The Applicability of the Battered Woman Syndrome (BWS) Model to Gay Males and Lesbian Women Who Kill Their Intimate Batterers in Self-defence

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A thesis submitted to the University of Western Sydney in fulfilment of the requirements for the degree of Master of Laws (Honours)

December 2012
STATEMENT OF AUTHENTICITY

The work presented in this thesis is, to the best of my knowledge and belief, original except as acknowledged in the text. I hereby declare that I have not submitted this material, either in full or in part, for a degree at this or any other institution.

..........................................................

Ana Torres Ahumada

December 2012
Dedicated to:

My parents Ramiro Torres Carmona Y Carmen Ahumada Muniz,
whose passion for education and knowledge I inherited,
for always encouraging me to pursue further learning.

My precious children Brandon and Giselle, my greatest source of love and inspiration,
for the immeasurable and unconditional love that they offer me;
whereby I find the strength and courage to achieve everything. Thank you
for smiling at me while holding my hand during this roller coaster journey.
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Abstract

The defence of self-defence, like much of the common law, has strongly male-centric origins and emphases. Judges and juries have little difficulty understanding the theory of the case presented to them by defence counsel when self-defence is argued to have been necessary as a result of an attack by a stranger or after a bar brawl. It is argued that what is conceptually more difficult for jurors is the application of the defence of self-defence in circumstances where an alleged perpetrator of an assault or homicide does so in circumstances of intimate partner violence, and that this is particularly exacerbated in circumstances where the victim and the alleged offender are of the same gender.

The last two decades have witnessed a great deal of advocacy and law reform inquiry addressed towards improving the response of the criminal justice system to killings committed by battered individuals who kill their intimate partners. Most of the developments in the area have focused on the heterosexual female victim of spousal or partner abuse, the so-called ‘battered woman’. Since 1991, in an attempt to alleviate the difficulties that the gender-biased defence of self-defence poses to battered women, expert evidence in Battered Woman Syndrome (‘BWS’)—a model of intimate violence developed during the 1970s to explain the experience and conduct of female victims of abusive heterosexual relationships—has been admissible during trials in Australia of battered heterosexual women for the killing of their intimate batterers. With the increasing utilisation of expert evidence in BWS, judges and jurors are becoming more exposed to arguably legal justifications for violent behaviour that would otherwise be considered irrational and criminal conduct.

However, the gendered focus of BWS results in significant barriers for battered gay and lesbian individuals who kill their intimate partners in self-defence. Simply, the
conceptualisation of intimate partner violence, as proposed by BWS, is heterosexist. Accordingly, the combination of the law of self-defence and BWS does not adequately take into account the exclusive particularities and unique dynamics of same-sex intimate violence. It is argued that the responses of alleged perpetrators in killing their same-sex partners may be the only reasonable response. This thesis argues that the current law of self-defence in New South Wales, at common law and under statute, is inadequate for gay and lesbian defendants who have been in violent intimate partner relationships. Although legislative amendments in New South Wales have offered the potential for better understanding self-defence used by battered individuals generally, the lack of knowledge that jurors may have regarding intimate violence in same-sex relationships, coupled with the homophobic and heterosexist attitudes held by many, may preclude these alleged offenders from using the defence of self-defence successfully.

This thesis suggests that in order to provide a more just trial for these alleged offenders one of two options must be undertaken. First, instead of requiring defendants to rely on the inappropriate BWS, to allow the use of a gender-neutral theory of intimate violence. Second, to modify the law of self-defence so that it better reflects the circumstances of all victims of intimate partner violence who kill their batterers.
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CHAPTER 1: INTRODUCTION

1.1 Overview

For almost as long as it has been recognised to exist in modern Western societies, intimate violence between same-sex couples has attracted only what may reasonably be described as inadequate judicial treatment and limited legislative action. In fact, the majority of the legal measures aimed at addressing this issue have been unhelpful, since these measures have tended, firstly, to provide assistance mainly for the heterosexual victims of spousal and partner abuse and, secondly, to heterosexualise the issue by encouraging the commonly-assumed misconception that domestic violence is confined to women as victims and men as perpetrators.

This thesis argues that the willingness of the courts in recent years to allow the admissibility during trial of evidence of Battered Woman Syndrome (‘BWS’) —a model of intimate violence developed some decades ago to explain the experience and conduct of female victims of abusive heterosexual relationships—to support claims of self-defence by battered gay and lesbian individuals who kill their intimate partners is evidence of the continuing inadequacy of the response of our legal system to same-sex victims of intimate violence, for while BWS is helpful in assisting some women defend murder charges, it is a gender-specific psychological concept that actively inhibits successful defences to murder for same-sex perpetrators who have been battered.

In Australia and overseas BWS has been the subject of academic critique. One of these criticisms is that while BWS is helpful for some defendants, it poses problems for battered individuals who do not fit within the stereotype of the ‘good battered woman’. This is a
stereotype created by the syndrome itself. Consequently, if a battered defendant fought back, retaliated, armed herself with a weapon or enlisted the help of others, this defendant is not a good battered woman as she did not fit within the straitjacket of the docile and complacent woman created by the model. Thus the discrepancy between her conduct and the stereotype makes the defendant unworthy of the jury’s mercy. There are alternative ways besides BWS for battered gay and lesbian defendants to argue self-defence and show that their actions were reasonable. One of these methods is Battered Person’s Reality (‘BPR’) or situational context evidence. This type of evidence is discussed in Chapter 7 of the thesis.

Another issue associated with BWS is that it suggests that the experience of intimate violence is confined to women as victims and males as perpetrators. Such a conceptualisation of intimate violence does not include the experiences of the victims of same-sex intimate violence. From this perspective, BWS reflects and promotes the heterosexist character of the law as it promotes a definition of intimate violence which does not include same-sex couples. This issue is best illustrated when BWS, a model of intimate violence originally developed through drawing on the experience of women victims of violence in heterosexual relationships, is applied to a case in which a gay male or a lesbian woman has killed her or his intimate abusive partner in circumstances of self-defence.

The major argument of this thesis is that if evidence in relation to BWS is admitted during the trial of such a gay male or lesbian woman defendant, it will exacerbate rather than alleviate his or her problems during the trial. The thesis will explain that BWS offers little if no support to battered gay male and lesbian women defendants who seek to rely upon it. This is mainly because BWS is a heterosexual model by nature and therefore a gender-specific theory which in many non-traditional scenarios of intimate violence exposes the defendant to being stereotyped as a bad battered woman or not as a person who has been battered at all.
Moreover, it exposes these defendants to the same issues and misconceptions to which battered women have been exposed. Further, BWS does not assist members of the jury to understand the context in which same-sex violence occurs. Nor does it elucidate the exclusive particularities and specific dynamics of same-sex violence that may explain why a gay male or lesbian woman may not leave his or her batterer, or why killing their batterer may be a reasonable response in a battered gay or lesbian person’s mind.

The thesis also argues that heterosexism and homophobic attitudes directly affect the development of abusive relationships for same-sex couples, as these are additional stressors in their relationships. It explains that there are additional forms of abusive behaviour which are unique to same-sex relationships. The effects of these factors combine to keep intimate violence between same-sex couples even more hidden than intimate violence between heterosexual couples. These are issues which heterosexual couples in abusive relationships do not face to the same extent. One of these issues is living in a society in which some view everyone as heterosexual and homosexuality as immoral. Because of the impact of these factors, many gay and lesbian individuals fail to leave their abusive partners. Similarly, HIV-positive status for gay males and the ‘lesbian utopia’\(^1\) for lesbian women may prevent these defendants from leaving their intimate batterer. If jurors do not gain an understanding of intimate violence within couples of the same sex, factors which are extremely relevant would be disregarded.

The thesis argues that, although changes to the law of self-defence in New South Wales have opened the potential for greater use of BWS by battered individuals generally, in the context of the current law, BWS is still a limiting factor both for homosexual individuals who kill

\(^1\) According to this concept, violence is perpetrated by males. For further reference see Lori Girshick, *Woman to Woman Sexual Violence: Does She Call It Rape?* (Northeastern University Press, 2009) 49.
their intimate batterers and for all battered individuals who do not fit within the stereotype of the good battered woman. The thesis concludes that, at a practical level, jurors’ lack of knowledge regarding intimate violence in same-sex relationships coupled with the homophobic and heterosexist attitudes held by many, may preclude gay male and lesbian women victims of intimate violence who have killed their abusive partners in circumstances of self-defence from arguing that defence successfully. Given the lack of legislative clarity provided to judges and jurors in the area of self-defence, battered gay and lesbian defendants are less likely than battered heterosexual defendants to be able to argue self-defence successfully.

The thesis first examines the importance of BWS as a model of intimate violence. It explains that the relevance of its admission during the trial of battered defendants is the recognition by the legal system that self-defence laws treat women disadvantageously. However, the thesis will argue that as a response to ameliorate the situation, expert evidence in BWS was prescriptive and inadequate for many defendants including some battered heterosexual women. The thesis also endorses the criticism expressed by feminist legal scholars that BWS is inadequate for battered women as it tends to portray women as abnormal, irrational, passive and helpless. It is argued that the law of self-defence should be able to accommodate within itself the responses of women to violence. Battered women should not be required to medicalise their experiences and responses to violence in order to access the defence successfully. The first step to this end is recognising that the male response to aggression is not the only reasonable one. This issue was at the centre of legal inquiry by the Australian Law Reform Commission (‘ALRC’) in 2010. The thesis explores recommendations by the ALRC that the law of self-defence be changed so as to accommodate victims of intimate violence who kill their abusers.
The thesis suggests that in order to deliver a fairer outcome to these victims of intimate violence one of two options must be undertaken. First, to use a gender-neutral theory of intimate violence in place of BWS or, second, to modify the law of self-defence so as to make it adequate for all victims of intimate violence who kill their abusive partners.

1.2 Chapter Structure

This chapter has introduced the central arguments of this thesis. It now outlines the structure of the thesis and previews the development of the major arguments and objectives of the research.

Chapter 2 explains the history of the ‘discovery’ of domestic or intimate violence by professionals. It discusses the prevalence and incidence of intimate violence, including the incidence of gay and lesbian intimate violence and homicide, and provides a context for the rest of the thesis. The chapter describes BWS as a model of intimate violence. It explains the purpose, nature and structure of the BWS model. It provides an explanation of the two most important parts of the model: the cycle of violence, including its stages; and the theory of learned helplessness. The chapter discusses the control to which the victim of intimate violence is subjected, in addition to the different forms of abuse, and the dynamics, manifestations and effects of that violence. The chapter provides a conceptualisation of same-sex intimate violence and explains how heterosexist and homophobic attitudes amongst other personal stressors mould the dynamics and development of a violent relationship between same-sex partners. The chapter argues that these factors, coupled with the lack of assistance and support services available to the victims of same-sex battering, contribute to keeping same-sex intimate violence closeted and may prevent the victim from leaving the abusive relationship and seeking help.
Chapter 3 examines the theoretical framework surrounding the right to self-defence in Australia. It explains the distinction between defences of justification and defences of excuse and why differentiating between justifiable and excusable homicide will assist us in understanding why the element of ‘reasonableness’ remains part of the law of self-defence. The chapter explores self-defence as a defence of justification and discusses the conceptualisation of the right to use self-defensive force from both a subjective and objective philosophical perspective. The chapter argues that several consequentialist and rights-based approaches, among others, naturally support self-defensive killing in circumstances where the defendant is a battered spouse or partner. The chapter thus lays the foundation for the argument that battered individuals are justified in killing their intimate batterers under the same jurisprudential basis that supports self-defensive killing itself.

Chapter 4 explains the current law of self-defence in New South Wales under both the common law and under s 418 of the Crimes Act 1900 (NSW), and lays the foundations upon which the main argument of the thesis will be established. The chapter discusses the elements required to be satisfied by an accused who seeks to rely on the defence successfully in accordance with the decision of the High Court of Australia in Zecevic v Director of Public Prosecutions (Vic) (‘Zecevic’). It also makes a brief reference to the pre-Zecevic common law view of self-defence. The chapter discusses the two limbs of the test in Zecevic and explains why, if this test is used, the killing of an intimate batterer would lead the jury, if they are not further assisted in understanding the situation, to the conclusion that the defendant’s actions were neither reasonable nor necessary. The chapter then discusses the nature of the 2002 amendments to the Crimes Act 1900 (NSW) and the new test under s 418. The chapter

\[2\] (1987) 71 ALR 641.
considers how this test was interpreted in \textit{R v Katarzynski} (‘\textit{Katarzynski}’)\textsuperscript{3} and explains the difference between the common law test in \textit{Zecevic} and the new statutory test.

Chapter 5 is very important to the central argument of the thesis as it explains how BWS and the law of self-defence are interrelated. In doing this, the chapter discusses some of the most notorious criticisms of BWS made by both academic and judicial authorities. The chapter explores some of the most important decisions involving BWS. Some of these decisions were handed down by Australian courts and others by courts in other common law jurisdictions. The chapter pays special attention to the common law preoccupation with reasonableness and argues that, without a proper appreciation of the battered woman’s predicament, the reasonableness of her actions cannot be adequately assessed. This chapter shows that the practical significance of accepting expert evidence in BWS into a courtroom was the acknowledgment that our legal system is based on heterosexist male discourse and experience and that historically the criminal law has treated women disadvantageously. The chapter sustains the argument that the legislative amendments incorporated in New South Wales have not, at a practical level, made self-defence available for battered defendants since jurors assessing the culpability of these defendants continue to associate self-defence with the traditional scenario of two male strangers who engage in a one-off pub brawl. This erroneous conceptualisation of the defence, espoused with the lack of knowledge jurors may have about intimate violence, renders self-defence unavailable at a practical level for battered defendants. In addition, the statutory reintroduction of excessive self-defence may jeopardise the possibility that battered defendants pleading self-defence may obtain a full acquittal, as jurors may opt to find them guilty of manslaughter by operation of excessive self-defence

\textsuperscript{3} [2002] NSWSC 613 (9 July 2002).
instead. The chapter argues that this risk is real, considering that jurors may struggle to walk in the battered defendant’s shoes.

Chapter 6 contains the central argument of the thesis. The chapter explains that the problems faced by battered gay and lesbian defendants who kill their batterers in self-defence are even greater than those faced by battered heterosexual women. While these defendants face the same difficulties some heterosexual women have regarding the adaptability of the current law of self-defence to killings committed in the context of a prior history of violence, there are additional stressors in same-sex relationships which directly impact on the development of violent relationships. There are also unique features to these relationships which need to be understood by jurors and judges if a fair assessment of the accused’s culpability is to be made. The chapter explains how heterosexism and homophobia contribute to, and to some extent mould, the dynamics between couples of the same sex involved in an abusive relationship. It argues that while BWS is helpful in assisting battered women to defend murder charges, it is a gender-specific psychological concept which inhibits successful defences to murder for same-sex perpetrators who have been battered. Other reasons why BWS is inappropriate for battered defendants are also discussed.

Chapter 7 summarises the themes and issues that emerge from this research and discusses the implications of these in the context of legal reform. The thesis will propose that in order to provide a fairer outcome to homosexual defendants who have killed their intimate batterers, one of two options should be adopted. Considering that BWS is not effective, a better solution is to adopt a gender-neutral theory of intimate violence in its place. Any such gender-neutral theory should not medicalise the experiences of battered individuals, nor should it create a new stereotype of the ‘battered individual’. Perhaps a better view is to refocus on the role of the expert as a translator of the experiences and effect of the
predicament suffered by the victims of battering. In other jurisdictions, initiatives to change the effect that the use of expert evidence in BWS has upon battered defendants, has led to the introduction into the courtroom of expert evidence in battering and its effects. The chapter will argue that this change is a positive one, considering that the effects of intimate violence vary according to the social and cultural contexts of individuals’ lives and these include differences in the pattern, duration and severity of the battering. Thus institutional and social responses to the batterer and the battered partner, in conjunction with many other factors characteristic of both individuals, must be considered to frame the violence and its context before the jury. This evidence, also known as social framework evidence, may benefit a battered gay or lesbian defendant as it might assist the court to better assess the circumstances to which the accused was responding. Another suggestion is to allow during the trials of these victims non-medicalising expert evidence explaining the experience of living in intimate violence. This evidence, known as Battered Person’s Reality (‘BPR’), seeks to assist judges and jurors in understanding what might constitute reasonable behaviour in an intimate violence situation. Such testimony emphasises the diversity of responses to ongoing violence and aims neither to reinforce stereotypes associated with the victims of intimate violence nor to medicalise their predicament. Alternatively, another option may be to modify the law of self-defence to make it adequate for all victims of family violence who kill their intimate batterers. The chapter considers the reforms proposed by the Victorian Law Reform Commission in 2001 as a model for introducing broader evidence about intimate violence into the courtroom, and discusses the possibility of a separate defence for battered defendants in an abusive domestic relationship, as considered by the Australian Law Reform Commission in 2010 and recently introduced into the Criminal Code (Qld). The chapter argues that, rather than creating a separate defence for the victim of intimate violence who
kills, and thus dealing with their predicament in an atypical way, self-defence doctrine should be expanded so as to accommodate the experience of these victims.

1.3 In Summary

This chapter has outlined the major arguments and topics developed in this thesis. It has provided the reader with a structure of each of the chapters of the thesis and its major objectives.

The following chapter will discuss the nature, impact and prevalence of intimate violence between both heterosexual and same-sex couples. The chapter will also introduce BWS as a model of intimate violence.
CHAPTER 2: INTIMATE VIOLENCE

2.1 Introduction

Despite the criticisms surrounding BWS as a model of intimate violence and the controversy that it has caused in academic circles since its inception, the term ‘Battered Woman Syndrome’ provided one of the first professional understandings of intimate violence to be adopted in modern Western legal circles. The primary definition of the syndrome was provided by Dr Lenore Walker, a pioneering researcher in the area of intimate violence, who in 1979 coined the term ‘battered woman’ for heterosexual women victims of spousal abuse.4 Since then, Dr Walker’s model of heterosexual intimate violence has guided policy, education, intervention and the responses of our legal system to the issue of intimate violence.5 The use of BWS in a legal context began as a way to support claims of self-defence in cases where battered women had perpetrated acts of violence against their violent male partners. In a legal context BWS operates as a mechanism for explaining the conduct of battered women to jurors. If the responses to violence of these women are not contextualised, jurors, like any other individuals who either lack knowledge of, or have not been involved in, battering relationships, may perceive their reactions as unreasonable, confusing or disproportionate. Although BWS has managed to explain the behavioural and cognitive responses of battered women, and this has led the syndrome to achieve some legitimacy in psychological and legal circles, it has done so at the expense of forcing a construction of our image of intimate violence which assumes a male batterer and a female victim. Its rigid


5 While it is acknowledged that a shift has occurred since the 1970s regarding community awareness and attitudes towards intimate violence and that, parallel to this, substantial legal reforms have been developed, such efforts have mainly been directed towards battered heterosexual women.
structure does not only seek to typify the responses of the victims of intimate violence by creating a stereotype of the ‘battered woman’, it also poses problems for individuals whose responses to violence or personal characteristics are not in alignment with that stereotype. Some of these individuals are gay male and lesbian women defendants who, after being exposed to a prolonged period of violence, have killed their same-sex batterers.

This chapter will first discuss the prevalence of intimate violence among both heterosexual couples and couples of the same sex. Second, it will explore the process by which intimate violence is conceptualised and acknowledged as an undeniable societal pathology. Third, the chapter will proceed to discuss BWS as a model of intimate violence. In addition to providing a definition of the syndrome, the discussion covers the origins of the syndrome, its development and inextricably heterosexual nature. This enables the reader to become familiar with some of the innate anomalies of BWS which foster some of the major arguments of this thesis. Fourth, the chapter will provide an exploration of same-sex intimate violence, its nature, and the reasons why victims of same-sex battering may decide to stay in abusive relationships. Some of these reasons do not exclusively relate to same-sex couples whereas some others—such as HIV-positive status for gay males, the ‘lesbian utopia’ for lesbian women and the impact of heterosexism and homophobia—are unique to same-sex relationships and also contribute to keeping the issue of same-sex intimate violence out of the public sphere. The chapter will explain that intimate violence and its cycle may be experienced by both heterosexual and homosexual individuals alike is not sufficient; such commonality does not significantly recognise the differences between the two experiences.

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created by a couple’s shared gender. Finally, the chapter will discuss the little support and assistance that society and the criminal justice system offers to these defendants. The chapter argues that the police and the courts have historically been heterosexist institutions in which homophobia may exist, and that awareness by gay and lesbian individuals of this issue may prevent them from adopting legal measures to put an end to the violence they experience from their batterers or from seeking help outside their abusive relationship.

2.2 The Prevalence of Intimate Violence

A significant number of all homicides involve intimate partners. According to a survey conducted by the Australian Bureau of Statistics in 2006, titled Personal Safety, Australia, approximately one in three Australian women have experienced physical violence during their lifetime. The same study indicates that nearly one in five women have suffered some form of sexual abuse, and nearly one in five have experienced violence by a current or previous partner. Similar research published in 2004 reveals that one-third of Australian women who have a former or current intimate partner reported experiencing some form of

7 Instead of resorting to BWS to justify why the victims of same-sex battering fail to leave their abusive partners, more attention should be given to the victim’s resources, and his or her social and family gregariousness, maturity, culture, and even sexuality, as these factors may impact upon not only the batterer’s efforts to limit the victim’s autonomy but also upon the effect that such efforts have on the victim. In fact, such variances not only condition the victim’s perception of helplessness, but also reduce his or her ability to understand the batterer’s power, the seriousness and impact of his or her threats, and the likelihood that the batterer would carry out those threats: Amy Mille, Ronald Bobner and John Zarski, ‘Sexual Identity Development: A Base for Work with Same-sex Couple Partner Abuse’ (2000) 22(2) Contemporary Family Therapy 190, 195.


physical, sexual or psychological violence by that partner. Unfortunately, these acts of violence against women may culminate in them losing their own lives, or may lead them to take away the life of their aggressor in self-preservation. Overall, the results vary depending on definitional and methodological factors, although some of the estimates tend to fall within the 20-35 per cent range, indicating that intimate violence is a reality faced by many women and that it causes many of them to lose their lives.

The majority of the research available on intimate violence and intimate partner homicide has been based upon studies conducted into heterosexual relationships. Although research specifically into the prevalence of intimate violence in same-sex couples has become more common in recent years, parallel research on same-sex intimate partner homicide remains scarce. In spite of the fact that research exploring the prevalence of same-sex intimate violence is more limited, researchers and workers in the gay and lesbian community generally agree that the incidence of intimate violence in same-sex relationships is comparable to that in heterosexual relationships. Some researchers indicate that between 15-20 per cent of gay

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10 Jenny Mouzos and Tony Makkai, Women’s Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS) (Australian Institute of Criminology, Research and Public Policy Series No 56, 2004) <http://www.aic.gov.au/publications/current series/rpp/41-60/rpp56aspx>. This study was specific as to the gender of the perpetrator.

11 Jane Mulroney, ‘Australian Statistics on Domestic Violence’, Australian Domestic & Family Violence Clearinghouse Topic Paper (2003) 1-6. The paper reveals some statistics related to the incidence of violence against women. A representative sample of 6300 Australian women was provided by the Women’s Safety Australia Study in Mulroney’s paper. The key results indicate that 23 per cent of women who had ever been married or in a de facto relationship experienced domestic violence by a current intimate partner; 42 per cent of women who had been in a previous relationship reported violence by a previous partner; 12 per cent of women who reported violence by their current partner at some stage during the relationship said they were currently living in fear; 35 per cent of women had experienced violence from their partner during a period of separation.


and lesbian couples are affected by intimate violence. Gay male intimate violence is in fact
the third most severe health problem causing death, behind HIV/AIDS and substance abuse,
facilitating gay men in the world today. It is estimated that around the world approximately
500,000 gay men per year are battered by a violent intimate partner. In a nationwide survey
of the Gay, Lesbian, Bisexual, Transgender & Intersex (‘GLBTI’) community in 2006, the
Australian Centre in Sex, Health and Society reported that 27.9 per cent of the men who self-
identified as either gay, bisexual, queer, not sure, or other, said that they had been in a
relationship where an intimate partner abused them. Similarly, in the United Kingdom, a
nationwide study of the Lesbian, Gay, Bisexual and Transgender (‘LGBT”) community also
conducted in 2006 indicated that 35.2 per cent of men who self-identified as gay, bisexual or
queer reported that they had experienced domestic abuse at some point in a same-sex
relationship. Other studies conducted in 2008 also suggest that the rate of violence is
higher in same-sex relationships if it is taken into account that many gay and lesbian victims
of abusive relationships do not disclose their predicament to researchers.

With respect to lesbian women, during the 1980s a study of 1109 lesbians reported that
slightly more than half of the respondents indicated that they had been abused by a female

14 Mulroney, above n 11, 12.
1990) 14.
16 Ibid.
of GLBTI Australians’ (Melbourne, 2006) 19, 26.
<http://www.bristol.ac.uk/sps/research/projects/completed/2006/rc1307/rc1307finalreport.pdf> 7. See also
Catherine Donovan, Marianne Hester and Melanie McCary, ‘Researching Same Sex Domestic Violence:
19 Dena Hassounheh and Nancy Glass, ‘The Influence of Gender Role Stereotyping on Women’s Experiences of
Female Same Sex Intimate Partner Violence’ (2008) 14 Violence Against Women 310, 312.
partner. In 1990 a study of 90 lesbians reported that 46.6 per cent had experienced repeated acts of violence. Similarly the Ristock study in 1994 of 113 lesbians reported that 41 per cent said they had been abused in one or more relationships. In 2002, a report was published indicating that 68 per cent out of the 72 participants screened who identified themselves as being gay or lesbian, reported experiencing some form of domestic violence in a same-sex relationship. The same study indicated that men were more likely than women to have experienced intimate violence. It should be noted, however, that these studies may not accurately reflect the incidence of violence between couples of the same sex because of the unwillingness of the victims to report or discuss incidents or episodes of violence.

Now that the reader has been provided with an overview of the incidence of intimate violence for both heterosexual and same-sex couples, the paper will proceed to discuss how intimate violence came to be recognised as a societal pathology and the crucial role that BWS played in such recognition.

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20 Ibid.


23 Tod Burke, Michael Jordan and Stephen Owen, ‘A Cross National Comparison of Gay and Lesbian Domestic Violence’ (2002) 18(3) Journal of Contemporary Criminal Justice 231, 238. A study of gay men in abusive relationships reported that, of 52 respondents, most had experienced pushing, shoving or grabbing (79%); restraining or preventing the other one to leave (77%); punching, hitting, or striking with hands or fists (64%); slapping (54%); G S Merrill and V A Wolfe, ‘Battered Gay Men: An Exploration of Abuse, Help Seeking, and Why They Stay’ (2000) 39(2) Journal of Homosexuality 1, 5.

24 Samantha Jeffries and Matthew Ball, ‘Male Same-sex Intimate Partner Violence: A Descriptive Review and Call for Further Research’ (2008) 15 Murdoch University Electronic Journal of Law 134, 142. These incidents are generally considered to be a matter of a personal or private nature between partners. Moreover, heterosexism and homophobic attitudes contribute to the maintenance of the silence of same-sex domestic violence victims. These three factors—lack of disclosure, homophobic attitudes and heterosexism—are inextricably linked to one another.
2.3 Naming the Abuse ‘Domestic Violence’

Although intimate violence is a serious and widespread problem, there is a lack of agreement about its nature, causes and appropriate legal treatment. Researchers and workers in the field come from a variety of personal and professional backgrounds, which has invariably and historically led them to see intimate violence from different and sometimes juxtaposed perspectives.\(^{25}\)

Initially, the term ‘domestic violence’ was adopted by women’s advocates to emphasise the risk to which women were exposed within their own family and household; over time, this term became synonymous with battering.\(^{26}\) Later, a variety of terms were used interchangeably to name the violence that occurred ‘behind closed doors’, and which at the time was believed to affect women predominantly.\(^{27}\) These included: ‘battered wife’, ‘battered woman’, ‘wife abuse’ and ‘wife beating’.\(^{28}\) This early recognition and conceptualisation of violence amongst intimates has guided policy making, legal measures and interventions to date.\(^{29}\)

Initially, when violence amongst intimate partners emerged as a recognisable social pathology during the mid 1970s, empirical knowledge of the issue was limited. Women’s advocates and others who provided support and assistance for women involved in abusive


\(^{28}\) Ibid.

\(^{29}\) Ibid.
relationships started to compile clinical observations about the common responses these women had to the violence to which they were exposed for prolonged periods. Some researchers were able to identify patterns in both the physical and emotional abuse to which women in abusive relationships were submitted and in the responses the women had to the abuse.

Simultaneously, in the 1970s and 1980s, family sociologists studied violence in families and between intimate partners. However, the information obtained by these studies diverged significantly from shelter, hospital and police data with respect to incidence, perpetrators, severity, and context.\(^{30}\) The studies suggested that women were as violent as men in intimate relationships.\(^{31}\) Some women’s advocates rejected these studies as being at odds with the information about domestic violence provided by shelters, hospitals and courts.\(^{32}\) Nevertheless, during the 1980s and 1990s it became apparent that despite early conceptualisations of the gendered nature of intimate violence, males were also being assaulted in the home by their female partners, and intimate violence was occurring in gay and lesbian relationships.\(^{33}\) The term ‘domestic violence’ was reprised as a gender-neutral concept that could encompass all potential forms of spousal or relationship violence.

‘Domestic violence’ may thus be defined in general terms as the systematic exercise of illegitimate power or force and coercive control by one partner, whether heterosexual or

\(^{30}\) Kelly and Johnson, above n 26, 478.

\(^{31}\) Ibid.

\(^{32}\) Ibid.

\(^{33}\) Tomison, above n 27, 3.
homosexual, towards another.\textsuperscript{34} Despite this conceptualisation, the term domestic violence has been used to mean different things to different participants. On the one hand, gender-neutral laws have been enacted in different jurisdictions to identify any act of violence by one partner against another as domestic violence, and for many social scientists as well the term refers to any violence between intimate partners.\textsuperscript{35} On the other hand, for many in the field, domestic violence describes a coercive pattern of men’s physical violence, intimidation and control of their female partners. Although a shared understanding is assumed, there is in fact no universally accepted definition of domestic violence.\textsuperscript{36} More recently it has been contended that ‘domestic violence’ should be used as a global term to encompass all violence within the family setting, and that the terms ‘partner abuse’ or ‘intimate violence’ should be adopted to describe violence in adult intimate relationships.\textsuperscript{37}

Unfortunately, the issue is not the naming of the abuse but the misconceptions surrounding it and, consequently, the way in which some of these conceptualisations have been adopted by our legal system, thus informing the way in which the latter has responded to the issue of intimate violence. One of these examples is the misconception that intimate violence involves women as victims of battering and their male partners as perpetrators. The issue is clearly demonstrated by the adoption of BWS, a model which is heterosexual by nature, during the trials of gay male and lesbian women defendants who have killed their intimate batterers. To legitimise and reflect an understanding of intimate violence which is inclusive


\textsuperscript{35} Tomison, above n 27, 2.

\textsuperscript{36} Ibid.

\textsuperscript{37} Anthony Morgan and Hannah Chadwick, ‘Key Issues in Domestic Violence’ (Australian Institute of Criminology, Summary Paper No 7, December 2009) 1.
of same-sex couples by our legal system, the expert invited to testify during the trial of gay and lesbian defendants should deliver his or her testimony through a gender-neutral theory of intimate violence.

2.4 Battered Woman Syndrome

2.4.1 Dr Walker’s Research: the Path to Battered Woman Syndrome

During the mid 1970s, the silence surrounding the prevalence and impact of physical and sexual violence perpetrated against women by their male intimate partners was broken. In 1979 American psychologist Dr Lenore Walker described the impact that domestic violence had upon these women. She published a study based on interviews with a non-random sample of 120 women from the United States of America, each of whom were at the time or had been victims of intimate partner violence. The interviews with these women led Dr Walker to identify psychological patterns of behaviour within the group. Based on these interviews, Dr Walker postulated two theories directly applicable to women who were exposed to prolonged periods of violence: the theory of the cycle of violence, and the applicability of the theory of learned helplessness to battered women. In 1984 Dr Walker declared these two elements to be the core of the Battered Woman Syndrome. It is known as a ‘syndrome’ because it refers to the association of several clinically recognised features or

38 Tomison, above n 27.


41 Walker, above n 39, 55.

signs which were common or characteristic of women who were exposed to a prolonged period of violence.

2.4.2 The Three Stage Cycle of Violence

This model of violence is unique because it typically explains that violence occurs in repeated cycles, each one having three escalating stages. The first stage is known as ‘the tension building stage’ and it is characterised by minor abusive incidents, sometimes accompanied by verbal and/or emotional abuse. Some minor physical violence could be present. In response, the victim seeks to pacify the assailant by using techniques which were effective in the past. The primary objective of the victim in making these efforts is to prevent further violence and future conflict. According to Dr Walker, during this stage the victim’s passivity reinforces the assailant’s violent aggression. This leads to the second stage, ‘the acute battering stage’.

The second stage is characterised by an uncontrollable explosion of violence by the batterer. Although the severity of the violence at this stage may vary, the victim’s sense of fear and perception of danger are at their most heightened, as would occur when facing death or serious risk of bodily injury. During this stage the victim is extremely frightened, and

44 Ibid.
46 Blackman, above n 43, 101.
47 Walker, above n 39, 70.
stopped by her perception of her assailant as omnipotent, from seeking the required help.\textsuperscript{48} This belief is also enhanced by the assailant’s threats and intimidating behaviour. According to Dr Walker, the discharge or release of violent behaviour invariably would lead to the third stage, ‘\textit{the loving contrition}’ or ‘\textit{honeymoon}’ phase.

This third stage is characterised by the batterer’s apologetic and conciliatory behaviour. It is quite common during this stage for the batterers to attempt to convince their victims of their intention to change.\textsuperscript{49} The batterer exhibits remorse, the victim often believes him, not identifying that these promises were only made as a manipulative tool by the assailant to control her and to keep her in the relationship.\textsuperscript{50} The common response by the victim is to stay in the relationship, to return if she has fled or to take him back.\textsuperscript{51} She feels relieved but confused, expresses optimism and hopefulness.

Over time, the violent stages become more prominent, and outweigh the contrition periods. Some battered women decide to leave or terminate the relationship, but the assailant uses financial, physical, or emotional threats to prevent her from leaving. A very common threat is taking the children away.\textsuperscript{52}

\textsuperscript{48} Ibid.


\textsuperscript{51} Walker, above n 39, 57.

\textsuperscript{52} Ibid.
2.4.3 *Learned Helplessness: Why Battered Women Fail to Leave*

In order to explain why battered women failed to leave their relationships, Dr Walker used the concept of ‘learned helplessness’. According to this concept, the battered woman tries to identify and subsequently modifies the behaviour that she believed caused her abusive partner’s attack. If, despite such efforts, she continues to experience violence from her batterer, she begins to experience a distorted sense of powerlessness, usually accompanied by loss of self-esteem, passivity and extreme docility.

The theory of learned helplessness was originally developed by Dr Martin Seligman, an American psychologist who in 1967 sought to assess the impact of physical punishment with respect to the probability of avoidance and cessation as a response. The empirical foundations of Seligman’s work were studies conducted on laboratory animals which were repeatedly subjected to electrical shock from which they were initially unable to escape and which they would later fail to escape from when escape became possible. In fact, rather than escaping, these animals would carry on with the behaviour they had adopted or developed to minimise the effect and pain of the shock. Dr Seligman’s preliminary studies were conducted on rats. These studies showed that resistance decreased systematically as a function during punishment. In 1967, Dr Seligman conducted three sets of experiments...

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54 Ibid.
56 Ibid.
57 Ibid.
directed towards the study of behavioural psychology which would subsequently lay the foundation for the concept of ‘learned helplessness’.

The first experiment was conducted using 32 dogs, divided into groups. Each dog was transported to an individual compartment or cubicle where the experiments were to be conducted. The animals were exposed to inescapable shock and subjected to instrumental avoidance training. The findings indicated that prior exposure to inescapable shock interfered with the subsequent acquisition of instrumental avoidance. The second experiment revealed that interference through shock affected instrumental motor responses. The third experiment indicated that the effect of inescapable shock upon instrumental escape avoidance response could disappear quickly. Further studies showed that prior exposure to violence interferes with the ability to learn in a situation when avoidance or escapes are possible.58

Seligman used the concept of learned helplessness to explain certain forms of psychological paralysis by using social learning and cognitive-motivational theoretical principles. He suggested that animals and humans exposed to violence learn that ‘reinforcers’ 59 are uncontrollable.60 Reinforcers in this context are consequences that follow after a particular behaviour has been exhibited, which increase the probability that the behaviour will be


59 The term ‘reinforce’ means to strengthen, and it is used in psychological circles to refer to any stimulus which strengthens or increases the probability of a specific response: AllPsychONLINE, Psychology 101, Ch 4: Learning Theory and Behavioural Psychology (29 November 2011) <http://allpsych.com/psychology101/reinforcement.html>.

60 Seligman, above n 58.
produced in the future. The consequences can be negative⁶¹ or positive.⁶² In summary, Seligman argued that experience with uncontrollable trauma basically has three effects:

1. Individuals become passive while facing the trauma.

2. Individuals experience retardation at learning,⁶³ so that their responses control and alleviate trauma.

3. Individuals show more stress with trauma they cannot control than with equivalent controlled trauma.⁶⁴

Seligman suggested that this maladaptive behaviour appears in a variety of species, including humans. In his later work, Seligman explained how victims may learn during the victimisation relationship that responding is futile.⁶⁵

Dr Walker argued that similarly, over time, battered women would adopt a state of psychological paralysis which prevented them from perceiving or acting on opportunities to escape the violence. And, like the subjects of Seligman’s experiments, the battered women would passively accept their situation and stop making attempts to leave the battering

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⁶¹ When an activity, item or individual is removed following a behaviour, and it increases the likelihood that the behaviour will occur again, it is a negative reinforcer.

⁶² When a consequence that results in gaining or maintaining access to a desired event is presented following a behaviour, and it increases the likelihood that the behaviour will occur again, it is a positive reinforcer.

⁶³ Or inability to learn that responding is effective.

⁶⁴ Seligman, above n 58.

⁶⁵ Martin Seligman and Christopher Peterson, ‘Learned Helplessness and Victimization’ (1983) 39 Journal of Social Issues 406, 409. These authors argued that although cognitive faculties are at the centre, other psychological processes are at stake, such as motivation (unwillingness to try innovative routes of escape), emotion (the helpless states resembles depression) and cognition (inability to learn new responses to overcome prior learning that trauma is uncontrollable).
relationship. Accordingly, battered women exhibit a distorted perception of their abilities to control or to alter their position or situation.

Although BWS has not been specifically listed in the *Diagnostic and Statistical Manual of Mental Disorders* (‘DSM-IV’), which is the primary diagnostic reference for mental health professionals in the United States of America and in Australia, it is generally accepted to be a subcategory of the medically certified post-traumatic stress disorder. However, Dr Walker emphasised that the nature of BWS could be best understood as an offshoot of the concept of learned helplessness, rather than as a mental illness. Feminist scholars argue that BWS implies the stereotyping of battered women as psychologically impaired victims and their necessary use of defensive force within this context may appear unjustifiable to the members of the jury. This view will be explored in the following chapter. The theory of learned helplessness and its validity have been severely criticised. The reasons for this criticism will be explored in Chapter 5 of this thesis. The paper will now explain that despite different social and personal stressors, research indicates that both heterosexual and same-sex intimate violence are cyclical in nature.

66 Ibid.
67 This point has been severely criticised by feminist scholars who support the view that BWS portrays battered women as abnormal or suffering from a distorted perception or frailty.
68 Craven, above n 49.
71 See 3.4.
72 See 5.4.2.
2.5 Control: Dynamics, Manifestations and Effects of Violence Generally

Before discussing same-sex intimate violence, it is important to explore the issue of control, how it dictates the dynamics of couples in abusive relationships and its effects upon them.

Intimate violence differs in many ways from other forms of violence which occur in the public realm. The incident that results in intervention by the criminal justice system is only a small part of a complex pattern of abuse and control that cannot be adequately understood nor can its gravity be measured in isolation from that context. Responses by our legal system to the issue do not seem to encompass these dynamics. Control, or the need to exert power, is at the core of the picture. Violence is used as coercive control, though the concurrent use of other means to establish dominance, prevent escape, repress conflict, appropriate resources, and establish privilege lessens the utility of severe violence in imposing subordination.\(^{73}\)

Moreover, such violence is characterised by its ongoing nature, the complicated and diverse forms of behaviours it encompasses, and its far-reaching consequences.

At the centre of coercive control is an array of tactics directly aimed at subordinating the battered person to their abusive partner.\(^{74}\) These tactics exploit the battered partner’s capacities and resources for the batterer’s personal gain and gratification, thus depriving the battered partner of the means needed for autonomy or escape. This has the effect of regulating the battered partner’s behaviour to conform to the will of the batterer.\(^{75}\) Control is effective because it provides the basis for differences in personal power, actualises sexual inequality in concrete behaviours, and constrains the sphere where independent action is


\(^{74}\) Ibid.

\(^{75}\) Ibid 271.
possible. Its effect is to deprive a battered partner of resources for resistance or escape.\textsuperscript{76} The following sections explore in greater detail some of the diverse forms of behaviour this control encompasses.

