WALKING IN HER SHOES

Battered women who kill in Victoria, Western Australia and Queensland

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The challenge of reasonableness

To kill in self-defence is to kill because it is necessary to do so. It is a rational or reasonable action performed in the face of a serious threat. Yet so bald a statement obscures the gendered history of the defence, and denies the continuing struggle to have the actions of battered women who kill judged as reasonable.

As a legal justification, self-defence has comfortably accommodated the bar-room brawler who reacts spontaneously and proportionately to an immediate threat. It has not however, until recent legislative reforms, accommodated the battered woman who kills her partner. Laws have not given credence to battered women who use weapons, enlist the support of others, or act while their batterers are asleep or otherwise.

Killing in immediately non-confrontational circumstances would seem to point inexorably to the conclusion that the woman's actions were not reasonable or necessary. The questions around her actions may well be *'Why didn't she just leave, seek help, or call the police? Were there not options available to her other than the use of lethal force?'* These questions bring the challenge of reasonableness to light, and raise the related question: *'From what vantage point is reasonableness to be judged?'*

Viewed from the perspective of the average judge or juror, uninformed about the dynamics and effects of domestic violence, the killing may appear entirely unreasonable; as either irrational or retaliatory. However, from a battered woman's perspective — having lived with serious abuse under the constant threat of violence, having developed a heightened capacity to perceive danger from her batterer, for whom escape has failed or is not a realistic option — there may have been no other reasonable alternative.[1] This is not to say that battered women do not kill their spouses other than in self-defence. Rather, to determine whether a woman's actions were justified in self-defence requires a holistic appreciation of her predicament. Since *R v Lavallee* [1990] 1 SCR 852, this struggle to have reasonableness judged from the shoes of the battered woman has received focused judicial attention. As L'Heureux-Dubé J remarked in *R v Marlott* [1998] 3 SCR 123 at 143:

> The legal inquiry into the moral culpability of a woman who is … claiming self-defence must focus on the *reasonableness* of her actions in the context of her personal experiences …

Accordingly, the full context of a battered woman's predicament must be considered to determine whether her actions were justified in self-defence, thereby warranting her acquittal. Indeed, her 'reality' must be brought into sharp relief at trial. It must be explored and explained for and to those who will be making judgments. For 'a battered woman's experiences are generally outside the common understanding of the average judge and juror.'[2] And, it is only with an appreciation of the battered woman's 'reality' that reasonableness can be assessed.

Points to consider around this matter are the legislative reforms in Victoria, Western Australia and Queensland and the extent to which they require judges and jurors to appreciate the battered woman's reality. In varying degrees the amendments in Victoria and Western Australia have sought to require judges and jurors to walk in the shoes of battered women who kill in order to evaluate the reasonableness of their actions. These reforms have, at the least, clarified or extended the common law position (outlined next) to better ensure engagement with the reality of a battered woman who claims to have killed in self-defence. Queensland's introduction of a new, partial defence to murder, available only to victims of seriously abusive relationships, has however disavowed the Victorian and Western Australian approach. The Queensland reforms have done nothing to ensure that a battered woman's reality is taken into account where acquittal is sought on the basis of self-defence. Instead, s 304B *Criminal Code* (Qld) now emphasises the necessity to judge reasonableness from the perspective of the battered woman *only* in so far as this may enable a verdict of murder to be reduced to manslaughter.

The common law and the challenge of reasonableness

The common law test for self-defence is set out in *Zecevic v. DPP (Vic)* (1987) 162 C.L.R. 645 at 661:

> It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he [or she] did. If he [or she] had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he [or she] is entitled to an acquittal.

This is both a subjective and objective assessment, requiring an honest belief *and* reasonable grounds for the belief, that it was necessary to do what she did. It requires consideration of both the perception of the threat and the response to the threat. Once the issue of self-defence is sufficiently raised by the defendant,

REFERENCES

1. Patricia Easteal, *Less than Equal: Women and the Australian Legal System* (2001), 37.

2. *R v Malott* [1998] 1 SCR 123, [43] (L'Heureux-Dubé J); *Lavelle* [1990] 1 SCR 852, 871–872; *Osland v The Queen* (1998) 197 CLR 316, 337 (Gaudron and Gummow JJ), 376–377 (Kirby J).

