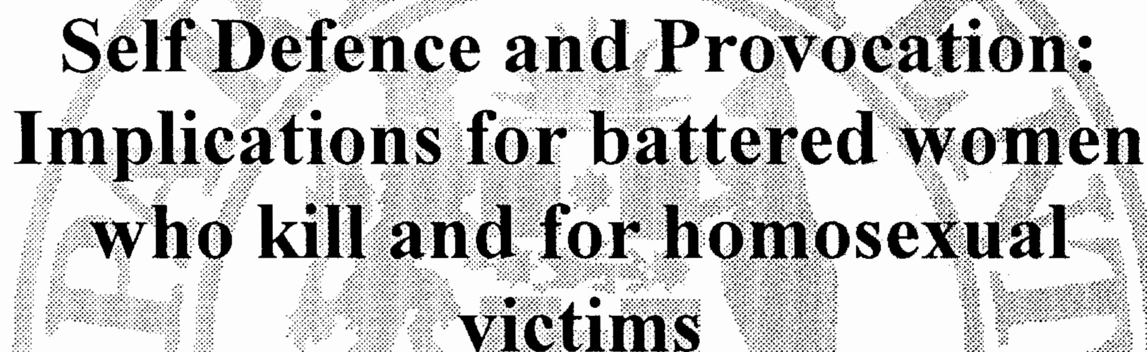

Self Defence and Provocation: Implications for battered women who kill and for homosexual victims

by

Fiona Manning

Briefing Paper No 33/96

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EXECUTIVE SUMMARY

This Paper examines the operation of the law of self defence and provocation in two discrete homicide contexts. First, the Paper looks at the defences as they apply to homicides perpetrated against a background of domestic violence (pages 9-18). The Paper then considers the use of the so-called "homosexual advance defence" to support a plea of self defence or provocation (pages 23-26). The Paper examines both the structure of the substantive law, as well as the practical application and interpretation of the law to determine whether there is any injustice in the manner in which the defences operate in these two areas.

By way of background, the Paper provides an overview of homicide in NSW (pages 4-5) and of the significance of the defences in homicide cases (pages 5-7). The principal characteristics of domestic killings are specifically highlighted (pages 7-8). One of the critical findings of the studies is that most killings by women result from longstanding domestic violence against them by the victim, whereas men who kill their partners are often the perpetrators of previous violence against them.

Domestic homicides have been selected for consideration for a couple of reasons. Studies show that domestic homicides comprise a significant category of killing (page 7). This is also the context in which most women kill, and provides the setting in which it is alleged the gendered nature of the defences is most evident. The arguments used to support the contention that the defences apply in a gender biased manner are outlined (pages 10-14, 16-18).

The two most frequently suggested mechanisms for incorporating the perspective or experience of women are presented. These are the use of expert testimony to explain the dynamics of a battering relationship (pages 18-21), and the introduction of a separate defence specifically applicable to victims of domestic violence who kill (pages 21-23).

In recent times there has emerged a new category of case in which the defences of provocation and self defence feature. The common element in these cases is the presence of an alleged homosexual advance by the victim towards the accused. This Paper highlights the principal issues raised and findings made in the review of the "homosexual advance defence" by the Attorney General's Working Party (pages 23-26).

Finally, the Paper briefly outlines current reform proposals in relation to the defences (pages 26-28).

1. INTRODUCTION

This Paper looks at the operation of the legal defences of self defence and provocation in two discrete homicide contexts. First, the applicability of the defences to homicides perpetrated against a background of domestic violence is considered. Secondly, the Paper examines the use of the defences in the context of homicides committed against homosexual men following an alleged sexual overture (the so-called homosexual panic or advance defence).

The use of the defences in each of these specific contexts raises important social issues. In particular there is a suggestion that as the defences currently operate there is a possible injustice against a particular segment of the population by reason of the popular misconceptions and prejudices prevailing in the general community concerning battered women and homosexual men respectively.

Concerns that prejudice may be clouding jurors' judgment in the latter cases prompted the Attorney General to establish a Working Party to review the cases in which the "homosexual advance defence" has been used.[1] A concurrent review of the defence of provocation is presently being conducted by the New South Wales Law Reform Commission, as part of a much broader inquiry into each of the partial defences to murder. The issue of gender bias in the defence, the role of battered woman syndrome and the suggested introduction of a new defence specifically applicable to victims of domestic violence were all raised in the course of the Commission's Discussion Paper.[2] However, the Commission acknowledges that meaningful reform in this area necessarily entails an examination of the defence of self defence in addition to provocation. This Paper attempts some such examination.

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1 NSW Attorney General's Department, *Review of the "Homosexual Advance Defence"*, DP August 1996. "Shaw urges another look at 'panic defence' in trials", *Sydney Morning Herald*, 17/8/96; "Murdered gay men: most are bashed", *Sydney Morning Herald*, 17/8/96.

2 NSW Law Reform Commission *Provocation, Diminished Responsibility and Infanticide* DP 31, August 1993 at 48-50,67-68. "Wife Bash Laws", *Telegraph Mirror*, 1/9/93; "Female killers' defence doubt", *Sydney Morning Herald*, 2/9/93; "The meaning of murder", *Sydney Morning Herald*, 2/9/93.

2. HOMICIDE IN NEW SOUTH WALES: AN OVERVIEW

There have been numerous Australian homicide studies conducted over the past few years. These studies include Homicide: The Social Reality,[3] Homicides in Australia,[4] the Victorian Law Reform Commission's analysis of homicide prosecutions in Victoria between 1981 and 1987,[5] a study of sentenced homicides in New South Wales from 1990-1993[6] as well as more specific studies which focus on particular offenders,[7] or particular homicide contexts.[8] These homicide studies enable the construction of a portrait of homicide patterns across the country.[9]

Based on statistics compiled by the NSW Bureau of Crime Statistics and Research for the period 1968 to 1992 the annual incidence of homicide in New South Wales is likely to lie somewhere between 1.3 and 2.3 per 100,000 population. This represents approximately 100 homicides annually.[10]

The main features of homicide offences identified by these studies are that:

- The majority of homicide offenders and victims are male.

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3 A Wallace *Homicide: The Social Reality* (NSW Bureau of Crime Statistics and Research, 1986). This study has since been updated by R Bonney *Homicide 2* (NSW Bureau of Crime Statistics and Research, 1987) and a further updated consolidation was released in 1994 entitled "Trends in homicide 1968-1992" (1994) 21 *Crime and Justice Bulletin.*

4 H Strang *Homicides in Australia 1990-1991* (AIC, 1992), and *Homicides in Australia 1991-1992* (AIC, 1993).

5 Victorian Law Reform Commission *Homicide* Report No. 40, 1991.

6 Judicial Commission of New South Wales *Sentenced Homicides in New South Wales 1990-1993: A Legal and Sociological Study*, 1995.

7 Eg K Polk *When Men Kill: Scenarios of Masculine Violence* (Cambridge University Press, 1994); W Bacon et al *Women Homicide Offenders in New South Wales* Report for the Feminist Legal Action Group (NSW) 1982.

8 Such as MT Nguyen da Huong and P Salmelainen *Family, Acquaintance and Stranger Homicide in New South Wales* (NSW Bureau of Crime Statistics and Research, 1992); P Easteal *Killing the Beloved* (AIC, 1993).

9 Note that statistics should be approached somewhat cautiously. There may be variations in the definition of homicide adopted by the different studies. The source of information used in the study is an important variable: reliance on court statistics, for example, would exclude murder-suicides, unsolved homicides and cases in which the prosecution is not proceeded with for whatever reason. Another limitation in the statistics is that the studies are necessarily restricted to an assessment of known homicides.