2.5.1 \textit{Financial Control}

Financial abuse begins with a partner’s control over the basic necessities of daily living, including money. One partner in the relationship may take absolute control of the financial resources of the couple depriving the abused partner of money. Batterers may take their victim’s money or deny their victim access to money to which they have a legitimate claim. Money may be taken directly through theft, violence, or intimidation.\textsuperscript{77} Similarly, money to which a partner is entitled may be explicitly traded off for sexual services.\textsuperscript{78} Deprivation may be routine or used as punishment. The economic mask of violence may involve exploitation. The batterer may force his or her partner to do other duties in addition to their full-time job or parenting duties. Dr Patricia Easteal recounted how a senior level public servant in Canberra explained to her that her husband forced her to do his accounts at night even though she had a very demanding full-time day job, plus parenting duties.\textsuperscript{79} Regardless of the couple’s income, the distribution of money within abusive relationships is sharply skewed in the batterer’s favour.

\textsuperscript{76} Ibid.

\textsuperscript{77} Ibid.

\textsuperscript{78} Ann Jones, \textit{Next Time She’ll Be Dead: Battering and How To Stop it} (Beacon Press, 2000) 33.

2.5.2 **Physical Violence**

Like other types of control, physical violence is a beguiling process punctuated by periods of remorse. As described by the Walker model, during these ‘honeymoon’ periods the batterer swears and promises that he will never beat his victim again. Even in the relatively few cases where there is an apology, the motives for this can run the gamut from genuine contrition because of guilt or shame through to manipulation designed to solicit forgiveness or win the batterer post-abuse favours.

A battered individual living in this situation does not know when violence will occur. The unpredictability creates hypervigilance and a state of chronic tension. The victim is not permitted to show her anger and pain because it would only lead to provoking a violent response.\(^8^0\) Avoiding the batterer’s next outburst is the battered individual’s mission. The reality is, however, that irrespective of her docility and efforts, the batterer will attack again, usually justifying his outburst with a litany of verbal abuse accusing the victim of some alleged failure.\(^8^1\)

These victims may be threatened that should they leave, the batterer will kill them. Even if they do manage to leave, too often the violence may continue even if there is legal intervention. The available evidence pointing to frequent breaches of domestic and restraining violence orders indicates that legal intervention may not placate the batter’s desire for control.\(^8^2\)

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\(^8^0\) Ibid.

\(^8^1\) Jones, above n 78, 134.

\(^8^2\) Easteal, above n 79, 104.
Sometimes the batterer forces the victim to choose between his or her own safety and the safety of their children (the ‘Battered Parent Dilemma’). Typically, this dilemma describes an ongoing facet of abusive relationships where the offending partner repeatedly forces a victimised carer to choose between taking some action they believe is wrong (such as beating their child or disciplining the child in inappropriate ways), being hurt themselves or standing by while the batterer hurts the child.83

2.5.3 Sexual Abuse

Many victims of intimate violence are forced to have sex against their will often or all the time. A survey conducted by the Australian Bureau of Statistics in 1996, titled Women’s Safety Australia, 1996, revealed that only 1 per cent of those currently in a relationship admitted to sexual assault by a current partner, while 10.2 per cent said it had taken place in a previous relationship.84 In some surveys between 13 and 15 per cent of respondents have indicated husbands or ex-partners were the perpetrators of sexual assault.85 In addition, over 75 per cent of the marital rape victims responding to an Australia-wide survey of rape and sexual abuse published in 1994 stated that the sexual assault they experienced was part of a general pattern of physical violence.86

Sexual assault is part of the broader pattern of humiliation and dominance. For many victims of intimate violence, rape is another component of their batterer’s attempt to control the

83 Stark, above n 73, 253.


85 Patricia Eastal, Voices of the Survivors (Spinifex Press, 1994); New South Wales Sexual Assault Committee, Sexual Assault Phone-in Report, held November 1992 (Ministry for the Status and Advancement of Women, August 1993).

86 Eastal, above n 85.
victim’s life rather than a distinct form of victimisation. A batterer may continuously rape his or her partner, or engage in other forms of explicit sexual humiliation. The implied threat of sexual force allows a batterer to dictate when, how, where, and even with whom the battered victim has sex. The batterer may resort instead to more subtle or passive forms of coercion to obtain sex, such as the silent treatment or even withholding sex or affection. Most victims comply with their batterer’s demands quickly because the memory of past violence makes them believe that violence could occur again at any time. Another common tactic is for abusive men to threaten to ‘get it on the street’ if a partner refuses sex or insists he use a condom, raising the spectre of AIDS.\(^{87}\) The batterer’s sexual assault may also be linked to other aspects of their sexual demands such as how the victim dresses, acts and performs sexual acts.\(^{88}\)

Forcing their partners to engage in anal sex against their will is a common form of abuse and shaming. The range of emotional and social pressures and the threats of physical violence contribute to the belief by victims that their partners’ sexual behaviour is not sexual assault. This contributes to the low levels of reporting. Even though marital rape immunity has been abolished by the common law\(^{89}\) and by legislation in all Australian jurisdictions since 1981,\(^{90}\) in practice, an existing or previous relationship between persons invariably leads to any incidents of sexual assault which are reported to police rarely being followed through to

\(^{87}\) Stark, above n 73, 242.


\(^{90}\) *Crimes Act 1900* (ACT) s 69; *Crimes Act 1900* (NSW) s 61T; *Criminal Code* (NT) s 192(1); *Criminal Code, Evidence Act and other Acts Amendment Act 1989* (Qld) s 31; *Criminal Law Consolidation Act 1935* (SA) s 73(3); *Criminal Code* (Tas) s 55; *Crimes Act 1958* (Vic) s 62(2); *Acts Amendment (Sexual Assaults) Act 1985* (WA) s 325.
While the reasons for this are diverse and at times unclear, it seems that outdated ideas of what is reasonable behaviour between partners is a significant factor. For those raped by current or ex-partners, fear of the batterer is the most common explanation provided for not reporting. The victim’s concern that she will lack credibility, or her failure to realise that her partner having sexual intercourse with her without her consent is rape, further contributes to many victims’ decisions not to contact the police.

Many migrant women have a limited concept of sexual assault in general, equating it to sexual intercourse through penetration, and do not understand that sexual assault can occur in marriage. Because of their cultural and religious inheritance, many victims accept that complying with their abuser’s sexual demands is part of their duties. Consequently, some take on themselves the responsibility for what is sexual assault.

2.5.4 Emotional Abuse

Emotional abuse is one of the most common forms of abuse used by intimate batterers. They resort to this as an ongoing process, seeking to diminish and destroy the inner self of their victims. Essentially, the feelings, beliefs, ideas, and personal characteristics of the victim are belittled, causing the former to experience these aspects of the self as seriously damaged.
or eroded.\textsuperscript{96} Emotional abuse is often considered the worst kind of abuse as it is usually inflicted by those loved and trusted. It is also most difficult to identify and prove and is almost impossible to use as the basis for pressing charges against an intimate batterer.\textsuperscript{97} The batterer may use a variety of mechanisms to inflict this form of abuse. These may be overt—observable and identified\textsuperscript{98}—or covert—subtle and unobservable.\textsuperscript{99} Either type suffices to create emotional scars on the core of the victim’s self that are indelible.

Self-blame and low self-esteem are common effects of physical and sexual violence. Emotional abuse also harms the victim’s sense of self-worth and confidence. In the majority of cases the latter generally precedes other forms of violence.\textsuperscript{100} As suggested by the Walker model, the violence starts with little or somewhat trifling incidents; some of these often involve jealousy. Emotional manifestations of control include verbal put downs that denigrate the victim’s appearance, behaviour and personality; threats to harm them or their children; controlling what is eaten, etc.

Abusive individuals establish their moral superiority by degrading and denying self-respect to their partners. Emotional abuse is particularly harmful in the context of a primary dependence as when survival depends on approval, alternative sources of support are unavailable, and the object of degradation is deeply invested in how the other feels about them and is unable to muster positive self-talk or other forms of resiliency to counter negative messages. Adult victims of emotional control are in no sense childlike; however, the tactics

\textsuperscript{96} Ibid.

\textsuperscript{97} Ibid.

\textsuperscript{98} Belittling, yelling, name-calling, sulking, etc.

\textsuperscript{99} Minimising an individual’s accomplishments, projection, negative labelling, etc.

\textsuperscript{100} Easteal, above n 79, 106.
used by their batterers may disable their sense of adulthood, leading them to mimic a childlike dependence on approval that significantly magnifies the effect of the verbal abuse and insults they suffer.

A batterer may use shaming to demonstrate their victim’s subservience through marking or the enforcement of behaviour that is intrinsically humiliating or is contrary to the victim’s nature, morality or best judgment. For example, abusive partners may force their victims to bear tattoos, bites, burns and similar marks of ownership visible to others. Because of its link with ownership, marking often becomes a source of self-loathing and can prompt suicide attempts. Once a victim has done acts of which they are ashamed, they become even more vulnerable to degrading insults and further threats.\(^{101}\)

Batterers may also isolate their partners to instil dependence, express exclusive possession, monopolise their skills and resources, prevent them from disclosing violence, and keep them away from any possible support. A batterer may make the victim’s family and friends the first target of their isolation.\(^{102}\) It is thus common for batterers to be rude and overbearing to the victim’s family and friends. To prevent the potential support they may offer to the victim, a batterer may forbid calls or visits to families or limit visiting time, assault or threaten family members, or force victims to choose between them and the batterer, etc. Such actions predictably lead family members to avoid the couple, with some blaming the victim for choosing a partner like that.\(^{103}\)

\(^{101}\) Stark, above n 73,261.

\(^{102}\) Ibid 263.

\(^{103}\) Jones, above n 78, 183.
Isolation curtails victims’ access to choices about institutional roles, prevents them from garnering social support or recognition, severely constrains the audiences which they can access and forecloses choices about life projects and opportunities for self-expression.\textsuperscript{104} Furthermore, by criticising the victim, the batterer makes the former believe how lucky he or she is to have someone who seeks to improve them and who is always on their side. This is all part of the batterer’s attempt to monopolise their victim’s life.\textsuperscript{105}

The social, emotional and mental mask of violence is ongoing, generally escalates, and may be joined by a variety of other expressions of control and power. The fruit of emotional abuse is a life that may never reach its full potential for health and happiness due to the destruction of the victim’s belief in herself or himself.\textsuperscript{106} The victim may also have difficulties in experiencing a sense of belonging in society.

\subsection*{2.5.5 The Impact of Violence}

Battering is one of the most common causes of emergency room treatment for women and the major antecedent of injury to women, leading to a high percentage rate of suicide attempts and homicides.\textsuperscript{107}

Victims internalise blame for the abuse, thereby assuming responsibility for the violent situation, complying with the violence, viewing it as a survival mechanism, and

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\textsuperscript{104} Stark, above n 73,262. \\
\textsuperscript{105} Jones, above n 78, 184. \\
\textsuperscript{106} Lundberg-Love and Marmion, above n 95, 19. \\
\textsuperscript{107} Albert R Roberts (ed), \textit{Helping Battered Women: New Perspectives and Remedies} (Oxford University Press, 1996) 75.
\end{flushright}
demonstrating loyalty to the relationship, rooted in the hope that it will change. Some others may internalise the partner’s blame, contributing to self-hatred. When there are not other mirrors to see themselves reflected in, victims are stuck with the image that their violent partner has created.

Low self-esteem may also contribute to the victim becoming a hostage in his or her own home. The feeling of being unable to remove themselves from the situation due to lack of support or skills for coping on his or her own may be overwhelming. Moreover, based on their prior experiences or general folklore, a victim may not believe that the ‘system’ can assist them.

2.6 Typical Patterns of Intimate Violence: the Common Thread

Gay and lesbian survivors of intimate violence indicate that the typical abuse encountered by them was virtually identical to and followed similar patterns to the violence in abusive heterosexual relationships. Many of the reasons why gay and lesbian victims of intimate violence may fail to leave abusive relationships are also similar to the reasons why heterosexual victims of intimate violence may fail to leave their partners.

2.6.1 Similar Acts of Violence

Gay male and lesbian women victims of intimate violence have reported physical assaults and assaults with weapons; sexual assault and sex on demand; property damage; harassment; 

108 Jukes, above n 88, 107, 108.


110 Ibid.

death threats against the victim, his or her family and/or third parties; economic control; and psychological abuse, including isolation from family members and friends. Like heterosexual women victims of spousal abuse, gay male and lesbian women victims of partner abuse may encounter one, some or all of these acts of abuse and control.

### 2.6.2 Similar Patterns of Violence

Four empirical studies carried out in different jurisdictions indicate that the same cycle of violence exists within both heterosexual and same-sex relationships. Victims of same-sex intimate violence have reported during their abusive relationships a ‘honeymoon’ period in which the batterer exhibits remorseful attitudes and promises to change. They have also explained that, just like the experience of heterosexual women, this phase is followed by a tension building stage, which is in turn followed by further acts of violence, at which point the cycle commences again. It is perhaps this finding which has promulgated the adoption of BWS during the trials of gay and lesbian defendants who have killed their intimate batterers in self-defence.

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113 The cycle of violence was a theory developed to understand patterns of violence between heterosexual couples. This theory of violence, as mentioned above, was adopted by the Walker model. See 2.4.2.


115 Walker, above n 39, 49.
2.6.3 **Similar Reasons for Staying in Abusive Relationships**

As Dr Walker pointed out, abusive relationships are not necessarily violent 24 hours a day.\(^{116}\) This may serve as a reason why some victims stay in abusive relationships.\(^{117}\) A batterer who indicates that ‘he loves the victim’ and ‘promises not to do it again’ may find this serves to keep a battered woman with him.\(^{118}\) Associated with the cycle of violence is the concept of time, and the realisation that the honeymoon phase of the cycle can last from a day to a week to a year.\(^{119}\) This period of no violence often suffices to keep the victim from leaving the batterer.

Sometimes the victim stays due to a fear of escalating violence.\(^{120}\) Often victims are threatened with their lives if they leave the batterer. Thus, a victim may consider her present circumstance of staying safer than death resulting from leaving.\(^{121}\) The issue of dependence may be another reason why victims decide to stay. This issue manifests itself in various ways, such as financial, emotional or physical dependence.\(^{122}\) This dependency is created and deepened in situations where a batterer isolates his partner from friends and family, so that she is completely dependent on him.\(^{123}\)

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117 Sorenson and Thomas, above n 13, 338.
119 Ibid.
120 Ibid.
122 Bricker, above n 8, 1383.
Other victims remain with their violent partners for reasons related to their vows of marriage or interpersonal commitment to a romantic partner.\textsuperscript{124} Another reason why victims may stay that is related to relationship ideology is because of a hope for change from the batterer.\textsuperscript{125} A victim may feel compelled to ‘tame the beast’, hoping that this would facilitate the change in the perpetrator.\textsuperscript{126} A victim may also stay in a relationship due to a lack of social and personal support for leaving a violent family environment.\textsuperscript{127}

Other reasons victims may remain in an abusive relationship are that they will attempt to bring the violence against them to an end, or that they have adapted to the abuse. Attempts by victims at stopping the violence against them often result in the killing of the abusive partner with the initiation of a counterattack or self-defence.\textsuperscript{128} Victims may adapt to an abusive relationship by using coping mechanisms, such as denial. Thus, by denying that their partners harm them, victims can negate the danger they confront. This might also be termed ‘learned helplessness’.\textsuperscript{129} A victim might also justify controlling and abusive behaviours as an outward sign of caring or love by the batterer.\textsuperscript{130}

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\textsuperscript{126} Jones, above n 78, 68.

\textsuperscript{127} Ibid. According to Browne, these victims experience a lack of adequate provision for shelter, relocation, or protection from further attack which contributes to the sense of entrapment: Angela Browne, \textit{When Battered Women Kill} (Free Press, 1987) 5.

\textsuperscript{128} Cruz, above n 118, 311.

\textsuperscript{129} Walker, above n 53, 24. According to this concept, the battered woman tries to identify and subsequently modifies the behaviour that she believed caused her abusive partner’s attack. If despite such efforts she continues to experience violence from her partner, she begins to experience a distorted sense of powerlessness.

\textsuperscript{130} Overmier and Seligman, above n 55, 297.
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Some of these reasons why a victim of intimate violence might stay in an abusive relationship apply to both heterosexual and same-sex couples. The specific considerations applicable to same-sex couples will be discussed in greater detail later in the chapter. If we consider all of these dynamics of any interpersonal relationships we may realise how similar heterosexual and homosexual relationships are. If we think in particular in terms of behaviours associated with the roles of batterer and victim, it becomes clear just how alike intimate violence experienced by gay males and lesbian women is to that experienced in heterosexual relationships. As noted above, ‘learned helplessness’ is not the only explanation of why the victims of intimate violence may fail to leave an abusive relationship.

Now that BWS as a model of intimate violence has been explained, the chapter will proceed to demonstrate that despite similarities in the acts of violence and the cyclical nature of the violence in both heterosexual and same-sex intimate relationships, there are particular stressors and dynamics specific to same-sex intimate relationships which render BWS unsuitable to them. This is consistent with the final argument of this thesis to be found in Chapter 7, in which it is submitted that a gender-neutral theory of intimate violence may offer fairer outcomes to victims of intimate violence who have killed their intimate batterer.

### 2.7 A Better Understanding of Same-sex Intimate Violence

The incidence of intimate violence between gay men may not be surprising when males are encouraged to conform to the stereotypical heterosexual gender role-oriented definition of masculinity which is based on aggression and dominance as desirable male characteristics or

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131 See 2.8.

132 Cruz, above n 118.
attributes. These norms may be internalised as ‘appropriate’ male behaviour. Internalised homophobia can lead to the overamplification of these norms in gay male intimate relationships. These males may adopt such a view of masculinity as an attempt to be accepted as more ‘male’.

It is a common misconception that, due to the absence of a patriarchal male–female gender dynamic, intimate violence occurs to a lesser extent in lesbian relationships than in other intimate relationships. It is also common to socially construct ‘females’ as caring exhibitors of mutuality, passivity and non-aggression, and to assume therefore that intimate relationships between women are likely to be more ‘equal’ and ‘nonviolent’ than other intimate relationships. This notion is the result of traditional gender role stereotyping which portrays women as being innately nonviolent, caring and nurturing. It is a perception that also has significant implications for women who behave in ways that are incongruent with stereotypical gender roles, such as women in lesbian relationships who perpetrate violence towards their partners. These women may be viewed as unnatural, deviant and a threat to the traditional status quo of existing family relations and society. Despite the existence of these myths and stereotypes, female same-sex intimate violence is a serious problem. It

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134 It is understandable how gay males can exert controlling and violent behaviour in relation to their male partners if the context in which these men have grown and developed is considered.


137 Sorenson and Thomas, above n 13, 338.

138 Ibid.

profoundly affects the lives of lesbian, bisexual, and transgender women. The pervasiveness of gender role stereotyping, along with concomitant heterosexism and homophobia, places battered lesbian women at the mercy of a society where their experiences are ignored and stigmatised.\textsuperscript{140} This is a disadvantageous position, given that traditional sources of help—such as family, friends and community domestic violence services—may be lacking.\textsuperscript{141}

As will be argued in Chapter 6 of the thesis, these misconceptions and stereotypes may inform jurors’ opinions about same-sex intimate violence and thus the decisions they make when assessing the culpability of a battered gay or lesbian defendant who has killed his or her same-sex intimate batterer.\textsuperscript{142}

2.7.1 \textit{Definitions of Same-sex Intimate Violence}

Hart defines lesbian battering as ‘[t]hat pattern of violent and coercive behaviours whereby a lesbian seeks to control the thoughts, beliefs, or conduct of her intimate partner or to punish her for resisting the batterer’s control’.\textsuperscript{143} Island and Letellier define gay male domestic violence as ‘any unwanted physical force, psychological abuse, material or property damage inflicted by one man on another’.\textsuperscript{144}

These definitions do not really add to the general conceptualisation of intimate violence as they do not include the particular forms of abusive behaviour unique to same-sex

\textsuperscript{140} Hassounheh and Glass, above n 19, 311.

\textsuperscript{141} Paula Gilbert, ‘Discourses of Female Violence and Societal Gender Stereotypes’ (2002) 8 Violence Against Women 1271, 1289.

\textsuperscript{142} See 6.3.

\textsuperscript{143} Kerry Lobel (ed), \textit{Naming the Violence: Speaking Out about Lesbian Battering} (Seal Press, 1986) 206.

relationships. Unlike their heterosexual counterparts, battered gay and lesbian individuals are additionally exposed to specific factors which encourage same-sex intimate violence to remain hidden and which, as a matter of consequence, have also inhibited adequate responses to the issue.  

2.7.2 Exacerbated and Additional Personal Stressors

Relative to heterosexuals, gay males and lesbian women suffer from exacerbated, if not additional, personal stressors caused by living in societies where some hold assumptions not only that everyone is heterosexual but that homosexuality is immoral or unacceptable and, thus, that gay and lesbian individuals are not entitled to the same rights as heterosexuals. The impact of heterosexism and homophobic attitudes on same-sex intimate relationships will be explored later in this chapter.

Another stressor faced by gay males and lesbian women is being partnered to an inherent competitor. Individual members of the same sex desire similar resources. In addition, same-sex partners may have fewer abuse and homicide deterrents relative to heterosexual partners. For instance, it has been found that both high local kin density of male relatives and high levels of family support were deterrents for spousal abuse of women in heterosexual relationships.

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147 See 2.8.5.


150 Ibid.
Gay males and lesbian women report experiencing isolation from family and perceptions of lack of emotional support from family, especially during the period of time that they initially reveal their sexual orientation.

Intimate partner aggression in same-sex relationships is also linked to individual factors, micro-social variables and broader macro-social contexts. Some of these factors—which include masculinity, the effects of patriarchy, power, substance abuse, mental health issues, and intergenerational abuse—are equally applicable to heterosexual relationships. This demonstrates how, like heterosexual women, battered gay and lesbian individuals are affected by living in a very patriarchal, and to some extent misogynistic, society. Additional stressors apply to same-sex couples as a consequence of their living in a society where heterosexism and homophobia are common. This supports the argument that, whichever gender-neutral theory is adopted during the trials of battered defendants who have killed their intimate abusive partner in circumstances of self-defence, it should be capable of at least considering and bringing to the attention of jurors these unique features of same-sex intimate violence. This should not be done generically but by providing an opportunity to the battered individual, whether heterosexual or homosexual, to explain his or her individual predicament.

The chapter will now explore the reasons why victims of same-sex intimate violence may decide to remain in rather than leave an abusive relationship.


152 Cruz, above n 118, 316.

153 Sorenson and Thomas, above n 13, 338. The authors explain that many of the contextual triggers associated with same-sex intimate partner violence are also applicable to violence occurring among heterosexual couples.
2.8 Staying in Abusive Same-sex Relationships

Discussion earlier in the chapter pointed to a number of reasons why battered victims of intimate violence may not leave their batterers. 154 This section is concerned with the reasons why victims of same-sex intimate violence decide to stay. The most common reasons for staying are related to hope, love, loyalty and commitment, fear, financial dependence, inadequate knowledge about same-sex intimate violence, and a lack of societal assistance or support. Factors such as homophobic attitudes and heterosexism also encourage the victim to desist from leaving the batterer and keep the violence hidden. These factors, together with HIV-positive status for gay males and the ‘lesbian utopia’ for lesbian women encourage the victim of same-sex violence to remain in the abusive relationship.

2.8.1 Hope, Love, Loyalty and Commitment

Many individuals in same-sex intimate relationships stay because they hope that the violence may end and their partners may change. 155 Love and violence can co-exist, and these victims may still love their batterers; they may also feel loved by them. 156 Similarly, feelings of commitment and loyalty may result in their decision to stay. 157 These feelings may be intensified by the lack of structural support available to same-sex couples. 158 They may in

154 See 2.6.3.


158 Cruz, above n 118, 311.
fact feel that their partner is their only support, as the latter accepts their sexuality and this creates a premise of ‘us against them’. It may cause the abused to rely on the abuser for an emotional sense of security.

2.8.2 Fear

Many gay and lesbian individuals remain in their relationships for fear of being harmed. They are afraid that their abuser may cause serious harm to them or to someone close to them if they were to leave. They can also fear escalated violence or death. Perpetrators may also threaten to ‘out’ their victims, which is something that the victims may fear. In fact the US-based National Coalition of Anti-violence Programs has highlighted ‘outing’ as a highly specific form of abuse in LGBT communities. This issue exclusive to same-sex couples will be explored below in discussion of the impact of heterosexism and homophobia.

Fear of loneliness is also common. To many gay males, remaining in an abusive relationship is better than being a single gay man. In a study of battered gay men conducted in 2000, 33 per cent of the respondents stated that they stayed with their assailants because they were afraid of being alone. They may also fear for the wellbeing of their abusive partners if they were to leave.


160 Balsam, above n 145, 28.

161 Jeffries and Ball, above n 24, 159.

162 Ibid 160.

163 See 2.8.5.

164 Jeffries and Ball, above n 24, 161.
Fear for oneself and one’s violent same-sex male intimate also plays out in the context of HIV.165 HIV status may be influential in causing gay males to stay in abusive relationships. Many gay males with a HIV-positive status have indicated their fear of becoming sick and dying.166 If a batterer is HIV-positive, he may threaten to infect his victim or use his failing health to make the victim feel guilty.167 Sometimes the victim himself fears to abandon the HIV-positive batterer. Under many circumstances the batterer may threaten the victim with disclosing his (or her) HIV-positive status to friends or family members.168 This would result in discrimination and the loss of income or other benefits.169 As a form of violence, a batterer may withhold medications in order to obtain better control of the victim.170

2.8.3 Financial Dependence

Being financially dependent on their abuser may be a reason why battered gay and lesbian individuals remain in abusive relationships.171 The victim feels victimised by the financial inequality within the relationship and the reality that they are economically dependent on their abusive partner. This issue is not exclusive to same-sex couples.


166 Jeffries and Ball, above n 24, 161.

167 Lilith, above n 165, 203.

168 Ibid.

169 Island and Letellier, above n 144, 251.

170 Ibid.

171 Jeffries and Ball, above n 24, 161.
2.8.4 Inadequate Knowledge Regarding Same-sex Intimate Violence

Many gay and lesbian victims of intimate violence may stay with their abusers because they do not have adequate knowledge of same-sex relationships. They may believe that the abusive episodes they have experienced were isolated exceptions and will not recur. Some of these victims do not understand that their predicament is the result of domestic violence and that this does apply to gay males and lesbian women. Many simply experience difficulty in labelling their partner’s behaviour as domestic abuse. Some victims are not aware of positive same-sex intimate relationships; they may believe that aggression is ‘normal’ in the context of same-sex relationships.

2.8.5 The Impact of Heterosexism and Homophobic Attitudes

The role of heterosexist and homophobic attitudes towards same-sex couples contributes to the prolongation of the silence that has kept same-sex intimate violence hidden. The term ‘homophobia’ is used to describe the irrational fear, hatred, and intolerance of homosexuality. Contemporary theorists tend to view homophobia as inextricably linked to sexism, racism, classism, etc. Rather than clinical phobias, these are varied forms of the oppression of one group of people by another group, based on a particular characteristic or trait. Consequently, it is suggested that ‘heterosexism’ is a more appropriate term. This term has been defined as an ‘ideological system that denies, denigrates, and stigmatises any non-heterosexual form

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173 Jeffries and Ball, above n 24, 162.

174 George Weinberg, Society and the Healthy Homosexual (St Martin’s Press, 1972) 34.

175 Balsam, above n 145, 28.
of behaviour, identity, relationship and community’. 176 In this thesis the two terms are used interchangeably. However, it is important to mention that in accordance with both terms, same-sex relationships are pathologised by the dominant culture, a position which disadvantages gay and lesbian defendants if jurors bring these attitudes to their trials.

Abusive partners in same-sex relationships often resort to the use of homophobia and heterosexism as a tool of control over their battered partners. Some of these forms include: ‘outing’ or threatening to ‘out’ their partners, to friends, employer, church, etc. Exposing publicly the victim’s sexual orientation is a form of psychological abuse that is absent from violent heterosexual relationships. Given the potential consequences of this exposure, these threats may be particularly disabling:

If they are out closeted, gay males and lesbians risk personal rejection by others, discrimination, and even violence, all experiences that can have enduring psychological consequences … Suffering antigay assault or other overt victimisation can create considerable distress, including feelings of personal loss, rejection, humiliation, and depression; agitation, restlessness and sleep disturbance; somatic symptoms such as headaches and diarrhoea; and deterioration in personal relationships.177

Studies reveal that gay males and lesbian women are the subject of victimisation caused by homophobia and that this victimisation has a greater impact upon their mental health and


wellbeing than nonbiased related attacks. This contributes to their isolation, and influences the way in which they see their abusive relationship, including the impossibility of leaving. Sometimes by telling a partner that no one loves them but the batterer, the abusive partner also isolates the victim. A predominant factor encountered within abusive relationships between gay males is insecure attachment/attachment anxiety. Accordingly, less securely attached men feel that their partners are one of their possessions. Thus, to assert control, they are more likely to resort to abuse and violence in order to keep their partners. Similarly, a strongly masculine gender identity appears to increase their aggressive tendencies. Those gay males who identify strongly with a masculine gender identity seem to be more inclined to use aggression to resolve problems in their relationships. Meanwhile, the victim experiences low self-esteem and assertiveness, which leads them to a sensation of powerlessness. Feelings of worthlessness and insecurity can make men and women more prone to violence.

It may be the case that a batterer seeking to preclude his or her victim from obtaining help, may tell them that no one will help him or her because the members of the police force and the justice system at large are homophobic. Many gay and lesbian individuals enter same-sex relationships carrying a lot of emotional baggage, that is, having problems related to coming

178 Balsam, above n 145. Whether or not a woman has previously been a victim of intimate violence by a male batterer, she is invariably aware of the threat that such violence represents. This awareness conditions her experiences of violence within the home. Similarly, violence towards gay males and lesbian women takes place against a backdrop of violence against intimates. See Balsam, above n 145.

179 Jeffries and Ball, above n 24, 148.

180 Ibid.

181 Ibid.

182 Ibid.
to grips with their sexuality. The words of the batterer may make perfect sense and may even bond victims to perpetrators out of some loyalty in the face of a homophobic world.¹⁸³

A 41 year old Caucasian lesbian woman, Laura, explained that she would never tell her family who lived nearby about the abuse she receives from her partner:

> When I told them about being gay, they couldn’t accept it … Now, Eileen is in my life and at least my mom has come around, how could I give her a reason to reject me again? … [becomes tearful] … I am all Eileen has in this world. I would never do anything to make people think badly of her.¹⁸⁴

Some batterers tell their partners that he or she will not be believed because homosexuals do not or cannot rape or abuse their lovers. There are occasions in which internalised homophobia leads a batterer to tell his or her victim that the abuse received is well-deserved because he or she is homosexual. This can also be a result of self-hatred. Internalised homophobia refers to a fear or hatred of homosexuality that is carried within the individual against their own sexual desires.

In models of sexual identity development, internalised homophobia is seen as more acute early in the coming out phase, as the individual struggles to reconcile his or her own private feelings with the stigmatised views of homosexuality in the outside world.¹⁸⁵ Nevertheless, internalised homophobia can persist after the initial stages of coming out and even if the

¹⁸³ Cruz and Firestone, above n 135, 170.
¹⁸⁴ Balsam, above n 145, 31.
individual appears outwardly to have come to terms with his or her sexuality. Sometimes it may be manifested as a discomfort with other gay or lesbian individuals, attempting to ‘pass’ as heterosexual, and feelings of shame and guilt about one’s sexual orientation. These negative attitudes can be integrated into an individual’s identity and are inevitably reinforced by messages from society. This issue is considered to be a substantial barrier in adjustment to a positive homosexual identity because it causes psychological conflict within the individual. The result of internalised homophobia is self-deprecating messages which can result in depression and even substance abuse. It can also cause hostility to be directed at same-sex intimate partner abuse.

A batterer can also use and rely on heterosexist and sexist stereotypes to hide violence and increase control over his or her partner. For instance he or she may portray the violence as mutual or consensual and convince the victim that he or she is equally responsible. Whilst violence within same-sex relationships may be characterised as cyclical, there is a suggestion that incidents may involve some form of mutual battering. In the majority of the cases studied, the violence is bidirectional and both partners had been physically violent at some point within their relationship. However, it should be noted that sometimes participants in

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186 Ibid.
187 Balsam, above n 145, 29.
188 Cruz and Firestone, above n 135, 162.
190 Cruz and Firestone, above n 135, 149.
191 Cruz, above n 118, 316-18.
192 Merrill and Wolfe, above n 23, 20.
bidirectional violence indicate that they acted only in self-defence, they deny being the original aggressor.

Sometimes, an abuser may tell a male partner that the conduct is not domestic violence but an expression of ‘masculinity’. Hegemonic masculinity emphasises practices toward authority, control, aggressiveness and the capacity for violence. Men who choose to have intimate relationships with other men challenge hegemonic masculinity. This calls into question the ‘manliness’ of gay men both at the societal and the individual level. Thus, some gay males could potentially seek to oppose their subordinate position by utilising intimate partner violence in order to achieve hegemonic masculinity.

The lesbian and gay community is reluctant to acknowledge and address the existence of intimate violence. Yet if they do not do so, it is unlikely that the heterosexual community will make efforts to address the issue. Much of this reluctance is the result of homophobia. Some authors argue that in response to homophobia, lesbian women have placed great value on building an identity characterised by equality within their relationships. In rejecting the power inequality that is characteristic of heterosexual relationships, they have constructed the concept of the ‘lesbian utopia’. This concept is associated with the idea that females can create an entire community inhabited by this gender only, in which there is no dependency upon men. This leads to the belief that the existence of intimate violence in lesbian

193 Ibid.
194 R.W Connell, Masculinities (University of California Press, 2005) 78.
195 Vickers, above n 133, 5.
197 Patzel, above n 172, 212.
relationships is minimal. Many women who favour the idea of the ‘lesbian utopia’ are reluctant to acknowledge that women in lesbian relationships can be as violent as men. It may also be hard to believe how many lesbian women who are seen as strong and tough-minded individuals can be victims of abuse from partners who may be physically smaller than them.\textsuperscript{198} Even friends and family members of a battered lesbian woman may believe somehow that women are not big enough or strong enough to really do each other damage in a physical altercation.\textsuperscript{199}

With respect to gay males, the silence surrounding the issue of intimate violence in same-sex relationships is still greater.\textsuperscript{200} There is little controversy about the issue of intimate violence. There is almost no discussion of it. In fact, within Australia, efforts to raise awareness about the existence and prevalence of intimate violence in same-sex relationships have been instigated by lesbian feminists researching the issue.\textsuperscript{201} Lesbian women have been involved in the movement to stamp out domestic violence since its inception.\textsuperscript{202} They have responded to the oppressive exposure to sexism and patriarchy. Similar activism has not been found among gay males, so it is more difficult to assess the prevalence of intimate violence in this group. Although gay males have not tended to view their relationships as a utopia, they may consider themselves to be more evolved or more civilised than heterosexual males.\textsuperscript{203}

\textsuperscript{198} Hassounheh and Glass, above n 19, 321.
\textsuperscript{199} Elizabeth Schneider, above n 6, 201.
\textsuperscript{200} Vickers, above n 133.
\textsuperscript{201} Ibid.
\textsuperscript{202} Ibid.
\textsuperscript{203} Lundy, above n 34, 282.
Alternatively, gay males may internalise heterosexist views of masculinity.\textsuperscript{204} When internalised, these views will normalise aggression instigated or initiated by men, so that if a man is sexually assaulted or beaten by a known assailant, there is a tendency to identify the victim as blameworthy or to trivialise the violence as acceptable male-to-male aggression.\textsuperscript{205}

Many social institutions including religious organisations also legitimise sexual prejudice and the marginalisation of same-sex couples. This marginalisation instigates both personal and interpersonal discord.\textsuperscript{206} Similarly, the scarce legal benefits afforded to those in same-sex relationships and the laws that serve to oppress such relationships reflect a legitimising of homophobic attitudes at the societal level.\textsuperscript{207}

Another factor contributing to keeping intimate violence in same-sex relationships hidden is the fact that intimate personal relationships have long been regarded as having a ‘private’ status. It has been a traditional attitude that what adults do in the privacy of their own home is their own business.\textsuperscript{208} In the past and at least from the perspective of heterosexual couples, domestic violence was viewed as a private matter, concealed from public scrutiny and concern under the sanctity of marriage, the idiosyncrasy of the family as a private institution, or any other form of egoist discourse in favour of an individual’s right to privacy. It does not help that activists for gay and lesbian rights have used ‘privacy’ arguments as a tool to

\begin{footnotesize}
\begin{enumerate}
\item Ibid.
\item Mize and Shackelford, above n 112, 101.
\item Bartholomew et al, above n 157, 346.
\item The privacy argument was relied on in challenging the Georgia statute criminalising sodomy, in the case of \textit{Bowers v Hardwick}, 478 US 186 (1986).
\end{enumerate}
\end{footnotesize}
advance the rights of gay males and lesbian women.\textsuperscript{209} The fact that these advocates stridently argue that sexuality is a personal choice and preference, a private issue outside the realm of the state and its agents, may have the unintended consequence that discussion of the issue of the incidence of intimate violence between couples of the same sex is further inhibited.

\subsection*{2.8.6 \textit{Lack of Assistance and Support}}

Before discussing the lack of support and assistance those same-sex partner victims of intimate violence experience, it must be mentioned that heterosexual women who have killed their intimate batterer in self-defence face similar problems in dealing with the police and the courts. The legal system deals harshly with heterosexual battered women. Their first punishment is enduring emotional and physical hardship in the relationship itself, without being offered effective access to legal intervention or protection. Their second is facing criminal charges when these women are likely to be suffering the effects of exposure to a prolonged period of violence in the relationship in addition to the reproaches associated with causing the death of their batterer and while facing serious barriers to obtaining a fair trial on the merits. These barriers include limited access to legal representation that is informed by knowledge about male violence against women and gender bias in the law, and the relative unawareness that judges and jurors may have about the nature of intimate violence.

There are mainstream criminal laws which deal with domestic violence, including marital rape laws, domestic violence as a defence to a criminal charge, police powers of entry, powers of detention or arrest, bail and sentencing.\textsuperscript{210} In addition, each state and territory has

\textsuperscript{209} Vickers, above n 133.

\textsuperscript{210} Easteal, above n 79, 110.
legislation which facilitates a battered woman obtaining a protection order which, if breached, at least theoretically results in a criminal offence and punishment. 211 Unfortunately, the effectiveness of these measures is questionable. In 20 of 110 intimate murders of women researched, a restraining order or an assault charge was in existence at the time of the killing. 212 The efficacy of these orders depends upon the police and the court personnel. The responses of both to the issue of intimate violence has been variable. 213 Although there is ample legislation that theoretically provides an exit strategy and legal pathways for the battered woman, the efficacy of the plethora of the provisions is limited by their indeterminacy and the discretion of police, prosecutors, magistrates and judges. 214 Further, in practice, a battered woman may not have access to legal remedies.

Lack of available assistance to leave a batterer is a reason why many gay males and lesbian women remain with their partners. 215 Many of these victims have been confronted with homophobic and heterosexist attitudes from law enforcement agents and medical personnel.

211 Ibid. See also Domestic Violence and Protection Orders Act 2008 (ACT); Crimes (Domestic and Personal Violence) Act 2007 (NSW); Domestic and Family Violence Act 2009 (NT); Domestic and Family Violence Act 1989 (Qld); Domestic Violence Act 1994 (SA); Family Violence Act 2004 (Tas); Family Violence Protection Act 2008 (Vic); Restraining Orders Act 1997 (WA); Family Law Act 1975 (Cth).

212 Patricia Easteal, Killing the Beloved: Homicide between Adult Sexual Intimates (Australian Institute of Criminology, 1993) 76.


215 Ibid; Patzel, above n 172, 211.
when they have requested help.\(^{216}\) They ‘do not know where or how to seek help’ and/or ‘do not believe people would or could help them’.\(^{217}\)

2.8.6.1  *Non-legal Support Services and Victims of Same-sex Intimate Violence*

Non-legal support services and programs specifically addressing the issue of same-sex intimate violence are limited and the resources available for such purposes scarce.\(^{218}\) While domestic violence laws provide funding for counselling and shelters, as well as establishing information-collecting systems and providing for state-sponsored research, the problem is that the majority of the services created are intended to cater for the heterosexual victims of intimate violence.\(^{219}\) Where a narrow definition of domestic violence has been used and same-sex couples are not expressly included, the service or protection simply may not extend to same-sex victims of intimate violence.

This problem is particularly acute in relation to the ability of gay males and lesbian women to access shelters or refuges.\(^{220}\) Some shelters, but not all, are responsive and sensitive to the needs of lesbian women. Many complaints have been reported regarding the admission and treatment of lesbian women accessing a shelter.\(^{221}\) Workers at these institutions can be homophobic or heterosexist in their views and approach to dealing with victims of intimate violence. It may also be the case that ‘straight’ shelters blame shelters with openly lesbian

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\(^{216}\) Cruz, above n 118, 314.