If a battered woman honestly holds a belief that it is necessary in self-defence to kill, and the fact finder is asked to take into account all the situational and psychological circumstances that produced that belief, then an honest belief necessarily becomes a reasonable belief.

the burden then falls upon the prosecution to disprove either the subjective or objective limb of the defence beyond reasonable doubt.[3] If the prosecution fails to do this, then the defendant is entitled to acquittal.

The common law test is no longer constrained by any legal requirement that the threat be 'imminent', accepting the potential for a justified pre-emptive strike against, for example, a sleeping aggressor.[4] Nor must the response necessarily be 'proportionate' to the threat.[5] Imminence and proportionality are therefore simply considerations which bear upon the assessment of the existence and reasonableness of the belief.

Assessing the *genuineness* of a battered woman's belief, in answer to the question, 'What was she thinking when she killed her batterer?' plainly requires a full appreciation of her situational and psychological predicament. However, the extent to which these considerations bear on the determination of whether she had reasonable grounds for the belief that it was necessary to do what she did, is more controversial.

The assessment of whether there were *reasonable* grounds for a belief is not a purely objective inquiry. It is not simply a question of whether the woman's actions in self-defence accorded with those of the 'hypothetical reasonable person'.[6] Rather,

> [a]ccount must be taken of the personal characteristics of the particular accused which might affect his [or her] appreciation of the gravity of the threat which he [or she] faced and as to the reasonableness of his [or her] response to that danger.[7]

Accordingly, in *R v Hawes* (1994) 35 NSWLR 294, 306, the New South Wales appellate court stated that it is 'the belief of the accused, based upon the circumstances as he [or she] perceived them to be, which has to be reasonable, and not the belief of the hypothetical person in his [or her] position.' Similarly, the Victorian Court of Criminal Appeal, in *R v Hendy* (2008) 191 A Crim R 81, 87 has emphasised the necessity of considering reasonableness from the perspective of the accused:

> The question whether the belief was (proved not to have been) based on reasonable grounds is to be determined not by what a reasonable person would have believed but by what the accused person might reasonably have believed in all of the circumstances in which he [or she] found himself [or herself].

The battered woman's situational and psychological predicament, therefore, is critically relevant to the assessment of the reasonableness of her actions.[8] It is only with a full appreciation of the 'extraordinary circumstances' that she faced, that the reasonableness or otherwise of her actions becomes intelligible.[9]

However, taking into account *all* of the circumstances in which she found herself in the determination of whether her belief was reasonable, renders the distinction between subjective and objective limbs of the test meaningless. If a battered woman honestly holds a belief that it is necessary in self-defence to kill, and the fact finder is asked to take into account *all* the situational and psychological circumstances that produced that belief, then an honest belief necessarily becomes a reasonable belief. Such a merging has been judicially disavowed.[10] Nor was it contemplated by the High Court in its abolition of the common law doctrine of 'excessive self-defence', for which a genuine belief was sufficient to warrant a verdict of manslaughter, despite an objectively unreasonable perception of, or over-reaction to, a threat.[11]

Accordingly, the common law seeks to draw a line between rational and irrational belief,[12] retaining a measure of objectivity in the test, albeit of a qualified nature. This leaves the question of which circumstances can be taken into account to determine what the battered woman might reasonably believe.

One example of the muddying of these conceptual waters is the question of whether reasonableness is to be judged from the perspective of a drunken killer — should intoxication be considered? Authorities conflict on this point,[13] indicating tensions inherent in the 'mixed objective and subjective nature'[14] of the test; a tension eloquently expressed by the Tasmanian Court of Criminal Appeal in *McCullough v The Queen* [1982] Tas R 43:

> ... in our view it would be incongruous and wrong to contemplate the proposition that a person's exercise of judgement might be unreasonable if he [or she] was sober, but reasonable because he [or she] was drunk.