10 P Gallagher, M T Nguyen Da Huong and R Bonney "Trends in homicide 1968-1992" (1994) 21 *Crime and Justice Bulletin.*

- In descending order of frequency, the most common pattern of homicide occurs between male offenders and male victims, followed by male offenders-female victims, female offenders-male victims, and finally female offenders-female victims.
- Homicides most commonly occur between family members, followed by acquaintance homicide and then stranger homicide.
- Almost one quarter of all homicides are spouse killings.

3. ROLE OF THE DEFENCES OF SELF DEFENCE AND PROVOCATION

In New South Wales, provocation is only available as a defence to murder, whereas self defence has a wider application. In this Paper, however, both defences are considered solely in the context of homicide.

There are some important distinctions between these two defences. The major practical distinction is that self defence is a complete defence to criminal liability. Thus, if the defence is made out, the accused is found to have acted lawfully and is acquitted. By contrast, provocation is only a partial defence: it operates to reduce the accused's criminal liability from murder to manslaughter.

This distinction derives from the differing rationale of the defences. Self defence is traditionally said to be a defence of justification.[11] By contrast, the theoretical underpinning for the defence of provocation is a little less clear. Provocation is frequently described as "a concession to human frailty" and is thus generally referred to as an excuse based defence. The essential distinction between justification and excuse based defences is that the focus is on the act in the former, and on the actor in the latter.

The Defences Defined

Both defences are common law creations, although the defence of provocation is now defined by statute in New South Wales in section 23 of the *Crimes Act 1900* (NSW).

Provocation Provocation operates to reduce murder to manslaughter in circumstances where the act or omission causing death results from a loss of self-control on the part of the accused that was induced by any conduct of the deceased towards or affecting the accused. The conduct of the deceased must be such that could have induced an ordinary person in the

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[11] Although this is not universally accepted. For example I Leader-Elliott "Women Who Kill in Self Defence" (1993) 15 *Sydney law Review* at 435, 439 considers self defence an excuse rather than a justification. He cites the fact that the reasonableness of retaliatory action is to be judged from the defendant's point of view as evidence of this. Note also Wilson, Dawson and Toohey JJ in *Zecevic v DPP* "in scope and practice nowadays the plea has a greater connection with excusable homicide ..." (1987) 162 CLR 645 at 658.

position of the accused to have so far lost self-control as to have formed an intent to kill, or to grievously harm the deceased.

Self defence The defence of self defence continues to be defined by the common law: "An explanation of the law of self defence requires no set words or formula".[12] In order to establish self defence an accused must first show that he or she believed upon reasonable grounds that it was necessary in self defence to do what he or she did, and secondly, that there were reasonable grounds for that belief. If the accused is able to show this, or the jury is left in reasonable doubt about the matter, then he or she is entitled to an acquittal.

Historical development of the defences of self defence and provocation

The shape and requirements of the defences are a product of the historical context in which they arose. The fact that homicides are overwhelmingly committed by men and that the majority of advocates and judges involved in the criminal and appellate processes are men are two important elements in this contextual background. The defences of self defence and provocation, it has been argued, were developed to suit typically male responses to situations. They are predicated on a male view of human conduct, a male experience of self and others.[13]

The scenarios contemplated by the defences are isolated episodes, sudden quarrels, "when hostility erupts into violence".[14] The archetypical self defence situation involves a single and extraordinary attack between combatants of equal strength. In the case of provocation the defence reflects the circumstances that men went armed and the premium on male honour was high. These factors led to much duelling and other casual violence, with often fatal results.[15]

These scenarios bear no resemblance to the dynamics operating in domestic violence, which is the context in which most women kill. The situations and experiences faced by women were not recognised by the defences. "The danger faced by women who are consistently and seriously abused is not that embodied in a single attack." Furthermore, the abuse suffered by women is received from a position of unequal strength.[16] Women are no match

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12 Per the majority in the High Court case of *Zecevic v DPP* (1987) 162 CLR 645 at 661, endorsing an observation made by the Privy Council in *Palmer*.

13 Z Rathus *Rougher than usual handling: Women and the Criminal Justice System* (2nd ed, Women's Health Policy Unit, Queensland Health) at 91.

14 I Leader-Elliott "Women Who Kill in Self Defence" (1993) 15 *Sydney law Review* 403 at 405.

15 J Greene "A Provocation Defence for Battered Women Who Kill?" (1989) 12 *Adelaide Law Review* at 147.

16 S Tarrant "Provocation and self defence: A feminist perspective" (1990) 15 *Legal Service Bulletin* 147 at 149.

for men in hand to hand combat due to differences in size, strength and training.

4 DOMESTIC HOMICIDES AND THE DEFENCES

Characteristics of domestic killings generally

The largest category of homicide observed by Wallace consisted of those classed as "domestic". In the course of her study, Wallace made a number of findings about these homicides. They have since been confirmed in subsequent studies:

- Females are more likely to kill and be killed within the family. Only rarely are they involved in other types of homicide. Males, on the other hand, while also likely to kill and be killed within a domestic context are also considerably involved in homicides outside the family.

- Women were nearly three times as likely as men to be the victim of a spouse homicide.

- A history of abuse was evident in almost half of the spouse homicides.[17] In almost all these cases the abuse was in one direction: by the husband against the wife. It was found that violence was particularly prevalent in the husband killings. While a history of assault was evident in 40% of wife killings, as many as 70% of the husband killings occurred in response to an immediate threat or attack by the victim.[18]

- While women rarely killed husbands from whom they were separated, a substantial number of men killed estranged wives. More than one in three of the men killed wives from whom they were separated.[19] A number of other female victims were in the process of leaving their husband. Thus, altogether, in nearly half of the wife killings, the woman had either left or was in the process of leaving her husband when she was killed. In the majority of these wife homicides, it was the consequence of separation that prompted the killing. The issue of separation was relevant only in

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17 See also C O'Donnell and J Craney (eds) *Family Violence in Australia* (Longman Cheshire, 1982) at 3, outlining a historical study on patterns of family violence for the period 1880-1939. Findings were that spouse murder and attempted spouse murder was a pre-eminently male resort. Moreover, it was the most frequent kind of murder attempted by men throughout the period. 63% of spouse murders where a female was the perpetrator occurred following a protracted pattern of habitual violence at their husbands' hands. Most of the victims of femicide were battered wives.

18 A Wallace *Homicide: The Social Reality* (NSW Bureau of Crime Statistics and Research, 1986) at 110.

19 At 112.

three cases in which women killed husbands.

- Sexual jealousy was the major precipitating factor in approximately 12% of the spouse killings, almost without exception wife killings.[20]

Features of homicides perpetrated by females

Women and men kill in different circumstances. The majority of women who kill do so after a sustained period of physical, mental or sexual abuse. Before committing the homicide many women exhaust other options: the police, the law, leaving the relationship.

> By the time women who have been brutalised by their male partners launch a serious attack back at them, they have usually left the relationship many times, experienced the failure of the legal system and law enforcement agencies to protect them from continued abuse and returned to their partners after a long campaign by him has worn them down. They are often exhausted by the physical circumstances in which they live and emotionally drained by their failure to break free. Many of the women who finally attack have been seriously injured and hospitalised by their partners. Some of these women have also watched their children being abused and felt unable to protect them.[21]

Battered women remain in the battering relationship for a number of different reasons, *inter alia*, financial and emotional dependence on their husbands, physical or psychological isolation, concern for the welfare and custody of their children, lack of emergency housing, fear of public exposure, fear of greater injury, lack of meaningful assistance when official intervention was sought in the past and passivity or despair resulting from fear.