\(^{217}\) Jeffries and Ball, above n 24, 163.

\(^{218}\) Vickers, above n 133, 9.

\(^{219}\) This type of observation has been made previously by Ruthann Robson, ‘Lavender Bruises: Intra-lesbian Violence, Law and Lesbian Legal Theory’ (1990) 20 *Golden Gate University Law Review* 567, 571.

\(^{220}\) Patzel, above n 172, 210.

\(^{221}\) Bricker, above n 8, 1398.
workers for damaging their reputation and jeopardising further government funding.\textsuperscript{222} The result for many lesbian women is that either they are reluctant to access ‘straight’ shelters or, if they do, they are unwilling to disclose their sexual orientation.\textsuperscript{223} In this regard the options available to gay male victims of intimate violence are inadequate. The lack of support available to battered gay individuals may in itself constitute a sufficient explanation for the reason why gay males sometimes choose to remain with their batterers rather than leaving them and seeking help outside the relationship. This understanding is preferable to assuming that, as BWS suggests, battered gay individuals decide to stay with their batterer because they are helpless and suffer from a psychological malfunctioning which eventually leads them to kill even where other means of escape were available.

The thesis will now discuss the responses provided by the justice system to gay males and lesbian women who are victims of domestic violence. There is evidence that the police and the courts display heterosexist and homophobic attitudes.\textsuperscript{224}

\textbf{2.8.6.2 Legal Support Services and Victims of Same-sex Intimate Violence}

Police officers and the judicial system have historically been unresponsive to gay and lesbian intimate violence. It is therefore common for gay males and lesbian women victims of partner abuse to be unwilling to adopt or undertake legal measures to put an end to the violence.\textsuperscript{225} In some respects this is not surprising, considering that many laws in the civil\textsuperscript{226}

\begin{itemize}
\item \textsuperscript{222} Charlene Allen and Liz Roberts, ‘Homophobia: A Weapon of Batterers?’ in Massachusetts Coalition of Battered Women Service Groups, \textit{For Shelter and Beyond: Ending Violence Against Battered Women and their Children} (1992) as sourced in Lundy, above n 34, 278.
\item \textsuperscript{223} Ibid.
\item \textsuperscript{224} Bricker, above n 8, 1391.
\item \textsuperscript{225} Ristock, above n 21, 423.
\item \textsuperscript{226} As evinced by the unwillingness of the system to legitimise gay marriage.
\end{itemize}
and criminal arena encourage the institutionalised view that same-sex couples have fewer or lesser rights than their heterosexual counterparts. In the United States of America, for example, where the majority of studies on same-sex intimate violence to date have been conducted, sodomy is still a criminal offence in some states and domestic violence law does not include same-sex couples: relationships between police and the gay and lesbian community are strained, with a history of police harassment.\(^{227}\) What is significant from the literature is that a large number of gay and lesbian victims of intimate partner abuse nevertheless do seek help. In 1999 a study in the United States of America indicated that 54 per cent of lesbian women, gay males, bisexual and transgendered people reported seeking support for the abuse suffered at the hands of their violent partners.\(^{228}\) However, men were significantly less likely than women to seek help for relationship abuses, and lesbian women were more likely to seek help than gay men.\(^{229}\) The findings also made it clear that gay and lesbian victims of intimate violence may be wary of seeking help from mainstream formal sources of support, including police. In Australia, gay and lesbian individuals perceive that public agencies often fail to respond to their needs, either by discriminating against them, or through a lack of training.\(^{230}\)

2.8.6.2.1 The Police

Lack of faith in the ability of the criminal justice system to deal with same-sex intimate partner violence was the subject of research carried out in the United States of America in

\(^{227}\) Bricker above n 8, 1396.


\(^{229}\) Susan Turell and La Vonne Cornell-Swanson, ‘Not All Alike: Within-Group Differences in Seeking Help for Same-sex Relationship Abuses’ (2005) 18(1) *Journal of Gay and Lesbian Social Services* 71, 75.

\(^{230}\) Vickers above n 133, 7.
2002. This research found that 54 per cent of respondents had little confidence in the police, while 42 per cent reported that their distrust of the police would prevent them from reporting an instance of same-sex domestic violence.\footnote{Burke, Jordan and Owen, above n 23, 245.} Nearly half of the respondents either moderately or strongly agreed that their local police department was biased against homosexuality.\footnote{Ibid.} In 2006, the Australian Research Centre in Sex, Health and Society found that when reports to the police were made by gay male victims, 33.3 per cent felt that they were not treated with courtesy and respect. Further, 31.8 per cent felt that in respect to their reports of abuse the police failed to take adequate action.\footnote{Ibid.}

Basically, gay males and lesbian women are reluctant to seek police support for several reasons. If the police are contacted, the seriousness of an incident between a same-sex couple may be downplayed, and often these authorities act in a neglectful manner when it comes to arresting the batterer. In the words of one gay male victim:

\begin{quote}
My opinion of the police is the same as most other gay men. I’d never have gone to them in a million years. They treat gay violence as a huge joke.\footnote{Nick Kirby and Beverly Kemp, ‘Battered Men Come Out of the Closet’, \textit{The Independent}, 8 March 1995.}
\end{quote}

Vallerie Coleman, a clinical psychologist with the Los Angeles Gay and Lesbian Community Services explained:

\begin{quote}
I’ve heard a lot of horror stories about the police not treating lesbian victims seriously, and really being abusive themselves in terms of giving the woman a hard time. … That doesn’t
have so much to do with the violence itself, but how our society reacts, and how hard it is for lesbian women who are being battered to get help.  

Prosecutions are made more difficult where police have trouble identifying who the abuser is, despite clear evidence of physical injury.  

Police may adopt the view that two men engaged in acts of violence is not an incidence of domestic violence but fighting by two men who are equally matched. Similarly, police may not believe that a woman can be the batterer of another woman. The police treat violence between couples of the same sex as ‘mutual fighting’. In fact, rather than ensuring the safety of the victim by pursuing a pro-arrest policy, they may try to calm the parties down.

The issue of risking alienation from the gay and lesbian community also prevents many victims from contacting police, especially taking into account the history of unprovoked violence by the police against gay males and lesbians.

2.8.6.2.2 The Courts

Many argue that it is dangerous for gay and lesbian victims of domestic violence to engage the assistance of the courts, given the heterosexist and homophobic nature of these


237 Lundy, above n 34, 277.

238 Bricker, above n 8, 1396.

239 Lundy, above n 34, 277.

240 Vickers, above n 133.
institutions. Gay males and lesbian women receive unequal treatment in courts because they have difficulties fitting into the male heterosexist-based model of the law. However, advocating different treatment for gay men and lesbian women sets them apart as different, and invites continued stereotyping of them as inferior. Yet it is unfair that in order to access equal treatment by the courts, battered gay males and lesbian women have to argue that they are the same as battered heterosexual women when, as a group and as separate individuals, they are not. The heterosexualisation of intimate violence caused by the adoption of BWS leads to the further disadvantageous treatment of gay males and lesbian women, as fact finders will focus on the differences between the heterosexual and the homosexual groups.

The treatment of the law towards sexual preferences and heterosexism is observed in decisions such as R v Brown in which the House of Lords decided that, as a matter of public policy and interest, the defence of consent should not be extended to the practices of a homosexual group of gay males who had voluntarily agreed to engage in private sadomasochist encounters. According to the decision, the infliction of bodily harm on willing victims was injurious and the consent of such victims should be regarded as ineffective. Nevertheless, a few years later in the decision of R v Wilson the English Court of Appeal decided to quash a conviction against a married heterosexual man charged with assault occasioning actual bodily harm as a result of the consensual branding of the husband’s initials on his wife’s buttocks causing a wounding. The court justified the decision by explaining

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241 Bricker, above n 8, 1397. See also Vickers, above n 133, [45].
242 Bricker, above n 8, 1397.
243 R v Brown [1993] 2 All ER 75.
244 R v Wilson [1997] QB 47.
that despite causing a wound, and far from wishing to harm her, the husband merely wanted to assist his wife in her wish of obtaining a personal piece of adornment.

The ‘ordinary person’ standard considered in the law of provocation also excludes an understanding of the social reality encountered by homosexuals in our society. The High Court looked at this issue in Green v The Queen, an appeal from the New South Wales Court of Criminal Appeal involving a homosexual advance as the alleged provocation. The High Court decided that a nonviolent sexual advance by a homosexual individual could induce an ordinary male person to lose self-control and should be taken into account in deciding the accused’s partial defence of provocation. Accordingly, the homosexual advance represented an attempt by the deceased to violate the sexual integrity of a man. Recent writings, both academic and official, as well as substantial case law, suggest that provocation, and occasionally self-defence, are quite commonly raised in such circumstances. Although opinions to the contrary have emphasised that Green v The Queen has nothing to do with homophobia, the overall implication is that the Court is sensitive to the potentially triggering effect of homophobia. The message this sends to society is clear and therefore cannot be ignored. Due to ‘not being so inclined’, a


246 Ibid.

247 Ibid.


heterosexual man’s honour is insulted by a homosexual advance and he must retaliate accordingly to counter its effect.\cite{250}

Even if a gay or lesbian victim of intimate violence succeeds in having his or her batterer arrested, or brought to court to request a protection order, magistrates, judges and prosecutors may be unwilling or unable to help the victim.\cite{251} This is because their own negative attitudes towards gay males and lesbian women may affect their ability to act fairly. Moreover, as many court personnel are aware of the popular theories that base the perpetuation of intimate violence on male and female gender roles, they may be unable to identify intimate violence in a couple of the same sex.\cite{252} This issue is exacerbated when both parties appear before the court and each member of the couple claims to be battered. Inability to obtain a restraining order against their intimate batterer is a major obstacle for gay and lesbian victims of intimate violence. This is because of the commonly encountered attitude that same-sex domestic violence is mutual violence.\cite{253} This may lead to mutual restraining orders, in the absence of any reasonable inquiry into the facts surrounding the application before the court.\cite{254} This is problematic as the batterer may use the order as another means to exert control. It may also lead the court to assume in the future that mutual violence has occurred, and the previous mutual order will reinforce this belief.\cite{255} A judicial officer who would be likely to dismiss a

\footnotesize


\cite{251} Bricker, above n 8, 1397.


\cite{253} Bricker, above n 8, 1397.


\cite{255} Vickers, above n 133, 8.
man’s claim that he was battered by his female spouse may assume that both parties in a gay or lesbian relationship are equally to blame or equally capable of inflicting physical injury on each other.256

The discussion above helps to explain why gay males and lesbians women have little faith in the legal system, the legal framework which is in fact responsible for protecting them from discrimination. This is why educating legal institutions about homophobia and the dangers attached to making heterosexual assumptions is of the essence, as the response of the legal system to the issue of same-sex intimate violence will be conditioned by these institutions. It will influence the nature of the assistance and resources, if any, that are available to victims of same-sex battering.

2.9  In Summary

Domestic violence is not a societal anomaly confined to women as victims and men as batterers. While the silence surrounding the prevalence and impact of domestic violence against women has been broken, intimate violence between same-sex couples remains ‘closeted’. Homophobic and heterosexist attitudes contribute directly to this issue. In addition, these societal stressors not only condition the development of abusive same-sex intimate relationships, they also propagate particular forms of abusive behaviour. A better understanding of these factors and their repercussions on same-sex couples is sufficient to differentiate the dynamics of abusive same-sex relationships from their heterosexual counterparts. As BWS exclusively attempts to typify the responses of battered heterosexual women to intimate violence, its conceptualisation of intimate violence does not incorporate

256 Robson, above n 219, 579.
the experiences of same-sex couples. It is not the aim of this thesis to contest the cyclical nature of intimate violence expounded by BWS through its theory of violence. In fact, the thesis has espoused the view, also supported by other authors, that the violence experienced by gay couples may have a cyclical nature. However, this ostensible acceptance of BWS should not distract from appreciating the inadequacy of BWS as a model of intimate violence, to explain the dynamics of same-sex couples involved in abusive relationships. While BWS utilises the concept of ‘learned helplessness’ to explain why battered individuals remain in abusive relationships, this chapter has explained that many victims of same-sex battering decide to stay in abusive relationships because of hope, love, loyalty, fear, dependency and inadequate knowledge about same-sex intimate violence. Additional stressors such as homophobia and heterosexism provide further reasons for a gay or lesbian victim’s failure to leave his or her batterer. Other factors, such as HIV-positive status for gay males and the ‘lesbian utopia’ for lesbian women, also contribute to the decision of gay and lesbian victims of intimate violence to remain in abusive same-sex relationships.

The lack of support and assistance available to these victims is a factor which the victims themselves consider to be a deterrent to them leaving their batterers. Many social institutions delegitimise the experience of victims of same-sex intimate violence and limited legal concessions are given to those involved in same-sex relationships. The responses provided by the criminal justice system to these victims have been neglectful and their predicament is easily discarded or trivialised. In fact the police force and the courts are seen as institutions in which heterosexist and homophobic attitudes predominate. Awareness of these issues has precluded many victims of same-sex intimate violence from putting an end to the violence by seeking legal remedies.
The following chapter will argue that it is not necessary for battered partners to lead evidence of BWS to support claims of self-defence in circumstances where, after being exposed to a prolonged period of violence, they have killed their batterers. This is the case regardless of whether the intimate violence took place in a heterosexual relationship or in a same-sex relationship, as BWS poses significant barriers for both battered gay and lesbian defendants and battered heterosexual women who do not fit within the stereotype of the good battered woman created by the model. It will be argued that, when the jurisprudential nature of the defence of self-defence is explored, it may be seen that the defence should be available to these victims of intimate violence without there being a need to medicalise their experiences through reliance on BWS. The chapter argues that, in addition to the practical disadvantages that BWS offers to the victims of intimate violence who seek to rely upon it, it also produces an impoverished jurisprudence.
CHAPTER 3: KILLING IN SELF-DEFENCE

3.1 Introduction

Chapter 2 of this thesis discussed the incidence and nature of domestic or intimate violence and the conceptualisation of intimate violence provided by BWS. This chapter has self-defence as its focus, and argues that BWS is not necessary for battered partners to rely successfully on self-defence. In particular, it is argued that when the jurisprudential basis of self-defence is examined, the defence should be available without the need to rely on BWS. Reliance on BWS produces not only disadvantageous outcomes for gay and lesbian defendants, but also an impoverished jurisprudence.

The chapter commences with a discussion of the distinction between defences of justification and defences of excuse. It explores self-defence as a justification for killing another, and how rational and philosophical grounds naturally support self-defensive killing in circumstances where the defendant is a battered partner. Consistently with the central arguments of this thesis, it is argued that BWS blurs the distinction between defences of justification and defences of excuse. The chapter argues that since BWS medicalises the experiences of battered defendants, it operates as a de facto defence of temporal abnormality of the mind which excuses rather than justifies the killing of an intimate batterer.

In arguing how different theories of justifiable homicide support the killing of a batterer, certain examples of justifiable homicide are analysed to illustrate the validity of the argument with respect to battered individuals. Some of the examples provided make reference to battered heterosexual women as opposed to battered gay or lesbian individuals. This is
because, as was noted in Chapter 2, some of the issues faced by battered heterosexual women are also applicable to battered same-sex partners.  

3.2 Self-defence: A Defence of Justification or of Excuse?

Under the common law a person is justified in using lethal force in legitimate self-defence and therefore if an accused person acted in self-defence, he or she has acted lawfully.

The common law historically drew a distinction between killings that were justified and killings that were excused. In early English common law the legal profession paid considerable attention to the distinction between these doctrines. As noted by Professor Joshua Dressler, a practical reason may have inspired the interest:

the killing of an individual to prevent an atrocious felony could have resulted in a justifiable homicide culminating in an acquittal of the accused whereas a killing committed by a person suffering from insanity resulted in the forfeiture of the accused’s properties and the need of a pardon to avoid the accused’s death penalty.  

During the nineteenth and twentieth centuries, however, a successful claim of excuse could potentially have the same effect as a claim of justification, so that members of the legal profession and scholars lost interest in the inherent differences between these exculpatory concepts. It was said in Zecevic v Director of Public Prosecutions (Vic) (‘Zecevic’) that any practical distinction between justifiable homicide and excusable homicide disappeared with

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257 See 2.6.3.

the abolition of forfeiture by statute in 1928. Nevertheless, the last ten years have witnessed the rebirth of a solid body of literature based upon the concepts of justifiable and excusable homicide and directed at determining whether certain types of conduct should be punished, excused or justified. It has been argued by several authors, amongst them David Brown et al, that the concepts themselves do not assist in the understanding and analysis of the current defences to homicide due to the fact that the terms are not used consistently. According to Brown, some authors base the distinction between the concepts on the degree of moral blameworthiness while others base it upon historical grounds.

Whilst under the early common law claims of justifiable homicide related to deaths resulting from law enforcement, under the modern law claims of justification have extended beyond deaths resulting from law enforcement to situations where the conduct of the accused might not be regarded as wrongful. Thus modern examinations of the law of self-defence at common law refer to the distinction between justifiable and excusable homicide. The importance of the distinction was noted by the majority of the High Court of Australia in Zecevic, where Wilson, Dawson and Toohey JJ stated that ‘[t]he importance of the distinction lay largely in the different consequences of successful pleas of justification and excuse’.

262 Ibid.
263 See, for example, Zecevic (1987) 71 ALR 641.
264 Ibid 649 [30].
In its discussion, the High Court explained that justifiable homicide carried with it commendation rather than blame.\footnote{Ibid 649 [30].} It entitled the accused to a total acquittal, entailing no forfeiture and requiring no pardon.\footnote{Ibid 649 [35].} It extended to killing done by a law enforcement officer in the execution of justice, such as while the defendant was apprehending a felon or preventing a felony. Justifiable homicide thus extended to cases of self-defence which were in response to a felonious attack by the deceased.\footnote{Ibid 649 [40].} In contrast, excusable homicide was not entirely without blame and merely excused, rather than acquitted, the defendant. It required, first, a pardon and it also involved, until abolished, forfeiture of the defendant’s property.\footnote{Ibid 649 [30].} It was concerned, not with the execution of justice, but with a necessary and reasonable response to a threat to life. The High Court went on to state, however, that the distinction ‘now is a matter of history … and today it is no part of the law in Australia to differentiate between the two’.\footnote{Ibid 649 [45].} It retains some importance, nevertheless, as the following section indicates.

3.2.1 The Current Common Law

Under the modern law the distinction between conduct, including homicide, that is justifiable and conduct that is excusable is still important, but for many different reasons. A distinction between justifiable and excusable homicide is found in the elements of the offence with which the accused is charged. The defence of justification requires that the elements of the
offence are satisfied, but challenges the wrongfulness of the act, whereas the defence of excuse accepts that the conduct of the accused was wrongful but avoids the attribution of criminal responsibility to the accused. In other words, justification looks at the quality of the act; excuse at the distress of the actor. In addition, the wrongfulness aspect of a defence of justification can be satisfied where the harm averted is greater than the harm inflicted. Basically, defences of justification turn the legal inquiry into the external circumstances surrounding the criminal conduct and release the accused of criminal responsibility because the harm caused by the accused’s conduct was outweighed by the harm prevented. Thus an action which would otherwise be punishable could be justified in the light of specific circumstances. Therefore a homicide is justifiable, for example, when a ministerial officer acts in obedience to a lawful warrant issued by a competent tribunal, or when a soldier kills in obedience to the lawful commands of his or her superior. So, too, a defendant who kills her attacker in order to save her life is justified and the killing is lawful. She is accepting responsibility for the killing but denies that it is a wrongful act. In contrast, the defendant claiming a defence of excuse accepts that, although what was done was wrong, there is a reason why the accused should not be blamed for it. A good example of a defence of excusable homicide is the defence of insanity. Other examples of defences of excusable homicide include substantial impairment and infanticide.

271 Ibid.
273 Brown et al, above n 261, 612.
It is worth noting that the High Court in Zecevic made it clear that although self-defence nowadays resembles justification rather than excuse because, if successfully pleaded, it provides a full acquittal to the accused, its true nature philosophically as a matter of history is excusable, as it is directly aimed at the preservation of human life rather than the execution of justice.\textsuperscript{276} This history of the law of self-defence serves to explain why the requirement of reasonableness, which was a requirement of excusable homicide, continues to be part of the law of self-defence nowadays.\textsuperscript{277} In addition, it establishes why the requirement of reasonableness should not be regarded as a definitional element of the offence but as going rather to exculpation.\textsuperscript{278}

The requirement of reasonableness has affected the development of the law of self-defence, and has limited the availability of the defence to battered gay and lesbian defendants who seek to rely on self-defence as they may struggle to persuade jurors that their conduct is reasonable. As it will be explained in Chapter 5 of this thesis, unaided jurors who lack an understanding of intimate violence may perceive the battered defendant’s action as disproportionate, lacking immediacy and therefore unreasonable.\textsuperscript{279}

With respect to battered partners, the distinction between excusable and justifiable homicide is further important because, as argued in this thesis, their conduct should not be viewed as a wrongful act at all. Their position should be considered to be the same as the position under the old common law of justifiable homicide that, since no wrong had been committed, no pardon was required. Although requirements of proportionality, immediacy and duty to

\textsuperscript{276}Zecevic (1987) 71 ALR 641, 649 [45].

\textsuperscript{277} Ibid 649 [50].

\textsuperscript{278} Ibid 649 [50].

\textsuperscript{279} See 5.3.
retreat act as gatekeepers to the defence, and are relevant to an assessment of the necessity of
the self-defensive action and the reasonableness of the accused’s response, they constitute
a major obstacle in framing self-defence for victims of intimate violence who kill their
batterers.

With respect to the use of expert evidence in BWS and the distinction between justifiable and
excusable homicide, it must be noted that BWS medicalises the responses to violence of the
battered defendant, suggesting that their response to violence was abnormal but for the
syndrome, which excuses it. Thus the syndrome excuses what otherwise would be
considered abnormal. This is problematic from a jurisprudential perspective, since the
defence of self-defence is nowadays considered to be a defence of justification. Given that
the current chapter seeks to explore the law of self-defence, it is important to understand its
philosophical underpinnings and contextual foundations. The relevance of the distinction
between excuse and justification to this thesis is that battered individuals who kill their
batterers in self-defence should have the right to present their defence in a way that is
consistent with the principles of justifiable homicide. However, when BWS is introduced
into a trial, the medicalising of the defendant’s behaviour moves the focus from justifiable
homicide to excusable homicide. In accordance with this argument, the distinctions must be
drawn and the lack of definitional boundaries between defences of justification and defences
of excuse remedied.

Arguably, the reason why many scholars have discredited the categorisation of the current
defences to homicide into defences of either justification or excuse is because the majority of
twentieth century theoretical legal scholarship in the field of criminal law has been

consequentialist; that is, the authors have been too concerned with analysing and studying criminal law doctrines in terms of their consequences—for example, their effect on crime, its prevention or a similar goal.\(^{281}\) Little consideration has been given to whether the rules themselves, whatever their effectiveness in preventing or reducing crime, have been based upon community-held moral principles.\(^{282}\) An application of moral reasoning in the analysis of the law of self-defence in regard to the killing of a batterer by his or her battered partner would expose the fact that the issue is one of fairness—the policy of the law does not directly countenance the full circumstances faced by a battered partner. The problem with this consequentialist approach to the criminal law is that it does not consider the fact that the question of whether it is fair to punish a battered wife who has killed her batterer should be independent of whether or not the punishment will have a beneficial impact on her future behaviour or that of other battered women.

Having argued the case that the distinction between justifiable and excusable homicide is still an important one for the defence of self-defence, the paper will proceed to explore various rational and philosophical grounds for supporting the justification of killing in self-defence.

\(^{281}\) Dressler, above n 258, 1157.

\(^{282}\) Ibid.
3.3 Justifying Killing in Self-defence

3.3.1 Objectivist and Subjectivist Approaches

Self-defence is nowadays viewed as a defence of justification since a successful plea of the defence resembles justification as opposed to excuse.283 However, the grounds for deeming a particular act to have been justified can vary depending on different perspectives. Two of these perspectives are those endorsed by ‘objectivists’ and ‘subjectivists’. Objectivists look at the quality of the accused’s actions without regard to his or her beliefs or the reasonableness thereof.284 Conversely, subjectivists or reason-based theorists argue that an act is justified if the accused had good reasons for acting, therefore requiring a reasonably-held belief that the act is permissible.285

The distinction between these two approaches is best understood with reference to the situation of a battered individual who kills his or her assailant while the assailant is asleep. According to objectivist theorists, if a battered gay male kills his abusive partner while he is sleeping, he commits an unlawful killing and no attention should be paid to the fact that the defendant honestly and reasonably believed that once his abusive partner woke up he would carry out the threat uttered by him against the defendant before his falling asleep. By contrast, subjectivist theorists accept that if the same battered male reasonably believes that his partner is going to kill him, then he is warranted or justified in killing him, regardless of

283 See Zecevic (1987) 71 ALR 641, 650 [50]. It should be noted that while in Australia self-defence has generally been regarded as an excuse, the prevalent view in contemporary American and English jurisprudential debate is that self-defence is a justification rather than an excuse: Rebecca Bradfield, The Treatment of Women Who Kill Their Violent Male Partners within the Australian Criminal Justice System (PhD thesis, University of Tasmania, 2002) 72-3 <http://eprints.utas.edu.au/10454/Bradfield_ch3.pdf>.


285 Ibid 714.
the fact that other options, such as leaving his abusive partner or asking for help, were available. The case of *R v Secretary*,286 the first case in Australia where the Battered Woman Syndrome was recognised in the context of self-defence, is used to illustrate the distinction.

In that case the accused, Helen Secretary, had been in a de facto relationship with the deceased for 11 years. For the last eight years of their relationship, the deceased had subjected the accused and her children to physical, mental and verbal abuse. During the two months prior to the killing, the deceased’s violence had increased. One month before the killing, he had beaten the accused with his hands and a belt to the extent that neighbours had reported the matter to the police. Police visited the residence and seized two of the batterer’s three guns. The accused spent just under a week at a women’s shelter. The deceased left the household for about a week but continued to breach an AVO by visiting the household and ultimately moving back in. The day before the shooting by the accused, the accused, her younger sister and the deceased drove to a neighbour’s home. Prior to leaving the house, the deceased assaulted the accused by threatening her with a knife. He then used a knife to cut the telephone cord in order to prevent her from calling the police. The return trip was stressful to the accused. The deceased assaulted her verbally and was driving dangerously to intimidate her. During this trip the accused saw the rifle, which the deceased had earlier told her he had thrown in a bin, in the back of the vehicle. Upon their return to the house, the deceased’s aggressive conduct continued. He swore at the accused and other family members. The accused’s sister deliberately stayed, fearing for the accused’s safety. The deceased retired to his bedroom and told the accused to follow him. The deceased assaulted the accused by punching her to the head and throttling her. He then ordered the accused to get him a drink of water and his cassette player, which she did. As the accused was leaving

the room, the deceased then sat up in his bed and said the following words: ‘Hurry up, because I want you to come back and tickle my back because I’m gonna have a little sleep and, when I wake up, I’m fucking [inaudible] haven’t fuckin’ started’. Following those words, the accused then feared for her life. She left the room, picked up a bullet from a cabinet in the living room, went downstairs and loaded the gun which was in the back of the car. She walked back, pointed the gun at the deceased, who was asleep, and fired. The deceased died almost immediately.

At first instance, the trial judge refused to put the issue of self-defence to the jury. This decision was based upon an interpretation of s 28(f) of the Criminal Code (NT). That section exculpates a person who uses self-defensive force ‘where the nature of the assault being defended is such as to cause the person using force reasonable apprehension that death or grievous harm will result’. The law required that the person threatening or attempting to apply force has an actual or apparent ability to carry out the threat. This requirement posed difficulties for the accused as the deceased threatened her but then went to sleep. The accused was found not guilty of murder but guilty of manslaughter as a result of provocation. On appeal, Mildren and Angel JJ held that the issue of self-defence should have been left to the jury.

Arguably, the facts of the case suggest that if ever there is someone of whom it may be said that they deserve retribution, it was probably this batterer. However, the same facts illustrate how difficult is for a battered woman to successfully argue self-defence. It is important to remind the reader that this case was chosen not because the battered defendant was heterosexual, but because the case exemplifies the problems and abuse which can be suffered by any battered individual. It is a good example of this kind. Could the situation have been different if the killing of the batterer had occurred during an episode of violence? If the
accused had shot the deceased while he was beating or throttling her, the facts would clearly indicate that she had a right to use lethal force. The same facts would make the use of BWS evidence unnecessary.

If a subjectivist approach is adopted, Helen Secretary’s actions in leaving the room, picking up the bullet, loading the gun, and shooting her partner in the back are warranted, as she had good reasons for her conduct at the time it was committed. She was attuned to the batterer’s pattern of violence and had learned to recognise that the attack she was to encounter, once the batterer woke up, would seriously threaten her sexual integrity or life. Nevertheless, a very important consideration must be addressed: not all morally justified conduct is criminally justified or excused for the purpose of the current criminal law. While Helen Secretary’s actions could be morally justified on a subjectivist basis, an objectivist interpretation of the law would lead to the conclusion that her conduct was unnecessary and her behaviour unreasonable.

The same difficulties arguing self-defence are faced by battered gay and lesbian defendants, but they are exacerbated as a result of homophobia and heterosexism. But if killing is morally wrong, should the killing committed by a battered gay defendant ever be justified? Hart explains the permissibility of killing in self-defence by noting that it is an exception to the general rule which makes killing punishable. It is admitted because the policy or aims which in general justify the punishment, and protection of human life, do not include cases


288 Desmond O’Connor and Paul Fairall, Criminal Defences (Butterworths, 2nd ed, 1996) 3.
such as this.\textsuperscript{289} However, if, as Hart asserts, the protection of human life is a goal of the criminal law, the system has failed because a human being’s life has been taken (that of the batterer) by another human being (the battered defendant).\textsuperscript{290} If the system singlemindedly seeks to protect human life equally and fairly, and it allows a male who responds to an isolated act of violence from another male of similar size and strength to have access to the defence of self-defence, it should also allow a battered gay male or lesbian woman, whose fear of attack is reasonable, to use this same law to defend himself or herself from a same-sex batterer, of potentially equal size and who has proven to be capable of executing his or her violent threats. If the system is based upon the premise that the equality of lives is of the utmost importance, why does it appear that the life of a heterosexual male is more precious than that of a battered gay or lesbian individual for the purpose of self-defence?\textsuperscript{291}

Does not the batterer forfeit his right to life by virtue of threatening his or her same-sex partner?\textsuperscript{292} It may be argued that the purpose of assessing the culpability of a battered individual during trial is not to judge the batterer morally, but to evaluate the propriety of the battered individual’s conduct in relation to the threat posed by the batterer. By implication, the life of the batterer and the life of the battered partner do not have the same entitlement to be preserved. Broadly interpreted such proposition may imply that a battered woman like Helen Secretary, or any battered individuals generally, have a moral claim against their batterers ad infinitum. That is, without limit. If this view is accepted, battered defendants

\begin{itemize}
\item \textsuperscript{291} Cheyney Ryan, ‘Self-defence, Pacifism and the Possibility of Killing’ (1983) 93 \textit{Ethics} 508, 510.
\item \textsuperscript{292} Leverick, above n 275, 45.
\end{itemize}
could, rightly, enlist the help of someone to kill their batterers and then assert self-defence as they are justified to defend their lives considering the nature of the threat posed by the batterer.\textsuperscript{293} It could be argued that, as a result of sex role conditioning, heterosexism, homophobic attitudes and the lack of support offered to them by the state, these defendants cannot protect themselves and are therefore entitled in default to take other measures, including taking away the life of their intimate aggressor, to protect their lives.\textsuperscript{294}

Although this principle may suggest that, under certain circumstances, human life becomes expendable or subject to moral depreciation, subjectivist accounts, generally, do justify self-defensive killing by battered individuals irrespective of the gender of the victim or the batterer. This account of self-defensive killing also supports the foundations of the thesis that self-defence must be recast so as to take into account the experiences of the victims of intimate violence who kill their batterers. Adopting a subjectivist approach through legislative change would logically offer a fairer outcome to these victims.

\textbf{3.3.2 The Consequentialist Approach}

Consequentialism can be defined as a doctrine in which the moral value of any action lies in its consequences, thus consequentialists argue that it is by reference to their consequences that actions, laws and legal institutions can be justified.\textsuperscript{295} There is a large body of literature justifying the existence of self-defence upon consequentialist grounds.

\textsuperscript{293} This issue was one of those centring the debate in \textit{Oland v The Queen} (1998) 159 ALR 170.

\textsuperscript{294} Lenore Walker, ‘A Response to Elizabeth Schneider’s Describing and Changing’ (1986) 9 \textit{Women’s Rights Law Reporter} 223, 224. Walker herself argued that battered women who enlist the help of others are not premeditated killers. Rather, these women, as a result of sex role conditioning and/or other factors, cannot protect themselves and are therefore entitled to resort to other means to protect their lives.

\textsuperscript{295} Leverick, above n 275, 46.
According to this concept, the consequence of killing a batterer in self-defence is preferable to the consequence of allowing the victim of an aggressor to be killed. However, for self-defence to work as a justification within a consequentialist conception, there must be reasons why the death of the batterer is preferable. The following paragraphs consider some of the arguments that have been put forward to support this proposition. One of the most common explanations is that by virtue of the blameworthiness of the attack or threat, the aggressor renders his or her own life less valuable. This approach is known as the ‘discount approach’.  

3.3.2.1 The Discount Approach

According to this approach those who intentionally pose a lethal threat to others place themselves in a situation of moral weakness. Thus, for instance, when a choice is forced between the life of a batterer and that of his or her intimate partner, the battered partner’s life is preferred on the basis that it is worth more than the batterer’s since he or she has discounted the value of his or her own life by posing a lethal threat to his or her victim. Perhaps, it has been discounted through the years of emotional and physical abuse to which the victim has been exposed.

The main criticism of the discount approach is that the idea that an aggressor’s life can be discounted through culpability is inconsistent with the principle that all humans’ lives have


297 Leverick, above n 275, 33.

298 Ibid.

299 Montague, above n 296, 209.
equal value before the law. Further, in the case of a battered partner, if the batterer’s life is discounted on the basis of his or her culpability and history of abuse, then the battered partner’s life may be discounted in the same way if he or she has engaged in acts of violence towards the aggressor or anyone else in the past or in the future. This poses a problem for same-sex relationships, where retaliation by the battered partner is not uncommon. However, the idea that self-defence should not be available to a battered gay or lesbian individual on the basis that he or she has not lived a blame-free life seems inconsistent with the current principles of criminal law.

This approach also fails to justify a killing in self-defence where the aggressor is not responsible as a result of insanity or age. While killing a culpable aggressor could always be justified, killing an innocent aggressor in response to a passive threat may or may not be justified. This depends on whether other factors weigh in its favour. On account of the difficulty posed by the discount approach, some consequentialists feel more comfortable justifying killings in self-defence upon the basis of the ‘future harm approach’.

3.3.2.2 The Future Harm Approach

According to this approach, the consequence of killing a batterer is preferable to the death of the victim because, by killing the batterer, the victim is likely to be saving more lives than his or her own in the long term. This is so because, if an assailant is permitted to go

301 Leverick, above n 275, 33.
302 Ibid.
unsupervised, it is likely that he or she will kill not just the present victim but other future ones.\textsuperscript{304}

The future harm approach could justify the killing of some innocent aggressors. For instance, if someone who is mentally insane is permitted to go unchecked it is possible that he or she is likely to kill others. Nancy Davis has argued that the future harm approach is most convincing with respect to the killing of an innocent aggressor who is dangerous but not responsible for his or her conduct due to insanity.\textsuperscript{305}

The principle would have some efficacy in explaining the killing of a batterer by a battered partner. Abusive partners frequently have a history of antecedent domestic violence.\textsuperscript{306} It is common that they have exhibited violent conduct towards people with whom they were intimately involved during previous relationships.\textsuperscript{307} Accordingly, by killing their aggressor the battered victim is preventing the aggressor from causing further harm to future victims, in this context to the batterer’s future intimate partners.

The two approaches just discussed can be described as ‘act’ consequentialism, that is, in weighing up the benefits of killing the aggressor or the victim, only the direct consequences of the self-defensive conduct under consideration are taken into account.\textsuperscript{308} However, it may be the case that killing in self-defence is justifiable on the basis of ‘rule’ consequentialism, to which we now turn.

\begin{flushleft}
\textsuperscript{304} Leverick, above n 275, 48.
\textsuperscript{306} Sorenson and Thomas, above n 13, 352.
\textsuperscript{307} Ibid.
\textsuperscript{308} Alexander, above n 303, 1179.
\end{flushleft}
3.3.2.3 **Rule Consequentialism**

According to rule consequentialism, a rule permitting self-defensive killing would tend to deter aggression and, ultimately, save human lives.\(^{309}\) A great exponent of this doctrine is R B Brandt, who argues that the availability of self-defence is beneficial to the community as it promotes the public good.\(^{310}\) This is because the awareness of a potential batterer that the self-defensive force that may be used against him or her is legitimate, is in itself a deterrent factor. A priori this definition would support the killing of abusive intimate partners by gay and lesbian defendants. This is because batterers usually manage to prevent the victim from leaving them by telling them that the police and other legal and social institutions are homophobic and that the victim would not be believed. If the batterer believes that his or her battered partner would be justified in killing him or her because the barriers mentioned above have been removed—that is, the victim may now enjoy the protection of government agencies—the batterer may be deterred from continuing the abuse.

If the exclusive consideration in the justification of self-defence is one of rule consequentialism, however, this would justify killing an aggressor when the killing does not necessarily occur in circumstances attracting a classical model of self-defence or when the killing is no longer necessary. For instance, when the attacker is disarmed and lying helpless on the floor. Perhaps this approach would resonate better with those scenarios in which battered individuals kill their assailants while they are sleeping or who arm themselves in order to strike.

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\(^{309}\) Ibid.

3.3.2.4  *Consequentialism: A Combined Approach*

Frequently rule consequentialism is used in conjunction with act consequentialism to produce a more cohesive doctrinal basis to justify self-defence. After all, if the benefits to society in having a rule likely to deter aggression are placed on the same side of the scales as the life of the victim, then self-defensive killing is justified on the balance of interests. It is believed that this combined approach underpins the current law of self-defence where certain killings are permissible but subject to some legal requirements. Thus, where two lives come to compete for a right to life, the life of the victim is preferred considering that the victim’s interest, coupled with the societal interest of preserving the right to bodily integrity, represents the stronger choice when weighed against the attacker’s life. Justified killing is permitted as long as it deters aggression. To create a rule aimed at deterring aggression by justifying lawful violence, however, is inconsistent with the original rule whose purpose is the deterrence of aggression.

If legal matters were to be analysed only as matters of consequence, this would involve violations of individual rights and justice,\(^3\) thus even those exponents who espouse consequentialist explanations admit that there are difficulties with the doctrine. It is easy to understand how justification is itself a troubling concept, as it promulgates the preference for one human life over another.

3.3.3  *The Personal Partiality Approach*

Another approach to the justification of killing in self-defence is that if a battered partner is forced to choose between his or her life and the life of their batterer, it is their right to prefer

their own life over that of their assailant, as he or she personally values it more.\textsuperscript{312} This approach is well known as the ‘personal partiality approach’.\textsuperscript{313} The argument here is that there is no morally relevant reason why one of the two—batterer and victim—should live at the expense of the other. Since there is no morally relevant reason to decide one way or the other, it is morally permissible for the victim to decide the matter in favour of himself or herself.\textsuperscript{314}

A criticism is that, if battered partners kill their intimate batterers based upon personal partiality, the batterers would likewise be justified in retaliating against any self-defensive force used against them.\textsuperscript{315} A second criticism is that if the killing of a batterer by a battered partner is permissible on the grounds solely that he or she is entitled to prefer his or her own survival, there is no difference between self-defence and other killings in which an individual kills to save his or her own life by killing another.\textsuperscript{316} The concept is a better fit with defences of excuse than with justification, as it has nothing to do with the execution of justice but rather with preferring one’s life over that of another.\textsuperscript{317} It is difficult to see why persons are entitled to favour their own life over that of another simply because it is their own life and they value it more,\textsuperscript{318} unless the person is compelled to do it.


\textsuperscript{313} Where an individual is faced with making a choice between lives, he or she has a right to give preference to his or her own life: ibid.

\textsuperscript{314} Ibid.

\textsuperscript{315} Ibid.

\textsuperscript{316} Michael Gorr, ‘Private Defense’ (1990) 9(3) \textit{Law and Philosophy} 241, 252. An example of such killings is where the individual kills an innocent aggressor.

\textsuperscript{317} Leverick, above n 275, 52.

\textsuperscript{318} Kasachkoff, above n 312.
It is submitted that the situation of compulsion activating the exception to criminal responsibility is one of immediate danger to a certain legitimate interest that forces the actor to harm another in order to save his or her life first. The compulsion exception is the survival instinct observed in all species. It is one which the law acknowledges as part of human frailty, for instance in the law of provocation. After all, it is the aggressor who implements an illegitimate use of force. Thus, the legitimate interest of the victim to defend his or her life will entitle him or her to repel this attack in order to protect himself or herself from the risk of injury anticipated and posed by the initial attack of the aggressor. The approach is consonant with the conduct of a battered individual who, by killing his or her aggressor, demonstrates preference towards his or her own life.