Similarly, it is questionable whether a mental impairment or delusion resulting from an internal defect of the mind will, at common law, be a circumstance to be taken into account in determining the reasonableness of a belief. That limitations exist in this regard was acknowledged by Hunt CJ in *Kurtic* (1996) 85 A Crim R 57, 64:

> ... the issue of whether there were no reasonable grounds for a belief that it was necessary in self-defence to do what was done — although not wholly objective — must nevertheless be at least partly objective.

3. *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 657 (Wilson, Dawson and Toohey JJ).

4. *Secretary* (1995) 5 NTLR 96, 104; see also, *R v McKay* [1957] VR 560, 562–563; *Osland v The Queen* (1998) 197 CLR 316, 382 (Kirby J).

5. *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 662 (Wilson, Dawson and Toohey JJ).

6. *R v Conlon* (1993) 69 A Crim R 92, 98 (Hunt CJ).

7. *R v Conlon* (1993) 69 A Crim R 92, 99 (Hunt CJ).

8. *Osland v The Queen* (1998) 197 CLR 316, 337 (Gaudron and Gummow JJ) 378 (Kirby J).

9. *Osland v The Queen* (1998) 197 CLR 316, 375 (Kirby J).

10. *R v Portelli* (2004) 148 A Crim R 282, 295.

11. *Zecevic v DPP(Vic)* (1987) 162 CLR 645; the defence of excessive self-defence has been reintroduced by statute in New South Wales, South Australia, Victoria and Western Australia: see *Crimes Act 1900* (NSW) s 421; *Criminal Law Consolidation Act* 1935 (SA) s 15(2); *Crimes Act* 1958 (Vic) s 9AC and *Criminal Code* 1913 (WA) s 248(3).

12. *R v Portelli* (2004) 148 A Crim R 282, 293.

13. *R v Conlon* (1993) 69 A Crim R 92, 99 (Hunt CJ) expressing the view that it is a factor to be considered in relation to the reasonableness of a belief; *R v Katarzynski* [2002] NSWSC 613, [26] doubting this proposition.

14. *R v Conlon* (1993) 69 A Crim R 92, 99 (Hunt CJ).

These qualifications may have relevance for the battered woman who seeks to rely on self-defence in circumstances of self-induced intoxication, or where prolonged violence has resulted in a state of mental illness or delusion — situations where the rationality of her belief may be called into question. Indeed, in terms of application, a 'pathological' presentation of a battered woman's actions risks undermining her claim to reasonableness and diverting attention away from the extraordinary circumstances that she faced. However, the general proposition remains: reasonableness must be considered from the perspective of the woman under judgment, 'giving proper weight to the predicament of the accused'.[15] It is apparent then that the common law of self-defence all but requires the fact finder to walk in the shoes of the battered woman in assessing her claim of self-defence.

Yet, to enable judges and jurors to walk in the shoes a battered woman requires more than just an accurate statement of the law. It requires the presentation of comprehensive evidence that informs and educates fact finders of the defendant's 'reality' and the 'general dynamics of abusive relationships.'[16] In this regard, Stubbs and Tolmie argue that Australian decisions demonstrate a preoccupation with the extraordinary psychology of battered women to the exclusion of a full appreciation of their extraordinary situations.[17]

Arguably, then, it is not the doctrinal content of the law of self-defence, but its application in individual cases, which has excluded the experience of battered women, and undermined their claims to reasonableness.[18] In recognition of this, law reform in Victoria, Western Australia and Queensland has focused, to greater and lesser degrees, on both the doctrinal content of the law of self-defence and its application. The essential features of these reforms need to be considered, along with the extent to which they enable battered women to meet the challenge of reasonableness.