Although women will sometimes kill during a physical attack, a study by Lansdowne and Bacon found that in over a third of cases of a woman killing her husband, the husband was asleep at the time of the killing. In most cases there was a delay between the killing and the

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[20] Note also the study by Polk and Ranson of homicides in Victoria in 1985 and 1986. This study concluded that possessiveness was a major feature of male violence: when the victims were younger women, this was most often accompanied by jealousy and a history of violence. In 6 of the 7 cases in which a woman killed her male partner, there was evidence that the female had acted in self protection against a violent and abusive male partner. K Polk and D Ranson "The Role of Gender in Intimate Homicide" (1991) 24 *Aust and NZ Journal of Criminology* 15.

[21] Z Rathus *Rougher than usual handling: Women and the Criminal Justice System* (2nd ed, Women's Health Policy Unit, Queensland Health) at 100.

last threat or assault offered by the husband, and in every case the woman used a weapon.[22]

5. THE USE OF PROVOCATION IN DOMESTIC HOMICIDES

Statistics

Use of provocation generally The NSW Judicial Commission recently undertook a comprehensive study of all sentenced homicides in NSW from 1990-1993.[23] This study revealed that the defence of provocation was argued in 7.8% of cases. The acceptance rate for the defence was 70% (where provocation was argued alone) and 83.3% (where it was argued in combination with diminished responsibility).

Women were successful in 100% of cases in which provocation was argued. This compared with an acceptance rate of 60% for males.

In the Victorian Law Reform Commission's Homicide Prosecutions Study[24] none of the women who raised provocation in trials for domestic killings were convicted of murder. By contrast, men who raised provocation were convicted of murder in 23.3% of cases and of manslaughter in 66.7% of cases. In providing these figures the Commission acknowledges that it is reasonably rare for provocation to be the only legally relevant factor raised at trial. This limits the ability to comment on the operation of the provocation defence, since it cannot be conclusively stated that provocation was the reason for the manslaughter conviction.

In both studies more male accused used provocation as a defence, in absolute terms and as a proportion of all accused charged with murder. However, where female accused raised the defence, they were more likely to be successful. The Victorian Law Reform Commission study found that men are less likely to obtain a conviction for manslaughter on the basis of provocation if the victim is a woman than where the victim is a man.

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[22] W Bacon and R Lansdowne "Women who kill husbands: the battered wife on trial" in *Family Violence in Australia* C O'Donnell and J Craney eds (Longman, Cheshire, 1982) at 71. The authors stress that both the time delay and use of weapons must be seen in context. Most women suffer a disadvantage compared with men in protecting themselves by the use of their bodies alone because they have not been encouraged from an early age to develop confidence, skill and strength in physical activities. Women also suffer a physical disadvantage against a male attacker who is heavier, taller and stronger as well as more used to punching and kicking. Taking into account these factors the authors concluded that it is not surprising that such a high proportion of women can only fight back in anger when not paralysed by the terror of an actual attack and even then need to use a weapon (at 91).

[23] Judicial Commission of New South Wales *Sentenced Homicides in New South Wales 1990-1993: A Legal and Sociological Study*, 1995.

[24] Law Reform Commission of Victoria, *Homicide Prosecutions Study*, Appendix 6 to Report 40 (1991).

A cursory reading of these statistics would tend to suggest that provocation assists women as much, if not more, than men in the context of domestic killings. From its own data, the now defunct Victorian Law Reform Commission concluded that there was no support for the assertion that the provocation defence generally operates in a gender biased way.[25] However, statistics which show women are availing themselves of provocation in proportionately equal or greater numbers than men do not assuage the concerns of all. For those who maintain that the defences operate in a gender biased manner, the statistical analysis performed by the Victorian Law Reform Commission was claimed to be superficial, and failed to address the central issue by failing to comment on the difference in what counts as provocation for men and women.[26] The principal manifestations of the bias said to exist in favour of male defendants are outlined below.

(i) Women as victims

The defence operates to excuse male violent behaviour Wallace reports that while women rarely killed husbands from whom they were separated, a substantial number of men killed estranged wives.[27] She also found that sexual jealousy was the major precipitating factor in approximately 12% of spouse killings, almost without exception wife killings.[28]

In addition to sexual jealousy, characteristics commonly associated with male violence against women include possessiveness (the notion of women as personal property remains strong), fear of abandonment, desire for control (emotional, social and sexual), assertion and enforcement of power.[29]

The fact that provocation is considered and raised where killings occur during separation or as a result of sexual jealousy, is said to demonstrate an inherent gender bias in the operation of the section, since such killings represent a male gender specific response subsequently generalised to the whole community.

Men may be socialised in ways which encourage them to react with

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25 Victorian Law Reform Commission *Homicide* Report No. 40, 1991 at 75.

26 Note for example criticisms of the study made by A Howe in *Provoking Comment: The Question of Gender Bias in the Provocation Defence - A Victorian Case Study* (unpublished paper) and J Scutt in *Women and the Law: Commentary and Materials* (LBC, 1990) at 463. Scutt is also critical of the fact that the Commission did not provide a gender breakdown for cases in which self defence was the major argument.

27 Wallace at 98.

28 Wallace at 100.

29 Eg Z Rathus *Rougher than usual handling: Women and the Criminal Justice System* (2nd ed, Women's Health Policy Unit, Queensland Health) at 94; K Polk and D Ranson "The Role of Gender in Intimate Homicide" (1991) 24 *Aust. and NZ Journal of Criminology* 15.

> murderous rage, where women react to similar situations with emotions other than rage, or deal with rage differently, or become enraged beyond control in situations which are not "culturally" or "ordinarily" or "reasonably" understood as enraging.[30]

In modern day society, where marriage breakdown is a common occurrence, it has been questioned whether adultery or infidelity by an offender's spouse or de facto should, as a matter of law, be capable of grounding a provocation plea.[31] Adultery is the archetypal provocative situation. But at the time when provocation as a partial defence was being developed, adultery was a serious offence, a crime of immorality punishable by the ecclesiastical courts. Unlawfulness of the deceased's conduct was important in determining the sufficiency of the provocation.[32] The arguments for confining, as a matter of policy, the circumstances in which provocation may be pleaded are arguably more cogent in cases where the parties are estranged.[33]

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30 Pickard and Goldman as quoted by D Martinson in "Implications of Lavallee v R for Other Criminal Law Doctrines" (1991) *UBC Law Review* at 26.

31 Historically the common law played a key role in determining what might amount to provocation at law. "It was considered as a matter of policy that people ought not to be permitted to yield to some provocative situations whatever the actual effect of the provocation offered might have been on them."(S Odgers "Contemporary Provocation Law - Is Substantially Impaired Self-Control Enough" in Yeo (ed) *Partial Excuses to Murder* (Federation Press) at 106) Categories of provocation insufficient to reduce murder to manslaughter were words alone; affronting gestures; misconduct by a child or servant; trespass to property and breach of contract (per Lord Holt as noted in Ashworth at 293). By confining the categories of provocative conduct, the law clearly indicated that there were certain types of provocation to which a person ought not yield. Until about 1837 the question whether there was provocation sufficient to extenuate murder was a question of law.(B Brown "The 'Ordinary Man' in Provocation: Anglo-Saxon Attitudes and 'Unreasonable Non-Englishmen'" (1964) 18 *International and Comparative Law Quarterly* 203). Most of these earlier restrictions have been abandoned. The safeguards today are the subjective and objective conditions which must be satisfied before the defence can be made out. Thus, the question of sufficiency is normally left to the jury within the confines of the objective test. Policy decisions are also made by the DPP in deciding whether to accept a plea of guilty to manslaughter on the basis of provocation. The role of the judge is to determine whether there is material in the evidence which is capable of constituting provocation. This input by the judge is reasonably circumscribed. The High Court in *Stingel v The Queen* (1990) 171 CLR 312 at 334 cautioned that a trial judge should be conscious of the limited scope of the preliminary question of law, and of the need to exercise caution before declining to leave provocation to the jury.