3.3.4 Rights-based Approaches

Perhaps a simpler understanding of self-defensive killing is that a battered partner whose life is threatened by an aggressor is permitted to use lethal force to defend his or her life.\(^{319}\) The battered individual is compelled to kill because his or her right to life, which is a moral right, is at stake.\(^{320}\) This victim of partner abuse whose life is threatened by a batterer has a right to defend his or her life because the right to life is universal, that is, it is a right possessed by all human beings just by virtue of being human.\(^{321}\) The right to use self-defensive force is a right possessed by all human beings, including those living in abusive intimate relationships,


\(^{320}\) Within this conception, human rights are considered ‘moral rights which are owed to each man and woman by every man or woman solely by reason of being human’. These rights differ from other moral rights because they possess five inherent characteristics: universality, individuality, paramountcy, practicability and enforceability: see Leverick, above n 275, 55.

as individuals, rather than as a member of a group. Their right to override the life of their batterers is paramount as they have a strong justification for doing so. The right to use lethal force against a batterer who threatens one’s life is a right that the state has the power to uphold, even if it chooses not to do so. Since the state has failed to protect the life of the battered defendant, he or she can assert or enforce this right against the state and against the batterer. Such enforceability stems from the legitimacy of enforcing the most fundamental of all human rights: the right to life.

The right to protect one’s life by using self-defensive force has been supported by several philosophers. To John Locke, there is a natural right to self-preservation. For Thomas Hobbes, there is a right to bodily protection. William Blackstone describes it as a natural right of resistance and self preservation. Similarly, many academics argue that the permissibility of killing in self-defence is grounded upon the notion that all human beings have a right to life. By his guilty act, namely threatening the victim’s life with his constant violence, the batterer loses his right to life or, at least, the right to claim his right. He morally forfeits his right to life. The batterer’s right, naturally, was not transferable; however, such right or claim could be lost. Two theories as to how an intimate batterer may lose his or her right to life are considered below.

322 Ibid.
323 Leverick, above n 275, 56.
324 John Locke (translated Lewis F Abbott), Two Treatises on Government: A Translation into Modern English (Industrial Systems Research, 2009) 76.
325 John Finnis, Natural Law and Natural Rights (Clarendon Law, 2nd ed, 1980) 55.
This theory is known as ‘moral forfeiture of the right to life’.\textsuperscript{328} According to this account the right to life is forfeited simply because the life of the aggressor becomes an unjust immediate threat to the life of another. It needs to be remembered that we are not concerned with punishing the aggressor but instead with warding off an attack.\textsuperscript{329} The moral forfeiture account permits self-defensive killing without expecting the victim to have attempted other means of putting an end to the violence before killing the batterer. For instance there is no expectation that she should have complied with a duty to retreat in order to save her life.\textsuperscript{330}

The approach is consistent with the experiences of battered partners for whom, on most occasions, retreat from intimate violence is not available. Sometimes the problem is one of perception: it has been argued that some individuals exposed to prolonged periods of violence perceive their batterers as omnipotent and capable of reaching them no matter if they try to escape.\textsuperscript{331} However, many victims of intimate violence who have left abusive relationships in the hope of putting an end to the violence have found that, even after leaving the abusive relationship, the violence from their batterers continued.\textsuperscript{332} The law itself has no specific requirement that the victim has a duty to retreat when facing a lethal threat.\textsuperscript{333} It is a circumstance to be considered with all the others in determining whether the accused

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\item\textsuperscript{328} Leverick, above n 275, 62.
\item\textsuperscript{329} Ibid 64.
\item\textsuperscript{330} Ibid. For duty to retreat see 5.2.3.
\item\textsuperscript{331} Lenore Walker, ‘Battered Women, Psychology and Public Policy’ (1984) 39 \textit{American Psychologist} 1178, 1182.
\item\textsuperscript{332} Paula Finley Mangum, ‘Re-conceptualizing Battered Woman Syndrome Evidence: Prosecution Use of Expert Testimony on Battering’ (2007) 19 \textit{Third World Law Journal} 593, 596.
\item\textsuperscript{333} Zecevic (1987) 71 ALR 641, 653.
\end{itemize}
\end{footnotesize}
believed upon reasonable grounds that what he or she did was necessary in self-defence. According to this account batterers become moral monsters and, as a result of their conduct, they forfeit their right to life.

3.3.4.2 Death as Punishment

On the other hand, it could be argued that the killing of an aggressor is his or her punishment for using illegitimate force. The problem posed by this approach is that justice is not to be administered by citizens unless empowered by the state. Moreover, there is no law in Australia which requires the loss of one’s life as a punishment for any particular offence. Another issue associated with this account is that it distracts us from the main predicament for justifying self-defence, since it presupposes that the victim has formed the required mens rea to kill as opposed to using force that is proportional and necessary to save her or his own life.

3.3.5 Other Approaches

It could potentially also be argued that the killing of an abusive intimate partner is justifiable, simply because the battered individual acted in response to the batterer and the violence he or she perpetrated. In other words, the batterer and the violence perpetrated by him or her are precursors and conditioners of the battered individual’s response. These two elements preclude the victims of battering from exercising their free will, as when they killed their batterers they were not acting freely but under the compulsion of the circumstances in which they were placed. The circumstances and the batterer act like coercers which terminate the free will of the battered partner. With regard to battered gay and lesbian defendants, it may be observed that the isolation and discrimination felt by battered same-sex partners may

\[334\] Ibid.
result in them having very limited avenues for escaping from an abusive relationship. In fact it could be argued that heterosexism and homophobia act as additional elements of coercion which may force a battered gay or lesbian individual to kill his or her intimate batterer. Since the killing was not an autonomous act, there cannot be moral attribution. This conception of justice is Kantian.\textsuperscript{335} To Kant, moral responsibility exists where there is sufficient autonomy.\textsuperscript{336} Accordingly, to act freely is not to choose the best means to a given end; it is to choose the end itself, for its own sake—a choice that humans beings can make provided they have acted autonomously.

As has been observed, a number of different arguments have been raised seeking to justify killings in self-defence. Some of these suggest that for a victim of intimate violence to kill his or her batterer is the right thing to do because this act provides a maximum, or a greater, amount of good to the majority. Other approaches are more concerned with the rights of the individual and choose to defend the inviolability of the right to life. Still other approaches have justified the killing of the aggressor by arguing that it is what he or she morally deserved. These arguments are not necessarily consistent with obeying the legal rules set by states to achieve the primordial goal of achieving legal order. Obeying the rule of law is essential to the state and protected by it even with the imposition of punishment. Thus, to protect the legal order, self-defensive killing is only permissible under certain circumstances. Unfortunately, however, this legalistic approach to self-defence obscures the reality of many battered individuals who have killed their intimate batterers. This is despite the fact that the same philosophical foundations supporting self-defence arguably would independently


\textsuperscript{336} Ibid 109.
support the killing of an intimate batterer when he or she poses a threat to the battered partner’s life.

An alternative interpretation of the circumstances in which a victim of intimate violence finds himself or herself may be that a battered individual does not owe a duty to the state to refrain from using self-defensive force. This is because since the state has failed to protect them, they enjoy the ‘right’ to put an end to their predicament. This Hobbesian approach would justify the killing of their abusive partner.\footnote{According to Hobbes, the obligations of citizens to their governments last as long as the government is able to protect them: see Thomas Hobbes, ‘Of the Liberty of Subjects’ in Thomas Hobbes, \textit{Leviathan} (London, 1651) Ch XXI [21] <http://socserv.mcmaster.ca/econ/ugcm/3ll3/hobbes/Leviathan.pdf>.} A Rawlsian approach to justice would similarly justify such a killing if the principle of the ‘veil of ignorance’ is followed. If the Rawlsian approach is applied, a person in the original position would retain the right to kill to defend his or her life when the state fails to protect him or her.\footnote{John Rawls, \textit{A Theory of Justice} (Harvard University Press, 1971) 71-93. According to Rawls, the ‘veil of ignorance’ blocks knowledge, such that a person does not know what burdens and benefits of social cooperation might fall to him or her once the veil is lifted. With this knowledge blocked, parties in the original position must decide on principles for the distribution of rights, positions and resources in their society.}

So far it has been established that as a theoretical matter a claim of self-defence can be justified on substantial moral grounds. And although some of the principles discussed may seem extreme, it is important to understand that the majority of these moral theories strongly support the killing of an intimate batterer and self-defensive killing as a justification. That is, killing in these circumstances is not morally wrong. The chapter now turns to examine the arguments that self-defensive killing should be excused rather than justified, because the law should not compromise its moral path or tolerate as ‘not wrongful’ the killing of another person.
3.4 Excusing Killing in Self-defence via Battered Woman Syndrome

Claire Finkelstein argues that the preservation of one’s life is an act of self-interest, and that the action of protecting it at the expense of killing someone who threatens it is not justified, but excused.339 Similarly, in Zecevic, Wilson, Dawson and Toohey JJ explained that although the result of a successful plea of self-defence resembles justification rather than excuse, since it entitles the accused to a full acquittal, in practice nowadays the plea has a greater connection with excusable homicide, being in most cases related to the preservation of human life rather than the execution of justice.340

If excused, the conduct of the battered individual is still wrongful but excused on the ground that, by reason of BWS, the battered person is to be treated as if mentally ill.341 This is central to this thesis’ criticism of BWS and the problems that occur when Australian courts admit expert testimony in BWS: when the culpability of a battered defendant is assessed, judges commence their legal inquiry into the defence of self-defence with an understanding that the battered person’s behaviour is atypical.342 This implies that judges are more likely to excuse the killing of an intimate batterer if BWS evidence is permitted. By failing to attribute the killing to the external circumstances of violence in which the victim lives, judges and jurors are suggesting that the killing is not justifiable, but rather that it may be

341 In Director of Public Prosecutions (NT) v Secretary (1995) 129 FLR 39, 45 the expert suggested that the defendant killed her partner in a state of mind that was far from that of the reasonable adult.
excusable. The approach adopted by Australian judges is that, due to psychological malfunctioning, the battered defendant perceived the threat to himself or herself to be immediate and he or she acted out of proportion to the threat: they killed because they were mentally unstable. However, the response of the accused was reasonable because that is the way in which someone abnormal may have reacted to the same circumstances. But if the psychological malfunction of the accused is not explained through BWS, then, despite the circumstances showing otherwise, their response was neither necessary nor reasonable. The defendant relying on BWS is claiming an excuse because he or she asserts that, although what they did was wrong, there was a reason why he or she should not be blamed for it: basically, that his or her perceptions were distorted. Thus it is argued by this thesis that BWS is used as a de facto defence of excuse when self-defence is pleaded by a victim of intimate violence.

This thesis argues that to characterise the issue as one of excuse is to suggest that the responses of battered individuals are irrational. The inquiry should, rather, be centred on the abusive nature of the intimate relationship and how the accused’s responses become necessary and reasonable if these circumstances are considered: viewed in this light, the accused’s conduct should be regarded as justified and not wrongful.

3.5 In Summary

This chapter has discussed how, regardless of whether the victim of intimate violence and his or her batterer had been in a heterosexual or a same-sex relationship, the killing by a battered

343 Brown et al, above n 261, 612.

344 Leverick, above n 275, 18.
individual of their intimate partner could potentially be justified by using self-defence as a
defence of justification. While Chapter 2 explained the inability of BWS as a model of
intimate violence to reflect the dynamics of same-sex intimate violence,\textsuperscript{345} this chapter has
further criticised the syndrome for blurring the distinction between justifiable and excusable
homicide.

Self-defence has been accepted in our Western tradition as the legal saviour of those who are
compelled to kill in order to protect their own lives. As a concept it cannot be separated from
the principles that contributed to its development. These principles support the argument that
self-defensive killing is justifiable for a variety of morally-based reasons. A deeper
understanding of self-defence through the discussion provided in this chapter leads to the
conclusion that the different moral theories of criminal law provide sufficient grounding to
support use of the defence in circumstances where battered individuals kill, irrespective of
their gender, and that the defence should be available to them without it being necessary to
resort to BWS. When victims of intimate violence kill, they kill in self-preservation. Taking
their batterer’s life is imperative to their own survival, considering that other ways of
escaping their deaths are not realistic options. As it is argued in Chapters 5 and 6 of this
thesis, the law of self-defence needs to be modified so as to better accommodate the position
of victims of intimate violence—regardless of whether they are heterosexual women, lesbian
women or gay males—who kill their intimate batterers in self-defence. This chapter has
established that such recommendation enjoys the philosophical support of all the theories
discussed within the chapter.

\textsuperscript{345} See 2.7-2.9.
The next chapter will examine the current test for self-defence in New South Wales under both the common law and under s 418 of the *Crimes Act 1900* (NSW).
CHAPTER 4: THE LAW OF SELF-DEFENCE

IN NEW SOUTH WALES

4.1 Introduction

The legal recognition by a state of the right to use self-defence represents an acknowledgment by it that the use of self-defensive force is a legitimate expression of individual autonomy and sovereignty.\(^{346}\) Unfortunately self-defence is not readily available to every accused who kills their attacker while exercising his or her right to use self-defensive force. It does not easily fit the scenario of intimate violence, nor does it recognise that women may respond to fear and violence differently to men. This chapter discusses both the common law of self-defence as stated by the High Court of Australia in *Zecevic*\(^{347}\) and the new formulation of the defence in New South Wales under the 2002 amendments to the *Crimes Act 1900* (NSW). The chapter lays the foundations upon which the main argument of this thesis is founded. That is, that the current law of self-defence does not recognise or facilitate the justifiable use of self-defensive force by battered gay and lesbian defendants who have killed their intimate partners.

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\(^{346}\) This view was endorsed by the Privy Council in *Palmer v The Queen* [1971] AC 814, 831 (Lord Morris): ‘It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances.’

\(^{347}\) (1987) 71 ALR 643.
4.2 The Position at Common Law

4.2.1 A Recent History of Self-defence under the Common Law in Australia

In the Privy Council decision of Palmer v The Queen (‘Palmer’) Lord Morris stated that

[i]t is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary.348

This statement reflects both recognition of the right to use lethal force as a legitimate legal concession and the way in which the common law has limited its use by providing that such right is only to be exercised if it is reasonably necessary to do so.349

In R v Howe (‘Howe’) the High Court of Australia held that an accused person was entitled to use lethal force against his or her attacker; however, if the force used by the accused was excessive, he or she was guilty of manslaughter as opposed to murder.350 This partial defence of excessive self-defence was rejected by the Privy Council in Palmer.351 The Privy Council based its decision on the basis that the proportionality of the accused’s response to the original aggressor was an essential element of self-defence. The Privy Council held that it was not an option for excessive self-defence to be available to an accused as a halfway house where he or she had used defensive force excessive to that permitted by the law.


349 It is precisely the requirement of ‘reasonableness’ which has centred the debate regarding self-defence. For discussion of reasonableness see 5.3.

350 R v Howe (1958) 100 CLR 448.

Accordingly, the defence of self-defence either succeeds so as to result in an acquittal of the accused, or if, to the contrary, it is disproved, the defence is rejected and the accused is guilty of murder. Thereafter and until the decision of the High Court in Viro v The Queen (‘Viro’), Australian trial judges directed jurors in accordance with Palmer. 

In Viro, the High Court of Australia held that it was no longer bound by decisions of the Privy Council and followed the law of self-defence as stated in Howe in preference to Palmer. It must be mentioned that both decisions Viro and Palmer were united in their insistence on limiting the use of lethal force by an accused defending himself or herself to action taken that the accused ‘reasonably believed or believed on reasonable grounds to be necessary’ or ‘reasonably proportionate to the danger’. The point of divergence between the two decisions is that in alignment with Viro, self-defence is limited to situations in which the accused is responding to an unlawful attack made, or about to be made, threatening the accused with death or serious bodily harm. In addition, Viro proposed that if in fact the accused used more force than was reasonably proportionate but he or she believed that the force used was reasonably proportionate to the danger faced, the verdict

353 (1978) 141 CLR 88.
355 (1978) 141 CLR 88.
356 (1958) 100 CLR 448.
359 Viro (1978) 141 CLR 88, 146.
should be one of manslaughter.\textsuperscript{361} \textit{Palmer}\textsuperscript{362} does not deal with these refinements and to some extent simplifies the task for jurors.

Until the High Court’s decision in \textit{Zecevic},\textsuperscript{363} Australian trial judges directed jurors in accordance with the six propositions formulated by Mason J as he then was in \textit{Viro}.	extsuperscript{364} These propositions are as follows:

1. (a) It is for the jury first to consider whether when the accused killed the deceased, the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him.

   (b) By the expression ‘reasonably believed’ is meant, not what a reasonable man would have believed, but what the accused himself might have reasonably believed in all the circumstances in which he found himself.

2. If the jury is satisfied beyond reasonable doubt that there was no reasonable belief by the accused of such an attack no question of self-defence arises.

3. If the jury is not satisfied beyond reasonable doubt that there was no such reasonable belief by the accused, it must then consider whether the force in fact used by the accused was reasonably proportionate to the danger which he believed he faced.

\textsuperscript{361} \textit{Viro} (1978) 141 CLR 88, 147.
\textsuperscript{362} \textit{Palmer} [1971] AC 814.
\textsuperscript{363} (1987) 71 ALR 64.
\textsuperscript{364} (1978) 141 CLR 88.
4. If the jury is not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate it should acquit.

5. If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder, that depending upon the answer to the final question for the jury—did the accused believe that the force which he used was reasonably proportionate to the danger which he believed he faced?

6. If the jury is satisfied beyond reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief the verdict will be manslaughter.365

These propositions have been accepted as the ratio of Viro.366 Unfortunately, judges have found explaining the six propositions to jurors and applying them in practice to be a difficult task. Moreover, in Zecevic, Mason CJ was himself critical of the six propositions, acknowledging that it had been ‘a mistake to attempt to state the law of self-defence in a form which sought to take account of the onus of the proof’.367 Since the ultimate onus of proof with respect to the defence lies on the prosecution to negative the defence beyond reasonable doubt, the propositions were sometimes expressed in the negative or double-negative.368

365 Zecevic (1987) 71 ALR 641, 648 citing Mason J in Viro (1978) 141 CLR 88, 146. As pointed out by Deane J in Zecevic, ‘[u]nder the Viro formulation, the element of “reasonableness” arises at three different stages [1(a), 3 and 5] as the essential component of distinct requirements or tests’: (1987) 71 ALR 641, 660. His Honour goes on to state that the first and second stage requirements of reasonableness under the formulation are ‘a mixture of the objective and subjective’, while the requirement of reasonableness at the third stage is alone ‘completely subjective’: 660.

366 (1978) 141 CLR 88.


368 Ibid 649.
According to his Honour, this formulation led to complexity which might otherwise have been avoided.369

4.2.2 Understanding Zecevic

The High Court of Australia found the perfect opportunity to reconsider both self-defence and excessive self-defence in Zecevic,370 and this decision is still the common law authority in Australia with respect to self-defence. The decision is also important because in this case counsel for the appellant challenged the Court to reject the notion that self-defence has an objective component in terms of reasonable belief or belief on reasonable grounds.371 In this sense counsel for the appellant challenged both Viro372 and Palmer373 by arguing that no person should be convicted of murder where he or she has killed in the honest belief that it was necessary to do so in lawful self-defence, and that he or she should be judged according to the facts as he or she believed them to be.374 Counsel for the appellant further challenged Viro by arguing that the action taken by the accused did not need to be a reasonably proportionate response to the danger he or she faced.375

369 Ibid 645.
371 Ibid 645.
372 (1978) 141 CLR 88.
375 Ibid.
4.2.2.1 The Facts of the Case

The facts of the case were that the accused, Fadil Zecevic, was convicted in the Supreme Court of Victoria of the murder of Harold Peter Triebel. He appealed to the High Court against the judgment of the Full Court of the Supreme Court which had dismissed an appeal against his conviction. The appellant and his family owned a block of units in Ascot Vale, Melbourne. The deceased had rented one of the units. The relationship between the deceased and the Zecevic family began to deteriorate as a result of the deceased’s failure to shut the security gates to the courtyard around which the units were erected. On 1 July 1983, an altercation arose between the appellant and the deceased. The appellant was stabbed in the chest by the deceased. The deceased further threatened the appellant by uttering, ‘I will blow your head off’. The appellant submitted that the deceased had a knife and might have had a shotgun in his car. After the initial altercation, the appellant ran to his bedroom, got a gun and went outside, where he shot the deceased. The appellant stated that he didn’t want to kill the deceased; he had only wanted to protect himself because he thought the deceased was going to kill him.

During the appellant’s trial for murder, the trial judge withdrew the issue of self-defence from the jury. According to his Honour the only inference open upon the evidence was that the appellant did not reasonably believe that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him. His Honour relied

376 Ibid 647.
377 Ibid 648.
on the first of the propositions laid down by Mason J as he then was in *Viro*\(^{378}\) and the appellant was convicted. He appealed to the High Court.

4.2.2.2 *The Decision*

It was submitted on behalf of the appellant before the High Court that even if the requirements of the first proposition were accepted, there was sufficient evidence to require the issue of self-defence to be left to the jury.\(^{379}\) On appeal, all seven judges allowed the appeal and ordered a retrial.\(^{380}\) According to the Court, the issue of self-defence which was clearly raised, should have been left for the consideration of the jury.\(^{381}\) In a joint judgment Wilson, Dawson and Toohey JJ expressed the view that there was evidence upon which the jury could have concluded that the appellant believed it was necessary to do what he did in order to defend himself. According to their Honours, there was sufficient evidence of the grounds for that belief. They stressed that whether those grounds were reasonable ones was a matter for the jury to consider.\(^{382}\)

The joint judgment of Wilson, Dawson and Toohey JJ in *Zecevic*\(^{383}\) reflects the new test for self-defence. The test was formulated as follows:

> The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that

\(^{378}\) 141 CLR 88.


\(^{380}\) Ibid 672.

\(^{381}\) *Zecevic* (1987) 71 ALR 641.

\(^{382}\) Ibid 655.

\(^{383}\) (1987) 71 ALR 641.
belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. Stated in that form, the question is one of general application and is not limited to cases of homicide. Where homicide is involved some elaboration may be necessary.384

The controversial issue between the judges in Zecevic385 related to the issue of excessive self-defence. As briefly mentioned above, in Viro it was held that if a person used lethal force while believing that it was needed but such belief was unreasonable, the person should be found guilty of manslaughter as opposed to murder.386 The joint judgment of Wilson, Dawson and Toohey JJ in Zecevic followed Palmer387 and rejected that view.388 Mason CJ and Brennan J separately agreed with the joint judgment.389 In thus holding that self-defence either succeeds or it does not, the majority in Zecevic abolished in Australia the defence of excessive self-defence. While Gaudron and Deane JJ agreed with the joint judgment with respect to the test for self-defence,390 they explained in separate judgments that it should remain the case at common law that where an accused holds an honest but not reasonable belief that it was necessary to kill in self-defence, the result, in accordance with Viro,391

384 Ibid 652.
386 Viro (1978) 141 CLR 88, 147.
389 Ibid 646 (Mason CJ), 655 (Brennan J).
390 Ibid 661 (Deane J), 668 (Gaudron J). Gaudron J expressed her support as follows: ‘I agree with Wilson, Dawson and Toohey JJ in their formulation of that question as whether the accused believed on reasonable grounds that it was necessary in self-defence to do what he or she did. I agree, for the reasons stated by their Honours, that an objective element of reasonableness is necessary before self-defence operates as a complete defence to a charge of murder.’
391 (1978) 141 CLR 88.
should be a verdict of manslaughter. Gaudron and Deane JJ’s views in this last regard are reflected in s 421 of the Crimes Act 1900 (NSW), which reintroduced in that jurisdiction the concept of excessive self-defence. This partial defence will be discussed later in the chapter.

4.2.2.3 A Better Formulation of the Common Law?

The test for self-defence as laid down in Zecevic appears to represent a better formulation of the law of self-defence than that in Viro. The common law test under Zecevic justifies self-defensive killing, but it does this by setting stringent requirements if a complete acquittal is desired. The test accepts that the protection of human life is paramount, while simultaneously limiting or minimising the overall amount of societal violence. These two characteristics would, necessarily, lead us to believe that the law of self-defence is consequentialist: it justifies conduct that results in the least harm, in terms of warranting the protection of human life while limiting self-defence so as to minimise societal violence.

In the subsequent decision of R v Katarzynski (‘Katarzynski’) before the Supreme Court of New South Wales, a case dealing with self-defence in which the differences between the test for self-defence under the common law and under s 418 of the Crimes Act 1900 (NSW) were

392 Zecevic (1987) 71 ALR 641, 666-7 (Deane J), 671 (Gaudron J).
393 See 4.4.
395 (1978) 141 CLR 88.
discussed, Howie J, while explaining the differences between the two tests, commented with respect to the common law after Zecevic\textsuperscript{398} that

\begin{quote}
[t]he common law, therefore, provided that self-defence existed where the accused (a) believed that he was called upon to defend himself, (b) that his conduct was necessary in order to defend himself and (c) that he had reasonable grounds for each of those beliefs.\textsuperscript{399}
\end{quote}

According to the first part of the test—that is, that the accused believed he was called upon to defend himself and that his conduct was necessary in order to defend himself—what matters is whether the accused believed on reasonable grounds that it was necessary to do what he did.\textsuperscript{400} This part of the test is concerned with whether there are reasonable grounds for the belief the accused actually held, thus the test starts with what the accused actually believed, rather than substituting the belief of a hypothetical reasonable person.\textsuperscript{401} Nevertheless, that is immediately qualified in the second part of the test—that the accused had reasonable grounds for each of those beliefs—by the requirement that the grounds be, in an objective sense, reasonable grounds. This second part of the test requiring that the accused had reasonable grounds for each of those beliefs is completely objective. Therefore it could be argued that the centre of the enquiry is shifted in Zecevic to the accused’s beliefs—although these must be reasonable.\textsuperscript{402}

\begin{footnotes}
\footnote{398}{(1987) 71 ALR 641.}
\footnote{399}{Katarzynski [2002] NSWSC 613 (9 July 2002) [10].}
\footnote{400}{This first part of the test exhibits some objectivist components as it endorses a substantive account of justification that turns on whether the conduct was necessary.}
\footnote{401}{R v Trevenna (2004) 149 A Crim R 505 (NSWCCA).}
\footnote{402}{The second part of the test also contains a subjectivist tendency. It is worth remembering that to subjectivists an act is justified if the defendant had good reasons for acting, requiring a reasonably held belief that the}
\end{footnotes}
This conception of the term ‘objective’ should not be confused with its use to assess the reasonableness of a defendant’s actions. To an objectivist the law should allow a claim of self-defence in circumstances in which a killing was necessary to avert peril. No regard is paid to the defendant’s beliefs or the reasonableness thereof. This is because the focus is upon the quality of the defendant’s actions. Thus even if a defendant honestly and reasonably believes that the use of self-defensive force was necessary, his or her killing of the aggressor may still be unjustified if it was not necessary to avert peril.403

The emphasis on the accused’s belief ensures that, in the determination of culpability, sufficient account is taken of the personal attributes of the particular accused. Thus, characteristics such as the accused’s age, sex, physical disabilities, religion and ethnicity would be relevant in determining the reasonableness of the accused’s belief in the necessity of the force applied by him or her.404

It was said by the High Court in Zecevic that ‘issues of self-defence need to be approached in a practical manner and without undue nicety, giving proper consideration to the predicament of the accused’.405 The High Court explained that in most cases where the issue of self-defence is presented to the jury, the accused may have been afforded little, if any, opportunity for calm deliberation or detached reflection. Osland v The Queen (‘Osland’)406 was the first case in which the High Court was asked to consider the relevance of BWS to a defence of self-defence. According to Kirby J, evidence of an abusive relationship would ‘assist a jury conduct was permissible. For objectivist and subjectivist approaches to justifying killing in self-defence see 3.3.1.

403 For objectivist and subjectivist approaches to justifying killing in self-defence see 3.3.1.


405 Zecevic (1987) 71 ALR 641, 653 [10], [15].

to understand, as self-defensive, conduct which on one view occurred where there was no actual attack on the accused underway but rather a genuinely apprehended threat of imminent danger sufficient to warrant conduct in the nature of a pre-emptive strike’.\textsuperscript{407} The relevance of the imminence of an attack will be discussed in the next chapter;\textsuperscript{408} however, the ‘predicament of the accused’ does include whether the accused had been in an abusive relationship with the deceased. Nevertheless, as Gaudron and Gummow JJ pointed out, while BWS may be a proper subject for expert evidence, the issue is not simply whether the accused is a battered woman, but whether she acted in self-defence.\textsuperscript{409} It is necessary to discriminate between a self-defensive response to a great danger which can only be understood in the light of a history of abuse within a relationship, and a response that involves a deliberate desire to exact revenge for past and potential, but unthreatened, future conduct.\textsuperscript{410} The former will attract considerations of self-defence; the latter will not.\textsuperscript{411}

Another benefit of the test for self-defence in \textit{Zecevic}\textsuperscript{412} is that it places less emphasis on the common law requirement of proportional force. Thus the issue of necessary force is resolved by answering the following question: Did the accused honestly and reasonably believe the use of force to be reasonably necessary? This new focus has made the proportionality

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{407} Ibid 220 [40].
\item \textsuperscript{408} See 5.2.1.
\item \textsuperscript{409} \textit{Osland} (1998) 159 ALR 170, 186 [58].
\item \textsuperscript{410} Ibid 220 [172] (Kirby J) citing Angel J in \textit{R v Secretary} (1996) 86 A Crim R 119, 122.
\item \textsuperscript{411} \textit{Osland} (1998) 159 ALR 170, 220 [172].
\item \textsuperscript{412} (1987) 71 ALR 641.
\end{enumerate}
\end{footnotesize}
requirement just one of the factors to be considered. 413 Wilson, Dawson and Toohey JJ explained the matter by stating that

it will in many cases be appropriate for a jury to be told that, in determining whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds, it should consider whether the force used by the accused was proportionate to the threat offered. However, the whole of the circumstances should be considered, of which the degree of force used may be only part. 414

There are no longer any separate requirements that the accused’s response be proportionate to the attack; or that the threat to which he or she is responding to be an imminent one. Similarly, the original attack no longer needs to be an unlawful one, and there is no duty upon the accused to retreat as far as possible before using force. 415 According to the New South Wales Court of Criminal Appeal in R v Dziduch, 416 it is sufficient that the accused believed on reasonable grounds that it was necessary to do what she did. The ‘formal’ removal of the traditional legal requirements of proportionality, immediacy, and the duty to retreat has made it somewhat easier for battered women to rely on the defence of self-defence. Nevertheless, it will be argued that, at a practical level, these requirements still play an important role under the common law test. Further consideration to this issue will be given in Chapter 5 of this thesis. 417

413 Yeo, above n 404, 148. For discussion of the requirement of proportionality see 5.2.2.


417 See 5.2.
Another reason for preferring this test over previous formulations is that it simplifies the understanding of the application of the law of self-defence for juries. In *R v Dziduch,* Hunt J of the New South Wales Court of Criminal Appeal explained the applicability of the *Zecevic* test in relation to the direction of juries:

The fundamental question which a jury has to determine in relation to the issue of self-defence is whether the Crown has established that the accused did not believe on reasonable grounds that it was necessary in self-defence to do what he did. The Crown may establish either that the accused had no such belief or that there were no reasonable grounds for such a belief. If the Crown fails to establish either one of those two alternatives, the accused is entitled to be acquitted of the charge.

Many criticisms of the common law test for self-defence, especially the difficulties it posed for battered defendants seeking to access the defence, led to the introduction in New South Wales of the 2002 reforms to the *Crimes Act 1900* (NSW). The effect of these reforms are now considered.

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418 Yeo, above n 404, 148.


422 Chapter 5 explains how the common law preoccupation with reasonableness, and the continued relevance of the requirements of proportionality, immediacy and the duty to retreat to the assessment of the necessity of the defendant’s self-defensive action and the reasonableness of his or her conduct under *Zecevic* represented serious problems for battered defendants.
4.3 The Statutory Position

Statutory changes to the law of self-defence in New South Wales were first introduced in 2001 and took effect on 22 February 2002.\footnote{The \textit{Crimes Amendment (Self-defence) Act 2001} (NSW) introduced a new Part 11 Division 3 consisting of six sections into the \textit{Crimes Act 1900} (NSW). The second reading speech accompanying the Crimes Amendment (Self-defence) Bill 2001 (NSW) described the purpose of the sections as follows: ‘Section 418 outlines when the defence of self-defence is available. Section 419 provides that the prosecution bears the burden of proof beyond a reasonable doubt that the person did not carry out the conduct in self-defence. Section 420 provides that self-defence is not available if the use of force involves the intentional or reckless infliction of death to protect property or prevent criminal trespass or remove a person committing criminal trespass. Section 421 relates to the situation where excessive force is used in self-defence which results in death. Section 422 relates to the application of self-defence when it is a response to lawful conduct, and section 423 is a transitional provision’: New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 28 November 2001, 19094 (Bob Debus, Attorney-General).} According to the Explanatory Notes accompanying the Crimes Amendment (Self-defence) Bill 2001 (NSW), the object of the Bill was to ‘codify’ and ‘simplify’ the law with respect to self-defence.\footnote{The object of this Bill is to codify the law with respect to self-defence. The codification generally accords with the codification of that defence contained in the Model Criminal Code recommended by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (Chapter 2—General Principles of Criminal Responsibility, clause 313, report issued December 1992). … The codification effected by the Bill seeks to simplify the law by enabling defendants to rely on self-defence if they believed their conduct was necessary (even if they were wrong), so long as the response was objectively proportionate to the situation (as they perceived it)’: Explanatory Notes, Crimes Amendment (Self-defence) Bill 2001 (NSW) <http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/B19764C0978B859CA256B12001953AD?Open&shownotes>.} In fact, the statutory provisions significantly altered the common law in a way that arguably may offer a more effective outcome during the trial of a battered heterosexual woman who has killed her abusive intimate partner. The theoretical flexibility of the section and its potential availability to battered defendants will be discussed in Chapter 5 of this thesis.\footnote{See 5.5.} Whether such benefits are to be enjoyed by gay and lesbian victims of intimate violence who have killed their intimate batterers will be discussed in Chapter 6.\footnote{See 6.4.}
Section 418 of the *Crimes Act 1900* (NSW) abrogated in New South Wales the common law test for self-defence as postulated under *Zecevic*.\(^{427}\) In addition, s 421 of the *Crimes Act 1900* (NSW) restored the pre-*Zecevic* position in *Viro*\(^ {428}\) in relation to excessive force that if the accused used more force than was reasonably proportionate, the verdict should be one of manslaughter so long as the accused believed that the force used was reasonably proportionate to the danger which the accused believed he or she faced.\(^ {429}\)

### 4.3.1 *Crimes Act 1900 (NSW) s 418*

Section 418 of the *Crimes Act 1900* (NSW) provides as follows:

**418 Self-defence—when available**

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

2. A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:

   (a) to defend himself or herself or another person, or

   (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or

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\(^{427}\) (1987) 71 ALR 641.

\(^{428}\) (1978) 141 CLR 88, 146-7. It is worth noting that this approach is consistent with the views of Gaudron and Deane JJ in *Zecevic* (1987) 71 ALR 641: 666 (Deane J), 671 (Gaudron J).

\(^ {429}\) This is one of several respects in which the *Crimes Amendment (Self-defence) Act 2001* (NSW) did not follow the Model Criminal Code: ‘The Bill (but not the Code) reduces murder to manslaughter in the case of excessive self-defence, that is, where the defendant uses force that inflicts death and that is not a reasonable response in the circumstances, but where the defendant believed it was necessary for personal defence or for preventing or terminating unlawful deprivation of liberty’: Explanatory Notes, Crimes Amendment (Self-defence) Bill 2001 (NSW), above n 424. Excessive self-defence is discussed at 4.4.
(c) to protect property from unlawful taking, destruction, damage or interference, or

(d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,

and the conduct is a reasonable response in the circumstances as he or she perceives them.

Under this provision, therefore, for self-defence to be available to an accused person in New South Wales:

1. the person must believe that the conduct is necessary to defend himself or herself, and

2. that conduct must be a reasonable response in the circumstances as he or she perceived them.\(^{430}\)

Section 418 was interpreted by Howie J in the case of \textit{Katarzynski}.\(^{431}\) There Kirstain William Katarzynski was indicted for murder to be tried before a jury. The deceased was shot by the accused three times following a number of altercations between them in a hotel in Liverpool during the early hours of the morning of 6 April 2001.\(^{432}\) According to Howie J, the question for the jury, where there is evidence raising self-defence, is not the same as it was at common law after \textit{Zecevic}.\(^{433}\) His Honour formulated the questions to be asked by the

\(^{430}\) \textit{Crimes Act 1900} (NSW) s 418(2).

\(^{431}\) [2002] NSWSC 613 (9 July 2002).

\(^{432}\) Ibid.

\(^{433}\) (1987) 71 ALR 641.
s 418 as follows:

(i) is there a reasonable possibility that the accused believed that his or her conduct was necessary in order to defend himself or herself; and, (ii) if there is, is there also a reasonable possibility that what the accused did was a reasonable response to the circumstances as he or she perceived them.\(^{434}\)

According to his Honour, the first part of this test is determined from a completely subjective point of view considering all the personal characteristics of the accused at the time he or she carried out the conduct.\(^{435}\) The second part of the test is determined by an entirely objective assessment of the proportionality of the accused’s response to the situation that he or she subjectively believed he or she faced.\(^{436}\) The Crown will negative self-defence if it proves beyond reasonable doubt either:

(i) that the accused did not genuinely believe that it was necessary to act as he or she did in his or her own defence or (ii) that what the accused did was not a reasonable response to the danger, as he or she perceived it to be.\(^{437}\)

Howie J explained that with respect to the issue of the reasonableness of the accused’s response, it is objective in so far as the jury is not concerned with what the accused believed was necessary to respond to the circumstances as he or she perceived them to be. The

\(^{434}\) Katarzynski [2002] NSWSC 613 (9 July 2002) [22].

\(^{435}\) Ibid [23].

\(^{436}\) Ibid.

\(^{437}\) Ibid.
statutory provision is not concerned with whether the accused’s belief as to what was the necessary response was a reasonable one, or whether he or she had reasonable grounds for that belief. This is the point of divergence between the common law and the new provision: the accused need not have reasonable grounds for his or her belief that it was necessary to act in the way he or she did in order to defend himself or herself. It is sufficient if the accused holds that belief.

The section invests jurors with broad discretions. It makes it clear that it will be a matter for the jury to decide what matters it should take into account when determining whether the accused’s response was reasonable in the circumstances in which he found herself or himself. Since the jury is not assessing the response of the ordinary or reasonable person but the response of the accused, in making that assessment some of the personal characteristics of the accused will be relevant just as will be some of the surrounding physical circumstances in which the accused acted. Matters such as the age of the accused, his or her gender, or the state of his or her health may be considered by the jury. Whether or not some particular characteristic of the accused is to be considered will depend largely upon the particular facts of the case.

Many would argue that this provision effectively facilitates use of the defence by battered individuals without the need for expert testimony in BWS. Accordingly, if a battered defendant really thought that she was in danger, even if she was mistaken about the perception, she may be able to rely upon self-defence for her actions—unless her conduct in

438 Ibid [24].
439 Ibid.
440 Ibid [25].
441 Ibid.
the circumstances as she perceived them was not a ‘reasonable response’. This understanding of self-defence, as codified under s 418, refines and elaborates on the common law elements of self-defence. For instance, the necessity at common law for objectively reasonable grounds is expressed under s 418 in the requirement that the response be reasonable.

The applicability of the provision to battered individuals will be discussed in greater detail in the next chapter.

4.3.2 The Moral Basis of s 418

A priori the essence of s 418 appears to be subjectivist, since the killing of an aggressor or batterer is justifiable if the accused person believed that the lethal action was necessary to defend himself or herself, provided that this conduct was a reasonable response in the circumstances as he or she perceived them. The section’s moral underpinning makes it clear that the act of killing is justified, in accordance with subjectivist theory, if the accused had good reasons for acting in the way he or she did provided that he or she had a reasonably held belief that the act is permissible. From this philosophical perspective it appears that in nature s 418 seeks to facilitate use of the defence by those individuals such as battered women who believed in the necessity of the use of lethal force against their batterers. Unfortunately, as will be discussed in Chapter 5, although the moral basis of the section may

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443 Ibid. Compare Viro (1978) 141 CLR 88 where ‘reasonably believed’ was held to mean not what a reasonable person would have believed but what the accused himself might reasonably believe in all the circumstances in which he found himself. This remark was clearly made by Santow JA in R v Trevenna (2004) 149 A Crim R 505 [38] when contrasting the common law with s 418 of the Crimes Act 1900 (NSW).

444 Various theories morally justifying killing in self-defence were discussed in 3.3. For discussion of the subjectivist approach see 3.3.1.
be interpreted as being capable of accommodating battered individuals, reality shows that it treats them disadvantageously.\textsuperscript{445}

Theoretically, s 418 could potentially offer an effective defence to all accused. However, this assumes that the section will be applied equally to all defendants. A J Ashworth argued that every society has to cope with the difficult decision of determining when the lives of some individuals must be superseded by the important interests of others.\textsuperscript{446} In the case of this section, the decision respecting weighing up the competing interests of accused and deceased is to be made by jurors. The problem with this situation where the accused and deceased are same-sex partners is that the homophobic and heterosexist attitudes jurors may bring with them into the courtroom may cloud their reasoning and ergo prevent them from understanding why the interest of the accused in protecting his or her own life ought to have superseded the interest of the aggressor to live.