Law reform and the challenge of reasonableness

Victoria

On 23 November 2005, a new legislative scheme for self-defence commenced in Victoria. Whilst displacing the common law,[19] it retains the essential subjective and objective elements of the test in *Zecevic*. To warrant acquittal, the reasonable possibility that the accused held a subjective belief in the necessity of the actions taken in self-defence must exist,[20] and this belief must be based on reasonable grounds.[21] To dispel any doubt with respect to imminence and proportionality, the reforms make clear that in circumstances of family violence, self-defence may be claimed where the killer 'is responding to harm that is not immediate' or where the 'response involves the use of force in excess of the force involved in the harm or threatened harm'.[22] The killer is, however, only entitled to rely on a plea of self-defence where they have used lethal force believing themselves or another person to be at risk of death or serious injury.[23] In the event that a woman kills with an honest but unreasonable belief in the necessity of taking defensive action, she will be found guilty of defensive homicide rather than murder[24] — in effect, a reintroduction of the doctrine of excessive self-defence in that defensive homicide is an offence akin to manslaughter.

In terms of the doctrinal content of the reforms, it is worth noting that the Victorian Law Reform Commission had recommended the enactment of the New South Wales formulation of self-defence, which was based on the Model Criminal Code.[25] This formulation requires an actual belief in the necessity of the conduct, and, that the conduct is a *reasonable response* in the circumstances as the person perceives them.[26]

While enshrining the importance of the subjective experience of the accused in the assessment of reasonableness, the key departure of this formulation from the common law is that reasonableness is to apply only to the response, not to the perception of the threat. A literal interpretation would then allow an unreasonable perception to found a claim of self-defence. However, Santow JA, sitting on the New South Wales Court of Criminal Appeal, has questioned the extent of any departure from the common law, concluding that '[c]odification of what constitutes "self-defence" thereby refines and elaborates on the common law elements, but without introducing any major change.'[27]

The most significant reform to the law of self-defence introduced in Victoria is directed to the application of the law of self-defence and the evidence that may be relevant to determine the claim where 'family violence' is alleged. Under s 9AH (3) (a)-(f) *Crimes Act 1958* (Vic) evidence about the history of the relationship and violence within the relationship should include the:

- cumulative effect, including the psychological effects of the violence on the person;
- social, cultural and economic factors that impact upon the person;
- general nature and dynamics of the relationship affected by family violence, which would include the possible consequences of separation;
- psychological effect of violence on people in such relationships; and
- social or economic factors that impact on people in such relationships.

These can be adduced to prove both the subjective and objective limbs of the test — that is the existence of the belief, and as to whether there were reasonable grounds for it. Such reforms put beyond doubt that the reasonableness of a battered woman's actions must be evaluated by reference to 'what it must really be like to live in a situation of ongoing violence'.[28]

Western Australia

In contrast, despite a Law Reform Commission Recommendation,[29] changes designed to facilitate the admission of expert evidence to enable a holistic consideration of the circumstances of victims of prolonged family violence, were not introduced in Western Australian reforms. Instead, the reforms,

15. *Zecevic v DPP(Vic)* (1987) 162 CLR 645, 662–663.

16. *Osland v The Queen* (1998) 197 CLR 316, 376 (Kirby J).

17. Julie Stubbs and Julia Tolmie, 'Falling short of the challenge? A comparative assessment of the Australian use of expert evidence on the Battered Woman Syndrome' (1995) 23:3 *Melbourne University Law Review* 709, 730.

18. Elizabeth Sheedy, Julie Stubbs and Julia Tolmie, ' "Defending Battered Women on Trial" the Battered Woman Syndrome and its limitations' (1992) 16 *Criminal Law Journal* 369, 395.

19. See *R v Parr* (2009) 21 VR 590, but note discussion of the judicial practice of directing in terms of the common law self-defence and statutory self-defence until such time as determinative ruling made by Court of Criminal Appeal.

20. *Crimes Act 1958* (Vic) s 9AC and 9AE.

21. *Crimes Act 1958* (Vic) s 9AE.

22. *Crimes Act 1958* (Vic) s 9AH(1)(c) and (d).

23. *Crimes Act 1958* (Vic) s 9AC.

24. *Crimes Act 1958* (Vic) ss 9AC and 9AD.

25. Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) 61, Recommendation No. 6, 89–90.

26. *Crimes Act 1999* (NSW) s418; see also *Criminal Code* (ACT) s 42 and *Criminal Code* (NT) s 29 have adopted the Model Criminal Code formulation, though in the Northern Territory, the perception itself must also be reasonable.