32 A J Ashworth "The Doctrine of Provocation" (1976) 35(2) *Cambridge Law Journal* at 294.

33 In the case of *R v Panozzo* (Court of Criminal Appeal, NSW, No 60593/1990, unreported), for example, an estranged husband, still very emotionally attached to the wife that left him over twelve months ago, discovered a letter his estranged wife had written to another man. This letter contained expressions of endearment. He shot his estranged wife at point blank range in the head. Provocation was raised at the trial, the jury returned a verdict of manslaughter.

The law of provocation ignores the important background context to many wife killings Statistics demonstrate that the act of killing is not necessarily the first act of violence that the male has perpetrated on the woman. Studies have shown that many women who are being killed have been prior victims of violence at the hands of their spouse.[34]

However, within our legal system the forum in which the accused is tried has a narrow focus. The rules of evidence can operate to prevent the entire context of the killing from being revealed. In this way the circumstances of the killing are alleged to be distorted and the blame shifted.[35] The killing of a woman by her violent partner can be presented by the man as an isolated incident. A male offender is able to plead provocation on the grounds that his wife, de facto, or girlfriend was leaving without any examination of the reasons why she might be taking this action.

Another concern, frequently voiced, is that because the principal witness is dead, the only evidence of provocation comes from the accused himself. The accused has virtual carte blanche to construct his female victim as blameworthy.[36]

(ii) women as offenders

Modifications to the law of provocation Developments in the law of provocation have made the defence increasingly amenable to battered women who kill. The most significant amendments to the NSW *Crimes Act* were introduced by the *Crimes (Homicide) Amendment Act 1982* following the Report of the New South Wales Task Force on Domestic Violence. These amendments removed the requirement of suddenness so that the provoking conduct of the deceased can have occurred immediately before the act or omission causing death or at any previous time.[37] In the case of *Baraghith* Justice Enderby described how provocation can apply in the case of brooders:

> A man who has had a grievance, perhaps, for a substantial time may let the grievance smoulder in his mind, he may brood on it, until metaphorically it just burst into flame and at some stage he just loses his self-control. A situation like that may have existed and can lay the foundations for

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34 For example, Wallace found that 40% of homicides where the female spouse was murdered by her male partner there was a background of domestic violence perpetrated against the victim by the male spouse.

35 Women's Coalition Against Family, Violence *Blood on Whose Hands?,* 1994, at 108.

36 In a similar vein, the difficulty in disproving an allegation of homosexual advance, given that the accused is almost inevitably the only source of information on the circumstances giving rise to the "homosexual" victim's death, was identified by the Working Party as one of principal issues raised by the Homosexual Advance Defence. (NSW Attorney General's Department *Review of the "Homosexual Advance Defence"* DP, August 1996 at 9.)

37 *Crimes Act 1900* (NSW), s23(3)(b).

> provocation. Again, a man may carry a grievance for a long time but additional events may supply additional fuel for it and he also finally bursts into flames under the last little bit of provocation and his control goes. In both cases you may trace the grievance back a long way. But, in the end, there is the loss of self-control.[38]

The NSW provision also enables the provocation offered to be interpreted in the light of past provocative incidents.[39] Cumulative provocation is entitled to be considered. This means that the provocative impact of a the deceased's conduct is to be assessed by reference to the whole history of relations between the deceased and the accused. No longer is there a need for a final trigger even.[40] The loss of self-control may be produced by fear or panic rather than anger.[41]

The one feature which may prove problematic for women who kill in the context of domestic violence is the need to show that the killing was a result of loss of self control. This is the essence of provocation.

Bias in the interpretation of the defence Although the defence of provocation has undergone substantial modification, thereby adapting the defence to suit the circumstances in which both sexes kill, "the law is not, however, relevant only in terms of what appears on the statute books. The interpretation of the law is significant and must be seen in context."[42] Many in the general community (including judges and lawyers) labour under myths and stereotypes about domestic violence and battered women, which cause them to misunderstand a woman's circumstances and experiences.[43] These misunderstandings may unconsciously inform decisions made by the various agents of the criminal justice system at

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38 (1991) 54 A Crim R 240 at 265.

39 Section 23(2) specifies that the act or omission causing death can be committed under provocation whether the conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

40 "However, times are changing, and people are becoming more aware that a loss of self-control can develop even after a lengthy period of abuse, and without the necessity for a specific triggering incident. The presence of such an incident will assist a case of provocation, but its absence is not fatal." per Gleeson CJ in *R v Muy Ky Chhay* (1994) 72 A Crim R 1 at 13-14. This was approved by McHugh J in *Masciantonio v The Queen* (1995)183 CLR 58 at 71.

41 "The doctrine (of provocation) naturally extends to a sudden and temporary loss of self-control due to an emotion such as fear or panic as well as anger or resentment." per Mason J in *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 168.

42 J Scutt, *Even in the Best of Homes - Violence in the Family* (Penguin, 1983) at 184.

43 S Yeo "Resolving Gender Bias in Criminal Defences" (1993) 19 *Monash University Law Review* at 116.

the different stages of the criminal process, from initial interrogation, the exercise of prosecutorial discretion (which charge to prefer), in the provision of defence counsel (which defences to run/whether to accept a plea), in withholding the defence from the jury, in directions to juries, in summing up, in judgment and through to sentencing decisions.

6. THE USE OF SELF DEFENCE BY BATTERED WOMEN

Statistics

Despite the limited amount of empirical information, it is well documented that women traditionally have had difficulty using the law of self defence to justify their actions.[44] Rathus identifies the few Australian cases in which a history of domestic violence was used in support of a defence of self defence and provocation. In three of these cases (one from NSW) the female defendants were acquitted.[45]

Bacon and Lansdowne conducted a detailed examination of cases involving female homicide offenders in NSW over the period July 1979-March 1980. Isolating the cases in which the husbands or boyfriends were the victims provides a total sample size of 16.[46]

In 13 of the 16 cases the direct and immediate reason for the homicide was violence of the husbands. Of the 13 substantive defences raised at trial in these 16 cases, self defence was argued twice (argued at the trial of one woman and in the appeal of one other); provocation five times (argued by defence counsel in four cases and raised by the trial judge in one other); and defences of mental impairment six times (in three of these cases diminished responsibility was the only defence raised, in a further two diminished responsibility was raised with another defence, and in the remaining case the woman was found not guilty by reason of insanity).[47]

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44 D Brown, D Farrier and D Weisbrot *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (2nd Ed, The Federation Press, 1996) at 717.

45 *R v Kontinnen* (SA), *R v Hickey* (NSW) and *R v Stephenson* (Qld), as outlined in Z Rathus *Rougher than usual handling: Women and the Criminal Justice System* (2nd ed, Women's Health Policy Unit, Queensland Health) at 115.

46 This comprised 12 women convicted of killing their husbands or boyfriends, 2 women detained in mental hospital, 2 women who had received bonds, and one further woman who had served a sentence for the manslaughter of her husband. One of these cases could not be discussed as it was on for appeal. There were a further 2 women convicted of killing their husband or boyfriend who refused to participate in the project. No women who were acquitted were interviewed. W Bacon and R Lansdowne "Women who kill husbands: the battered wife on trial" in C O'Donnell and J Craney *Family Violence in Australia* (Longman Cheshire, 1982) at 68-69.