It could be further argued that the section does not adopt an absolute preference for life nor a total prohibition for intentional killing, but an assumption favouring life and opposing killing. If a legal system is to uphold the right to life there must be a liberty to use force for the purpose of self-defence, independently of the genders of the accused and deceased and the relationship, if any, between them. If a predilection favouring life, including that of the battered individual who kills to protect his or her own life, is an important consideration behind s 418, then it will not be against the purpose of the section to assist a battered individual who has killed his or her batterer to explain to the court in the most effective way the reasons why the killing was necessary and why he or she held this belief. As it will be

\textsuperscript{445} See 5.5.

argued in Chapter 7, the best way to do so, in the case of a battered individual, is to bring into the courtroom an expert whose testimony is based upon a gender-neutral theory of intimate violence or, alternatively, to reform the current law of self-defence so as to better accommodate the victims of intimate violence who kill their batterers.

So far this chapter has discussed the test for self-defence under the common law and under statute in New South Wales. It will now proceed to examine excessive self-defence and its resurrection by the 2002 amendments to the *Crimes Act 1900* (NSW). Such an examination is important to this thesis as it will be argued that excessive self-defence and, consequently, a finding of manslaughter under s 421 of the *Crimes Act 1900* (NSW) may be the closest to obtaining fairness that victims of intimate violence who kill their batterers may currently achieve. In providing jurors with the option of reaching the ‘middle path’ of a verdict of manslaughter, instead of compelling them to understand the predicament of battered defendants and assess the reasonableness of their actions by reference to such predicament, the law fails to give battered defendants the best opportunity of obtaining a full acquittal.

### 4.4 Excessive Self-defence

Excessive self-defence has had an interesting history in Australia. Originally, it was a partial defence similar to provocation: if successfully pleaded it reduced murder to manslaughter. As a partial defence it was introduced into the Australian legal framework by the High Court in 1958 in the case of *Howe*,\(^447\) adopting the reasoning of the Victorian Supreme Court in *R v McKay*.\(^448\) This approach was reversed by the Privy Council in *Palmer*.\(^449\) Twenty years

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\(^{447}\) (1958) 100 CLR 448.

\(^{448}\) [1957] VR 560.
later, the issue was revisited by the High Court in *Viro*,450 where the Court decided that jurors were required to consider whether the force used by the accused was proportional to the danger that he or she faced. The Court decided that if the force used was disproportional or excessive, the verdict should be one of manslaughter rather than murder. This doctrine was subsequently rejected by a majority of the High Court in *Zecevic*.451

Section 421 of the *Crimes Act 1900* (NSW) reinstated the pre-*Zecevic*452 common law position with respect to excessive self-defence as it had previously been stated by the High Court in *Viro*.453 According to that decision, where self-defence is necessary but involved the use of excessive force causing the death of the original aggressor, it will lead to a finding of manslaughter instead of murder. The section provides as follows:

421 Self-defence—excessive force that inflicts death

(1) This section applies if:

(a) the person uses force that involves the infliction of death, and

(b) the conduct is not a reasonable response in the circumstances as he or she perceives them,

but the person believes the conduct is necessary:

(c) to defend himself or herself or another person, or

450 (1978) 141 CLR 88.
453 (1978) 141 CLR 88.
(d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

(2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

Under this formulation, where a person uses force that causes death and the conduct of that person was not a reasonable response in the circumstances as the accused saw them, he or she will be criminally responsible for manslaughter as opposed to murder. The rationale underlying the existence of excessive self-defence relies upon the conviction that a person who honestly believed that the use of force was necessary to defend himself or herself but exceeded that which was reasonably necessary falls short of the moral culpability commonly associated with murder.454 According to the High Court in Viro, it would be unjust to make such a person accountable for murder.455 This is an example of how, when making judgments of law, judges may resort to principles of moral culpability to inform their decisions. In the second reading speech for the Crimes Amendment (Self-defence) Bill 2001 (NSW), Bob Debus, then New South Wales Attorney-General, stated that the approach of the High Court to excessive self-defence in Viro456 was ‘entirely appropriate when it is considered that in Australia we do not have degrees of murder as separate offences, and that

454 Viro (1978) 141 CLR 88, 139.
455 Ibid.
456 (1978) 141 CLR 88.
proven unlawful homicide only leads to murder or manslaughter convictions being available.\footnote{\textit{New South Wales, Parliamentary Debates}, Legislative Assembly, 28 November 2001, 19094 (Bob Debus, Attorney-General).}

In \textit{R v Trevenna}\footnote{\textit{R v Trevenna},\textit{ Legislative Assembly}, 2004, 149 A Crim R 505 (NSWCCA).} a female accused accepted that her conduct, within the terms of s 421 of the \textit{Crimes Act 1900} (NSW), was not a reasonable response in the way she used lethal force causing the death of the deceased, though she believed her conduct was necessary to defend herself against an imminent threat to her life from the deceased. It is important to mention that the battered accused was under attack when she killed her male batterer. This situation clearly illustrates the risk, in terms of culpability, that s 421 may pose for battered defendants, since the responses of battered defendants have historically been viewed by jurors who lack an understanding of intimate violence as unreasonable, due to their common failure to meet traditional requirements of immediacy and/or proportionality.

In \textit{Ward v The Queen},\footnote{\textit{Ward v The Queen},\textit{ Legislative Assembly}, 2006, 166 A Crim R 273 (NSWCCA).} a male accused found guilty of the manslaughter of his male neighbour appealed against his conviction and sentence. The New South Wales Court of Criminal Appeal explained that the use of force inflicting death could be committed with intent to kill the deceased or inflict grievous bodily harm. However, the accused would be liable for manslaughter rather than murder if the jury found that there was a reasonable possibility that the accused believed that his or her conduct was necessary in his or her own self-defence, but was satisfied beyond reasonable doubt that the response of the accused was not reasonable in the circumstances as he or she perceived them to be.\footnote{\textit{Ibid} 275.} This formulation of
excessive self-defence by the Court of Criminal Appeal provides jurors with sufficient judicial guidance to justify their possible unwillingness to walk in the shoes of a battered defendant and understand their predicament. This is dangerous because, as foreshadowed above and will be explained in Chapter 5, when battered women kill in the context of intimate violence, their actions usually lack immediacy and involve some level of planning, and consequently have frequently been seen as the result of calm deliberation or premeditation.461 The formulation of excessive self-defence under Ward v The Queen462 may lead the jury to a manslaughter conviction when in fact an acquittal, under the principles of self-defence, is more appropriate if the accused’s predicament was adequately contextualised.

4.5 In Summary

Self-defence is based on the premise that one who is attacked unlawfully by another is legitimately justified to take reasonable steps to defend himself or herself. However, the right to use lethal force in an act of self-preservation is limited to circumstances in which it is necessary and reasonable to do so. As explained in this chapter, the common law test for self-defence under Zecevic463 required both that the accused believed that he or she was called to defend himself or herself and that his or her conduct was necessary, and that he or she had reasonable grounds for each of those beliefs. Many consider this formulation of the defence preferable to previous common law formulations as there are no longer, in a strict form, separate requirements that the accused’s response was proportionate, or that the threat to which the accused was responding was imminent, or that the accused had attempted to

461 See 5.5.1.


retreat before resorting to the use of lethal force. These requirements were essential to traditional self-defence doctrine, which focused on a single, sudden attack and defence response between two males who were strangers and were of more or less similar size. Although these requirements in a strict sense are no longer part of the test for self-defence under the common law, they are still relevant to the assessment of the reasonableness of the accused’s actions. There remains a risk that the ‘reasonableness’ of the accused’s actions may be viewed from a male perspective that corresponds to the historical origins of the defence and does not adequately contextualise the experiences of victims of intimate violence who find themselves in a situation where they are subjected to a series of violent attacks and from which, in order to escape, they are in effect forced to kill.

In 2002 s 418 of the Crimes Act 1900 (NSW) replaced the common law test for self-defence in New South Wales. Unlike the common law, under s 418 self-defence is successful if the accused proves that there was a reasonable possibility that he or she believed that his or her conduct was necessary for self-preservation, provided that there is a reasonable possibility that what he or she did was a reasonable response to the circumstances as perceived by the accused. This formulation of the defence appeared to be more flexible than the common law formulation and capable of accommodating killings committed in circumstances of intimate violence, since a battered individual who kills does not need to have reasonable grounds for his or her belief that it was necessary to act in the way he or she did in order to defend himself or herself. However, the section lacks proper legislative guidance to inform jurors on how to contextualise the predicament of a victim of intimate violence when assessing the reasonableness of his or her conduct and, consequently, the culpability of the accused under the section. Moreover, the 2002 amendments invest jurors with a broad discretion with regard to the matters which they should consider when determining the reasonableness of the accused’s response to the situation in which he or she found himself or herself. Jurors
lacking knowledge of intimate violence may not know how to contextualise the predicament of the victim with reference to the provision. This is the same criticism that had earlier been made with respect to the common law. Moreover, while jurors continue to associate self-defence with a one-off encounter between two males, it is very unlikely that they will find the conduct of the battered defendant to be reasonable within the meaning of the section. The potential availability of s 418 of the *Crimes Act 1900* (NSW) to battered defendants is discussed further in Chapter 5 of this thesis.
CHAPTER 5: BATTERED WOMAN SYNDROME
AND THE LAW OF SELF-DEFENCE

5.1 Introduction

Chapter 2 of this thesis described BWS as a model of intimate violence. This chapter discusses the adoption of BWS in a legal context and its effect during the trials of battered women who have killed their abusive male partners. Understanding the difficulties that BWS and its underlying paradigms have posed for some battered heterosexual women is essential to this thesis, as some of these issues are faced equally by battered gay and lesbian defendants who have killed their intimate partners and seek to rely on expert testimony to defend their murder charges. This chapter will also explain how, historically, the law of self-defence has treated women disadvantageously.

As briefly foreshadowed during the previous chapter, the law of self-defence was originally developed and framed to accommodate one-off altercations between two males of similar size and strength. As a result, the legal framework upon which the defence of self-defence was built required that the force used by the accused was proportional to the threat posed to the accused and that the threat to which the accused was responding was an imminent one. At a practical level, these requirements represented insurmountable legal barriers for battered women who killed their male intimate batterers and sought to rely on the defence of self-defence. This inequity stems from the failure of the law to recognise that women and men respond differently to violence. Consequently, if a ‘male’ view of aggression is adopted to

assess the conduct of battered women, the conduct of battered women who do not engage in immediate retaliation to their batterer’s initial aggression but who, in order to kill, arm themselves with a weapon, enlist the help of others or wait until their batterer is asleep will not be accepted as a necessary response—yet if their predicament and the violence to which they have been exposed is contextualised, such conduct could be interpreted as both necessary and reasonable. It was an attempt to offer a fairer outcome to these defendants that led to the introduction of expert evidence in BWS during their trials.

This chapter explains that, for certain defendants, expert testimony in BWS may be inadequate. The chapter will discuss some of the major criticisms surrounding the adoption of BWS in a courtroom. It will argue that since it portrays women as ‘passive’, ‘dependent’ and ‘irrational’, the syndrome is in fact inappropriate even for the heterosexual victims of intimate partner abuse, for whom it was meant to facilitate a successful plea of self-defence. Some of the difficulties BWS poses for heterosexual defendants are also applicable to battered gay and lesbian defendants who have killed their intimate partners. The inadequacy of the BWS model of intimate violence to deal with these particular defendants was exhibited in the case of *R v McEwen*. The case itself and the applicability of the syndrome to a battered gay or lesbian accused will be discussed in Chapter 6 of this thesis, where it is argued that if the syndrome is applied to gay or lesbian defendants who have killed their intimate batterers in self-defence, it is likely that it will exacerbate rather than alleviate their problems during trial.


*465 (Unreported, Supreme Court of Western Australia, Murray J, 18-25 April 1995 (trial), Walsh J, 18 March 1996 (sentencing)). *It must be noted that there is no written judgment of this decision. Information about the case in this thesis was obtained from the transcripts of the trial before Murray J and the sentencing proceedings before Walsh J in the Supreme Court of Western Australia.*
5.2 The Disadvantageous Treatment of Women by the Law of Self-defence

Despite the clear link between killings committed by women and a previous history of violence from their male batterers, women have historically have found it difficult to use the law of self-defence to excuse their conduct and reduce or remove criminal liability.466 In R v Lavallee (‘Lavallee’), a decision of the Supreme Court of Canada, Wilson J explained that the law of self-defence does not easily fit the scenario of violence between intimate partners.467 Moreover, it does not acknowledge that men and women kill in different contexts and for different reasons.468 Accordingly, whilst most men kill in the context of a one-off fight with another male, when women kill their partners, it is likely that they are responding to a history of violence from them.469

The chapter will discuss the inadequacy of self-defence at common law in dealing with battered women. Historically, the three elements of the law of self-defence that have been problematic for battered women who killed their batterers are as follows:

466 Brown et al, above n 261, 746.


468 The majority of homicides involving intimate partners are committed by men against their female partners. These killings occur, usually, during the culmination of a history of domestic abuse, the breakdown of their intimate relationship, or while their partner seeks or threatens to leave the relationship. Jenny Mouzos and Catherine Rushforth, Family Homicide in Australia (Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice Series No 255, 2003) 1. The same studies indicate that in the significantly smaller number of cases in which women killed their intimate partners, the killing was related to a history of previous abuse from their male partners.

469 Recent studies indicate that men are more likely to kill their female partners out of jealousy, possessiveness or control, whereas females are more likely to kill their male partners in response to violence from the latter; see Lenny Roth, ‘Provocation and Self-defence in Intimate Partner and Homophobic Homicides’ (NSW Parliamentary Library Research Service, Briefing Paper No 3, 2007) Executive Summary, 2; Victorian Law Reform Commission, Defences to Homicide: Final Report (2004); Law Reform Commission of Western Australia, Review of the Law of Homicide, Project No 97 (2007); Australian Law Reform Commission, Equality before the Law: Justice for Women: Part 1, Report No 69 (1994); New South Wales Task Force on Domestic Violence, Report of New South Wales Task Force on Domestic Violence to Honourable N K Wran QC, MP Premier of New South Wales (1981).
1. the requirement that the threat was imminent;

2. the requirement that the response to the threat be proportionate; and

3. the requirement to utilise other avenues of conduct in order to avoid killing—the so-called ‘duty to retreat’.  

These elements of the law of self-defence will be discussed in turn.

5.2.1 The Imminence Requirement

A traditional element of the self-defence doctrine is the imminence requirement. It limited the use of force to cases where the threatened harm to which an accused person was responding was imminent. The requirement reinforces the principle that the defensive force used by the accused must have been ‘necessary’. This rule has been the subject of vigorous criticism, especially in cases involving battered women. Some authors argue that the rule often has the effect of depriving the accused of her right to self-defence altogether. Cases involving non-confrontational circumstances have received special attention. In such cases the woman strikes while her abuser is not currently threatening her, sometimes when he

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473 Ibid.
is unconscious or asleep, all of which make it difficult for the imminence requirement, as a matter of law, to be satisfied.\textsuperscript{474}

The case of \textit{State v Norman}\textsuperscript{475} in the United States of America is one of the most commonly cited in which a battered woman was prevented from claiming self-defence by an application of the imminence requirement. The facts of the case indicate that the defendant, Judy Norman, had been married to her violent husband, John Thomas Norman, for 25 years. Mr Norman was an alcoholic. He began to hit the defendant five years after they were married. Together, they had five children. Four of these children are still alive. The fifth one died as a result of Mr Norman kicking the defendant down a set of stairs, causing the baby to be born prematurely. The baby died.

According to the defendant’s testimony, Mr Norman beat her ‘almost every day’, especially when he was intoxicated and when other people were around. The abuse to which this man exposed her included hitting her with whatever was handy; kicking her; burning her skin with cigarettes; throwing objects at her; and refusing to let her eat for days. Mr Norman often mentioned to the defendant and to others that he would kill the defendant. He also threatened her with cutting her heart out.\textsuperscript{476} She said that she was afraid of pressing charges against him or leaving him because she had left him several times and he had found her, brought her back and beaten her.

\textsuperscript{474} In regard to this particular point, Richard Rosen noted that ‘[t]he threat of death or great bodily harm was not imminent when she shot her husband, not, at least, by any reasonable interpretation of the word imminent’: Richard A Rosen, ‘On Self-defense, Imminence, and Women Who Kill Their Batterers’ (1993) 71 \textit{North Carolina Law Review} 371, 376.

\textsuperscript{475} \textit{State v Norman}, 324 NC 253 (1989).

The day before Mr Norman’s death, sheriff’s deputies were called to their residence where the defendant complained that her husband had slapped her, thrown a bottle at her, smeared food on her face, burnt a cigarette on her chest and threatened to ‘cut her breasts off and shove them up her rear end’. 477 On the same day, police were called to the Normans’ house three times. The first time the police did not come. The second time an officer noticed that the defendant was badly bruised and advised her to file a complaint against her husband. The police explained that they needed a warrant in order to arrest him. The defendant told them that he would kill her if she was to pursue a warrant, and the officers left. An hour later the officers returned after the defendant had attempted suicide. She took an overdose of ‘nerve pills’. In the hospital she was interviewed by a therapist who advised her to file charges against her husband. After leaving the hospital the following day, the defendant walked to her mother’s house, obtained a gun and shot Mr Norman three times while he slept. During her trial she claimed self-defence; however the court did not allow the defence as there was not an imminent threat at the time of the killing since Mr Norman was asleep. She was convicted of manslaughter and sentenced to six years imprisonment.478

In response to this finding, many scholars have argued that battered women cannot rely on a legal rule grounded on the notion of a ‘one-off brawl’ occurring in a bar between two men of similar size and strength.479 Battered women have been exposed to a long period of violence

477 Ibid.

478 State v Norman, 324 NC 253 (1989). The defendant was charged with first degree murder, but at trial the jury found her guilty of voluntary manslaughter. On appeal, the Court of Appeals granted a new trial, citing as error the trial court’s refusal to submit a possible verdict of acquittal by reason of perfect self-defence. The Court of Appeals held that the defendant’s evidence that she exhibited BWS entitled her to have the jury consider whether the homicide was an act of perfect self-defence and, thus, not a legal wrong. The Supreme Court of North Carolina reversed the decision of the Court of Appeals, holding that the evidence introduced in the case would not support a finding that the defendant killed her husband due to a reasonable fear of imminent death or great bodily harm. The decision of the trial court was reinstated.

479 Kaufman, above n 472, 348.
in their own home, which, under most circumstances, they are unable to leave because of the existence of a variety of factors. Most such women are not as physically strong as their batterers, so they must rely on indirect means of self-defensive conduct, such as attacking their abuser while he is asleep or dormant. 480

In the Canadian case of Lavallee,481 Wilson J used a very interesting analogy to explain the reasonableness of the responses of battered women to male judges and jurors, likening the predicament of a battered woman to that of a hostage. Her Honour posed the following question:

If the captor tells her that he will kill her in three days, is it potentially reasonable for her to seize an opportunity presented on the first day to kill her captor or must she wait until he makes the attempt on the third day?482

While discussing the requirement for a successful plea of self-defence under Canadian law that an accused who has intentionally caused death or grievous bodily harm did so ‘under reasonable apprehension of death or grievous bodily harm’, Wilson J referred to the earlier Canadian case of R v Whynot,483 and stated that:

The requirement imposed [in that case] that a battered woman wait until the physical assault is ‘underway’ before her apprehensions can be validated in law would, in the words of an American court, be tantamount to sentencing her to ‘murder by installment’.484

480 Ibid.
482 Ibid [59].
483 (1983) 9 CCC 449 (NSCA).
Women like Judy Norman who kill their intimate batterers may have a strong case for the necessary use of force, but struggle to prove that the threat to them was an imminent one.

In Australia, too, the imminence rule has been one of the major obstacles preventing battered women from relying on self-defence. Courts have responded to this criticism by relaxing the requirement of imminence. The test for self-defence at common law now requires only that the accused believed on reasonable grounds that it was necessary to do in self-defence what he or she did. Accordingly, the essential element of self-defence is the necessity for the use of force. The imminence rule apparently no longer has independent validity. The case of *R v Secretary* was the first case in Australia where the validity of BWS was recognised in the context of self-defence. In this case the requirement of imminence would have posed significant difficulties for the defence of the accused as the deceased had threatened the accused but then went to sleep. While delivering her decision, Mildren J stated:

> The rationale for the imminence rule seems obvious. The law of self-defence is designed to ensure that the use of defensive force is really necessary. It justifies the act because the defender reasonably believed that he or she had no alternative but to take the attacker’s life.

While Mildren J’s comment clearly suggests that the imminence rule as an independent limitation on self-defence no longer exists, it merges into the necessity rule. It still causes a problem for women like Helen Secretary who may not be able to satisfy the jury that their self-defensive action was necessary because they were not under an immediate threat. In

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485 Zecevic (1987) 162 CLR 645, 661. For discussion of the decision in Zecevic see 4.2.2.2.

486 *R v Secretary* (1996) 5 NTLR 96. This case and its facts were discussed in 3.3.1.

487 Ibid 98.
Helen Secretary’s case, this was despite the fact that the deceased had threatened to kill her before he fell asleep.

At a practical level, imminence is still an indicator of necessity. This is known as the ‘proxy thesis’. Although imminence is only an indicator of whether the conduct of the defendant was necessary, it has been argued that it is an imperfect proxy to ensure that the defendant’s use of force is necessary.488 Some go as far as to suggest that imminence, like the duty to retreat, is a component of the requirement of necessity.489 The issue is that while the imminence requirement is present in our common law—even if only as a ‘proxy’ to assess the necessity for self-defensive action—it will make it difficult for women who have suffered abuse and controlling behaviour for some time to nominate a single point of confrontation as the reason for their retaliation. It is argued that to do so misunderstands and misconstrues the nature of abusive relationships.490

In R v Bradley,491 a case before the Supreme Court of Victoria, the accused shot her partner while he was asleep. There was not, apparently, an imminent threat to the accused at the time she shot the deceased and therefore self-defence was withdrawn from the jury. Although during the 25 years of their relationship, the accused had been subjected to extremely violent attacks, threats and humiliating behaviour, the focus of the inquiry during her trial for the killing of her batterer was the events which occurred during the day of the killing.492 This


489 Ibid.

490 Law Reform Commission of Western Australia, above n 469, 263.

491 (Unreported, Supreme Court of Victoria, Coldrey J, 14 December 1994).

492 In his reasons for sentence, Coldrey J noted that the abusive character of the relationship in which the accused had found herself was relevant to the sentence which it was appropriate to impose: ibid 1. His Honour
oversimplification led the Court to base its assessment only upon the fact that on the day of
the killing the deceased had insulted the accused and called her a ‘dog’. 493 The jury was of
the opinion that the accused had fired the fatal shot with the intention of killing her husband
James Bradley but found her guilty of manslaughter on the basis of provocation. Although
Coldrey J sentenced the accused to a period of two years imprisonment and ordered that the
whole of that sentence be suspended, 494 to limit the danger faced by the accused and to which
she was responding to the insult she received on the day of the killing is to ignore completely
the context in which intimate violence occurs.

This point is validated by the remarks of Kirby J with respect to the imminence requirement
in Osland:

The significance of the perception of danger is not its imminence. It is that it renders the
defensive force used really necessary and justifies the defender’s belief that ‘he or she had
no alternative but to take the attacker’s life’. 495

His Honour stresses that the centre of the enquiry should be a determination of whether or not
the use of force was necessary. From a doctrinal point of view, failing to prove the
imminence of the threat no longer poses a problem for a battered woman relying on self-
defence. However, at a practical level, it has been demonstrated that imminence continues to
have weight in assessing the reasonableness of the accused’s response. Thus, if this

stated that ‘when considering the sentence to be imposed in any particular case of manslaughter it is necessary
to deal with that case in the light of all the circumstances relevant to the offence and the offender’: 9-10.
Interestingly enough, the abusive character of the relationship was more relevant to the imposition of sentence
than to determining whether or not the killing was committed in self-defence.

493 Ibid 8.
494 Ibid 14.
495 Osland (1998) 159 ALR 170, 221.
requirement is not satisfied, jurors may consider the battered woman’s response to have been unreasonable.

5.2.2 The Proportionality Requirement

Another issue encountered by battered women who have sought to rely on the defence of self-defence was the requirement of proportionality. This requirement, as its name indicates, demands proportionality between the original attack and the self-defensive action. Proportionality as a legal requirement does not recognise the experiences of many victims of intimate violence; it is the antithesis of their reality and the circumstances they face. In many of the cases where a battered woman kills her batterer, there is a lack of physical proportion between the woman and her batterer. This disparity makes the requirement of proportionality unrealistic, considering that women in these circumstances respond to the abusive conduct at a time when the violent attack has ceased, or recourse to arming themselves in anticipation of another such attack. Unfortunately, arming themselves may lead to their actions being seen as disproportionate.

A similar result may be achieved by battered women who enlist the help of others. An illustration may be found in the case of Osland. The facts of the case are to be found in the judgment of Callinan J. On the morning of 30 July 1991 the accused, Heather Osland, and

496 This imposed serious difficulties for battered women who, in most of the cases, enlisted help or used a weapon and/or killed their batterer while the latter was unarmed. Such scenarios gave the impression that these battered women’s responses lacked proportionality: Colvin, above n 471, 344.

497 Bradfield, above n 464, 78. The Victorian Law Reform Commission observed that men are often physically stronger than their female partners and this means that women who are victims of domestic violence more often kill their intimate batterers in non-confrontational circumstances (such as when their batterers are asleep or have their guard down), use a weapon, or enlist the assistance of others: Victorian Law Reform Commission, above n 469, [3.11].

498 Easteal, above n 45, 40.

her son David Albion dug a grave in the Oslands’ back yard. In the evening, Heather mixed a sleep-inducing drug containing Diazepam into her husband Frank Osland’s food to induce sleep. When Frank lost consciousness, David struck Frank a fatal blow to the head. The accused and her son put the deceased’s head in a plastic bag and buried his body in the grave which they had prepared.

The accused and her son were later charged with murder. They had represented to all, including the police, that the deceased was a missing person. During the trial in October 1996, the accused was convicted of murder but the jury was unable to reach a verdict with respect to her son. At first instance, a forensic psychologist gave expert evidence about BWS and concluded that this was such a case.

The accused appealed unsuccessfully to the Court of Appeal of Victoria against both her conviction and her sentence. By the time of her appeal, her son had been retried and acquitted of both murder and manslaughter. The appellant gave evidence at her trial. She explained that she met the deceased in 1970 and began living with him in 1977. After only two weeks of living together the deceased became violent and abusive. She described him as dictatorial in domestic, social, familial and sexual matters. According to the evidence, he physically abused her children, and sexually assaulted her. She attempted to leave him and in fact did leave him several times, but he always found her and threatened to kill her and her children.

On appeal to the High Court, the accused argued that the trial judge gave the jury insufficient instructions on how they should consider the defences of self-defence and provocation, in the context of the expert evidence in BWS. A majority of the High Court comprising McHugh, Kirby and Callinan JJ dismissed the appeal, holding that the directions to the jury were adequate and BWS could not provide the accused with an excuse for killing her husband.
Kirby J stated it was open to the jury to find, as they plainly had, that the fact that the accused had enlisted the assistance of her son meant that her conduct ‘was premeditated and committed with “calm deliberation” and “detached reflection”'\textsuperscript{500} rather than reasonably necessary to remove further violence threatening her with death or really serious injury’.\textsuperscript{501} The accused’s actions did not fit into provocation or self-defence because it was a planned, premeditated killing.\textsuperscript{502}

In their judgments the majority emphasised the relevance of the events occurring immediately before the killing, but gave little weight to the history of violence to which the accused was subjected over several years:

> There was no suggestion in the appellant’s evidence of any particular conduct on the part of the deceased in the day or days preceding his death which could be described as ‘the last straw’. ... Even if the jury were satisfied that the appellant could be classified as a battered woman, and a true victim of BWS as described in the evidence, there would have been abundant justification for a conclusion that her conduct, in furtherance of her plan to kill her husband, was coolly premeditated.\textsuperscript{503}

Kirby J reiterated the view he had expressed in \textit{Green v The Queen}\textsuperscript{504} that ‘this Court should be extremely careful to avoid signals condoning serious violence by people who take the law

\textsuperscript{500} Ibid 220 [172].  
\textsuperscript{501} Ibid 221 [173].  
\textsuperscript{502} Gaudron and Gummow JJ dissented.  
\textsuperscript{503} \textit{Osland} (1998) 159 ALR 170, 219 [170].  
\textsuperscript{504} \textit{Green v The Queen} (1997) 191 CLR 334.
into their own hands’\textsuperscript{505} and cited with approved the remarks of Gleeson CJ, in the New South Wales Court of Criminal Appeal, that ‘[t]he law is not intended to encourage resort to self-help through violence’.\textsuperscript{506} This comment is interesting, considering that the defence of self-defence is used to legitimise the use of self-helping force in circumstances where the use of such force is necessary.

Kirby J’s views, reflecting those of a rule utilitarian,\textsuperscript{507} warn against the danger of private vigilantism. However logical, His Honour’s view fails to take into account that what is at stake is the battered woman’s life, and that resort to self-defensive force is necessary because the state and its social agencies have failed to protect her. Ostensibly, the accused’s response may lack proportionality, nevertheless, the accused herself may have felt that in the circumstances of constant, escalating violence, there was no other choice available to her than taking her aggressor’s life.

It has been suggested that the importance of proportionality and immediacy should be minimised, considering the dynamics of violent relationships that determines the nature of the threat and its perception by the accused. The Law Reform Commission of Western Australian opined that:

\begin{quote}
even where the perpetrator of the violence is not of greater size and strength, the perpetrator may still exert control over the victim, and the victim may fear for his or her safety.\textsuperscript{508}
\end{quote}


\textsuperscript{507} For rule consequentialism see 3.3.2.3.

\textsuperscript{508} Law Reform Commission of Western Australia, above n 469. The Commission noted that juries may find that the accused either lacked a genuine belief as to the necessity of his or her actions, or that such a belief was
This issue is of the outmost importance when we are dealing with a case of intimate violence between partners of the same sex. As will be discussed in the following chapter, violence within couples of the same sex is a complex issue. If it is understood in the light of heterosexist parameters, the conduct of gay and lesbian defendants may lack proportionality as it may seem unreasonable that a physically smaller partner could be the perpetrator.\textsuperscript{509}

\subsection{5.2.3 The Duty to Retreat}

In assessing the reasonableness of the battered woman’s response, the court must consider whether there were other avenues to avoid the killing. This is known as the duty to retreat. During trials involving victims of battering who have killed their intimate partners there is often a focus on whether the victim had any other way to resolve the conflict in the relationship.\textsuperscript{510} If the historical model for self-defence—the situation of a one-off physical attack—is kept in contemplation, the law will not excuse the killing where non-violent courses of actions were available. With respect to battered women, the requirement poses serious problems. First of all, the abuse is not one-off but ongoing. Second, retreat will not resolve the conflict in the relationship. Third, little importance is given to the fact that batterers are known for their relentless pursuit of their victims and, to some extent, are resistant to court control. Nevertheless, during the trials of battered women, significant attention is given to the question, ‘Why did she kill him instead of leaving him?’ Victims of intimate violence who kill are usually motivated by fear, desperation and a genuine belief that

\begin{itemize}
  \item not reasonable because: (a) the threat lacked immediacy (for example, where the accused waited until the deceased was asleep); (b) the threat lacked seriousness (for example, where the accused has responded to what may appear to be a relatively minor threat); or (c) the accused person had avenues available to them to escape or seek help.
\end{itemize}

\textsuperscript{509} Vickers, above n 133.

there are no other realistic means of escaping the danger posed by the batterer.\textsuperscript{511} While leaving the relationship may seem the most viable option to people who lack an understanding of intimate violence, this option has been shown to be unrealistic for many women.\textsuperscript{512} It can be both dangerous and difficult for battered women to leave.\textsuperscript{513} Moreover, these women do not believe that leaving the batterer will put an end to the violence.\textsuperscript{514} In fact, in many of the killings involving intimate partners, the woman had either left or was in the process of leaving her batterer.\textsuperscript{515}

The difficulty in reconciling the clash between the captive nature of intimate violence and the duty to retreat is also exhibited in the unwillingness of courts to countenance planning as part of a self-defensive killing. In this context, planning is not seen as an illegitimate, though necessary, means to equalise the fight between the battered woman and her batterer. Instead, the fact that the battered woman had an opportunity to plan is seen to imply that there were other options available to her. As well, although she is no longer legally obliged to attempt to escape the violence of her batterer, or to leave the relationship, a battered woman’s failure to

\footnotesize

\textsuperscript{511} Australian Law Reform Commission, above n 123, 649.

\textsuperscript{512} Ibid.

\textsuperscript{513} Fear for their safety or the safety of others, emotional attachment or love for the batterer, financial dependence, isolation, etc: see Julie Stubbs, ‘Domestic Violence and Women’s Safety: Feminist Challenges to Restorative Justice’ in Heather Strang and John Braithwaite (eds), \textit{Restorative Justice and Family Violence} (2002) 42-44. Financial independence does not preclude women from being subjected to intimate abuse. However, financial dependence and having children are factors which may force a woman to remain in an abusive relationship.

\textsuperscript{514} One quarter of the intimate partner homicides in Australia occur between separated, former and divorced couples; women are the victims in 84 per cent of these cases: see Roth, above n 469, 2.

\textsuperscript{515} Alison Wallace, \textit{Homicide: The Social Reality} (Bureau of Crime and Statistics and Research, Attorney-General’s Department (NSW), 1986) 83, 89.
do so will negatively impact upon the way in which jurors evaluate the reasonableness of her actions.\textsuperscript{516}

The removal, in a strict sense, of the traditional requirements of immediacy, proportionality and duty to retreat from the common law defence of self-defence have made it easier, at a formal but not at a practical level, for battered women who kill their intimate batterers to plead self-defence. These requirements, although formally removed, nevertheless are still relevant to the question of whether the accused believed on reasonable grounds that it was necessary to do what he or she did, and therefore still constitute legal barriers for battered defendants.

A discussion of these issues illustrates why battered women who kill their batterers find it difficult if not impossible to use self-defence successfully to defend murder charges under the common law. Given the gendered character of the defence, in the absence of testimony concerning BWS, a battered woman’s experiences might appear to the members of a jury to be incompatible with a claim of self-defence. This is the reason why a theory of intimate violence which can translate the experiences of battered women for judges and jurors is essential, for this theory would allow them to walk in the battered woman’s shoes. Since, as it will be argued in Chapter 6 of this thesis, these issues are also faced by battered gay and lesbian defendants, such a theory of intimate violence must be gender-neutral and flexible enough to accommodate the experiences of those who are gay or lesbian, battered, and live in a society which is both heterosexist and homophobic.

5.3 The Australian Common Law and its Preoccupation with Reasonableness

This section explains why the element of ‘reasonableness’ set out in *Zecevic*\(^{517}\) continues to pose problems for battered individuals. It will explain how, in order to assess the culpability of a battered accused fairly, jurors must contextualise the violence to which the victim has been exposed, otherwise jurors will inevitably be led to the conclusion that the response of the victim in killing the batterer was unreasonable. This is because the common law under *Zecevic*\(^{518}\) continues to qualify a battered woman’s belief in the necessity of her actions with the requirement of ‘reasonableness’. The test is whether the accused’s belief was based on reasonable grounds,\(^{519}\) not whether a reasonable woman, with all the characteristics of the accused, would have acted in self-defence.\(^{520}\)

It is precisely this requirement which has provoked severe criticism. Although the standard of reasonableness has been phrased and described in language of objectivity and rationality, it remains a male standard.\(^{521}\) Killing by a battered woman in circumstances that are not immediately confrontational would lead members of the jury to the conclusion that the woman’s actions were not reasonable or necessary. The lack of knowledge about the dynamics and effect of intimate violence would suggest that the killing of the batterer was

\(^{517}\) (1987) 71 ALR 641.

\(^{518}\) Ibid.

\(^{519}\) Ibid 655. As explained in Chapter 4, the Australian common law test for self-defence is set out in *Zecevic*: ‘It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal’.

\(^{520}\) Bronitt and McSherry, above n 415, 306.

either retaliatory or the product of irrational thought. Nevertheless, from a battered woman’s perspective—having lived with serious abuse, having developed a heightened capacity to perceive danger from her batterer and for whom escape has failed, leaving the relationship may not seem to be a realistic option—there may be no other reasonable response than to put an end to the violence by killing the batterer.522 The difficulty, thus, is to demonstrate that the male response to aggression is not necessarily the only reasonable one. The challenge is to persuade the members of the jury that the response of a battered woman, although not proportionate or immediate when measured against a male standard of aggression, may yet be reasonable in the circumstances.

The test laid down in Zecevic523 has both a subjective and an objective element. It requires, first, that the accused had an honest belief that it was necessary to do what he or she did, and second, reasonable grounds for that belief. As indicated by Dr Patricia Easteal, it requires consideration of both the perception of the threat and the response to it by the accused.524 Considering that imminence, proportionality, and duty to retreat are serious parameters which still bear significant weight upon the assessment of the existence and reasonableness of the belief, if the prosecution disproves either limb of the defence beyond reasonable doubt by demonstrating that the accused’s actions lacked imminence and proportionality, the claim based on self-defence will fail. The prosecutor may pursue this legal strategy simply by inviting the members of the jury to consider the genuineness of the battered woman’s belief. Without full appreciation of the woman’s situational and psychological state, the jury may


524 Hopkins and Easteal, above n 522.
not completely understand that her conduct was necessary considering that she lived with a continuous threat and fear for her life and safety.

Similarly, the battered woman’s situational and psychological predicament is highly relevant to an assessment of the reasonableness of her actions. In *R v Conlon* Hunt CJ indicated that all the personal characteristics of the accused which might affect the accused’s appreciation of the seriousness of the threat which the accused faced, and the reasonableness of the accused’s response to that danger, must be taken into account.

It has been argued that taking into account all of the circumstances in which the accused found herself in the determination of reasonableness, renders the distinction between the subjective and objective limbs of the test for self-defence meaningless. If a battered woman believes that it was necessary in self-defence to kill her batterer, and the jury is asked to consider all the situational and psychological circumstances that produce that belief, then her honest belief necessarily becomes a reasonable one. Arguably, if jurors were provided with a better understanding of the predicament of the victims of intimate violence, they may be able to ‘walk in the battered woman’s shoes’, and consequently will be able to understand why her conduct was reasonable.

This chapter now turns to the question of whether reliance on BWS is a solution to these problems.

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525 Osland (1998) 159 ALR 170, 200 [113].


527 Hopkins and Easteal, above n 522, 133.
5.4 The Use of Battered Woman Syndrome in a Legal Context

There are many reasons why BWS has been accepted as an evidentiary model in many jurisdictions all around the world. One of these reasons is that expert testimony in BWS does not deny women’s power of choice or agency, but explains how prolonged exposure to violence may alter the responses of a battered woman. This is important because, as was mentioned above, under the common law self-defence is predicated upon the reasonableness of the accused’s response in the circumstances. Therefore, in order for the battered woman’s conduct to be understood as reasonable, it is important that her perceptions are explained to the court.528

Wilson J’s comments in Lavallee explain clearly why expert testimony in BWS is necessary during the trial of a battered woman:

The average member of the public (or of the jury) can be forgiven for asking: why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beats her to the point of requiring hospitalisation? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so called ‘battered wife syndrome’. We need help to understand it and help is available from trained professionals.529

528 Feminist theory stresses that evidence as to social context as opposed to BWS would provide a fairer outcome. See Julie Stubbs and Julia Tolmie, ‘Battered Women Charged with Homicide: Advancing the Interests of Indigenous Women’ (2008) 41 Australian and New Zealand Journal of Criminology 138, 243. This issue will be discussed in the following chapters.

To determine whether a battered woman’s conduct could be justified in self-defence requires a contextual appreciation of her situation. This approach was endorsed by L’Heureux-Dube J in *R v Malott*:

>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.530

This quote clearly illustrates that the role of the expert is to answer some of these questions and provide assistance to the court by explaining how, within the context of a history of violence, the accused believed on reasonable grounds that it was necessary to do what she did. In Australia, Canada and the United States of America, Dr Walker’s model has been used, to some extent peremptorily, in the courtroom as a way of introducing evidence about intimate violence and its effects.531

Another reason justifying the preferential use of BWS in a courtroom is that it provides a better understanding of the battered woman’s response, as it contextualises the response within the history of intimate violence. A recent study conducted into jurors’ responses to different forms of expert testimony (social agency, BWS, etc) indicated that the imminence of the batterer’s threats substantially influenced the jurors’ responses but that the presence of expert testimony in BWS assisted a better understanding of the battered women’s response.532 The validity of expert evidence in BWS does not represent a paradigm for moral permissiveness and lack of legal responsibility, as the syndrome itself does not justify the |

531 Stubbs and Tolmie, above n 342.
532 Schuller et al, above n 516, 136.
unlawful killing. The right to self-defence is arguably a natural right, nowadays embodied within statutory provisions and the common law.\textsuperscript{533} To be granted the opportunity to explain how the conduct of the battered woman fits within the current principles of self-defence is simply a legal concession and a continuation of the individual’s natural right to use defensive force in given circumstances. Whether or not the use of BWS is the most effective way of contextualising the battered woman’s response is a matter of opinion.