27. *R v Trevenna* [2004] NSW CCA 43 (Unreported, Santow JA, 4 March 2004) [38].

28. Rebecca Bradfield, in Victorian Law Reform Commission, above n 25, 135.

29. Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report* (2007) 97, Recommendations 41 & 42, 293–294.

It is apparent then that the common law of self-defence all but requires the fact finder to walk in the shoes of the battered woman in assessing her claim of self-defence.

which commenced on 1 August 2008, targeted the definition of self-defence, thereby addressing its application only indirectly.

The pre-reform test of self-defence in the Western Australian Criminal Code applied only where defensive action was taken in response to an assault.[30] An 'assault' requires the threatened application of force by a batterer with a 'present ability to effect' his purpose.[31] This invariably involved a requirement of 'imminence'.[32] Although judicial interpretations of the requirement of imminence have, at times, stretched the meaning to embrace the experience of battered women,[33] the continued existence of the need for imminence is a clear expression of the historically derived, gender biased, 'one-off physical attack' model of self-defence.[34] It is this same model that traditionally incorporates an equally gendered requirement of proportionality[35] and diverts, or precludes, close consideration being given to whether a woman's actions are reasonable in all of the circumstances in which she finds herself.

Giving effect to these concerns, the new test of self-defence under s 248 *Criminal Code 1913* (WA) makes no reference to an assault, and goes further to make clear that a person may act in self-defence even where they are defending themselves, or another, against 'a harmful act that is not imminent'.[36]

In conformity with the common law 'subjective *and* objective' formulation, the pre-reform test of self-defence in Western Australia required a belief, on reasonable grounds, that it was necessary to do what he or she did.[37] And, as with the common law, the determination of whether reasonable grounds existed was to be ascertained by reference to the circumstances of the accused.[38]

In accordance with the view of the Law Reform Commission,[39] section 248(4)(a)-(c) requires, with respect to the defensive action, a subjective belief in its necessity; that it be 'a reasonable response in the circumstances as the person believes them to be'; and that 'there are reasonable grounds for those beliefs.' This test, therefore, includes a subjective and objective assessment of both the nature of the threat and the necessary response. As with the Victorian reforms, the Western Australian legislation re-introduces the doctrine of excessive self-defence, such that a person who kills with an honest, though unreasonable, belief in the necessity of taking self-defensive action, will be guilty of manslaughter rather than murder.

This formulation adds little to the common law, understood in terms of its proper interpretation. In particular, the meaning of 'reasonable grounds' is not clarified, leaving it open to ongoing judicial interpretation. This may be contrasted with the Victorian approach, which makes clear that circumstances of family violence are integral to the assessment of the existence of reasonable grounds. Western Australian reforms clearly direct attention to a consideration of the circumstances in which a battered woman finds herself. However, the extent to which this will require judges and jurors to walk in the shoes of battered women to evaluate reasonableness will ultimately be subject to the judicial application of the defence.

Queensland

Section 304B *Criminal Code 1899* (Qld) provides a specific defence to murder for battered persons. In so doing, it represents a first for Australia. The provision, which commenced on 10 February 2010, operates where 'the deceased has committed acts of serious domestic violence' against the accused.[40] In echo of the standard common law formulation of self-defence, s 304B requires that the defendant believed their act was necessary for self-preservation from death or grievous bodily harm. And that the defendant had 'reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.'

However it is in the result that s 304B and the common law part ways. Under the common law, and the formulations of the test of self-defence in Victoria and Western Australia, the existence of such a belief warrants acquittal. This result is an almost self-evident consequence of a finding that the use of lethal force was rational and reasonable. By contrast, s 304B operates as a *partial* defence, reducing murder to manslaughter. Thus, despite the existence of reasonable grounds for a belief that it was necessary to use lethal force in self-defence, the killer remains subject to punishment — a clear though seemingly contradictory indication that their actions were neither reasonable nor rational.

The enactment of s 304B leaves untouched the test of self-defence in Queensland — the last remaining jurisdiction in Australia requiring that defensive action only be taken in response to an assault. Therefore, where a battered woman seeks an acquittal, the reform does nothing to ensure that the reasonableness of her actions are assessed by reference to all of the situational and psychological circumstances in which

30. *Criminal Code 1913* (WA) s 248, s 249.