47 Id at 88-89.

This study was conducted before the changes to the defence of self defence by the High Court in *Zecevic* (discussed below). Nevertheless, it is significant that notwithstanding the context of domestic violence, the situations in which the women found themselves were not considered by their lawyers as justifying a plea of self defence. This attitude stands in strong contrast to that of the women concerned, who viewed the homicides as acts of self preservation. The high reliance on defences of mental disability was also considered noteworthy by the authors.[48]

Modifications to the law of self defence[49]

The law relating to self defence has been progressively liberalised culminating in the High Court decision of *Zecevic V DPP.*[50] The aspects of self defence which in the past proved problematic for women seeking to plead the defence included the requirement of proportionate force, imminence of danger and the duty to retreat.

The test for self defence laid down by the High Court in *Zecevic* is a mixed objective/subjective test. In assessing whether the accused's belief as to the nature of the danger she faced was based on reasonable grounds, no longer is the woman tested against the supposed reactions of the "reasonable man". The law now asks what this particular accused could have regarded as reasonably necessary defensive action, taking into account her (or his) personal characteristics and circumstances. What is required is that the accused honestly and reasonably believed the danger to be of a certain nature.

Connected with the accused's belief as to the nature of the danger is the requirement of imminence of such danger. The imminence of the attack is now much more liberally construed, the law no longer requiring the attack to have started or be just about to commence when the defendant took defensive action.[51] In the case of *Conlon*,[52] for example, Hunt CJ held that the accused was not obliged to wait until the attack upon him is repeated. If he honestly believed that the attack would be repeated he was entitled to take steps to forestall that threatened attack before it was begun. There is, however, very little guidance on the extent to which pre emptive strikes can be excused on the grounds of self defence. According to Leader-Elliott, the preferable view is that degrees of imminence of

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48 Since this demonstrates a readiness to classify women as sick, the decision to kill a product of a sick mind, rather than that of a rational or ordinary person in the circumstances.

49 The law of self defence was described in considerable detail in the NSW Parliamentary Library Research Service Briefing Paper 41/95 *Commentary on the Home Invasion (Occupants Protection) Bill 1995.*

50 (1987) 162 CLR 645.

51 Yeo "Resolving Gender Bias in Criminal Defences" (1993) 19 *Monash University Law Review* at 115

52 (1993) 69 A Crim R 92.

threatened harm go to the question of reasonable necessity.[53] Wilson J remarked in the groundbreaking case of *Lavallee*[54] "I do not think it an unwarranted generalisation to say that due to their strength, socialisation and lack of training, women are typically no match for men in hand-to-hand combat. The requirement ... that a battered woman wait until the physical assault is "underway" before her apprehensions can be validated in law would ... be tantamount to sentencing her to 'murder by instalment'".

Proportionality of the accused's response to the threatened harm is no longer an independent requirement of the defence. It is now merely a factor for consideration in determining whether the response was necessary.[55] This development is particularly relevant to female defendants who have killed their batterers with a weapon when they were unarmed or asleep.

Another development which supports the cause of battered women is the abrogation of the legal duty to retreat before an accused can attempt to defend herself or himself. In *Zecevic* the High Court relegated the issue of retreat to "a circumstance to be considered with all the others in determining whether the accused believed on reasonable grounds that what he or she did was necessary in self defence".[56] References to the symbolic role of retreat are inappropriate when domestic violence is at issue. Policies designed to outlaw mutual combat between contending males have no application in the overwhelming majority of domestic conflicts, where there is no mutuality and no agreement to engage in combat.[57]

Factors accounting for the continuing resistance to the use of self defence

If the test for self defence as set out in *Zecevic* is as flexible as suggested above, why is the defence not used more often by battered women who kill? It would appear that the interpretation and application of the law is as important as the structure of the law. Several related factors have been suggested to account for the reluctance to expand the use of self defence in the context of battered women who kill. These include:

- the erstwhile unfair operation of the defence has become entrenched;

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53 I Leader-Elliott "Women Who Kill in Self Defence" (1993) 15 *Sydney law Review* at 456.

54 (1990) 55 CCC(3d) 97.

55 In *Zecevic* the majority said that evidence of disproportion between threat and response is a matter for the jury (at 662).

56 At 663. Commentators are at pains to stress that the possibility that retreat may have been reasonable in the circumstances should never be confused with the different and insupportable assumption that a woman owes to her aggressive partner a duty to terminate their relationship so as to avoid any occasion for self defence. See for example, Leader-Elliott at 449.

57 Leader-Elliott at 450.

- domination of the legal profession by men who have no understanding of women's circumstances and experiences;
- myths and stereotypes about domestic violence and battered women.
- A concern not to be seen to be encouraging other women to fatal violence.

There is no dispute that the previous test for self defence, with its requirements of imminence, proportionality and duty to retreat meant that the vast majority of women, who typically kill during a lull in the violence and generally with a weapon, were precluded from pleading the defence. Their legal position often stood in stark contrast to their own perception of their situation. From the perspective of the battered woman her act of killing may well be perceived as an act defending herself. She has neither the physical strength, nor the social conditioning to respond to an actual attack. For someone involved in a situation of domestic violence the threat of danger may be always impending. One of the commonest consequences of the widespread ignorance about the dynamics of a battering relationship is said to be that in order to qualify for the defence of self defence not only must the woman meet the traditional norms of self defence, but they are also subjected to an extra unwritten requirement that they leave the violent relationship.[58] But to say "she could leave" ignores the cultural, social and economic realities of women's lives.[59]

Because the circumstances in which battered women kill have for so long been excluded from the ambit of self defence, the prevailing conceptions about what can amount to an occasion when deadly force is reasonable or necessary have become hard to displace.

A further reason suggested to explain why men's and women's claims to have acted in self defence are not being evaluated equally is the tendency of women to rely on the defence of provocation.[60] One of the more ironic consequences of expanding the scope of provocation and improving its applicability to battered women who kill is that women are opting for the defence of provocation in circumstances where an outright acquittal might be the more appropriate result. In Canada, for example, the success of battered woman syndrome in reducing charges has created a new dilemma:

> [O]ne risk presented by the developing case law in Canada is that the government will codify the trends we see in plea bargaining and jury trials

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58 J Stubbs (ed) *Women, Male Violence and the Law* at 209.

59 J Scutt "Judicial Bias or Legal Bias? Battery, Women and the Law" in Bessant J, Carrington K and Cook S (eds) *Cultures of Crime and Violence - The Australian Experience* (LaTrobe University Press, 1995) at 136-7.

60 E Sheehy, J Stubbs and J Tolmie "Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 *Criminal Law Journal* at 378. The statistics confirm that provocation is being successfully used to a far greater extent than self defence in cases involving battered women who kill.