Despite the criticisms surrounding BWS, the majority of experts invited to testify at trial do rely upon Dr Walker’s model of intimate violence, the Battered Woman Syndrome.\textsuperscript{534} Another reason why the model has been preferred over others is because it does not presuppose a relationship between a mental condition and a subsequent vulnerability to intimate violence. It also recognises abuse as a continuous and escalating phenomenon, rather than a single event.\textsuperscript{535} In fact, it explains how the shock reactions of the victims of intimate violence combined with depression and low self-esteem may influence the ability of a woman to leave a relationship.\textsuperscript{536}

### 5.4.1 Landmark Decisions Involving Battered Woman Syndrome

In the United States of America the case of \textit{State v Kelly}\textsuperscript{537} represented a major breakthrough within the area, as it provided a mechanism for the jury to hear evidence about the history of violence and the abusive character of the relationship. The facts of the case were as follows. The accused, Gladys Kelly, had been married for several years to the deceased, Ernest Kelly.

\begin{footnotes}
\item[533] Kaufman, above n 326, 22.
\item[534] Schuller et al, above n 516.
\item[535] Craven, above n 49.
\item[536] Schneider, above n 6, 202.
\end{footnotes}
During this period Gladys was the recipient of major beatings and other physical abuse by the deceased, especially when he was drunk. The accused tried to leave the relationship several times, nevertheless the deceased threatened her with killing and mutilating her if she ever left him. After an episode of severe violence, the deceased would apologise and promise to change. The evidence suggested that on the day of the killing, the deceased, who was drunk, was walking with the accused and her daughter when suddenly he began to hit her, choke her and also bit her on several occasions. A crowd intervened and separated them; however, soon after, the deceased ran towards the accused with his hands raised, ready to hit her. The accused feared for her life and removed a pair of scissors from her handbag with the intention of frightening the deceased away; unfortunately, she stabbed and killed him. At first instance the accused sought to bring an expert to give evidence in BWS to help establish her claim of self-defence. The testimony wasn’t accepted and she was convicted of manslaughter by the jury. The accused appealed to the Supreme Court of New Jersey. 538 The court considered whether the trial judge had erred in excluding the expert testimony in BWS. The seven judges of the Supreme Court unanimously ruled that the trial judge had erred in failing to admit the expert evidence. The decision of the trial judge was overturned and a new trial was ordered.

Wilentz CJ stated:

Only by understanding these unique pressures that force battered women to remain with their mates, despite their long standing and reasonable fear of severe bodily harm and the isolation that being a battered woman creates, can a battered woman’s state of mind be accurately fairly understood ... the expert testimony offered was directly relevant to ... what

538 Ibid 372.
Gladys Kelly believed at the time of the stabbing, and was thus material to establish the honesty of her stated belief that she was in imminent danger of death. ... we also find the expert testimony relevant to the reasonableness of the defendant’s belief that she was in imminent danger of death or serious injury.539

Another landmark case was the Canadian case of *Lavallee*.540 The facts of the case indicate that Angelique Lavallee, the defendant, was in an abusive de facto relationship with the deceased, Kevin Rust. During an argument, the deceased threatened to harm her, saying, ‘either you kill me or I’ll get you’. During the incident, the deceased slapped her, pushed her, and hit her twice on the head. He handed Lavallee a gun, which she first fired through a screen. According to the evidence, Lavallee first considered taking her own life by shooting herself. Nevertheless, however she shot the deceased in the back of the head when he turned to leave the room. At the trial, Lavallee argued self-defence. A psychiatrist testified as an expert witness in relation to the nature and extent of the violence which existed within the abusive relationship, the imminent fear within her mind, and her perception of the circumstances to an extent that she felt that she needed to kill him to protect her own life. Lavallee did not testify. The jury acquitted Lavallee, but the Crown appeal to the Manitoba Court of Appeal was successful and a new trial was ordered. The Court of Appeal decided that the jury was not properly instructed with respect to the psychiatric evidence, nor about the psychiatrist’s reliance on hearsay evidence.541 The defendant appealed to the Supreme

539 Ibid.


541 Ibid 853. The issues before the Supreme Court were whether the evidence of the psychiatrist should have been before the court at all and whether, if it should, the trial judge's instructions with respect to it were adequate: 853.
Court of Canada, seeking to restore the acquittal at first instance. \(^{542}\) The verdict of not guilty was restored. \(^{543}\) The Court recognised that the experiences, background, and circumstances of the defendant should be taken into account in determining whether the defendant actually believed she was at risk of serious bodily injury or death and had to use force to preserve herself, and the reasonableness of her beliefs. On behalf of the Court Wilson J \(^{544}\) explained that:

Without such testimony I am sceptical that the average fact finder would be capable of appreciating why her subjective fear may have been reasonable in the context of the relationship. After all, the hypothetical ‘reasonable man’ observing only the final incident may have been unlikely to recognise the batterer’s threat as potentially lethal. \(^{545}\)

The judgment of the Supreme Court of Canada in this case shows that we must consider a broad range of factors that may influence the accused’s beliefs. These factors will be also relevant to determine the reasonableness of those beliefs. \(^{546}\)

In Australia, the first case to recognise the role of expert testimony in BWS in a case of self-defence was \(R v Kontinnen\). \(^{547}\) The facts of the case indicate that the accused was in a de facto relationship with the deceased. The accused lived with the deceased, another woman

\(^{542}\) Ibid.

\(^{543}\) Ibid 889.

\(^{544}\) The unanimous judgment of Dickson CJ and Lamer, Wilson, L’Heureux-Dubé, Gonthier and Cory JJ. was delivered by Madam Justice Bertha Wilson: see ibid 853.

\(^{545}\) Ibid 881.

\(^{546}\) Department of Justice, Canada, \textit{Self Defence Review: Final Report Submitted to the Minister of Justice Canada and the Solicitor General of Canada} (July 11, 1997).

\(^{547}\) \(R v Kontinnen\) (Unreported, Supreme Court of South Australia, King CJ, Legoe and Bollen JJ, 30 March 1992). See also (1992) 16 Crim LJ 360.
and her child. According to the evidence provided by the accused she was the subject of physical and verbal abuse by the deceased. During the last two years of their relationship, the accused had been hospitalised as a result of the beatings received from her partner. On the day of the killing the deceased threatened to kill her, the other woman and the child. During her trial, self-defence and provocation were argued. Expert evidence in BWS was admitted. According to the trial judge, the evidence was relevant to two issues: (a) whether or not the accused believed it was necessary to shoot the victim, and (b) whether the belief was based on reasonable grounds. The accused was acquitted by the jury.

These early cases demonstrate an acknowledgment by the courts that it is not possible to administer justice in a courtroom during the trial of a battered woman who has killed her batterer without first understanding that the battered woman has been placed in her position, as an accused, because she has herself been a victim of violence. By implication it accepts that historically both the law and society have treated women generally unfairly. It accepts that expert evidence in BWS is essential to discredit the stereotypical and gender-biased character of the law of self-defence. These decisions have changed the way in which the evidence relates to the elements of the law of self-defence.

Certainly, without the help of experts, few courts and juries allow themselves to walk in the battered woman’s shoes. The Queensland case of *R v Stjernqvist*[^548] is an exception, as the jury acquitted the accused although she had shot her partner in the back.[^549] The judge had instructed the jury that the assault that the accused was defending herself against was the

[^548]: (Unreported, Cairns Circuit Court, Derrington J, 18 June 1996).

[^549]: It must be noted that the definition of an assault that one can defend oneself against in the *Criminal Code* (Qld) includes ‘situations in which violence is merely threatened as long as there is actually or apparently a present ability to implement the threat’. This definition includes pre-emptive strikes.
general nature of the relationship and all of the threats towards her. Unfortunately, not many battered defendants have been offered such fair treatment.

5.4.2 **Battered Woman Syndrome: A Problematic Solution**

Despite its importance as a catalyst to understanding the significance of violence, BWS has been severely criticised. Some of these criticisms were discussed by L’Heureux-Dube J in *R v Malott*, a case in which the Supreme Court of Canada was asked to consider self-defence in the killing of Paul Malott by his battered common law wife, Margaret Ann Malott. Her Honour referred to *Lavallee* and the acceptance of expert evidence as critical to overcome stereotypical thinking. Her Honour warned, however, that the treatment of expert evidence in BWS had led to a new stereotype of the ‘battered woman’, with the consequence that those women who are unable to fit themselves within the stereotype of a victimised, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided. This comment pinpoints one of the most common issues encountered by battered gay and lesbian defendants who have killed their intimate batterers—failure to fit the stereotype of the battered woman. According to L’Heureux-Dube J, if a woman is claiming self-defence, the centre of attention of the legal inquiry must be placed on her moral culpability by considering the circumstances and her experiences as a woman, as opposed to

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550 Easteal, above n 79, 51.


552 [1990] 1 SCR 852.

her status as a battered woman who deserves an acquittal based upon her suffering as a victim of heterosexual battering.  

Kirby J in Osland made it clear that BWS is not an entirely new and discrete defence to a charge of culpable homicide. Self-defence may indeed be relevant in a case where an abusive relationship is established by the evidence. According to his Honour such evidence will assist the jury to understand how the accused’s actions could be understood as self-defensive conduct where there was not an actual attack on the accused underway but, rather, a genuinely apprehended threat of imminent danger sufficient to warrant conduct in the nature of a pre-emptive strike.

It is clear that in many jurisdictions, battered women defendants have been allowed to raise self-defence successfully in circumstances where there was no imminent attack. In some of these cases the threat faced by the woman was not understood as being the general ongoing danger with which the woman was living in the relationship.

In R v Kontinnen, the batterer threatened his de facto wife with violence before he went to sleep. According to his threat such violence would be effectuated when he woke. The

554 L’Heureux-Dube J remarked that ‘[t]he legal inquiry into the moral culpability of a woman who is, for instance, claiming self-defence must focus on the reasonableness of her actions in the context of her personal experiences, and her experiences as a woman, not on her status as a battered woman and her entitlement to claim that she is suffering from “battered woman syndrome”’: ibid 163 [41].

555 Osland (1998) 159 ALR 170, 213.

556 Ibid.


558 (Unreported, Supreme Court of South Australia, King CJ, Legoe and Bollen JJ, 30 March 1992).
accused shot him while he was asleep.\textsuperscript{559} Evidence of BWS was led to allay the possible doubt of jurors that the accused’s shooting the deceased while he slept was not a necessary self-defensive response. The accused had been hospitalised 10 times in two years as a result of the battering inflicted upon her by the deceased. The evidence also suggested that the deceased had assaulted and raped the accused before he went to sleep. It was found that he represented a general and ongoing threat to her; this threat was demonstrated by his past actions and assaults. On the basis of BWS evidence the accused’s claim of self-defence was successful and the jury acquitted the accused.

The introduction of BWS evidence during the trials of battered women has been an important development because it has served as a tool enabling juries to gain greater awareness about the nature and effect of intimate violence. Unfortunately, the syndrome itself contributes to the stereotyping of women and their responses to violence as helpless or illogical. It shifts the focus from the variety of reasons why a battered woman may remain in a violent relationship, implying that if it were not for her psychological condition, it would be possible and reasonable for her to leave. There are often more mundane sociocultural factors at play in abusive relationships, for instance, financial dependence and lack of support from family members, social services or police.\textsuperscript{560}

There are also some criticisms directly associated with the ‘syndrome’ itself and Dr Walker’s research. BWS is not specifically listed in the \textit{Diagnostic and Statistical Manual of Mental Disorder}\textsuperscript{\textregistered} published by the American Psychiatric Association, which is the primary diagnostic

\textsuperscript{559} Ibid.

\textsuperscript{560} Stanley Yeo, ‘R v Hickey’ (1992) 16 Criminal Law Journal 272, 273. These factors and others are referred to in Chapter 2: see 2.6.3 and 2.8.
reference for mental health professionals in the United States of America and in Australia. 561

It has been argued that is difficult to translate a field of endeavour that poses both quantitative and qualitative serious research to the forensic field. 562 This may lead to some confusion between the medical use of the term ‘syndrome’ and the legal and evidentiary use of the term. Moreover, critics of the scientific basis of BWS have described the syndrome as having ‘no medical legitimacy’ and as failing to meet established criteria for ‘scientific reliability’. 563 The same critics have further described BWS as being an ‘unsubstantial concept’ increasingly doubted in the courts of the United States of America where it originated, and as soon likely to disappear from the American legal scene. 564

As a syndrome, BWS medicalises the battered woman’s experience and responses to violence, sometimes even beyond the comprehension of lay jurors. 565 There are, however, other problems related to medicalising women’s experiences. For instance, women who don’t exhibit the ‘symptoms’ may find it almost impossible to convince the members of the jury that their conduct was reasonable in the circumstances. Furthermore, the experiences, and responses, of some battered women are used to prescribe typical responses of a battered woman.

Another criticism of BWS is the concept of learned helplessness. Although the concept explains why a battered woman may remain in a relationship, it does not properly justify the

561 Craven, above n 49.
562 Ibid.
564 Goodyear-Smith, above n 563; Faigman and Wright, above n 563. See further Chapter 7.
breaking of the relationship and the final retaliation causing the killing. Failure to explain this deprives the syndrome of some logical sense. In fact, as will be discussed in Chapter 6 with reference to the case of *R v McEwen*, the prosecution can use this issue to discredit the syndrome, the validity of the testimony by the expert, and consequently the defence of the accused.

It must also be noted that it is the expert who describes the woman’s experience as opposed to the woman herself. This issue, coupled with the medicalisation of the woman’s response to the threat, will suggest that the woman is suffering from a psychiatric illness and because of such illness she committed the killing. Thus, it attributes a mental condition to the accused instead of focusing on the abusive character of the relationship, specifically the conduct of the batterer. By translating her experiences this way, the expert not only pathologises them but also takes them out of their social context. As a syndrome, BWS explains the accused’s psychology as opposed to her circumstances. The impact of this is that some courts may interpret the syndrome as being relevant to the subjective, as opposed to the objective, component of self-defence, when in fact it should be relevant to both because the violence, if properly contextualised, can explain the reasonableness of the accused’s response.

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567 *R v McEwen* (Unreported, Supreme Court of Western Australia, Murray J, 18-25 April 1995 (trial), Walsh J, 18 March 1996 (sentencing)).

568 See 6.2.2.

569 Easteal, above n 42, 210.

It has been suggested that as BWS may not offer, to certain defendants, a probable and successful outcome, it is commonly used to facilitate plea bargaining. More battered women who have killed their intimate partners are pleading guilty to manslaughter so that murder charges are dropped.\(^{571}\) This is not a good outcome for battered defendants who killed their batterers in self-defence and who could have succeeded in obtaining a full acquittal if their predicament, and therefore their responses to violence, were properly understood by jurors.

Other criticisms indicate that BWS may confront the social stereotype of womanhood that may be held by the judge or the members of the jury.\(^{572}\) This may be part of the explanation why expert testimony on this issue is limited by the courts, particularly where courts limit the extent to which the jury can use such evidence when reaching a verdict.\(^{573}\) Most importantly, however, it gives the impression that battering relationships are confined to women as the only victims of spousal or partner abuse. It is precisely this particular point made by Kirby J in *Osland*\(^ {574}\) which will be explored in Chapter 6 of this thesis.

Although BWS has been subject to many criticisms, it is an important concept which has changed and influenced the way in which intimate violence was and is perceived. Julie Stubbs and Julia Tolmie summarised its significance as follows:


\(^{573}\) In *State v Kelly* 478 A 2d 364, 377-8 (1984), Wilentz CJ explained that what the expert could explain was that the defendant had the syndrome, and could explain that syndrome in detail, relating its characteristics to the defendant, but only to enable the jury better to determine the honesty and reasonableness of the defendant’s belief.

\(^{574}\) (1999) 159 ALR 170. See 6.3.
the significance of admitting expert testimony during the trial of battered women who killed their batterers is not the recognition of the condition known as the Battered Woman Syndrome, but the fact that the courts have been able to consider a broader view of the evidence that is relevant to the legal elements of the law of self-defence.⁵⁷⁵

Because self-defence was so narrowly defined, from a male perspective, the challenge was to demonstrate that the responses of males to an attack are not necessarily the only reasonable responses. At a practical level, the task is to show judges and jurors that the response of a battered woman may be reasonable if her circumstances are considered and properly understood. The Australian Law Reform Commission has also taken the view that, in understanding violence, it is important for members of the jury to understand the context in which domestic violence occurs and the psychological and situational circumstances of the victim, especially if the victim of spousal abuse becomes the killer.⁵⁷⁶ This raises the related issue of whether current defences to homicide for victims in family relationships are adequate.

The chapter will now explain how currently, and despite the existence of s 418 of the Crimes Act 1900 (NSW), expert testimony in intimate violence is needed during the trial of battered defendants. It will be argued that neither s 418 nor BWS, or the two of them combined, make the defence available to all battered defendants.

⁵⁷⁵ Stubbs and Tolmie, above n 342, 32.

⁵⁷⁶ Australian Law Reform Commission, above n 123.
5.5 Battered Women Who Kill: Crimes Act 1900 (NSW) s 418

In New South Wales the common law relating to self-defence was amended by the *Crimes Amendment (Self-defence) Act 2001* (NSW). It has been suggested that due to the flexibility of the current defence in this jurisdiction it is unnecessary for battered women to rely on BWS. The statutory amendments should permit a battered woman to successfully plead the defence without it being necessary to force her into the ‘straightjacket’ created by BWS. Arguably, many issues are avoided if the battered individual does not need to strictly exhibit the characteristics of the Walker model, thus avoiding the suggestion that she is not a ‘good’ battered woman. This section of the thesis will explore whether or not the New South Wales statutory amendments actually offer a better outcome to battered defendants. It will explain how the outcome under s 418 may not necessarily be better without some expert testimony aimed at contextualising the history of violence, but that even with this difficulties remain if jurors are not well directed as to how to use the evidence during the trial.

Pursuant to s 418 of the *Crimes Act 1900* (NSW) a person is not criminally responsible if the person’s conduct is considered to be carried out in self-defence. The section requires that for self-defence to be available to an accused person:

1. the person must believe that the conduct is necessary to defend himself or herself, and

   

577 These amendments were discussed in Chapter 4: see 4.3, 4.4.

578 Brown et al, above n 261, 641. The issue is currently under scrutiny by the New South Wales Parliamentary Research Service.
such conduct must be a reasonable response in the circumstances as he or she perceived them.\textsuperscript{579}

While the common law posed quite significant difficulties for battered women in meeting the requirements of the objective part of the test for self-defence, theoretically s 418 facilitates the application of the defence, since the provision does not require the battered woman to have reasonable grounds for her belief that it was necessary to carry out the conduct that caused the death of her batterer, in the way she did, in order to defend herself.\textsuperscript{580} This is where the current provision is in contrast with the position at common law under \textit{Zecevic}.\textsuperscript{581} Since the issue as to the reasonableness of the battered woman’s response is determined by an entirely objective assessment of the proportionality of her response to the situation she subjectively believed she faced, the jury should not be concerned with what the battered woman believed was necessary to respond to the circumstances as she perceived them to be.\textsuperscript{582} It is neither concerned with whether her belief as to what was the necessary response was a reasonable one, or whether she had reasonable grounds for that belief.\textsuperscript{583} Under s 418 it is sufficient if the battered woman genuinely holds that belief.\textsuperscript{584} Thus, requirements of immediacy, proportionality or duty to retreat, at least from a doctrinal point of view, will not present an impediment for the battered woman, as all that is required is that the woman holds

\textsuperscript{579} \textit{Crimes Act 1900} (NSW) s 418(2). The meaning of s 418 was discussed in Chapter 4: see 4.3.1. The amendments to the \textit{Crimes Act 1900} (NSW) not only abolished the common law in the area of self-defence, but also reinstated the partial defence of excessive self-defence: s 421. See 4.4.

\textsuperscript{580} \textit{Crimes Act 1900} (NSW) s 418(2).

\textsuperscript{581} (1987) 71 ALR 641.

\textsuperscript{582} \textit{Katarzynski} [2002] NSWSC 613 (9 July 2002) [25].

\textsuperscript{583} Ibid [24]-[25].

\textsuperscript{584} Ibid [24].
the belief that it was necessary to carry out the conduct that caused the death of her batterer, in the way she did, in order to defend herself.\textsuperscript{585}

Under s 418, if a battered woman kills her batterer, the issue for the jury is to determine whether her actual response was reasonable in the circumstances as she perceived them to be. Therefore, her claim of self-defence is not defeated by reason of the fact that an ordinary person would not respond to the non-immediate threat of a batterer who is asleep, where, because of the battered woman’s history of abuse, she honestly but unreasonably believed that the batterer represented a threat to her life and safety. Instead, if a battered woman believes it is necessary to kill the batterer but the conduct which manifests itself from this belief is unreasonable in the circumstances as perceived, the battered woman will be found guilty of manslaughter by operation of excessive self-defence.\textsuperscript{586}

While s 418 alleviates some of the problems of the common law, the type of evidence currently provided under BWS may still be required. To be fair to battered women, the evidence must provide jurors with as complete a picture as possible of a battered woman’s predicament leading up to the taking of her batterer’s life so that the jurors can understand her circumstances and put themselves in the battered woman’s shoes. Even if this evidence is permitted under s 418, the section is too generic and provides no proper guidance to be used by jurors about that evidence and how it may relate to the assessment of the accused’s culpability. Thus, despite the existence and potential flexibility of the section, it is still essential for jurors to receive assistance in order for them to understand what may be reasonable for a battered woman living in a violent relationship.

\textsuperscript{585} Ibid.

\textsuperscript{586} In \textit{R v Trevenna} (2004) 149 A Crim R 505 (NSWCCA), the accused accepted that her conduct was not a reasonable response, though she believed her conduct was necessary to defend herself against the imminent threat of the deceased.
Moreover, under s 418, jurors are provided with a broad discretion in determining what matters should be taken into account when assessing whether the response of the battered woman was reasonable in the circumstances in which she found herself.\footnote{Katarzynski [2002] NSWSC 613 (9 July 2002) [25]: ‘It will be a matter for the jury to decide what matters it should take into account when determining whether the response of the accused was reasonable in the circumstances in which he or she found himself or herself’ (Howie J).} It is easy to imagine that, in the absence of evidence relating to BWS, a juror may not understand why a history of several years of abuse from the batterer towards the accused could be relevant if, on the day of the killing, she responded by killing him where the evidence indicated that in the hours immediately preceding the killing he had threatened her but was not in sufficient physical proximity to attack her. Would the situation be different if it was explained to jurors that she was so attuned to his moods that she could predict that an attack would start once he woke up or arrived home? Alternatively, a juror may believe that if the batterer had gone to sleep and the accused believed he would attack her when he woke up, a more sensible option than killing him would be for the accused to leave. If jurors are equipped with knowledge of intimate violence, however, they would understand why it is dangerous and in many cases unrealistic for battered women to leave.\footnote{Victorian Law Reform Commission, above n 469, 160.}

Similarly, if the prosecutor challenges the defence of self-defence by inviting jurors to consider issues such as those mentioned above, it is easy to understand how, in the absence of expert evidence in BWS, jurors could come to the conclusion that the battered woman did not genuinely believe that it was necessary to act as she did in her defence or that what she did was not a reasonable response to the danger posed by the batterer as she perceived it.\footnote{Ibid.} This,
in accordance with the interpretation of s 419 of the *Crimes Act 1900* (NSW) in *Katarzynski*, is sufficient to negative the defence.

So, too, in the absence of expert evidence in BWS, a trial judge may not leave self-defence to the jury because he or she may focus attention on the events occurring immediately before the killing and not the history of violence. Some of these issues will be further explored in Chapter 6 using the case of *R v McEwen* as a reference.

So far this chapter has explained how BWS is used in a legal context and the main criticisms surrounding the inclusion of this type of expert evidence during the trial of battered defendants generally. It was also explained that the statutory amendments to the law of self-defence in New South Wales have not completely overcome the barriers offered by the law of self-defence to battered individuals who kill in circumstances of intimate violence. The chapter will now explain how the existence of s 421 of the *Crimes Act 1900* (NSW) as an option available to jurors may prevent battered women from obtaining a full acquittal and how BWS could potentially draw the line between a finding of murder, manslaughter and a full acquittal for battered defendants.

### 5.5.1 Battered Women, BWS and Excessive Self-defence

Arguably, the reintroduction in New South Wales by s 421 of the *Crimes Act 1900* (NSW) of the partial defence of excessive self-defence may assist battered women who have killed their batterers but cannot satisfy all of the elements of self-defence under s 418. Nevertheless, the

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591 This situation was observed in *R v Bradley* (Unreported, Supreme Court of Victoria, Coldrey J, 14 December 1994). See Chapter 5.

592 *R v McEwen* (Unreported, Supreme Court of Western Australia, Murray J, 18-25 April 1995 (trial), Walsh J, 18 March 1996 (sentencing)).
danger associated with the introduction of the legal concession is that it may prevent battered women who have killed their intimate partners from being acquitted on the basis of self-defensive killing given the existence of excessive self-defence as the middle option.\textsuperscript{593} If jurors are presented with the option of finding a battered woman guilty of manslaughter on the basis of excessive self-defence, they may rationalise that her conduct in killing her batterer was out of proportion and unreasonable while totally disregarding the reasonableness of her actions in the context of her predicament. It could be argued that expert testimony in BWS may make it more likely that jurors would decide that the accused acted reasonably and not excessively, and therefore that she deserves to be acquitted instead of being found guilty of manslaughter. Ideally, however, the theory of intimate violence drawing the line between a finding of murder, manslaughter or a total acquittal should not be one that has historically failed defendants who do not conform to the stereotype of the good battered woman.

Pleading guilty to manslaughter is the most common strategy used by battered women and the usual default option. This may be chosen to avoid the risk of a murder conviction, and the potential for a significant or even mandatory sentence. Julie Stubbs and Julia Tolmie found that of the 25 cases before Australian courts between 2000 and 2007, 64 per cent ended in a guilty plea. It suggests that manslaughter has become the default option.\textsuperscript{594} Plea bargaining may be appropriate in some cases, but like BWS it may operate to privatise justice and individualise some of the structural problems that the law of self-defence poses for battered individuals who kill in circumstances of intimate violence.\textsuperscript{595}

\textsuperscript{593} As discussed in 4.4 and sourced in Roth and Blayden, above n 464, 35 [10].

\textsuperscript{594} Stubbs and Tolmie, above n 528. 148.

\textsuperscript{595} Ibid.
5.6 In Summary

Battered women encounter serious difficulties when they have killed their intimate batterers in circumstances of self-preservation. Under the common law, originally, the three requirements of imminence, proportionality and the duty to retreat rendered the defence of self-defence out of bounds for these defendants. These concepts encompassed a definition of self-defence which was consistent with the paradigmatic one-off spontaneous encounter, such as a pub brawl, which reflected a standard male response to aggression. The law of self-defence did not take into account the plight of battered women who killed to put an end to the violence they were receiving from their intimate batterers. Although the current common law position has relaxed the significance of the concepts of immediacy, proportionality and the duty to retreat via Zecevic,596 these requirements continue to pose problems for battered women as they are important in assessing the necessity and reasonableness of the battered woman’s response. In order to bring some gender parity to the law of self-defence, expert testimony in BWS was included during the trials of battered women. Despite its shortcomings, the BWS model contributed significantly to a better understanding of women’s responses to violence. It also represented a willingness by the courts to acknowledge that the male standard of aggression which underpinned the common law was unfavourable to women.

In New South Wales, statutory amendments to the law of self-defence have not delivered a fairer outcome for battered women as jurors continue to associate self-defence with the male paradigm. Jurors’ lack of knowledge of intimate violence and a lack of legislative guidance prevents them from properly considering the predicament of battered women when

determining culpability. This lack of understanding arguably renders the use of expert evidence in BWS necessary in order to allow jurors to ‘walk in the battered woman’s shoes’. The issue, nevertheless, is that BWS may not be the most effective method of demonstrating to jurors how the response of a battered individual may be reasonable, especially if the individual in question is one of those who does not fit into the stereotype of the battered woman created by BWS itself. As well, while the reintroduction of the partial defence of excessive self-defence may provide some assistance for battered women who kill their partners but cannot satisfy all of the statutory requirements for self-defence, the existence of the easy middle option of manslaughter may also prevent battered women who have killed their abusive partners from being acquitted on the basis of self-defence.

The following chapter will explore the main argument of this thesis, that the inclusion of expert testimony in BWS during the trial of battered gay and lesbian defendants exacerbates, rather than alleviates, their problems during trial. The chapter will explain why the traditional self-defence doctrine is inadequate for these defendants. It will be argued that the recent amendments to the law of self-defence in New South Wales, on their own, will not provide further assistance to these defendants: a theory of intimate violence is still required, or the law of self-defence must be changed to better accommodate the victims of intimate violence who kill their batterers.
CHAPTER 6: BATTERED WOMAN SYNDROME AND
THE GAY OR LESBIAN DEFENDANT

6.1 Introduction

Chapter 4 of this thesis explained that self-defensive killing is permissible in Australia, subject to some legal restraints. Chapter 5 argued that the laws defining self-defence have historically posed difficulties for victims of intimate violence who kill their batterers. These laws easily accommodate the defence of a man who kills another of similar size and strength while responding to an imminent threat with lethal force. However, the laws apply disadvantageously to individuals who use lethal force in circumstances which fall outside this patriarchal formulation of the defence. It was further argued that if battered individuals seek to challenge their culpability by arguing self-defence there are two options available. One is simply to allow traditional self-defence doctrine principles to be applied to them with little sensitivity and, probably, a disadvantageous outcome.\(^{597}\) The other option is to attempt to persuade the court that their conduct is justified by using BWS evidence during their trials. This disadvantageous treatment applies equally to both heterosexual and homosexual battered defendants who kill their intimate partners. Although by relying on expert evidence in BWS battered individuals are medicalising their experiences, they might have greater opportunities for acquittal with such evidence even if it is at the expense of portraying their responses as abnormal or atypical. This is the case if the battered defendants are heterosexual women, but as it will be argued in this chapter, expert evidence in BWS during the trials of battered gay

and lesbian defendants is likely to exacerbate their problems rather than alleviate them. So far these are the avenues available to victims of intimate violence who kill their batterers and seek to rely on self-defence. Should the law relating to self-defence be reformed? This thesis argues that to ameliorate the current situation for battered defendants, whether they are heterosexual or homosexual, the current laws of self-defence must be reformed so as to accommodate their application to the experiences of the victims of domestic violence who kill, taking into consideration the dynamics and features of domestic violence. Another alternative might be to expressly allow battered defendants to lead evidence as to intimate violence, thus accommodating within the current laws of self-defence a more appropriate gender-neutral theory of intimate violence and facilitating their application to the experiences of victims of intimate violence who kill. As was explored in Chapter 3 of this thesis, the same jurisprudential basis which justifies self-defensive killing supports the killing of a batterer by his or her battered partner, therefore there is no reason, at least from a philosophical standpoint, impeding legislative development in this area.

Most of the research in the field of intimate violence has focused on women as victims and males as perpetrators. However, as Kirby J stated in Osland:

> unlike conception and childbirth, there is no inherent reason why a battering relationship should be confined to women as victims. Instances exist where the reverse is the case, including in some same-sex relationships of analogous dependence and prolonged abuse.\(^{598}\)

This chapter initially examines the case of \(R \, v \, McEwen\),\(^{599}\) the first Australian decision in which evidence of BWS was used by a homosexual defendant in the context of self-defence.

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\(^{598}\) Osland (1999) 159 ALR 170, 212 [159].
A discussion of this decision is of the essence as it illustrates clearly the difficulties that gay and lesbian defendants face when expert testimony in BWS is used during their trials. The chapter explains that while BWS is helpful in assisting some women to defend murder charges, it is a gender-specific psychological concept that actively inhibits successful defences to murder for battered gay and lesbian defendants. With respect to these defendants BWS will only exacerbate, rather than alleviate, their problems at trial. It is argued that the syndrome heterosexualises, and fails to consider the unique features and dynamics of, abusive intimate relationships between same-sex couples. These issues are important in relation to a fair assessment of the accused’s culpability. From these amongst other considerations emanates the suggestion that, instead of expert evidence in BWS, a gender-neutral theory of intimate violence should be adopted during the trials of battered gay and lesbian defendants.

The chapter then examines reasons why the current law of self-defence as laid down in s 418 of the Crimes Act 1900 (NSW) is inadequate for a battered gay or lesbian defendant. This part of the chapter seeks to lay the foundations for the argument that the law of self-defence must be modified in order to make self-defence available to these defendants. It is acknowledged that the statutory amendments to the law of self-defence in New South Wales have increased the likelihood, at least at a theoretical level, that battered gay and lesbian defendants who kill their batterers could successfully argue the defence. The current

599 R v McEwen (Unreported, Supreme Court of Western Australia, Murray J, 18-25 April 1995 (trial), Walsh J, 18 March 1996 (sentencing)). It must be noted that there is not an actual written judgment of this case. The accused was tried before Murray J in the Supreme Court of Western Australia on 18-25 April 1995 and was sentenced by Walsh J on 18 March 1996.

600 Homosexual individuals who kill in circumstances of intimate violence face some of the same problems encountered by battered heterosexual women who seek to utilise self-defence to defend murder charges but who do not fit within the stereotype of the good battered women: see Stubbs and Tolmie, above n 342, 744 and Catharine Simone, ‘Kill(er) Man Was a “Battered Wife”: The Application of Battered Woman Syndrome to Homosexual Defendants: The Queen v McEwen’ (1997) 19 Sydney Law Review 230.
provision does not require that the threat to the accused be imminent nor that his or her response be proportionate to the threat. Nevertheless, like battered heterosexual women, battered gay and lesbian defendants find application of the defence in this context still problematic because jurors fail to understand the nature and dynamics of abusive relationships. This failure can lead juries to assess the culpability of the accused without a full appreciation of his or her predicament. Nor do juries receive sufficient directions from trial judges addressed to explain to them that self-defensive force may be reasonable even where it is not proportional to the threat faced or where it is not an immediate response to the threat. Ideally, a model of intimate violence would help jurors understand that even a disproportionate or non-immediate response from a victim of intimate violence who kills his or her batterer may be reasonable. BWS should not be used as such model since despite its potential to assist some battered defendants, in the context of the current law of self-defence in New South Wales it is still a limiting factor, both for homosexual individuals who kill their batterers and for all battered individuals who do not fit within the stereotype of the ‘good battered woman’.

6.2  *R v McEwen*

This 1995 case in the Supreme Court of Western Australia was the first Australian decision in which evidence of BWS was used by a gay man in the context of self-defence. The accused was charged with murdering his male partner of 14 years. McEwen’s defence argued both self-defence and provocation, and relied on BWS for the purposes of supporting both defences argued.
6.2.1 The Facts of the Case

The accused, Robert Vaughan McEwen, met his partner, Thomas Hodgson, in Auckland, New Zealand. At the time, the accused was 17 and Mr Hodgson was 16 years his senior. After having known each other for a short period, the two moved in together and openly started a homosexual relationship. Their relationship lasted 14 years. While living together the two shared financial obligations and common property. In 1988 the couple left New Zealand and moved to Perth. Mr Hodgson was employed by a publishing company where he was a successful sales executive. The accused initially worked at the Hilton hotel but subsequently was employed to manage a café located within close proximity to the home of the accused and the deceased. According to evidence given by the accused, the relationship between him and the deceased was, from the beginning, contoured by a series of rules demarking the duties, roles, expectations and responsibilities of each of them.\(^{601}\) During examination in chief the accused said that the deceased was very controlling and would not permit him to go out to any places other than his work unless he was accompanied by the deceased.\(^{602}\) The accused also said that it was part of their arrangements that the deceased was to look after their money, pay the bills, and take general care and management of their finances.\(^{603}\) The facts reveal that Thomas Hodgson was a charming and intelligent individual, but simultaneously controlling, possessive and domineering.\(^{604}\) He socially isolated the accused by denying him contact with his family and friends.\(^{605}\) The deceased

\(^{601}\) Transcript of Trial Proceedings, *R v McEwen* (Supreme Court of Western Australia, Murray J, 20 April 1995) 260, 261 (examination in chief of McEwen).

\(^{602}\) Ibid.

\(^{603}\) Ibid.

\(^{604}\) Simone, above n 600, 233.

\(^{605}\) Ibid.
subjected the accused to public humiliation, financial control and even restricted him from leaving the house.\textsuperscript{606} The accused was so scared of the anger exhibited by the deceased that he learnt not to question or challenge him. On the rare occasions where the accused challenged the deceased, the latter would coerce the accused into apologising.\textsuperscript{607}

On several occasions, McEwen attempted to leave the relationship but the deceased implored McEwen not to leave him. He also expressed some remorse and promised to change. One of these episodes occurred during April 1991, and after having convinced the accused to remain in the relationship, the deceased violently abused the accused sexually.\textsuperscript{608} This event was the predecessor to a series of frequent and brutal acts of rape, harassment and sexual violence by the deceased towards the accused. While giving evidence, the accused explained that the deceased would forcefully penetrate him anally and sometimes would perform the same act upon the accused while he was asleep. Arguments about sex were common in their relationship. The night before the killing was committed, the deceased demanded sex from the accused, who was reluctant to comply. The accused’s belief was that sex was coerced and inevitable.\textsuperscript{609} The accused explained that this belief was founded upon the preceding four nights of non-consensual sex. Before retiring to bed, the two of them had smoked cannabis and also taken Rohypnol.\textsuperscript{610} The deceased was the first one to retire and the accused followed him. However, the accused left the bedroom after being pressured to have sex when he did not wish to do so. The accused explained that he was frustrated as he was

\textsuperscript{606} Transcript of Trial Proceedings, \textit{R v McEwen} (Supreme Court of Western Australia, Murray J, 20 April 1995) 260, 262 (examination in chief of McEwen).

\textsuperscript{607} Ibid 260, 276 (examination in chief of McEwen).

\textsuperscript{608} Ibid.

\textsuperscript{609} Simone, above n 600, 232.

\textsuperscript{610} Transcript of Trial Proceedings, \textit{R v McEwen} (Supreme Court of Western Australia, Murray J, 21 April 1995) 340.
not able to fall asleep. After leaving the bedroom, the accused consumed more Rohypnol and smoked more marijuana. According to the accused’s evidence, the last thing he remembered was the deceased yelling at him from their bedroom. He also remembered that the deceased made threats to him regarding the inevitability of rape.

The prosecution argued that the accused formed the relevant mens rea a few hours later and then proceeded to stab the deceased 42 times with two kitchen knives. He disposed of the deceased’s naked body at a construction site, then returned home, cleaned up, and called the deceased’s sister. The accused told her that the deceased had not returned home after going out during the previous night. When the police found and identified the body, the accused was questioned. When cross-examined as to motive, McEwen stated: ‘I don’t know why I did it’.611

6.2.2 Expert Testimony as to the Application of Battered Woman Syndrome

At McEwen’s trial, the defence offered testimony from an expert on intimate violence to support McEwen’s plea of self-defence. The expert testimony was designed to explain to the members of the jury answers to questions such as

why would he stay in such a violent relationship? Why did he not tell someone or seek help? Why of course in the end did this … quiet, meek and submissive young man … suddenly stab his partner to death in a frenzied attack?612

During the trial, McEwen’s barrister emphasised the necessity of expert evidence in facilitating the jury’s understanding of the nature of the accused’s conduct:

611 Ibid 375.

612 Transcript of Trial Proceedings, R v McEwen (Supreme Court of Western Australia, Murray J, 20 April 1995) 254 (R Smith QC, counsel for the defendant, opening speech to jury), cited in Simone, above n 600.
despite, in a sense, what the accused said about being trapped, he was in fact trapped in a relationship and the cumulative emotional and psychological effect of that on him made his responses different to the responses which might be expected from an ordinary person who had not been in that relationship, or that type of relationship, and it is to explain and to enable the jury to understand the nature of those reactions … which could not be understood by people properly without expert evidence.613

The expert testified about BWS and portrayed the accused as a ‘battered wife’.614 This characterisation allowed the attribution to the accused of the characteristics of a battered wife, so that McEwen was perceived as exhibiting all the necessary symptoms of learned helplessness and, ergo, able to justify his failure to leave the abusive relationship to the jurors.

McEwen’s relationship with the deceased was similarly explained in a way which reflected the cycle of violence postulated by the Walker model to explain the pattern of abuse in heterosexual relationships.615 The whole defence of the accused was designed to explain, and consequently justify, his ‘unreasonable’ and ‘abnormal’ behaviour. Unfortunately, this attempt to contextualise his experience and responses as a victim of intimate violence was done via the scientific testimony of an expert as opposed to through the accused’s own account of the events.

613 Transcript of Trial Proceedings, R v McEwen (Supreme Court of Western Australia, Murray J, 20 April 1995) 340 (R Smith QC).