31. *Criminal Code 1913* (WA) s 222.

32. Law Reform Commission of Western Australia, above n 29, 167; see also, *Knight* (1988) 35 A Crim R 314.

33. See particularly *Secretary* (1996) 131 FLR 124 in which the NT Court of Criminal Appeal construed an equivalent provision to apply to circumstances in which the accused had killed her batterer whilst he slept.

34. Law Reform Commission of WA, above n 29, 97, 167.

35. Ibid, 165–166.

36. *Criminal Code* 1913 (WA) s 248(4)(a).

37. *Criminal Code* 1913 (WA) s 248.

38. Law Reform Commission of WA, above n 29, 97, 160.

39. Ibid, Recommendation 23, 172, see also 170.

40. *Criminal Code 1899* (Qld) s 304(1)(a).

she finds herself. It is only in pursuit of a partial defence that the Code makes specific reference to the 'abusive domestic relationship and all of the circumstances of the case.'

As with the pre-reform Western Australian self-defence provisions, aside from the requirement that a person claiming to have acted in justified self-defence was responding to an assault, the formulation of s 271 and s 272 *Criminal Code* 1900 (Qld) largely conforms with the common law. It, too, requires a belief on reasonable grounds that it was necessary to do what he or she did, albeit that this is expressed as a belief that the accused 'cannot otherwise preserve' themselves or others from death or grievous bodily harm. Further, in accordance with the common law, the existence or non-existence of reasonable grounds must be assessed by reference to the circumstances of the accused. [41] This includes, for example, evidence of 'previous threats and assaults'.[42] Indeed, the Queensland Court of Criminal Appeal has made clear that these circumstances include the full violent history of a relationship and that such circumstances, and their impacts, may be made intelligible to the fact finder through the admission of expert evidence.[43] Accordingly, there is a compelling argument that the 'abusive relationship and all of the circumstances of the case' should, in any event, be a critical focus of attention in the assessment of a claim to self-defence in Queensland.

This leads to a real concern about duplication and the impact of this duplication on judicial attempts in Queensland to draw a distinction between defences of self defence and killing in an abusive domestic relationship. Where a woman kills her batterer in circumstances where she is subject to a threat of serious violence, such as to constitute an assault, she may seek to rely on both defences. In such a case, the same essential elements must be considered by the jury. That is, did she honestly believe that it was necessary to do as she did to preserve her life or protect herself from grievous bodily harm? And did she have reasonable grounds for that belief? Given this level of conformity, judicial directions may focus on the fact that s 304B expressly requires consideration of the 'abusive relationship and all of the circumstances of the case', whereas s 271 and s 272 do not. While this distinction may be insignificant as a matter of law, it may be of great practical importance. Where a choice must be made, jurors may incline to the view that a battered woman's actions were *only* reasonable taking into account the violent antecedents. The result: a manslaughter verdict where otherwise a battered woman would have been entitled to an acquittal. Disturbingly, such an outcome would run counter to the overall objective of the reform, intended as it was to ensure that the Criminal Code (Qld) further embrace the experience of those who kill after suffering prolonged abuse.

That being the case, what justification is there for a reform that substantially duplicates the existing defence of self-defence? In fairness to Mackenzie and Colvin, the authors of the discussion paper which led to the enactment of s 304B, it should be noted that:

> [r]espondents were generally opposed to the models for a reformed general law of self-defence which have been developed in other Australian jurisdictions. The concern was that widening the net of the general law of self-defence might protect unmeritorious defendants as well as those who deserve a defence.[44]

Notwithstanding this, there was also a general view that some change was necessary, particularly to avoid the consequences of a murder conviction for victims of serious abusive relationships where other defences have failed; namely, a mandatory life sentence.[45] However, despite seeing the merit of an entirely subjective test of excessive self-defence as a basis for a manslaughter verdict, the authors 'concluded on balance that an objective test should be incorporated'.[46] Further, in terms of application, while the report recommended the adoption of a provision in similar terms to 9AH *Crimes Act 1958* (Vic) to ensure that all situational and psychological circumstances are taken into account, it was not proposed to extend to the complete defence of self-defence. In any event, no such provision has been enacted.