> of the reduction of murder to manslaughter in battering situations, thus rendering acquittals based on BWS less compelling for jurors. We need publicly to challenge the appropriateness of plea bargains on behalf of these women, and resist codification of these practices.[61]

Provocation, it is contended, may not be appropriate because provocation is designed to deal with an unreasonable but understandable over-reaction to an emotionally stressful incident. "An assumption that provocation is the most appropriate defence suggests that when women perceive themselves as being in danger in their own homes and unable to evoke the protection of the legal system, their perceptions are not rational but are, instead, idiosyncratic, emotional over-reactions. It neither legitimates their agency or absolves them of blame for their victimisation. On an individual and a broader societal level, provocation may contradict the reality that such women experience."[62]

7. OPTIONS FOR INTEGRATING OR RECOGNISING WOMEN'S EXPERIENCES

Use of expert evidence as a mechanism for overcoming myths and stereotypes

Juries need to be informed about the dynamics of domestic violence if they are to understand why battered women act to preserve their lives in ways that do not fit the usual paradigm of self defence.[63] The rules of evidence, however, create problems in communicating this information to the jury. The two relevant rules are that (i) evidence of opinion is excluded where the subject matter of enquiry does not call for specialist expertise; and (ii) the testimony of non-experts is not permitted upon matters calling for expertise. Battered woman syndrome has emerged as a mechanism for introducing expert opinion evidence which would be otherwise inadmissible by reason of the general rule against opinion evidence.

Battered Woman Syndrome According to the theory, a woman subjected to repeated violence becomes immobilised, passive and unable to act to improve her situation or to escape: so called "learned helplessness". These characteristics are said to emerge after experiencing the battering cycle at least twice. The "battering cycle" has three stages: tension building, acute battering, followed by contrite and loving behaviour.

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61 E Sheehy in "Battered Woman Syndrome: Developments in Canadian Law After R v Lavallee" in Julie Stubbs (Ed) *Women, Male Violence and the Law* (Institute of Criminology Monograph Series No 6, Sydney, 1994) at 187.

62 E Sheehy, J Stubbs and J Tolmie "Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 *Criminal Law Journal* at 378.

63 Z Rathus *Rougher than usual handling: Women and the Criminal Justice System* (2nd ed, Women's Health Policy Unit, Queensland Health) at 114.

Use of Battered Woman Syndrome (BWS) evidence was pioneered in the United States by Dr Lenore Walker. BWS is not a defence per se, the function of BWS is to provide jurors with an alternative perspective, or "social framework" for interpreting the woman's beliefs and actions - an interpretative social schema from which to view her actions as reasonable rather than aberrant.[64]

The principal context in which BWS evidence arises is in cases of self defence. BWS evidence is used to persuade jurors to accept the accused's contention that she reasonably believed in the necessity of her defensive action. Without the benefit of the syndrome, there is a concern that a jury might question whether the accused actually held such a reasonable belief since she could have left the violent relationship. The syndrome explains why she did not leave by presenting such symptoms as learned helplessness.

BWS has also been used to support or establish other defences, including provocation. In provocation cases BWS evidence is relevant in assisting the jury in assessing the defendant's subjective response and in measuring her actions against the objective test.

Although BWS has at least one champion in Australia,[65] feminists and legal commentators have, on the whole, not regarded it favourably. The primary criticism of BWS is that it reconstructs and accommodates women's experiences to fit the requirements of existing legal doctrine rather than challenging legal and cultural stereotypes about women and about woman battering.[66] The syndrome denies the rationality of the woman's response and instead presents a woman acting in defence of her batterer as irrational and cowed.[67]

In summary, the most important reservations about the use of BWS, and the negative impacts for battered women flowing from the use of BWS testimony are:[68]

- The reconstruction of the woman's experience in a manner consistent with scientific or medical discourse reinforces the notions of irrationality or disorder, and denies the rationality of the woman's actions. It also shifts the focus from the myriad of

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64 R Schuller and N Vidmar "Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature" (1992) 16 *Law and Human Behaviour* 273 at 277.

65 Dr Easteal in "Gender inequity in Australian Courts" (1992) *Criminology Australia* 10; "Battered Woman Syndrome: Misunderstood?" (1992) 3 *Current Issues in Criminal Justice* 356; "Battered Woman Syndrome: What is 'reasonable'?" (1992) 17 *Alternative Law Journal* 220.

66 J Stubbs and J Tolmie "No Legal Refuge" (1992) *Australian Left Review* 8.

67 Yeo "Resolving Gender Bias in Criminal Defences" (1993) 19 *Monash University Law Review* at 111.

68 Except where otherwise indicated, these points are drawn substantially from E Sheehy, J Stubbs and J Tolmie "Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 *Criminal Law Journal* at 384-387.

reasons why a woman may remain in a violent relationship. A woman who does not leave a relationship for economic or personal safety reasons may well be making a rational, healthy decision.

- The use of expert evidence does not confront the narrow male standard on which reasonableness is constructed.

- The voice of an expert is preferred to that of the woman herself.

- The danger that jurors' misconceptions about battered women may merely be replaced by another stereotype - the "typical" battered woman, and that a battered woman who fails to conform to this new standard will be disadvantaged accordingly.

- The characterisation of women who resort to violent self-help as helpless is lacking in logic.

- The issue is constructed as being beyond the understanding of the lay juror.[69]

The other category of criticism relates to the dangers of transferring syndromes from the therapeutic context (in which they are helpful) to the forensic context (where their use might not be quite so legitimate). By their very nature, syndromes, and the inferences being drawn from their alleged existence, are not amenable to rigorous empirical testing. Hence:

- Definitional problems of who constitutes a battered woman have been highlighted. How fuzzy are the edges of the syndrome? Can any of the characteristics be absent and the woman still be properly regarded as a sufferer of the syndrome?[70]

- There is a tendency for expert evidence to go too far. Expert evidence should never be permitted to go beyond giving general information about the syndrome in question.

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69 There is considerable disagreement as to whether the subject matter of the testimony is truly beyond the understanding of the jury. Schuller and Vidmar review surveys and report that although jurors are misinformed on some aspects of wife abuse and that some jurors are likely to be more misinformed than others, there is no overwhelming endorsement in the research of the "myths" about abuse. Furthermore, in one study which considered the influence of three particular variables, viz, presence or absence of expert testimony, level of force used by husband prior to woman's response and verdict instructions, the only variable found to influence initial verdict judgments involved verdict instructions. (at 284) See also S Yeo "Resolving Gender Bias in Criminal Defences" (1993) 19 *Monash University Law Review* at 111.

70 Various studies have found limits on the universality of the syndrome, in particular the cycle pattern of violence and the development of learned helplessness: R Schuller and N Vidmar "Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature" (1992) 16 *Law and Human Behaviour* 273 at 281.

- There is a danger that at trial the evidence (when given by impressive experts) may seem more credible than its unfalsifiable status would merit. There are insufficient controls and safeguards.
- The possibility of fraudulent claims is too high.
- Recognition of battered woman syndrome may lead to the call for recognition of other victimisation syndrome defences.

General expert evidence Although BWS does not enjoy universal support, there is considerable agreement that expert testimony about the general dynamics of domestic violence (rather than specifically BWS evidence) should be admissible. Such evidence would relate to the social reality of the battered woman, including an examination of the reasons why she did not leave the relationship and evidence to support the reasonableness of her fear, which would include not just evidence about the specific battering relationship, but evidence about such things as the prevalence of battering, violence in the home, the number of battered women killed by their batterers, the lack of community or police help and the lack of resources of battered women.[71]

The traditional limitations preventing testimony of this nature from being admissible have been somewhat relaxed in the new *Evidence Act.* So for example, pursuant to this Act evidence is no longer inadmissible only because it is about a matter of common knowledge.[72] Expertise is defined according to a person's specialised knowledge, based on their training, study or experience.[73] The ALRC Report[74] which provides the basis of the provisions of the *Evidence Act* intentionally refrained from requiring that expert's opinion be related to a recognised field of expertise or result from the application of theories or techniques accepted in that field. These developments may facilitate the admission of evidence explaining the characteristic features, the nature and effects of domestic violence, without the need to present it dressed in medical or psychological jargon.