614 Transcript of Trial Proceedings, R v McEwen (Supreme Court of Western Australia, Murray J, 21 April 1995) 404.

615 Transcript of Sentencing Proceedings, R v McEwen (Supreme Court of Western Australia, Walsh J, 18 March 1996) 93.
The expert described McEwen as passive, dependent and childlike.\(^\text{616}\) The testimony accentuated the personal issues and inadequacies of the accused rather than the factors which limited his actions and options in the face of ongoing domestic abuse.\(^\text{617}\) The expert stressed that the accused’s dependency on the deceased was unreal and aberrant when compared to someone else of the accused’s age. Instead of centring the accused’s defence on the self-preserving nature of his actions, his experiences were construed by the expert as irrational. The clinical psychologist stated in her report:

> It seems that in particular the sexual abuse which frequently involved anal rape of Mr McEwen over the last three years of the relationship together with the pattern of domestic abuse culminated in what could be termed ‘Battered Woman Syndrome’ causing a massive psychological breakdown of coping responses and loss of control. In my view it is likely that this was consistent with symptoms of severe post-traumatic stress disorder which caused injury to his mental health at the time.\(^\text{618}\)

Basically, the expert pathologised the accused’s predicament to lead the jury to regard the accused’s defence more favourably. The testimony provided evidence that he suffered a massive psychological breakdown as a result of the syndrome. This implies that he was, even

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\(^\text{616}\) Transcript of Trial Proceedings, \textit{R v McEwen} (Supreme Court of Western Australia, Murray J, 20 April 1995) 340.

\(^\text{617}\) This type of critique is drawn from feminist observations about the way in which BWS creates a stereotype of a battered woman and also medicalises these defendants. See Stubbs, above n 252, 272; Julie Stubbs, ‘The (Un)reasonable Battered Woman?: A Response to Easteal’ (1992) 3(3) \textit{Current Issues in Criminal Justice} 359.

\(^\text{618}\) Transcript of Sentencing Proceedings, \textit{R v McEwen} (Supreme Court of Western Australia, Walsh J, 18 March 1996) 93.
if only temporarily, mentally abnormal or insane. His responses and loss of control were abnormal if juxtaposed with those of a reasonable person. 619

Instead of walking in McEwen’s shoes and understanding his predicament, the expert portrayed McEwen’s responses as irrational and frenzied. No context was provided by reference to those factors and circumstances of a social, cultural and economic nature discussed in Chapter 2 which, together with homophobia and heterosexism, in many cases render the battered gay or lesbian victim powerless against the abuse of the accused. There was no consideration of the nature of intimate violence between same-sex couples as distinct from intimate violence between heterosexual men and women. 620 In fact, the unique features of same-sex intimate violence were totally disregarded. 621

During cross-examination of the expert, the prosecution questioned the failure of BWS to explain why battered women, who for the majority of their relationships exhibit passivity and docility, suddenly take control of their lives by killing the accused. The expert’s response was that ‘it is not easy to explain, but there are plenty of incidents once again where people do react in a very different manner from their normal way of reacting’. 622 This type of cross-examination was obviously designed to attack both BWS as a reliable syndrome and the credibility of the expert. The incident illustrates that BWS can be used as both a shield by the defence and a sword by the prosecution.

619 There was no attempt to characterise the accused’s actions as a form of self-preservation in the face of continuous violence. It was not considered that the response of a victim of domestic abuse is normal if his or her circumstances are properly considered.

620 Similar observations have been made previously by Robson, above n 219, 571.

621 Simone, above n 600, 234.

622 Transcript of Trial Proceedings, R v McEwen (Supreme Court of Western Australia, Murray J, 21 April 1995) 430.
6.2.3  The Decision

Although the defence relied on BWS for the purposes of supporting both self-defence and provocation, Murray J withdrew self-defence from the jury as, according to his Honour, there was not sufficient evidence to indicate that the accused’s belief that there was no other option but to take the batterer’s life was a reasonable one.  Perhaps the decision of Murray J to withdraw self-defence from the jury evinces the draconian consequences which might follow for a homosexual accused who seeks to utilise self-defence. The possibility of a total acquittal at a practical level disappears as judges also fail to understand how a gay male could be a battered woman.

Despite the defence’s efforts, the jury failed to reach a unanimous verdict and the case was sent back for retrial. Before the retrial could take place, however, the Crown entered into a plea bargaining agreement with the accused in which the Crown accepted a plea of guilty of manslaughter by operation of the partial defence of provocation, and the charge of murder was dropped. The expert testimony in BWS was accepted in support of both the accused’s claim of provocation and the mitigation of his sentence.

Two years after being charged with the murder of his partner, McEwen was sentenced in March 1996 by Walsh J in the Supreme Court of Western Australia to imprisonment for five years.

623 Transcript of Trial Proceedings, R v McEwen (Supreme Court of Western Australia, Murray J, 24 April 1995) 531-43.
6.2.4  The Importance of R v McEwen

The case of R v McEwen is compelling on a number of different levels. One issue is the lack of regard given to the sexuality of McEwen. In fact it was heterosexualised: the intimate violence which occurred between him and the deceased was forced to fit within the prevailing model of heterosexual intimate violence, BWS. The trial did not provide an opportunity for the accused to contextualise the nature and dynamics of same-sex battering. No consideration was given to the political context in which many gay males and lesbian women are forced to experience isolation and discrimination as a result of homophobic attitudes. These considerations are important as they may impact directly upon the development of violent relationships, and may force the accused to seek refuge with the batterer while diminishing his or her perception of other available means of escape such as leaving the relationship.

In addition to the factors which have been alluded to above, the case illustrates how difficult it is for a gay male to articulate a defence using a psychological and legal construct like BWS. When McEwen’s only option for defence at his trial was to offer a heterosexual model of intimate violence and to medicalise his experience as a victim of intimate violence, his predicament was delegitimised. This is the reality for many victims of same-sex intimate violence. The case also illustrates the inability of BWS to offer a fair outcome to many defendants, especially to those who do not manage to fit within the stereotype of the ‘good battered wife’. As the discussion in 6.2.2 of the expert evidence presented in the case

624 This is a term used by lesbian jurisprudence to explain the way in which gay and lesbian relationships are redefined into prevailing models of heterosexuality.

625 Simone, above n 600, 234.

626 See 2.8.5.
explained, BWS exposes gay and lesbian defendants to the stereotypes to which battered heterosexual women have been exposed. With respect to gay males, in addition, the model serves to feminise the defendant by attributing to him the characteristics that a misogynist system believes are stereotypical of women.

In *Osland*, Kirby J pointed out that it was best to avoid concepts or categories expressed in sex-specific or otherwise discriminatory terms and referred to the dangers of creating stereotypes which risk compromising the neutrality of the law. His Honour stressed that there is no specific reason why battering relationships should be confined to women as victims. The association of BWS with women exclusively on the one hand compromises the perception of women as fully independent and responsible individuals. On the other hand, it also distracts public and judicial concern from the main issue; that is, the reality that may accompany prolonged and abusive relationships of dependence, focusing instead on ‘gender loyalty and sympathy’. As his Honour correctly suggests, our legal system and self-defence laws heterosexualise gay intimate violence by construing same-sex relationships as a replica of the gendered patterns and role playing of heterosexual relationships. As a consequence, gay males and lesbian women may be unable to have their claims of self-defence justly decided as they do not manage to fit themselves within the stereotype of the battered woman. These defendants, already victims of stereotypes that portray them as

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627 *Osland* (1998) 159 ALR 170, 211.
628 Ibid 212.
629 Ibid 213.
630 Ibid.
631 Ibid.
gender-confused, will be forced to defend not only their action, but their inability to fit within the stereotyped female gender role.632

6.3 Gay and Lesbian Defendants and the Stereotype of the Battered Woman

Experts who explain intimate violence in terms of BWS will encourage the jury to try to fit the same-sex relationship between the accused and the deceased into the mould of a heterosexual relationship. This will most probably lead to increased stereotyping and confusion, as the expert and the jury will be forced to ask themselves who in the relationship played the role of the man and who played the role of the woman.633 The chance that either the defendant or the batterer will fit into a stereotypical gender role is minimal.634 This was acknowledged by the Supreme Court of Canada in the case of R v Malott.635 Such observation indicates that gay males and lesbian women who had previously retaliated, or who do not manage to fit into the battered woman stereotype, will be penalised for not exhibiting ‘passivity, docility and self-helplessness’—and thereby not fitting into the historical stereotype of a white, middle-class woman.636 By reducing or even ignoring the impact of a couple’s same gender and requiring a battered gay or lesbian defendant to attempt to fit himself or herself into the ‘battered woman’ stereotype, our system is disregarding the fact that diminishing the differences between a battered gay or lesbian defendant in a same-

632 Simone, above n 600, 235.
633 Ibid.
634 Herek, above n 177, 147.
sex relationship and a battered woman in a heterosexual relationship will not, of itself, eliminate the homophobic or unsympathetic attitudes that some members of society may hold against the former.637

Similarly, the issue of the size and strength of the batterer relative to his or her victim will present a barrier when a battered gay or lesbian defendant seeks to portray himself or herself as a battered woman. The common image associated with a battered woman as small, meek and cowering will not translate to a defendant as large and strong as his or her intimate partner.638 Despite the fact that the battered gay male or lesbian woman may be dissimilar in size and strength to his or her abusive partner, generally the discrepancy between the two will not be as extreme as the discrepancy in size and strength between the man and woman in an abusive heterosexual relationship. Judicial officers may have difficulty understanding the dynamics of intimate violence when unable to view the defendant as the weaker, helpless victim described in the BWS model. In the case of People v Huber,639 the court found that the defendant’s size was relevant when she was physically larger than her partner. This case involved the issue of self-defence between two lesbian women where there was a preceding history of intimate violence.

Another problem for gay and lesbian defendants under the Walker model is the rigidity of the model in describing the victim of abuse as helpless and passive. This description does not translate well to defendants who on prior occasions have fought back or attempted to flee.640 It is important to mention that heterosexual couples do engage in mutual battering. However,

637 Bricker, above n 8, 1416.
638 Robson, above n 219, 578.
639 475 NE 2d 599, 601 (Ill App Ct, 1985).
640 Robson, above n 219, 578.
the effects of physical battering are generally much more severe for one of the partners, usually the woman. This aspect of intimate violence is in contrast to the passivity of the victim which is characteristic of the Walker model.\textsuperscript{641} It is not clear whether or not battered gay males and lesbian women engage in more mutual battering than their heterosexual counterparts.\textsuperscript{642} Nevertheless, the statistics suggest that mutual battering is very common in same-sex relationships.\textsuperscript{643} The fact that the partners are of the same gender and, by implication, of similar size and strength may suggest to a judge or to the members of the jury that the defendant had fought back or it was feasible that he or she could have fought back. Thus, if the defendant retaliated or engaged in acts of mutual battering or fought back, the prosecutor will be able to argue that the defendant is not a battered woman because he or she failed to exhibit the passivity described by the Walker model. The prosecution is usually permitted to use the characterisation of the battered woman as portrayed in the evidence of the expert to refute that the accused was a battered wife. This issue was exhibited in the case of \textit{Mullis v State},\textsuperscript{644} where the court refused to admit expert testimony in BWS because the evidence showed that the defendant frequently fought back.

In \textit{R v Peters},\textsuperscript{645} a decision of the Supreme Court of New South Wales, the accused, Damien Anthony Peters, was charged with the murder of his partner, Tereupii Akai. The accused was sentenced to 17 years imprisonment on 20 December 2002. During the trial the accused relied on expert evidence on BWS. Wood CJ remarked:

\begin{quote}
\textbf{\textit{R v Peters}} (\textit{2002} NSWSC 1234 (20 December 2002)).
\end{quote}

\textsuperscript{641} Sorenson and Thomas, above n 13, 343.

\textsuperscript{642} Ibid.

\textsuperscript{643} Bartlett, above n 111, 586.

\textsuperscript{644} 282 SE 2\textsuperscript{d} 334 (Ga, 1981).

\textsuperscript{645} [2002] NSWSC 1234 (20 December 2002).
The facts in McEwan [sic] have some general similarity with those in the present case, so far as that offender had also been in a long term homosexual relationship with the victim, in which he had adopted a submissive and dependent position. However, the facts there were much more closely aligned with the classic position of a battered partner, in that there had been a long history of brutal sexual assaults and domination, which led to the Crown accepting a plea of guilty to manslaughter, by reason of provocation. … The present case falls some way short of this, as is indicated by the difference in plea, and also by the fact that the second murder occurred within a very short period after the relevant relationship began. Additionally, the contributing effect of the defendant’s own personal shortcomings and his long-term abuse of drugs cannot be ignored.646

The decision illustrates that if the accused retaliates or fights back or simply engages in non-passive behaviour, these actions will be interpreted against his or her defence as they will be considered some of his or her ‘shortcomings’. The facts of the case also suggest that the Court disregarded the accused’s HIV-positive status, the fact that the deceased had infected the accused with HIV, and the effect that this had on his relationship with the deceased and his mental health. As it was explained in Chapter 2, HIV status is one of the factors influencing gay males to remain in abusive relationships. Wood CJ’s remarks quoted above also contain the hidden implication that a battered woman is one who is not affected by alcohol or drugs.

Gay males and lesbian women will naturally have difficulties overcoming this stereotype. That this is so was also observed in R v Peters where Wood CJ made reference to the lack of alignment between the accused and the paradigm of a ‘battered person’.647 Characterising the

646 Ibid [77]-[78] (Wood CJ).

647 Ibid [77] (Wood CJ).
effects of intimate violence as a syndrome is part of the problem. The word ‘syndrome’ implies that there are definitive symptoms to be exhibited if a positive diagnosis is sought. BWS suggests to jurors and judges that there is a pathology or maladjustment within the victim. If a battered gay male or lesbian woman fails to exhibit all or even some of the symptoms associated with the syndrome, he or she will be immediately categorised as either a bad battered woman or not a battered woman at all, as was observed in *R v Peters*.649

In essence, BWS relies on gender stereotyping. Stereotypes about women—such as their socialised passivity, their economic dependence, and their lesser size, strength and fighting ability—are essential to BWS’s explanation of why women are abused by their male partners and why they have difficulty leaving these abusive relationships or fighting back. If these gendered notions are removed from the syndrome, BWS offers little explanation of why intimate violence occurs between same-sex couples or why battered gay men and lesbian women have difficulty in separating themselves from their abusive relationships.

6.4 Gay and Lesbian Defendants Arguing Self-defence without Battered Woman Syndrome in New South Wales

Chapter 4 of this thesis discussed the effect of s 418 of the *Crimes Act 1900* (NSW) which provides that a person is not criminally responsible if the person’s conduct is considered to be carried out in self-defence.650 In *Katarzynski* Howie J stated that s 418 posed two questions:

648 Bricker above n 8, 1426.


650 *Crimes Act 1900* (NSW) s 418.
(i) is there a reasonable possibility that the accused believed that his or her conduct was necessary in order to defend himself or herself; and, (ii) if there is, is there also a reasonable possibility that what the accused did was a reasonable response to the circumstances as he or she perceived them.651

6.4.1 Did the Accused Believe the Conduct Necessary to Defend Himself or Herself?

As noted in Chapter 4, in answering the first part of the test for self-defence under s 418 as described in Katarzynski652 jurors are entitled to take into consideration the personal characteristics of the accused and his or her personal circumstances at the time he or she carried out the conduct.653 Thus, theoretically, jurors could take into account not only the gender of the battered victim now accused of killing his or her intimate batterer, but also the personal characteristics of the accused and of the battering same-sex relationship. These characteristics could include, for instance, the accused’s sexuality and his or her perception of the batterer’s threat, taking into account the history of violence between the intimate partners etc. This may include the specific fears that had forced the battered gay or lesbian individual to remain in the abusive relationship, including his or her fear of being rejected if the batterer carried out a threat to publicly ‘out’ the victim’s sexual preference. Similarly, if the victim did not abandon the batterer because he feared the batterer’s threat to divulge the victim’s HIV-positive status. Gay and lesbian victims of intimate violence fear being further isolated and such threats may be sufficient to cause them to remain in abusive relationships.

652 Ibid.
653 Ibid [22]-[23].
Similarly, jurors will be able to put in context how the battered individual’s fear of being further stereotyped as a battered homosexual may prevent him or her from seeking help or assistance. As discussed in Chapter 2, many gay and lesbian individuals have the perception that by contacting the police or other government agencies dealing with domestic violence, they are exposing themselves to further homophobic attitudes, humiliation or discrimination. All these issues may be relevant to the members of the jury in understanding the reasons why the battered gay or lesbian individual did not leave the relationship, or was quite incapable of emotionally detaching himself or herself from the batterer. In order for this to successfully occur, however, jurors also need to have explained to them that gay and lesbian individuals, already stereotyped as a result of their sexuality, may be afraid of being further stereotyped as battered homosexuals.

Members of the jury may also consider that one of the reasons why a gay or lesbian victim of intimate violence may remain in an abusive relationship is because he or she was naive or inexperienced with respect to intimate same-sex relationships. If a battered gay or lesbian individual does not have anything else with which to compare their abusive relationship, he or she may be led to believe that abusive episodes are normal in same-sex relationships. Members of the jury may equally consider another reason why the battered defendant may not have left the batterer is because he or she loved the batterer and was committed to them. Alternatively, jurors may consider the unique financial or emotional dependence of the accused on the batterer made him or her vulnerable to the batterer’s control. If the accused believed that the batterer was going to change, for instance, to remain with him or her would seem a more sound choice for the accused than to seek help within the social and criminal justice system, which could either expose the gay or lesbian victim of intimate violence to homophobic or heterosexist views or provide an inadequate response. All of these aspects could be taken into account by jurors determining whether or not there was a subjective belief
of the accused that the death of the batterer was necessary in order to defend himself or herself. By discussing the personal attributes of the accused, it becomes possible to contextualise the predicament in which the accused found himself or herself.

6.4.2 Was What the Accused Did a Reasonable Response to the Circumstances as Perceived by the Accused?

In determining the second part of the test for self-defence under s 418 as described in *Katarzynski* jurors will consider whether there is also a reasonable possibility that what the accused did was a reasonable response to the circumstances as he or she perceived them. This part of the test is objective and will enable jurors to place the conduct causing the killing in the context of a response to a possibly lethal threat within the violent same-sex relationship. They also will be able to take into account how the battered gay or lesbian defendant’s perception could have been blurred as a result of his or her prolonged exposure to violence within the abusive relationship. By understanding the dynamics of the same-sex relationship and its violent patterns, jurors will be able to objectively assess why killing his or her batterer was a reasonable response in the circumstances as the accused perceived them. Arguably, this is the opportunity for jurors to assess the proportionality of the battered gay or lesbian individual’s response to the lethal threat that he or she subjectively believed he or she faced. The battered gay or lesbian individual does not have to have reasonable grounds for his or her belief that it was necessary to carry out the killing of his or her same-sex batterer.

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6.4.3 The Effect of Stereotypes, Jurors’ Preconceived Attitudes and the Discretion of the Jury

The test for self-defence under s 418 has the potential to allow jurors to ‘walk in the battered gay or lesbian individual’s shoes’, to understand that the accused’s response was proportional to the threat he or she faced and the threat of living with a continuous fear of escalating episodes of violence. So far, this formulation of the defence under s 418 appears to be, even if unaided by expert testimony, a better option for gay and lesbian defendants than BWS. Nevertheless, the real difficulties lie in challenging the pre-existing stereotypes, and the heterosexist and homophobic beliefs that jurors may hold. This issue, coupled with the discretion given to the jury, will expose battered gay and lesbian defendants to the personal frailties—and possible homophobic attitudes—of the members of the jury.

In Katarzynski, Howie J stated that:

It will be a matter for the jury to decide what matters it should take into account when determining whether the response of the accused was reasonable in the circumstances in which he or she found himself or herself.655

Further, in accordance with Katarzynski, s 419 of the Crimes Act 1900 (NSW) should be read such that the Crown will have negatived self-defence if it proves beyond reasonable doubt either:

(i) that the accused did not genuinely believe that it was necessary to act as he or she did in his or her own defence or (ii) that what the accused did was not a reasonable response to the danger, as he or she perceived it to be.656

655 Ibid [25].
With regard to the first limb, it would be easy to understand how a lay juror may be tempted to believe that the final incident causing the death of the batterer was not necessary, as the batterer was physically smaller than his or her mortal assailant. Similarly, jurors may have some difficulties in conceiving how a relationship of control and abuse could occur between two males or two females. Consistent with this, a jury’s determination of the reasonableness of the accused’s response to the danger as he or she perceived it to be may be blurred by the accused’s testimony indicating previous retaliation. In fact, jurors involved in criminal proceedings dealing with battered gay or lesbian defendants have already acknowledged, when questioned after the trial, that some male jurors refused to believe that a lesbian individual who had retaliated, by threatening her lover once with a gun while under attack from the latter, was a battered woman.\textsuperscript{657} Accordingly the prosecution during cross-examination played heavily on the fact that the accused had admitted the occurrence of such events. Such admissions, in the eyes of the jury, transformed the battered lesbian individual into a perpetrator, no longer worthy of the jury’s mercy.\textsuperscript{658}

The issue is that to be fair to a battered gay male or lesbian victim of domestic violence, the evidence must provide jurors with as complete a picture as possible of the battered individual’s predicament leading up to the taking of his or her batterer’s life, so that in assessing whether the response of the battered gay or lesbian victim was reasonable in the circumstances in which he or she found himself or herself, the jurors can put themselves in the victim’s position. However, it is not difficult to imagine how a juror who is heterosexual and who has never been exposed to intimate violence may not understand why a history of

\textsuperscript{656} Ibid [23].

\textsuperscript{657} State v Green (Fla Dist Ct App, N90-0039, 1990).

\textsuperscript{658} Bricker, above n 8.
several years of abuse from the batterer to the accused could be relevant if the evidence indicates that, in the hours immediately preceding the killing, the batterer had threatened the victim but was not in sufficient physical proximity to strike. Similarly, even jurors without homophobic attitudes may not understand why, instead of using lethal force, the battered individual did not simply use the force required to repel the attack. This is an issue if evidence of previous mutual battering is used by the prosecution. Alternatively, a juror may consider that if the batterer had gone to sleep and the battered gay or lesbian victim believed he or she would be attacked once the batterer woke up, a more sensible option for the victim than killing the batterer would be to leave. Nevertheless, if it was explained to jurors that, as a result of homophobia, many gay and lesbian victims of domestic violence seek refuge in their abusive partners—they don’t have positive role models to follow and they become so attuned to the moods of their batterers that an abused partner may be able to predict that a possible attack could start once the batterer woke up—the situation could be different. If jurors have some knowledge of intimate violence and the extra stressors faced by same-sex couples as a result of heterosexism and homophobia, they would understand why it can be dangerous and in many cases unrealistic for a battered gay or lesbian individual to leave their abusive partner.

If the prosecutor challenges the defence by inviting jurors who have not had the benefit of such evidence as to the battered gay or lesbian defendant’s predicament to consider some of these issues, it is easy to understand how jurors could come to the conclusion that the battered gay or lesbian individual did not genuinely believe that it was necessary to act as he or she did in self-defence, or that what he or she did was not a reasonable response to the danger posed by the batterer as he or she perceived it. This would be sufficient to negative the
defence under Katarzynski. Although the use of evidence as to the battered gay or lesbian defendant’s predicament is permitted under s 418, no proper guidance is given to jurors about how to use the evidence. It is argued that it is essential for jurors to receive greater assistance in understanding what may be reasonable for a battered gay male or lesbian woman living in a violent intimate relationship.

6.5 In Summary

For a long time both our criminal justice system and society generally failed to acknowledge the existence and seriousness of intimate violence between same-sex couples. More recently, when this violence has culminated in the killing of a batterer by his or her same-sex intimate partner, the law has responded to the issue by offering the accused the opportunity to use expert evidence in BWS during their trials. The fact that this heterosexual model of intimate violence is offered to battered gay and lesbian individuals in support of their claim of self-defence exposes the unwillingness of our legal system to legitimise different sexual preferences and orientation. Arguably, admission of expert evidence in BWS during the trial of a battered gay or lesbian individual illustrates that even where the law recognises same-sex intimate violence, its heterosexism and homophobic tendencies will delegitimise it. Although BWS ostensibly attempts to offer some equality to battered gay and lesbian defendants, it has not succeeded. BWS either passes over or misrepresents key dimensions of same-sex intimate violence which it is essential to consider in making a fair assessment of the accused’s culpability in these circumstances. It distorts more than it explains the particular responses of a gay or lesbian accused, while dismissing the nature and context of same-sex battering. BWS in fact contributes to reinforcing the already-existing rigid, hierarchical and

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gender-biased ‘dichotomies’ which, although the result of patriarchy, nevertheless inform our legal reasoning and, consequently, impoverish our understanding of both heterosexual and same-sex intimate relationships. The case of *R v McEwen* clearly demonstrates the impossibility of attempting to contextualise the predicament and responses of a battered gay male to ongoing violence through the lens of a battered heterosexual woman. At a practical level, such testimony as was offered in *R v McEwen* will more likely exacerbate the problems of battered gay and lesbian defendants during trial.

Although the enactment of s 418 of the *Crimes Act 1900* (NSW) could be categorised as another attempt to offer some equality to battered gay and lesbian defendants, it has little to offer. Despite the potential that the section theoretically offers to battered defendants, the lack of legislative guidance espoused with the poor understanding that judicial officers and jurors may have about same-sex intimate relationships may render the defence useless to battered gay and lesbian defendants. If one of the aims of the legislative reforms was to make the defence of self-defence available to victims of intimate violence who kill their batterers, these efforts must be fortified by educating judicial officers and jurors about the experiences of victims of same-sex partner abuse, as their belief in the necessity of the self-defensive force used by them and the reasonableness of that belief cannot be properly assessed if their predicament is disregarded.

660 Some of these dichotomies are the binaries of active/passive, dominant/submissive, victim/agent, etc. See further Simone, above n 600.

661 (Unreported, Supreme Court of Western Australia, Murray J, 18-25 April 1995 (trial), Walsh J, 18 March 1996 (sentencing)).
CHAPTER 7: THE WAY FORWARD

7.1 An Unsatisfactory Situation

The predicament and experiences of the victims of intimate violence are incomprehensible to many people. Some of these are judges and jurors who are called to assess the criminal responsibility of the battered gay or lesbian victim of intimate violence who, in circumstances of self-defence, has put an end to his or her hardship by killing their intimate batterer. The difficulty of the task for the judicial actors is intensified, with possible detriment to the accused, when they lack reference in their own lives by which to measure the perception and conduct of the battered defendant at the moment when he or she used lethal force in self-defence. This lack of reference prevents them from walking in the battered defendant’s shoes and consequently impedes them from assessing his or her culpability fairly in the light of their plight. Without an understanding of intimate violence, jurors may perceive the responses of these victims as the product of detached deliberation and even premeditation. The requirements of immediacy, proportionality and duty to retreat, which continue to be relevant at common law to an assessment of the necessity and reasonableness of the accused’s response, are similarly problematic for battered defendants, since these inherently patriarchal gatekeepers to the defence flavour it with a male standard of aggression and continue to impregnate the minds of jurors with an understanding of self-defence which translates only to a one-off encounter between two male strangers of similar size and strength. Such conceptualisation of the defence renders unreasonable in the eyes of the jury the conduct of the victim of battering who kills his or her intimate batterer. However, as has been suggested by Dr Patricia Easteal, one of the most prominent scholars in the area, if battered defendants honestly believe that it is necessary to use lethal force against their
batterers and jurors are asked to consider all of the situational and psychological circumstances which produced that belief, then an honest belief on the part of these individuals necessarily becomes a reasonable belief.662

The deficiencies in the law of self-defence highlighted by feminist legal theorists prompted the inclusion of BWS during the trials of battered women who killed their intimate partners. While BWS was thought to be an effective means by which to educate jurors about the plight of battered women and how their predicament influenced their responses to the violence inflicted upon them by their batterers, the model has proven to be both prescriptive and inadequate. BWS is inappropriate for any battered defendant who falls outside the paradigm of the ‘battered woman’ created by the model itself, including many of the heterosexual victims of spousal or partner abuse around whom the model was originally designed. The most noticeable problem with BWS for all battered defendants is that it reinforces the stereotype of women that it originally sought to dispel, as it propagates a perception of women as helpless, passive, dependent and somehow incapacitated victims. BWS places greater emphasis on these perceived incapacities of the victim than on the dynamics of intimate violence. The model also diverts attention and the application of the law from the fundamental issue which excites a legal response, directing it instead to what is assumed to be a typical case in which the law offers a legal concession to kill batterers when the killing is committed in the context of an abusive relationship. Unfortunately, when expert evidence in BWS is admitted during a trial, the focus becomes not the circumstances and context faced by the accused, but the extraordinary psychology of the syndrome instead. Perhaps the real contribution of BWS towards an understanding of intimate violence is the illumination that}

662 Hopkins and Easteal, above n 522.
self-defence is patriarchal by nature and that the law has treated disadvantageously the victims of family violence who kill.

As a model of intimate violence BWS has contributed to the heterosexualisation of same-sex intimate relationships and has informed the way in which the cases of battered gay and lesbian defendants are presented. The gender-biased assumptions of BWS cannot readily be applied to abusive same-sex relationships, and expert testimony in BWS may exacerbate rather than alleviate the problems of the battered defendant at trial if the violent relationship in question was between partners of the same sex. For instance, BWS encourages the belief that violent relationships are limited to women as victims and males as perpetrators. This understanding of intimate violence in a juror’s mind may encourage a view that same-sex relationships are abnormal or a pathological deviation of ‘normal’ sexuality, or alternatively jurors may find it inconceivable to identify the existence of intimate violence in a gay or lesbian relationship. From this perspective, gay males and lesbian women who are defending murder charges, and who already may be perceived as gender confused, are faced with the task of masking their sexuality, defending their self-defensive conduct and proving their ability to fit within the stereotyped female straitjacket of the battered woman created by the Walker model. Moreover, when a battered gay or lesbian defendant who is of similar size and strength to his or her partner is juxtaposed with the image of the battered woman propagated by the model as docile, submissive and cowering, jurors may be led to the conclusion that the former is not really a victim of intimate battering and, consequently, not worthy of the jury’s mercy. Similarly, the conceptualisation of a battered woman as a helpless and passive victim does not readily translate to a gay or lesbian defendant who had previously engaged in mutual combat with the batterer or attempted to leave the abusive relationship. The fact that same-sex partners are of similar size and strength relative to the
man and woman in an abusive heterosexual relationship may suggest to jurors that the defendant had fought back or at least had the capacity to do so.

The medicalisation by BWS of the experiences of the victims of battering connotes impairment or abnormality to many people including judges and jurors. As a consequence, a battered gay or lesbian defendant who does not manage to exhibit sufficient alignment with the symptoms of BWS will be categorised as a bad battered woman. In fact, many of the unique features of same-sex intimate violence and its specific dynamics may lead jurors to believe that the accused is either a bad battered woman or not a battered woman at all as he or she did not comply with the characteristics of the stereotype of the battered woman created by BWS. As was demonstrated through the discussion of *R v McEwen*, expert testimony on BWS may confuse jurors, as they may not be able to reconcile how the conduct of a battered gay male can be assessed by reference to a heterosexual model of violence created to assist battered women.

As a component of BWS, the theory of learned helplessness does not consider the unique reasons why battered gay males and lesbian women stay with their same-sex partners. HIV-positive status for gay males and the ‘lesbian utopia’ for lesbian women may condition the way in which an abusive gay or lesbian partner deals with the victim of his or her battering. These factors may also deter or prevent victims of same-sex battering from leaving their batterers. In addition, the heterosexist and homophobic attitudes of our legal system and society generally may prevent these victims from seeking help or leaving their batterer—and to some extent may coerce them into seeing the killing of the batterer as their only way of escaping. These are factors unique to same-sex intimate relationships which BWS disregards.

663 (Unreported, Supreme Court of Western Australia, Murray J, 18-25 April 1995 (trial), Walsh J, 18 March 1996 (sentencing)).
and which, if explained to jurors, may lead them to conclude that the conduct of the battered gay or lesbian defendant was reasonable.

In New South Wales, the enactment of s 418 of the *Crimes Act 1900* (NSW) did not totally eradicate the anomalies offered by the common law to battered defendants. Although theoretically the section has the potential to provide a fairer outcome to these defendants, at a practical level it is still not adequate, as jurors continue to associate self-defence with the one-off encounter between two males of similar size and strength. Moreover, the section vests jurors with ample discretion as to the matters to be considered when the culpability of the accused is assessed. To vest such responsibility on jurors may be a waste, especially if they are not provided with better guidance as to how to contextualise the abusive character of the relationship when assessing the culpability of the accused. If these jurors lack an understanding of intimate violence they may not necessarily understand why the history of several years of abuse from the batterer towards the accused could be relevant if, on the day of the killing, the accused responded by killing the batterer where the evidence indicates that in the hours immediately preceding the killing the batterer had threatened the accused but was not in sufficient physical proximity to attack him or her. The same circumstances may lead a trial judge to withdraw self-defence from the consideration of jurors. Inviting the jurors to consider matters such as those described above which, if the jurors are unaided by evidence contextualising the circumstances of the accused, may inevitably lead them to a finding that the battered defendant did not genuinely believe that it was necessary to act as he or she did in his or her defence or that what she or he did was not a reasonable response to the danger posed by the batterer as she or he perceived it, may also assist a prosecutor to challenge the defence. All of these issues, coupled with the lack of legislative guidance provided to jurors who bring to the trials of these victims all the preconceptions they have about intimate
relationships and especially same-sex intimate relationships, render the possible fairness and flexibility of the amendments futile.

Many arguments such as these were raised through the thesis to explain why statutory enactment of the law of self-defence in New South Wales has not completely eradicated the disadvantageous treatment of battered defendants by the law of self-defence. The 2002 amendments to the *Crimes Act 1900* (NSW) additionally created a further problem for battered defendants generally: the possibility that, rather than being acquitted, they will be found guilty of manslaughter by operation of excessive self-defence. The partial defence may prompt and even promote jurors’ readiness to decide that the accused’s response, although necessary, was out of proportion or excessive. Considering that historically the responses of battered defendants have frequently been characterised as excessive—especially those of battered gay males and lesbian women who are seen as playing the role of the woman in same-sex relationships—this is a problem. Section 421 of the *Crimes Act 1900* (NSW) now provides jurors with the legal machinery to determine that these battered defendants did not really act in self-defence and, ergo, do not deserve a total acquittal. Nevertheless, their ‘over-reactive’ responses make them worthy of manslaughter. Rather than compelling jurors to walk in the battered gay or lesbian defendant’s shoes, the statutory amendments to the law of self-defence have given jurors an easier option: to deliver a verdict of manslaughter as a ‘legal compromise’—a response to the issue, once again, that like BWS is in fact equally disadvantageous to these defendants.

Battered gay and lesbian defendants who kill their intimate batterers basically have two choices:
1. to permit jurors, handicapped by myths and stereotypes about same-sex intimate relationships, to assess their cases by using traditional self-defence doctrine unaided—with a potentially disadvantageous outcome; or

2. to opt for pathologising their predicament by using BWS, arguing that although irrational/abnormal their conduct is justified as they were impaired by the heterosexual syndrome—with no guarantee of success, and facing the same obstacles that the model poses for some battered women while risking being further stigmatised as ‘gay and battered’.

These choices as has been demonstrated are poor. Self-defence law should be flexible enough to accommodate the experiences of the victims of intimate battering who kill without expecting them to pathologise their experiences in order to gain the jurors’ mercy. Furthermore, BWS in this context is operating as a de-facto defence of excuse, that is, it is excusing the conduct of the accused as a result of a temporal abnormality of mind. Such conceptualisation is unsustainable from a jurisprudential point of view, as self-defence is categorised nowadays as a defence of justification. Thus BWS creates a jurisprudential blurring between defences of justification and defences of excuse. If the right to use self-defensive force should be granted and made available to all citizens, and such right is supported by the most accepted philosophical underpinnings of the criminal law, there is no practical reason why self-defence should not be available to battered defendants who kill.

While heterosexual women who have killed their batterers have been unfavourably treated by the law of self-defence, battered gay or lesbian individuals who kill in circumstances of family violence face still greater issues during their trials. Gay and lesbian victims of intimate violence face the same difficulties that heterosexual victims of spousal or partner abuse encounter regarding the adaptability of the current law of self-defence to killings which
occur within the context of a prior history of violence between intimate partners. The result is that if traditional self-defence doctrine is applied to their cases with little sensitivity to their plight, the likely outcome is that jurors will be led to decide that their conduct was either unnecessary or unreasonable. In fact they risk that homophobic and/or heterosexist attitudes may compromise the outcome of their trials.

7.2 Towards a Gender-neutral Theory of Intimate Violence

It has been argued that in order to assess the culpability of a battered gay or lesbian accused fairly, jurors must be educated about same-sex intimate violence: this the only way in which the myths and stereotypes they may hold about the issue can be rejected and a miscarriage of justice prevented. It is also essential that jurors are provided with guidance as to how to relate the particular peculiarities of same-sex intimate violence to the assessment of the necessity and reasonableness of the gay or lesbian accused’s response. If jurors are not provided with a complete picture of what it is like to live in an abusive relationship and simultaneously be part of a society that is both heterosexist and homophobic, then in order to properly assess the necessity and reasonableness of the accused’s response, jurors must be provided with a theory of intimate violence capable of accommodating the experiences of victims of same-sex battering. This theory should not be BWS.

To improve the situation for battered gay and lesbian defendants who have killed their intimate batterers two options are available:

- to use a gender-neutral theory of intimate violence instead of BWS; or
- to modify the law of self-defence so as to make it adequate for all victims of intimate violence who kill their batterers. Such changes should provide jurors with sufficient legal machinery to enable them to contextualise the reasonableness of the accused’s
conduct ‘in the circumstances as he or she perceives them’ by reference to the experience of the victim of battering.

It has been proposed that in order to avoid the problems caused by expert testimony on BWS during the trial of a battered gay or lesbian individual, an expert witness must present a different theory of intimate partner violence.664 Such theory should not be dependent upon the gender of the batterer or the victim. However, it is suggested by this thesis that it should be capable of providing ample room so the individual characteristics of the particular same-sex relationship can be included. The challenge is not only to place jurors in the position of the victim of battering, but to have them understand the reality of what it is like to be in abusive relationship in addition to being gay and battered in a heterosexist/homophobic society. Until recently, the majority of the research on intimate violence has been directed at heterosexual relationships. Research into intimate violence in same-sex relationships is still limited.

While it may be argued that gender neutrality does not necessarily equate to equality, this assumes that every theory of intimate violence must, like BWS before it, be prescriptive and rigidly applied. This does not have to be the case. This thesis recommends that any theory used to describe adult intimate violence must first of all be flexible enough to accommodate the dynamics of different kinds of intimate relationships. It should be capable of adapting to both heterosexual and gay and lesbian adults. If it is not, it faces the risk of creating another stereotype or other stereotypes with the result that, like BWS, some battered victims of

664 Bricker, above n 8, 1432.
intimate violence will not fit within it and will be deprived of the defence of self-defence or characterised as ‘non-battered’.

To date a gender-neutral theory of intimate violence which could be applied to both heterosexual and same-sex relationships has not yet been developed. Nevertheless there are two consolidated theories of intimate violence which potentially are capable of delivering a fairer outcome to battered defendants: those proposed by Dr Angela Browne and Dr Julie Blackman. These theories do not depend on portraying the battered person as helpless or passive. While both researchers based their findings on studies of heterosexual women, their theories can be applied in a gender-neutral manner.

7.2.1  

**Browne’s Model: When Victims of Battering Kill**

Dr Angela Browne’s study focuses specifically on battered women who killed their intimate batterers rather than on battered women generally. She argues that the expert at trial must lay the foundation for the jury’s interpretation of the defendant’s acts as reasonable:

> A knowledge of the history of the prior violence and the specific context within which the incident occurred is essential for understanding the woman’s perceptions at the time of the homicide… The life of a battered woman is replete with prior provocation, continuing apprehension, and the constant threat of impeding danger. As we learn more about battered women, those who kill seem to be reacting to the level of violence perpetrated against them.665

To explain why these women fail to leave their relationships, Browne looks at the alternatives available. This is a positive aspect which would benefit gay and lesbian defendants as the

expert would be able to discuss those reasons which force a battered gay male or lesbian woman to remain in an abusive relationship. For instance, the HIV-positive status of the victim, the fear of being ‘outed’, emotional dependence on the batterer, etc. This would be crucial for jurors in assessing the reasonableness of the accused’s response. Homophobia, heterosexism and the lack of assistance offered to battered gay males and lesbian women could, if contextualised, persuade a jury that escaping or retreating was not an easier option.

Browne explains that battered women, like other victims of trauma, focus upon survival during the ‘impact phase’.666 This suggests that it is applicable to males or females irrespective of the victim’s or the batterer’s gender. Browne argues that the affective, cognitive and behavioural responses of these victims are likely to become distorted as a result of focusing on survival.667 They invest their attention in not crying out in pain, in order to mitigate the severity of the abuse, but have not developed any plans for escaping the violent situation.668 This phase is followed by a ‘euphoric phase’ in which the individual has unrealistic expectations about recovery.669 Browne compares these women to prisoners of war. As the aggressor becomes omnipotent, the victim’s flight or fight responses become inhibited. Victims’ perception of their alternative options become increasingly limited the longer they remain in the situation.670 Belief that safe alternatives exist is still more limited for gay males and lesbian women, who in fact have fewer alternatives than battered heterosexual women.