Overall, it is difficult not to conclude that the review has resulted in a compromised outcome, leaving battered women who kill in Queensland in an invidious position compared to their interstate counterparts. So much was all but acknowledged by Mackenzie and Colvin:

> While there may be deficiencies in the existing law and lessons to be learned from the experience of other jurisdictions, a broader inquiry should be conducted before reform is initiated.[47]

Section 304B may well reduce the number of murder convictions for those who kill after being subjected to serious domestic violence. This clearly is its primary purpose. However, it will do nothing to increase the prospect of acquittal for battered women, and may even jeopardise their claims of justified self-defence.

Conclusion

Reasonableness is context dependent. It requires consideration of the rationality of a choice to use lethal force from the perspective of the killer. This does not mean that a woman who kills her batterer was necessarily acting reasonably. Human motivations are varied; some defensible, some not. What it does mean is that to assess the reasonableness of a choice to kill requires engagement with the experience of the killer. It requires those making the judgment to 'walk in her shoes' and make any decisions by reference to her experiences. An honest belief in the necessity of using lethal force is insufficient to warrant acquittal. To succeed requires that this belief be reasonable. But as judicially acknowledged at common law and in Victoria, Western Australia and Queensland, this objective assessment is given colour and character by the battered woman's experience. It is her belief, informed by all of the circumstances in which she found herself, that must be reasonable.

41. *Vidler* (2000) 110 A Crim R 77, 81.

42. *R v Muratovic* [1967] QdR 15, 19–20 (Gibbs J, with whom Lucas J agreed).

43. *R v McKenzie* (2000) 113 A Crim R 534, 547–548 (McPherson JA, with whom McMurdo P and Dutney J agreed); *R v Babsek* [1998] QCA 116 (unreported, 2 June 1998, Moynihan J, with whom Davies and McPherson JJA agreed) [11].

44. Geraldine Mackenzie and Eric Colvin, *Homicide in Abusive Relationships: A Report on Defences* (2009), 4 <justice.qld.gov.au/__data/assets/pdf_file/0018/21618/homicide-in-abusive-relationships-report-on-defences.pdf> at 7 August 2010 [1.23], [3.32]. See reference to powerful submissions in support of more general reform from a minority of respondents, including Zoe Rathus [3.28].

45. Ibid [1.20], [1.32].

46. Ibid [3.50].

47. Ibid [3.32].

An honest belief in the necessity of using lethal force is insufficient to warrant acquittal. To succeed requires that this belief be reasonable.

Yet despite this judicial acknowledgment, the challenge of reasonableness has remained, in doctrine and application. It has been a clear motivating issue for legislative change. Of the three states considered, Victoria has gone furthest to ensure engagement with the experiences of battered women. Despite largely retaining the common law formulation of self-defence, the Victorian amendments put beyond doubt that reasonableness must be considered by reference to the battered woman's full situational and psychological predicament. There is a provision for expert evidence about the dynamics and effects of family violence. This is critically important since we know that, for a number of reasons, battered women are often not considered the best witnesses. An expert voice may be needed to explain why the defendant had no other recourse; why her action may have been pre-emptive and/or why her action was reasonable.[48] In contrast, the Western Australian reforms have largely focused on the doctrinal content of the law, emphasising to some extent the importance of considering the subjective experience of those who claim to have acted in self-defence. The ability for jurors and judges in that State to walk in the battered woman's shoes may be limited by the reforms, which did not include provisions equivalent to Victoria's 9AH. The Queensland reforms have emphasised the importance of considering 'the abusive relationship and all of the circumstances of the case' only in so far as this may warrant a finding of manslaughter, rather than murder. This may reduce murder convictions for battered women, avoiding the application of a mandatory life sentence. However, there is a real risk that the enactment of s 304B will hinder efforts in that State to have judges and jurors engage with the 'reality' of battered women in assessing their claims to justified self-defence.

48. Above n 1, 125–128.

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