Creation of a separate defence

The idea of a separate defence for persons in a battering relationship who kill their batterer is not a novel idea. Separate defences have been framed in a number of different ways.

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71 M MacCrimmon "The Social Construction of Reality and the Rules of Evidence" (1991) *UBC Law Review* at 48-49.

72 *Evidence Act 1995* (NSW), s 80.

73 Section 79.

74 Australian Law Reform Commission, *Evidence*, Report 38 (1987).

They include a defence of "sudden and extreme emergency";[75] a defence of self preservation;[76] and psychological self defence.[77] The 1987 Report of the South Australia Domestic Violence Council recommended that "a new complete defence be created which can be acted upon by a defendant charged with murder where the elements of such defence are a proven history of serious personal violence by the deceased against the accused or against any child or children of the accused's household."[78] The Western Australia Task Force established by Chief Justice of Western Australia, Justice David Malcolm AC, recommended that a new defence be created to take account of the reality of the lives of women who kill their abusers, such that "conduct is carried out by a person in self defence if the person is responding to a history of personal violence against herself or himself or another person and the person believes that the conduct was necessary to defend himself or herself or that other person against the violence."[79]

The rationale and details of a unitary defence to killings by victims of domestic violence, if such a defence were to be created, would need to be approached cautiously because no

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75 per a submission to the Australian Law Reform Commission *Equality Before the Law: Justice for Women* Report No. 69 Part I, (1994) at 277. This defence would apply if the person believed:
(a) that an urgent situation of peril exists;
(b) that committing the offence is the only way to avoid the peril; and
(c) that the conduct is a reasonable response to the peril.

76 Ibid. This defence is intended to encompass the preservation of both the physical and mental self. The main elements would be that:
(a) the accused had lived with, or had frequent contact with, a person who had exerted power over her or him and subjected her or him to violence and abuse over a period of time;
(b) his or her capacity to act to escape must have been severely limited; and
(c) he or she killed because of a reasonable fear for her or his life or safety, physical or mental or of those dear to her or him, such as children. The reasonableness of the fear would be judged from the viewpoint of someone who had endured the accused's experiences.

77 C Ewing *Battered Women Who Kill: Psychological Self-Defense as Legal Justification* (1987) as discussed in V Mather "A Scary Tale: Battered Women Who Kill Their Abusers" (1992) 18 *Ohio Northern University Law Review* 601 at 615 et seq. Ewing proposes a theory of psychological self defense (sic) whereby the use of deadly force would be justified where it is "reasonably necessary to prevent the infliction of extremely serious psychological injury." The key term "extremely serious psychological injury" is defined as "gross and enduring impairment of one's psychological functioning which significantly limits the meaning and value of ones's physical existence." Ewing would also limit the use of this defence to persons who were being physically threatened at or near the time of the killing. Furthermore, the burden of proof of psychological harm would be on the defendant.

78 South Australian Domestic Violence Council *Domestic Violence - Final Report* (Women's Adviser's Office, Department of Premier and Cabinet) 1987, at 91.

79 D Malcolm *Report of Chief Justice's Task Force on Gender Bias* (1994), as reported in Z Rathus *Rougher than usual handling: Women and the Criminal Justice System* (2nd ed, Women's Health Policy Unit, Queensland Health) at 126.

killing by the victims of domestic violence will be identical. A myriad of issues would need to be considered. Should it be a partial or complete defence? Should it be a gender neutral or gender specific defence? Should it be available only for homicides or also for assaults? Should it be based on physical or psychological aspects or self-preservation (or all of the above)? In any new defence would the attitude or mental state of the woman be relevant or is the preceding history of domestic violence the crucial and determinative factor?

Advocates of a separate defence demonstrate an implicit recognition that there exists varying degrees of culpability amongst killings by battered wives, and that whilst some deserve exoneration, in other cases manslaughter or murder may be the more appropriate verdict. Most of the formulations suggested contain a requirement directed at limiting the circumstances in which the defence can be invoked. In the submissions received by the ALRC the homicidal act is only sanctioned if "committing the offence is the only way to avoid the peril" or "the accused's capacity to act to escape is severely limited". The formulation recommended by the WA Task Force insists that the accused believe the conduct to be necessary in defence against the violence. However, there is little guidance as to how this criteria is to be met. It is unclear, for example, what bearing any of the following factors would have on the availability of the defence:[80] the nature and extent of the violence suffered in the relationship, prior attempts by the accused to enlist the protection of the criminal justice system or other agencies (and with what result), attempts by the accused to leave, the factors which influenced her decision to return (if applicable), the availability of a safe and affordable place to go, whether it was reasonable to expect her to be the one to leave the family home, her victim's response to her efforts to protect herself in the past, previous intimations about what he might do to her in the future, the existence of any cultural circumstances aggravating her situation.

A separate defence would also encounter procedural and evidentiary difficulties including the fundamental problem of proving the violence (domestic violence often occurs in private and without witnesses). In some instances where evidence exists it would be necessary to overcome the hearsay rule, which has the potential to exclude statements made by the accused to her doctor, for example.

8. APPLICATION OF SELF DEFENCE AND PROVOCATION IN CRIMES AGAINST HOMOSEXUAL MEN

Against a general background of growing awareness of the incidence of violence directed against gays and lesbians, the spotlight has recently been thrown on the fate of homosexual men who have been the victim of the accused's "homosexual panic". The inaccurately termed "homosexual panic defence" or "homosexual advance defence" ("HAD") is not

80 From J Stubbs and J Tolmie "Battered woman syndrome in Australia: A challenge to gender bias in the law?" in J Stubbs (Ed) *Women, Male Violence and the Law* (Institute of Criminology Monograph Series No 6, Sydney, 1994) at 194.

actually a defence per se, merely evidence pleaded by offenders in support of a recognised defence. Offenders are using homosexual advance as grounds for asserting that the resulting homicide was committed either under provocation or in self defence.

What has alarmed many people is the success of these pleas despite the presence of several factors prima facie inconsistent with the requirements of self defence or provocation. These factors include evidence of protracted violence; the infliction of repeated and horrific injuries; the commission of theft following the homicide; and the commission of the homicide at the victim's home. Moreover, in most cases the victim was considerably older than his attacker.[81]

A recently released Discussion Paper[82] produced by a Working Party established by the NSW Attorney General identified 13 known cases, from 1993 onwards, in which HAD was alleged. All cases but one resulted in homicide. Since the release of the Discussion Paper a further case has received media publicity.[83] The Discussion Paper indicates that of the seven defendants indicted for murder, two were acquitted, two were convicted of murder and three were convicted of manslaughter. Four defendants pleaded guilty to manslaughter and one pleaded guilty to murder.

The Working Party identifies three principal issues raised by HAD:

- Whether the allegation of a homosexual advance, without more, ought to be sufficient to raise self defence and/or provocation.

- The difficulty in disproving such an allegation given that the accused is almost inevitably the only source of information on the circumstances giving rise to the "homosexual" victim's death.

- The treatment of homosexuality and the gay victim by the criminal justice system and the community.

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[81] In one of the cases in which provocation was accepted, for example, the 17 year old defendant killed the 64 year old victim in the victim's own home, by bashing his head. The defendant then proceeded to stab the victim a number of times before stealing his victim's video: *R v Turner* as discussed in *Review of the "Homosexual Advance Defence"* (NSW Attorney General's Department), August 1996 at 12.

[82] *Review of the "Homosexual Advance Defence"* (NSW Attorney General's Department), August 1996.