666 Ibid 5.
669 Bricker, above n 8, 1433.
670 Ibid.
According to Browne’s theory, the self-defensive action of the victims of battering must be put in context with the level of violence perpetrated against them by the batterer and their diminished ability to perceive opportunities for escape. She argues that as the intensity and frequency of the violent episodes increases, three additional factors have a major impact on the women’s decisions to remain with an abusive intimate partner. These reasons are factors of a practical nature, fear of isolation and the shock reactions natural to victims of abuse. These categories would provide room for discussion of the reasons why gay individuals decide to stay in abusive relationships.

In summary, if Browne’s model were utilised the likelihood of a fairer outcome for battered individuals is greater than under the BWS theory of intimate violence because it focuses on the brutality of the assailant, allowing the jury to have a better context of the relationship and thus to interpret the defendant’s reaction as reasonable considering his or her circumstances.

7.2.2 Blackman’s Model: Intimate Violence as a Study of Injustice

Another theory which potentially could be utilised along with Browne’s is the one postulated by Dr Julie Blackman. Blackman argues that intimate violence harms the victim’s sense of justice. Once harm is caused, the victim is less able to perceive injustice and he or she may also act on this perception. Once damage to the person’s sense of justice occurs, the

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671 Ibid.

672 As was explained in Chapter 2 of this thesis, there are many practical reasons why gay males and lesbian women remain in an abusive relationship, for example, lack of shelters specifically organised to provide support to gay and lesbian individuals, scarcity of institutions willing to provide support for victims of same-sex partner abuse, etc. See further 2.8. Similarly, fear of isolation in a society which still holds serious heterosexist and homophobic views to some extent coerces these victims to remain with the batterer.

victim’s ability to perceive alternatives also narrows.\textsuperscript{674} This is applicable to battered gay and lesbian individuals whose sense of self-worth and integrity is jeopardised not only by an abusive partner but also by societal attitudes.

The damage done to the individual’s sense of justice leads to an unusual level of acceptance of cognitive ability to perceive inconsistency as a way of coping.\textsuperscript{675} According to Blackman:

\begin{quote}
This tolerance of inconsistency is a reflection of the fundamental inconsistency of their lives: that the man who supposedly loves them also hurts them. This characteristic of battered women is particularly important for jurors to understand, since it may cause her to describe the events of her life in ways that are seemingly contradictory and may be misinterpreted as signs of a generally poor memory or bungled attempts to be deceptive.\textsuperscript{676}
\end{quote}

The novelty of this theory is thus that it explains the change in perceptions experienced by a victim of long term battering.

\textbf{7.2.3 Shifting the Focus Away from the Battered Individual}

Both Browne’s and Blackman’s theories are important to battered gay and lesbian defendants, because both include research that can be applied in a gender-neutral manner. Browne’s comparison between victims of trauma and battered women is particularly useful, because of the connection between non-gender specific victims and battered victims. Further, because Browne’s research reveals significant differences in the violence of the relationship of battered women who kill, the jury’s attention would be shifted away from the

\textsuperscript{674} Bricker, above n 8.

\textsuperscript{675} Ibid.

psychological state and gender of the defendant, toward the batterer and his or her acts of violence.

Donald Dutton’s research over a thirty year period into domestic violence in both heterosexual and same-sex relationships has led him to argue that in respect of intimate violence there is an association between relationship power dynamics and the perpetration of abuse. Similarly, there is a correspondence between intimate abuse and factors associated with the abusive personality. Dutton explains that certain individuals, whether heterosexual or homosexual, inflict violence upon their intimate partners because they suffer from a personality disorder or an abusive personality. His studies explain that to minimise shame or self-punishment, perpetrators alter their perceptions of their actions by viewing them as less serious, diminishing the negative consequences for the victim, or by blaming the victim for their actions. Many batterers attribute their violence to provocation by the victim. It should be noted that Dutton’s studies had male behaviour at the centre of their inquiry. However, the studies suggest that when intimate violence is discussed, it is important to consider the impact of the abusive personality of the perpetrator upon the development of the abusive relationship as it may directly influence the dynamics and cycles of the relationship. Dutton’s studies back up Browne’s research in shifting the focus from the battered individual to the batterer: it is argued that a gender-neutral theory of intimate violence should adopt a consideration of this nature.

678 Ibid 339.
Neither Browne’s nor Blackman’s theories makes reference to the word ‘syndrome’. The absence of gender-based terminology would also make adaptation of these theories of intimate violence to gay males and lesbian women easier. The challenge remains to confront the stereotypes held by jurors. However, at least theories such as these will not add to the stereotypes jurors already have of same-sex relationships. Nevertheless, perhaps rather than a new gender-neutral theory of intimate violence, a better way to address the issue lies in refocusing the role of the expert at the trial as a translator of the experiences and effect of the predicament suffered by the victims of battering.

7.3 Battering and its Effects: Social Framework Evidence

One change that could assist the defences of same-sex defendants is a broader definition of expertise. Those with extensive experience at the ‘coalface’ are in a position to give expert evidence. At this point this has been done in Australia to a limited extent.

7.3.1 In Other Jurisdictions

In the United States of America and Canada, broader social framework evidence or expert testimony in battering and its effects have been accepted during the trials of battered defendants to assist jurors in understanding the reasonableness of the accused’s response. This has prompted courts in these jurisdictions to conclude that there is a valid body of knowledge about the effects of battering which is more extensive than that conventionally understood by reference to the term ‘Battered Woman Syndrome’. The courts have also

680 Bricker, above n 8, 1434.

681 Professor Patricia Easteal, an academic, testified in a New South Wales Supreme Court case heard in Bathurst in 2005 (R v Morgan) in which the defendant was acquitted. Similarly, Danielle Castles, a social welfare worker, provided a report to the court in R v Yeoman [2003] NSWSC 194.
affirmed that this knowledge can be valuable at all stages of the criminal justice system. The use of a broader range of information, ‘social framework evidence’, in criminal cases involving killings committed by the victims of battering is now legitimated. The admission of social framework evidence has addressed the concerns raised by feminist scholars that evidence on BWS risked establishing a new stereotype of the ‘battered woman’, and was being misunderstood to signify that victims of battering suffered from an abnormality of the mind.

An American scholar, Mary Ann Dutton, has explained that it is due to misinformation about the effect of battering upon its victims and the gendered nature of legal reasoning, that courts may need the assistance of expert testimony in order to recognise and interpret the social framework of cases of individuals who have been battered. Dutton argues that:

> the primary purpose of expert testimony is to provide the jury and the judge with both an understanding of general principles of domestic violence and a framework within which to analyse the unique facts of the particular case being heard before the courts.

She has explained that for this to be achieved any expert must address four aspects:

1. the cumulative history of violence experienced by the victim;

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682 Stubbs and Tolmie, above n 342, 711.

683 Ibid 712. ‘The purpose of the testimony, to which Walker and Monahan have given the generic label of “social framework evidence” in order to distinguish it from other forms of social science evidence, is to provide the factfinder, usually a jury, with information about the social and psychological context in which contested adjudicative facts occurred. It is presumed that knowledge about the context will help the factfinder interpret the contested adjudicative facts’: see Neil J Vidmar and Regina A Schuller, ‘Juries and Expert Evidence: Social Framework Testimony’ (1989) 52 Law and Contemporary Problems 133, 133. See also Laurens Walker and John Monahan, ‘Social Frameworks: A New Use of Social Science in Law’ (1987) 73 Virginia Law Review 559.

2. the psychological reaction of the battered individual to the batterer;

3. the strategies used by the battered individual in response to prior violence, and the consequences of those strategies; and

4. the contextual factors that influenced both the victim’s strategies for responding to prior violence and his or her psychological reactions to the violence. 685

The novelty of Dutton’s approach to expert evidence of this nature is that she acknowledges that the role of the expert must differ depending on the case at hand. Dutton lists as examples a series of issues which an expert might be asked to address. Some of these issues include the following:

- Will the jury understand that a police officer can also be a battered woman?
- Can the jury understand why a battered woman fought back on this occasion but not on previous occasions?
- Can the jury recognise that a woman who has routinely fought back was nevertheless a battered woman and that the actions against her were illegal irrespective of her responses to them?
- Will the jury understand that the risk of serious or lethal violence often increases if she leaves the batterer? and
- Can the jury recognise that physical and mental health effects of domestic violence combined with the effects of culture influence battered women’s responses to abuse? 686

685 Ibid. See also Holly Maguigan, ‘A Defense Perspective on Battered Women Charged with Homicide: The Expert’s Role During Preparation for and Conduct of Trials’ (Paper prepared for the US National Association of Women Judges) 9, drawing on Walker and Monahan, above n 683, 560.
Dutton explains that as the role of the expert differs, so too will the criteria for choosing an appropriate expert. She argues that, depending on what the defence counsel in a given case hopes to achieve by introducing expert testimony, any of the following qualifications may be appropriate: an extensive history of working with battered women (for example, in women’s shelters or advocacy programs), nursing or other health care qualifications or experience, mental health clinical training, or experience in domestic violence research. As the qualifications listed above suggest, however, Dutton is particularly concerned that ‘the expert should understand the phenomenology of battered women’s experience through direct contact with battered women—rather than through academic endeavours alone’. Clearly, this represents a broad understanding of who can qualify as an expert for the purposes of testifying in these types of cases. Whether this is the best approach for Australia is addressed below.

7.3.2 In Australia

Social framework evidence of the kind suggested has been given in Australia since 1990; however, it should be used with more frequency. This choice would dismantle the BWS construct originally formulated by the Walker model and based on the assumptions that a cycle of violence is common to the experiences of all battered defendants and that their

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686 Stubbs and Tolmie, above n 342.

687 Ibid 716.


689 Dutton, above n 684, 5.
common reaction is learned helplessness. Such construct does both too little and too much for battered gay and lesbian defendants seeking to rely on self-defence. This shift toward more general testimony about battering and its effects constitutes a reconsideration of BWS as a model of intimate violence. It provides an adequate means of illuminating to jurors and judges a battered gay or lesbian defendant’s situation and behaviour, explaining the impact of intimate violence without appearing to heterosexualise and/or pathologise these defendants, or denying them reason and capacity in order to make them worthy of the jury’s mercy. The testimony of such expert witnesses provides a wholistic rather than ‘atomised’ account of what it is really like to live under the constant shadow of abuse.

This kind of social framework evidence would definitely help jurors and judges to understand and apply the principles of self-defensive killing where an accused has used lethal defensive force against an abusive partner of the same sex. For instance, it is difficult to realistically assess the range of options a gay male or lesbian woman might have to escape an abusive relationship without understanding that, as a result of homophobia and heterosexism, these victims may be more likely to feel isolated than heterosexual victims of intimate violence; or to understand how it can be the case that the victim is physically bigger than the abuser.

The case of *R v McEwen* discussed at the beginning of Chapter 6 exemplified all these issues. In this case the evidence was directed in a very narrow way and did not contextualise the issue of same-sex violence nor focus on the particular isolation of victims of same-sex violence, or the difficulties specific to gay men. For instance, it didn’t explore the accused’s fear of leaving, or of publicising a gay relationship in the face of a homophobic society; the

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691 (Unreported, Supreme Court of Western Australia, Murray J, 18-25 April 1995 (trial), Walsh J, 18 March 1996 (sentencing)).
inability of the accused to use women’s refuges for short-term shelter and accommodation, or to otherwise access mainstream support services; his reluctance to hand his partner over to the police or even to admit to police the nature of the relationship; mainstream social acceptance of male-to-male aggression as constituting a conflict of equals; or the social stigma of raising issues of violence within the gay and lesbian community. Instead of realistically exploring the context in which the accused was attempting to deal with the violence he faced in the intimate recesses of his daily life, the expert evidence before the court ‘feminised’ the accused himself. He was portrayed as passive and childlike, with all the personal and psychological inadequacies implied in suffering from the renamed ‘battered spouse syndrome’. Arguably, a more expansive understanding of battering and its effects might have assisted the Court to better assess the circumstances to which the accused was responding. It is noteworthy that in Osland Kirby J was clearly influenced by the phenomenon of violence in same-sex relationships in seeking to avoid sex-specific categories in the construction of BWS evidence. He commented that, whilst domestic violence is overwhelmingly a phenomenon that affects women, victimisation is not inherent to women.  

7.4 Battered Person’s Reality (‘BPR’) Evidence

Having situational context experts explain the experience of living in an intimate violence situation using a non-medical model can assist the judge and the jury in understanding what is reasonable behaviour in such a domestic relationship. This form of testimony could be used effectively by battered gay and lesbian defendants seeking to show jurors that their


actions were reasonable. This testimony would emphasise the diversity of responses that victims of intimate violence may have to ongoing abuse without needing to reinforce or further the stereotypes of battered gay and lesbian individuals as helpless or passive. If accepted, such testimony would also prevent the medicalisation of their predicament.

The situational context expert might commence his or her testimony with a section on same-sex intimate violence generally, explaining that same-sex intimate violence culminating in death more often involves substance abuse, threats, and threats with weapons, more severe battery and sexual violence than does heterosexual intimate violence culminating in death.694 The general characteristics of same-sex intimate violence might then be addressed. The expert would proceed to describe the effects of living under the constant threat of intimate violence, categorising the violence and its impact as Battered Person’s Reality.695 The expert would educate the court about same-sex intimate homicides, revealing that intimate homicides are usually preceded by an unusual incident—something done by the batterer that is outside his or her customary repertoire. Such incidents have been referred to as the ‘turning point’.696 The expert would then focus on the case at hand, highlighting relevant background variables such as any history of childhood abuse, battering increasing in severity, intermittent periods of contrition and relative ‘peace’ in the relationship, etc.

The situational context expert may also be able to discern and label violent behaviour by the batterer that had not been named as such by the defendant.697 Certain behaviours may


695 Ibid.

696 Ibid.

697 Ibid.
become so repetitive that the victim may trivialise or normalise it to the point of invisibility. The expert would penetrate the family system’s denial, naming not only some physical acts as violence, but also emotional, economic, and sexual patterns of control.

The BPR expert would discuss the pre-emptive conduct of the defendant, explaining that if he or she had tried to defend himself or herself immediately after the batterer’s attack, it is likely he or she would have ended up seriously injured or dead. Further, for someone who is not as aggressive as the batterer, such an immediate response is not reasonable behaviour. The expert may additionally help the court to understand that, for the battered individual, the threat may have felt immediate.

To explain why the battered individual stayed in the abusive relationship, the BPR expert would describe why leaving the relationship was not easy. The expert may equate the violent relationship to the case of a political hostage context—the more serious the psychological and physical brutality, the greater the capacity of the captor to exert control. Disempowerment is perpetuated through humiliation, shame and isolation. Moreover, leaving the relationship does not necessarily mean that the violence will stop.

Such testimony would avoid using BWS, a syndrome that has exacerbated the problems that battered same-sex defendants encounter during their trials.

698 Easteal, above n 79, 56.

699 Ibid.

700 Ibid.
7.5 Modifying the Law of Self-defence

Chapter 2 of this thesis established that the killing of an intimate batterer is justifiable under the same philosophical principles which justify the existence of the defence of self-defence. It is argued that these principles should be used to support the moral permissiveness of killing a ‘moral monster’.701

In 2001, in response to a request by the Attorney-General of Victoria, the Victorian Law Reform Commission (‘VLRC’) undertook to review and provide a report on defences to homicide in Australia. After three years of research and consultation in Victoria as well as other jurisdictions, a final report was published in 2004. The centre of the inquiry conducted by the VLRC was the way in which the criminal law has dealt, and how it should deal, with the fact that people kill in a range of different situations.702 In examining this question, the report also discussed those factors affecting the accused’s culpability.

The VLRC argued persuasively that the law of defences to homicide—and particularly provocation and self-defence—is gender-biased. This gender bias may be seen both in the ways in which the defences are framed, interpreted and applied, and in the very different circumstances in which men and women raise them.703 While it was clearly explained that battered women should not have an entitlement to an automatic acquittal, the VLRC argued that ‘it is important for defences to take proper account of women’s and men’s experiences of violence, and the different circumstances in which men and women may genuinely believe

701 For the batterer as moral monster see 3.3.4.1.

702 Victorian Law Reform Commission, above n 469, Executive Summary, xix.

703 Ibid xxv.
they need to act to protect themselves from serious injury’. The VLRC was of the view that it is possible that the only way to ensure that self-defence works properly for women is to create a specific legal response to the issue and thereby create a new and separate defence; however, one of the most common arguments provided by those who advocated against a new defence was the fear of medicalising women’s experiences or portraying these as ‘atypical’ in order to offer them fairer outcomes during trial. The VLRC concluded that there should not be a separate defence for women who kill abusive partners. It stated that:

Changes to the substantive law will only ever provide a partial solution to ensuring defences to homicide operate fairly for those who kill in response to family violence. It is equally important to ensure juries are provided with information which allows them to understand, and take into account, the broader context of violence. ... Neither the honesty of the accused’s belief, nor the reasonableness of the accused’s action, can be properly evaluated unless the jury is aware of, and understands, the broader context of violence between the accused and the deceased and the accused’s situation. It is important the evidence provides the jury with as complete a picture of the accused’s situation leading up to the homicide as possible so the jury can put themselves in the accused’s position.

Although the courts already recognised much evidence as relevant and admissible, little guidance was provided to judges or defence lawyers about what evidence may be useful for juries in such cases. The VLRC recommended that to assist this evidence to be more readily identified, and to avoid any possible legal arguments concerning its relevance, a new evidentiary provision should be introduced, providing that where self-defence was raised and

704 Ibid xxvi.
705 Ibid.
706 Ibid xxxiv, xxxvi.
there was a history of prior violence between the accused and the deceased, evidence as to the following matters may be relevant:

- the history of the relationship between the accused and the deceased, including violence by the deceased towards the accused;
- the cumulative effects, including psychological effects, on the accused of the violence; and
- the social, cultural and economic factors that impact on the accused.\textsuperscript{707}

The VLRC also recommended that legislation should clarify the admissibility of expert evidence about the general nature and dynamics of abuse and social factors that impact on people in violent relationships.\textsuperscript{708} To amend the law in this way would help the community to appreciate that conduct in response to a history of violence was both ‘genuine’ and ‘necessary’ in self-defence.\textsuperscript{709} This would encourage greater recognition by judges, lawyers and jurors of the range of issues that will be relevant to a plea of self-defence where the homicide has taken place against a background of prior violence, avoiding any unnecessary arguments concerning its relevance and ensuring the range of factors which may be necessary to represent the reality of the accused’s situation are readily identified. The VLRC was of the opinion that a broader understanding by jurors of what it must be like for a victim of abuse to live in a situation of ongoing and serious violence was crucial to the further development of

\textsuperscript{707} Ibid xxxv. See also ibid [4.35]. The VLRC’s recommended amendments to the \textit{Crimes Act 1958} (Vic) have not been enacted.

\textsuperscript{708} Victorian Law Reform Commission, above n 469, [4.35].

\textsuperscript{709} Ibid xxvi.
self-defence. Without a proper appreciation of the circumstances of the accused, including the nature of the threat he or she faced, and other personal circumstances, the VLRC considered juries were unlikely to be able to make an informed assessment of whether the accused acted in self-defence. Accordingly, social, cultural and economic factors that were relevant to the accused and affected the options realistically available to him or her to respond to, or escape from, the violence they were subject to are essential items of the evidentiary bundle. The aim of this evidence should be to build as complete a picture as possible of the situation of the accused prior to the homicide so that jurors can put themselves as far as possible in his or her position.

To ensure the relevance of this evidence is properly understood by jurors, the VLRC recommended that this evidence be supplemented wherever possible with expert evidence on family violence. This evidence might include both general expert evidence about the nature and effects of family violence, and also case-specific expert evidence which would place the situation of the accused and his or her reactions into the framework of current knowledge about family violence. The VLRC expressed the opinion that legal practitioners may benefit from consulting with a person with expertise in working with victims of family violence, such as a counsellor or social worker, in preparing these matters for trial and identifying relevant evidence. Even the most skilled advocate is likely to experience difficulties negotiating the complexities and range of factors that may lead a

710 Ibid [4.31].
711 Ibid [4.29].
712 Ibid [4.33].
713 Ibid [4.32].
714 Ibid.
person to kill his or partner or a family member and understanding the dynamics of a violent relationship and considering how best to represent these to a jury.\textsuperscript{715} The VLRC pointed to difficulties where the accused was indigenous, from another cultural background, or in a same-sex relationship, and suggested that those who were likely to provide the most effective assistance in such instances were family violence workers with direct experience of working with these communities.\textsuperscript{716} While the VLRC did not make any specific recommendations to support the introduction of social framework evidence in other contexts, it considered there was no reason why a basis could not be found to introduce this evidence in appropriate cases.\textsuperscript{717}

In 2010, the Australian Law Reform Commission together with the New South Wales Law Reform Commission (‘the Commissions’) revisited this subject. The focus this time concerned the assessment of the extent to which the criminal law should recognise family violence as relevant to a defence to homicide, where the victim of spousal or partner abuse kills his or her batterer. This prompted an assessment of whether or not the current defences to homicide for victims in this situation are adequate. The majority of stakeholders consulted on the issue agreed that this area of law is in need of serious legal reform,\textsuperscript{718} and that self-defence was the preferable form of recognition of the dynamics of family violence in homicide defences. Nevertheless, there was no consensus upon whether existing self-defence provisions should be the subject of amendment, or whether a specific family violence-related

\textsuperscript{715} Ibid [4.33].

\textsuperscript{716} Ibid.

\textsuperscript{717} For example, in circumstances in which the perpetrator of the abuse has killed his or her partner, the prosecution may wish to introduce expert evidence on family violence to explain the actions of the accused.

\textsuperscript{718} Australian Law Reform Commission, NSW Law Reform Commission, above n 123, 644 [14.79].
form of self-defence was necessary.  All of the stakeholders, however, emphasised that changes must be adopted to ensure that there was substantive equality in the treatment of persons who kill in response to family violence and those who kill in response to other forms of violence.  During the discussion, great importance was given to two issues.  First, that legal frameworks should recognise the nature and dynamics of family violence, including its impact upon victims; and second, that criminal defences should not recognise the circumstances of family violence victims in an atypical context or typecast the responses of the victims of family violence who kill as the result of a medical syndrome or ‘extraordinary psychology’.  

The Commissions had reservations about creating discrete defences to address problems associated with the practical application of general defences, and expressed the view that self-defence is doctrinally capable of accommodating the diverse situational and psychological circumstances of family violence. The Commissions considered it was preferable to improve the application and effectiveness of the existing defences in the family violence context through legislative clarification and juridical-legal training and guidance. The Commissions recommended that individual jurisdictions review their current defences in order to assess their suitability to the victims of family violence who kill. Such reviews should encompass an assessment of defences specific to family violence as well as those of general application.

719 Ibid 645 [14.81].
720 Ibid 646 [14.81].
721 Ibid 649 [14.93].
that may apply to victims of family violence.\textsuperscript{722} The reviews should also consider the impact of rules of evidence on the operation of defences.\textsuperscript{723}

While the Commissions did not directly express an opinion regarding the use of BWS evidence, it was stressed that any view which seeks to present battered individuals’ conduct as abnormal should be rejected.\textsuperscript{724} The Commissions expressed a desire to achieve parity for both men and women under the law of self-defence, emphasising that such changes should occur without the need to use syndrome-based evidence to justify the killing.\textsuperscript{725} It was the view of the Commissions that, if expert testimony is required, it might be used to contextualise violence or to give evidence on a range of matters such as why people do not leave abusive relationships, the accused’s ability to perceive danger, cultural factors, other aspects and explanations of the accused’s conduct, etc.\textsuperscript{726}

Many Australian jurisdictions have given substantial consideration to recognising family violence in the context of defences to homicide. A number of important statutory reforms have resulted from this. These reforms include:\textsuperscript{727}

- removal of the requirement for the threat to be imminent from the law of self-defence in Western Australia;\textsuperscript{728}

\textsuperscript{722} Ibid 650 [14.96].

\textsuperscript{723} Ibid 650 [14.97].

\textsuperscript{724} Ibid 649 [14.93].

\textsuperscript{725} The syndrome whose avoidance is sought is that known as Battered Woman Syndrome (‘BWS’).

\textsuperscript{726} Australian Law Reform Commission, NSW Law Reform Commission, above n 123, 624 [14.10].


\textsuperscript{728} Ibid.
• reforms to the defence of provocation, including removal of the requirement that the
defendant ‘acted on the sudden and before there was a time for his passion to cool’ in
the Northern Territory;\textsuperscript{729}
• removal of the requirement that the provocative conduct of the deceased had occurred
immediately prior to the act or omission causing death in New South Wales;\textsuperscript{730}
• abolition of the defence of provocation as a result of its unsuitability for female
victims of intimate violence in Victoria, Western Australia, and Tasmania;\textsuperscript{731}
• expansion of the defence of self-defence to take family violence into account,
including creation of an express provision for the leading of evidence about family
violence, in Victoria;\textsuperscript{732} and
• creation of a new defence of family violence in Queensland\textsuperscript{733}

Until 2010, there was no separate defence for battered persons in Australia. In February
2010, s 304B of the \textit{Criminal Code} (Qld) was enacted, providing that a person who
unlawfully kills another in circumstances that would otherwise constitute murder, is guilty of
manslaughter only, if the deceased had committed acts of serious domestic violence against
the offender in the course of an abusive domestic relationship.\textsuperscript{734} The provision requires that
the defendant believed his or her actions were necessary to preserve his or her own life or

\textsuperscript{729} Ibid
\textsuperscript{730} Ibid.
\textsuperscript{731} Ibid.
\textsuperscript{732} Ibid.
\textsuperscript{733} Ibid.
\textsuperscript{734} \textit{Criminal Code} (Qld) s 304B(1)(a).
safety, and that, having regard to the abusive domestic relationship and all the circumstances of the case, there were reasonable grounds for that belief. The definition of ‘abusive domestic relationship’ correlates to a great extent with the victims’ reality of violence since it acknowledges that ‘a history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation’. It is important that legal frameworks recognise the nature and dynamics of intimate violence, including its impact upon victims. The value of this enactment lies in the recognition by the state that, without necessarily facing an ‘immediate’ threat, it may be reasonably necessary for the victim of intimate violence to kill to protect his or her life. Nevertheless, it is suggested that criminal defences should not recognise the circumstances of family violence victims in an atypical context. The author has reservations about creating discrete defences to address problems associated with the practical application of general defences. Self-defence should be able to accommodate the diverse situational contexts in which the victims of intimate violence kill. For this reason it is proposed that family violence should be expressly accommodated within an expanded concept of self-defence. The Queensland reform is ‘a compromised outcome’, leaving battered women who kill in Queensland in an invidious position compared to their interstate counterparts. Anthony Hopkins and Professor Patricia Easteal argue that while the section may reduce the number of murder convictions for persons who kill in response to serious family violence, it will not increase the prospect of acquittal for such persons, and may potentially undermine their claims to self-defence.

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735 Criminal Code (Qld) s 304B(1)(b).
736 Criminal Code (Qld) s 304B(1)(c).
737 Criminal Code (Qld) s 304B(4).
738 Hopkins and Easteal, above n 522, 135.
It is submitted by this thesis that any legislative amendments to the law of self-defence must make clear that in assessing the reasonableness of the accused, the full plight of the victim of battering must be considered, including the psychological and circumstantial situation of the battered accused. Moreover, some guidance is needed to avoid a blurring between self-defence and excessive self-defence when the killings were committed in circumstances of family violence. After all ‘reasonableness’ makes the difference between a full acquittal and manslaughter. It is not the aim of the thesis to advocate in favour of a legal concession to kill batterers. Not every victim of battering who kills their batterer acts because it is reasonable or necessary to do so. However, the safeguards of self-defence as a complete defence should not be delineated by reference either to patriarchal formulations or heterosexist assumptions. Prescriptive solutions such as BWS may further compromise the outcome at trial for a gay or lesbian victim of battering who has killed his or her abusive intimate partner since, instead of assisting decision-makers to walk in the former’s shoes, it may add to the wardrobe of typical stereotypes, not only associated with intimate violence, heaped upon the accused at trial. Moreover it may offer disadvantageous treatment to some defendants, like battered gay and lesbian individuals, whose experiences may fall outside the paradigm of docility, dependence and helplessness, associated under the Walker model with being battered.
BIBLIOGRAPHY

Articles/Books/Reports


Blackman, Julie, ‘Battered Women Who Kill: New Perspectives on the Concept of Self-
defense’ (Paper presented at the American Psychological Association Meeting, Toronto, Canada, 1984)


Blackman, Julie, ‘Emerging Images of Severely Battered Women and the Criminal Justice System’ (1990) 8 Behavioural Science and the Law 121


Bradfield, Rebecca, The Treatment of Women Who Kill Their Violent Male Partners within the Australian Criminal Justice System (PhD thesis, University of Tasmania, 2002)


Bronitt, Simon and Bernadette McSherry, Principles of Criminal Law (Oxford University Press, 2001)


Cranston, Maurice, What are Human Rights? (Basic Books, 1963)


Cruz, Michael and Juanita Firestone, ‘Exploring Violence and Abuse in Gay Male Relationships’ (1998) 13(2) Violence and Victims 159

Daly, Martin and Margo Wilson, ‘Crime and Conflict: Homicide in Evolutionary Psychological Perspectives’ (1997) 22 Crime and Justice 51


Department of Justice, Canada, Self Defence Review—Women in Custody: Final Report (February 6, 1997)

Department of Justice, Canada, Self Defence Review: Final Report Submitted to the Minister of Justice Canada and the Solicitor General of Canada (July 11, 1997)

Donovan, Catherine, Marianne Hester and Melanie McCarry, ‘Researching Same Sex Domestic Violence: Constructing a Survey Methodology’ (2008) 13(1) *Sociological Research Online* 8


Dutton, Donald G, ‘My Back Pages: Reflections on Thirty Years of Domestic Violence Research’ (2008) 9 *Trauma, Violence and Abuse* 131


Easteal, Patricia, *Killing the Beloved: Homicide between Adult Sexual Intimates* (Australian Institute of Criminology, 1993)

Easteal, Patricia, ‘Violence against Women in the Home: Kaleidoscope in a Collision Course’ (1993) 3(2) *Queensland University of Technology Law and Justice Journal* 1

Easteal, Patricia, *Voices of the Survivors* (Spinifex Press, 1994)


Felson, Richard and Messner, Steven, ‘Disentangling the Effects of Gender and Intimacy on Victim Precipitation in Homicide’ (1998) 36 (2) Criminology 405

Ferzan, Kimberly Kessler, ‘Justifying Self-defense’ (2005) 24 Law and Philosophy 711

Finkelstein, Claire, ‘Self-defense as a Rational Excuse’ (1996) 57 University of Pittsburgh Law Review 651

Finnis, John, Natural Law and Natural Rights (Clarendon Law, 2nd ed, 1980)


Girshick, Lori, Woman to Woman Sexual Violence: Does She Call It Rape? (Northeastern University Press, 2009)


Hassounheh, Dena and Nancy Glass, ‘The Influence of Gender Role Stereotyping on Women’s Experiences of Female Same Sex Intimate Partner Violence’ (2008) 14 Violence Against Women 310


Hayes, Robert and Michael Eburn, Criminal Law and Procedure in New South Wales (LexisNexis Butterworths, 2nd ed, 2006)


Jones, Ann, Next Time, She’ll be Dead: Battering and How to Stop It (Beacon Press, 2000)

Jukes, Adam Edward, Men Who Batter Women (Routledge, 1999)


Kelly, Joan B and Michael P Johnson, ‘Differentiation among Types of Intimate Partner Violence: Research Update and Implications for Interventions’ (2008) 46(3) Family Court Review 476

Kendall, Christopher, ‘Real Dominant, Real Fun!: Gay Male Pornography and the Pursuit of Masculinity’ (1993) 57 Saskatchewan Law Review 21


Landolt, Monica and Donald Dutton, ‘Power and Personality: An Analysis of Gay Male Intimate Abuse’ (1997) 37 Sex Roles 335


Lebson, Micah, ‘Suicide among Homosexual Youth’ (2002) 42 Journal of Homosexuality 107

Leverick, Fiona, Killing in Self-defence (Oxford University Press, 2006)

Levine, Andrew, Engaging Political Philosophy: From Hobbes to Rawls (Blackwell Publishers Ltd, 2002)

Lilith, Ryiah, ‘Reconsidering the Abuse That Dare Not Speak Its Name: A Criticism of Recent Legal Scholarship Regarding Same-Gender Domestic Violence’ (2001) 7 Michigan Journal of Gender and the Law 181

Lobel, Kerry (ed), Naming the Violence: Speaking Out About Lesbian Battering (Seal Press, 1986)

Locke, John (translated Lewis F Abbott), Two Treatises on Government: A Translation into Modern English (Industrial Systems Research, 2009)


Maguigan, Holly, ‘It is Time to Move beyond Battered Woman Syndrome’ (1998) 17(1) Criminal Justice Ethics 50


Meloy, Michelle L and Susan L Miller, The Victimization of Women: Law, Policies, and Politics (Oxford University Press, 2010)


Mille, Amy, Ronald Bobner and John Zarski, ‘Sexual Identity Development: A Base for Work with Same-Sex Couple Partner Abuse’ (2000) 22(2) Contemporary Family Therapy 190


Morgan, Anthony and Hannah Chadwick, ‘Key Issues In Domestic Violence’ (Australian Institute of Criminology, Summary Paper No 7, December 2009)


New South Wales Sexual Assault Committee, ‘Sexual Assault Phone-in Report, held November 1992’ (Ministry for the Status and Advancement of Women, August 1993)


O’Connor, Desmond and Paul Fairall, *Criminal Defences* (Butterworths, 2nd ed, 1996)


Overmier, J Bruce and Martin Seligman, ‘Effects of Inescapable Shock upon Subsequent Escape and Avoidance Responding’ (1967) 63 *Journal of Comparative and Physiological Psychology* 295


Roth, Lenny, ‘Provocation and Self-defence in Intimate Partner and Homophobic Homicides’ (NSW Parliamentary Library Research Service, Briefing Paper No 3, 2007)

Roth, Lenny and Lynsey Blayden, ‘Provocation and Self-defence in Intimate Partner and Sexual Advance Homicides’ (NSW Parliamentary Research Service, Briefing Paper No 5, 2012)


Ryan, Cheyney, ‘Self-defense, Pacifism and the Possibility of Killing’ (1983) 93 Ethics 508


Seligman, Martin, ‘Learned Helplessness’ (1972) 23 Annual Review of Medicine 407


Simone, Catharine, ‘Kill(er) man was a “Battered Wife”: The application of Battered Woman Syndrome to Homosexual Defendants: The Queen v McEwen’ (1997) 19 Sydney Law Review 230

Snow, Katrin, ‘The Violence at Home’, The Advocate (Los Angeles, CA), 4 June 1992, 60


Stubbs, Julie, ‘Battered Woman Syndrome: An Advance for Women or Further Evidence of the Legal System’s Inability to Comprehend Women’s Experience?’ (1991) 3(2) *Current Issues in Criminal Justice* 267

Stubbs, Julie, ‘The (Un)reasonable Battered Woman?: A Response to Easteal’ (1992) 3(3) *Current Issues in Criminal Justice* 359


Turell, Susan, ‘Seeking Help for Same-Sex Relationship Abuses’ (1999) 10(2) *Journal of Gay and Lesbian Social Services* 35

Turell, Susan and La Vonne Cornell-Swanson, ‘Not All Alike: Within-Group Differences in Seeking Help for Same-sex Relationship Abuses’ (2005) 18(1) *Journal of Gay and Lesbian Social Services* 71


Weinberg, George, *Society and the Healthy Homosexual* (St Martin’s Press, 1972)


**Cases**


*Bradley, R v* (Unreported, Supreme Court of Victoria, Coldrey J, 14 December 1994)

*Brown, R v* [1993] 2 All ER 75

*Charlebois, R v* [2000] 2 SCR 674

*Chhay, R v* (1994) 72 A Crim R 1 (NSWCCA)

*Conlon, R v* (1993) 69 A Crim R 92 (NSWSC)

*Director of Public Prosecutions (NT) v Secretary* (1995) 129 FLR 39

*Dziduch, R v* (1990) 47 A Crim R 378 (NSWCCA)

*Gallegos, State v* 719 P 2d 1268 (NM, 1986)

*Green v The Queen* (1997) 191 CLR 334

*Green, State v* (Fla Dist Ct App, N90-0039, 1990)
Howe, R v (1958) 100 CLR 448


Kontinnen, R v (Unreported, Supreme Court of South Australia, King CJ, Legoe and Bollen JJ, 30 March 1992); (1992) 16 Crim LJ 360

L, R v (1991) 174 CLR 379

Lavallee, R v [1990] 1 SCR 852

Malott, R v [1998] 1 SCR 123

McEwen, R v (Unreported, Supreme Court of Western Australia, Murray J, 18-25 April 1995 (trial), Walsh J, 18 March 1996 (sentencing))

McKay, R v [1957] VR 560

Mullis v State, 282 SE 2d 334 (Ga, 1981)

Norman, State v 324 NC 253 (1989)

Norman, State v 89 NC App 384 (1988)

Oakes, R v [1995] 2 NZLR 673 (CA)

Osland v The Queen (1998) 197 CLR 316

Palmer v The Queen [1971] AC 814

People v Huber, 475 NE 2d 599 (Ill App Ct, 1985)

R v Bradley (Unreported, Supreme Court of Victoria, Coldrey J, 14 December 1994)

R v Brown [1993] 2 All ER 75

R v Charlebois, [2000] 2 SCR 674

R v Chhay (1994) 72 A Crim R 1 (NSWCCA)

R v Conlon (1993) 69 A Crim R 92 (NSWSC)

R v Dziduch (1990) 47 A Crim R 378 (NSWCCA)

R v Howe (1958) 100 CLR 448

R v Katarzynski [2002] NSWSC 613 (9 July 2002)

R v Kontinnen (Unreported, Supreme Court of South Australia, King CJ, Legoe and Bollen JJ, 30 March 1992); (1992) 16 Crim LJ 360

R v Lavallee, [1990] 1 SCR 852

R v L (1991) 174 CLR 379

R v Malott, [1998] 1 SCR 123

R v McEwen (Unreported, Supreme Court of Western Australia, Murray J, 18-25 April 1995 (trial), Walsh J, 18 March 1996 (sentencing))

R v McKay [1957] VR 560

R v Oakes [1995] 2 NZLR 673 (CA)

R v Secretary (1996) 5 NTLR 96

R v Stjernqvist (Unreported, Cairns Circuit Court, Derrington J, 18 June 1996)

R v Trevenna (2004) 149 A Crim R 505 (NSWCCA)

R v Whynot, (1983) 9 CCC 449 (NSCA)

R v Wilson [1997] QB 47

R v Yeoman [2003] NSWSC 194

Runjanjic v The Queen (1992) 56 SASR 114

Secretary, R v (1996) 5 NTLR 96

Stjernqvist, R v (Unreported, Cairns Circuit Court, Derrington J, 18 June 1996)

State v Gallegos, 719 P 2d 1268 (NM, 1986)

State v Green, (Fla Dist Ct App, N90-0039, 1990)


State v Norman, 324 NC 253 (1989)

State v Norman, 89 NC App 384 (1988)

Taylor v The Queen (Unreported, Supreme Court of South Australia, Cox, Duggan and Debelle JJ, 16 June 1993)
Trevenna, R v (2004) 149 A Crim R 505 (NSWCCA)

Viro v The Queen (1978) 141 CLR 88

Ward v The Queen (2006) 166 A Crim R 273 (NSWCCA)

Whynot, R v (1983) 9 CCC 449 (NSCA)

Wilson, R v [1997] QB 47

Yeoman, R v [2003] NSWSC 194

Zecevic v Director of Public Prosecutions (Vic) (1987) 71 ALR 641

**Legislation**

*Acts Amendment (Sexual Assaults) Act 1985 (WA)*

*Crimes (Domestic and Personal Violence) Act 2007 (NSW)*

*Crimes Act 1900 (ACT)*

*Crimes Act 1900 (NSW)*

*Crimes Act 1958 (Vic)*

*Crimes Amendment (Self-defence) Act 2001 (NSW)*

*Criminal Code (NT)*
Criminal Code (Qld)

Criminal Code (Tas)

Criminal Code, Evidence Act and other Acts Amendment Act 1989 (Qld)

Criminal Law Consolidation Act 1935 (SA)

Domestic and Family Violence Act 1989 (Qld)

Domestic and Family Violence Act 2009 (NT)

Domestic Violence Act 1994 (SA)

Domestic Violence and Protection Orders Act 2008 (ACT)

Family Law Act 1975 (Cth)

Family Violence Act 2004 (Tas)

Family Violence Protection Act 2008 (Vic)

Restraining Orders Act 1997 (WA)

Other Sources

Explanatory Notes, Crimes Amendment (Self-defence) Bill 2001 (NSW)


Transcript of Trial Proceedings, *R v McEwen* (Supreme Court of Western Australia, Murray J, 18-25 April 1995)

Transcript of Sentencing Proceedings, *R v McEwen* (Supreme Court of Western Australia, Walsh J, 18 March 1996)