[83] It was reported that Kenneth Richards was found guilty of the manslaughter of Gordon Mills on the basis of provocation. The homicide took place after another man told Richards that Mr Mills had tried to sexually abuse him after he had become unconscious during a heavy drinking session. "Four year sentence for murder of friend", *The Australian*, 31 August 1996.

Provocation and HAD

Earlier in this paper the defence of provocation was defined. The key elements of the defence are that:

- the act or omission (resulting in death) is the result of a loss of self control;
- that this loss of self control was induced by any conduct of the deceased towards or affecting the accused;
- and the conduct of the deceased was such as could have induced and ordinary person in the position of the accused to have so far lost self control as to have formed an intent to kill or to inflict grievous bodily harm upon the deceased.

The manslaughter verdicts based on HAD evidence do not reveal any patent deficiency in the law of provocation itself. That the defence is proving successful in part reflects community attitudes towards homosexuals and beliefs about the affront to male masculinity or male honour that such a homosexual advance constitutes. Many jurors seem to be concluding that the victim's sexual advance not only caused the accused to lose his self control, but more importantly, that an ordinary person confronted by the same advance could likewise lose their self control. The concern evinced by the Working Party is that in arriving at this conclusion jurors bring to their deliberations prejudices and preconceptions concerning homosexuality that they have acquired in the course of their social conditioning.

As a threshold issue the Working party considers whether the allegation of homosexual advance, without more, ought to be sufficient to raise provocation. The concern is that a finding that a non-violent advance is provocative reinforces the notion that fear, revulsion or hostility are valid reactions to homosexual conduct. The reluctance to confine, as a matter of policy, circumstances in which provocation may be pleaded was noted earlier.[84] Nevertheless, the majority of the Court of Criminal Appeal in the case of *R v Green* took the view that a non-violent homosexual advance was not sufficient to meet the objective test.[85] Special leave to appeal to the High Court was granted in September.

The Working Party was not prepared to make any recommendations regarding the substantive law of provocation given that the NSW Law Reform Commission is currently conducting a review of the defence. However, in a bid to limit the role that prejudice might play in a HAD trial and jury deliberations, the Working Party has suggested jury directions to clarify that hatred of homosexuals is not a proper basis for provocation, and on the obligation to determine the matter free of prejudice.

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84 Page 11 and footnote 29 supra.

85 As reported in *Review of the 'Homosexual Advance Defence'* at 19.

Self defence and HAD

Following its analysis of the self defence cases in which HAD was an issue, the Working Party concluded that there is no difficulty with the content of the law of self defence. The law of self defence is capable of applying in HAD cases and is capable of producing a just result. However, the overwhelming concern of the Working Party was that some of the cases demonstrate a tendency by the jury to equate a sexual *advance* with a sexual *attack* (emphasis in the original).

If the case involves evidence of a sexual attack, thereby involving violence, then self defence is arguably a legitimate defence. However, a violent response to a non-violent advance (consisting of touching, or groping of intimate body parts, for example) is arguably unreasonable and therefore incapable of grounding self defence.

This analysis represents an ordinary application of the principles of self defence, outlined earlier in this Paper. The test for self defence is that accused must have believed on reasonable grounds that it was necessary in self defence to do what he or she did. In other words the accused must honestly and reasonably believe the danger to be of a certain nature. The plea of self defence can be based on a mistaken belief in the necessity for defensive force, but only if the mistake is reasonable.

The Discussion Paper suggests that the failure by the jury to differentiate a homosexual attack from a homosexual advance is at least partially attributable to community attitudes towards homosexuality. Myths about homosexual males being predatory, and the inherent threat posed by homosexuality to a man's "honour" and/or "masculinity" appear to play some role in these cases. Or as Tomsen describes it: some assailants might fear rape, but the affront to masculinity was more likely to influence the brutality of the attacks.[86]

The Working Party concludes that the extent to which misinformation, ignorance and myth in the community at large allow self defence to be raised and accepted by a jury in such circumstances provides compelling reason for the implementation of a coordinated and strategic community education campaign.

9. LAW REFORM PROPOSALS

Provocation

The NSW Law Reform Commission is currently examining provocation as part of its more extensive review of all the partial defences to murder.[87] In its Discussion Paper the

86 "Murdered gay men: most are bashed", *Sydney Morning Herald*, 17/8/96.

87 New South Wales Law Reform Commission *Provocation, Diminished Responsibility and Infanticide* DP 31, August 1993.

Commission has canvassed a number of options for reform of the defence of provocation. One option is the abolition of the defence, leaving matters presently going to the defence to be taken into account on the question of penalty. The more likely option is reformulation of the defence. The major substantive issue in the defence of provocation relates to the objective test. Suggestions for reform of the objective test contained in the Discussion Paper include the substitution of a subjective test with or without the introduction of an element of community standards. Submissions have been specifically requested addressing the desirability of making provision for evidence of BWS to be called. The Commission's final report is likely to released in 1997.

Self defence

In New South Wales the law of self defence is governed by the common law. However, there have been some moves to codify the defence. The question of the development of a uniform criminal code for all Australian jurisdictions has been on the agenda of the Standing Committee of Attorneys General since 1990. In pursuance of this objective the Model Criminal Code Officers Committee ("MCCOC", formerly the Criminal Law Officers Committee) was established, consisting of an officer from each jurisdiction with special responsibility for advising his or her Attorney General on criminal law issues.

The MCCOC has produced several discussion papers and reports to date. The final report on general principles of criminal responsibility[88] incorporates the definition of self defence adopted by the Committee. This has since been implemented at the Commonwealth level by the *Criminal Code Act 1995* (Cth).

Pursuant to the formulation adopted by the Committee "conduct is carried out by a person in self defence if the person believed that the conduct was necessary to defend himself or herself or another person ... and his or her conduct was a reasonable response in the circumstances as perceived by him or her."[89]

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88 Criminal Law Officers Committee *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility* (AGPS, 1993).

89 Set out in full, the section provides that conduct is carried out by a person in self defence if the person believed that the conduct was 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 his or her conduct was a reasonable response in the circumstances as perceived by him or her.

This section does not apply if force involving the intentional infliction of death or really serious injury is used in protection of property or in the prevention of criminal trespass or in the

It remains to be seen whether the law of self defence will be codified in this manner in New South Wales.

10. CONCLUSION

The defences of self defence and provocation in their present form are apparently neutral in their operation. The progressive modifications to the defences have made them increasingly accessible to female offenders. Nevertheless, the two homicide contexts examined in this Paper provide a good illustration of the way in which particular values or prejudices may become embedded not simply into the substantive law, but also pervade the wider community's general understanding of the manner in which the concepts embodied by the law apply.

There has been recent widespread concern about the existence of bias in various aspects of the legal system. The bulk of this literature has concentrated on gender bias,[90] and identifies an unconscious problem of a systemic nature. To the extent that the justice system suffers from bias, the system fails in its primary societal responsibility to deliver justice impartially and the administration of justice as a whole suffers.[91] An awareness of the existence, and understanding of these dynamics is the first step towards remedying their effects. Until such time as underlying attitudes are addressed, legislative amendments can only have limited results.

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removal of such a trespasser.

This section does not apply if the conduct to which the person responded was lawful and that person knew that it was lawful.

90 For example, Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No 69, 1994; the Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary*, 1994; establishment of three inquiries on aspects of gender bias by the NSW Ministry for the Status and Advancement of Women (now the Department for Women); establishment by the Chief Justice of the Western Australian Supreme Court of a taskforce investigating gender bias in the judiciary.

91 Professor K Mahoney *Gender Bias in Judicial Proceedings* A lecture at the Supreme Court of Western Australia, August 14, 1992 at 11.

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